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UNIVERSITY OF HUDDERSFIELD

DOCTORAL THESIS

**MARITIME PIRACY:
AN AUTO-LIMITATION APPROACH**

Author

Avinder Bhangal

Supervisor

Professor Stuart Toddington

*A thesis submitted in fulfilment of the requirements for the degree of Doctor of
Philosophy*

In

The University of Huddersfield, Department of Law

May 2016

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DEDICATION

Every challenging work requires one's own best efforts as well as guidance from elders - especially those who are very close to our hearts. This humble contribution I dedicate to my constant and loving parents, Karan and Jas, who have given me unconditional love and support.

Dear Mum and Dad, it is hard to express my thanks to you in words. Your understanding, your faith, your intellectual spirit, advice and unwavering support throughout my life has been indispensable. I will always be thankful for your praise and your criticism, and for your love and trust in me.

IN HONOUR OF

The present, and respect for the future

IN MEMORY OF

My beloved Grandparents

ACKNOWLEDGMENTS

Undertaking a Ph.D thesis is a marathon not a sprint. It has been a life-changing experience for me, and the most challenging activity of my life. It would not have been possible to do it without the support and guidance that I received from many people over the years.

Having initially enrolled on to the LL.B course at the University of Huddersfield back in 2006, I did not imagine completing an LL.M, let alone being given the opportunity to undertake a Ph.D. The LL.M in 2012, was the beginning and some small step in to the research sphere; I did not envisage getting to the point where I would be defending a Ph.D thesis in Huddersfield several years later.

A very special thanks to the *Huddersfield Law Department* for giving me this opportunity to carry out my doctoral research and for their financial support.

In particular, I would like to express my earnest gratitude to my supervisor Professor Stuart Toddington for his patience, motivation, and wisdom. I could not imagine having a better supervisor and mentor for my Doctoral studies.

The best and worst moments of my Doctoral journey have been shared with many people. It has been a privilege to spend several years in the Department of Law at the University of Huddersfield. I have grown personally and intellectually from being part of a community of colleagues, friends and scholars at Huddersfield and this experience will always remain dear to me.

The Library: no research is possible without the Library, the centre of learning resources. I would like to take this time to express my gratitude to all the library staff for their services.

I wish to express my appreciation to *all* those who have contributed to this thesis and supported me in one way or the other during this journey.

Above all, I owe it all to *Almighty God* for granting me the wisdom, health and strength to undertake this research task and enabling me to complete it.

In response to numerous questions from family and friends about my future academic endeavours, a very determined English warrior and scholar once famously said: "... this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning".

DECLARATION

I, AVINDER BHANGAL, confirm that the material contained in this thesis has not been used in any other submission for an academic award and that there is full attribution of the work of any other authors.

AVINDER BHANGAL

SIGNED:.....

DATE:.....

ABSTRACT AND THESIS CLAIM

This study examines the problems we face in making a coherent theoretical link between the international law of piracy and the law of the sea in the context of the rise in maritime piracy in Africa over the past three decades. It focuses on four nations affected by piracy in the Gulf of Guinea and Horn of Africa. Furthermore, the international law of piracy is concerned with two types of jurisdiction: prescriptive jurisdiction and enforcement jurisdiction. However, the law of the sea (UN Law of the Sea Convention) defines five types of jurisdiction: territorial seas, exclusive economic zone (EEZ), the continental shelf, high seas, and seabed or seafloor outside the area of claims of territorial seas under the EEZ. The above implies that where a State that has enforcement jurisdiction is unable or unwilling to enforce prescribed international laws against piracy, recourse ought to be had to a State with jurisdiction under the law of the sea. The current thesis seeks to demonstrate that maritime piracy has substantially increased in north-eastern and western parts of Africa because, albeit the development of the law of the sea has transposed towards acknowledging the rights (and obligations) of coastal States in order to defend their territorial seas with reference to the piratical incursions, not enough attention has been given to the consequences flowing from the fact that the coastal states in question do not possess the requisite resources and systems to enforce international law and/ or prosecute pirates.

It is submitted here that piracy in its modern form in the Gulf of Aden and Gulf of Guinea is a transnational crime that may best be contained through a regional legal infrastructure. It is also argued that the multilateral approach of linking enforcement jurisdiction to Universal Jurisdiction is problematic since it translates into 'relational statism' that is, where States habitually pursue only their self-interests. As such, consistency and clarity in the international legal situation may best be achieved by recourse to a traditional 'auto-limitation' approach whereby jurisdiction is essentially territorial and can only be exercised by a State outside its territory where it obtains the consent of the territorial State (perhaps through Convention or Treaty) or in accordance with a permissive rule derived from international custom. Therefore the thesis of this study suggests the need for legal reform. Chapter 1 provides the background to the study as well as the framework for the research. The main research aims, objectives and research questions are addressed in Chapters 2, 3, 4, 5 and 6. Chapter 7 concludes the research by presenting the findings and recommendations together with an outline of the research contribution.

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LIST OF ACRONYMS AND ABBREVIATIONS

AFRICOM	US Africa Command
AMC	Africa Marine Commando
AU	African Union
BFF	Bakassi Freedom Fighters
CENTCOM	US Central Command for East Africa
CIL	Customary International Law
CRIMGO	Critical Maritime Routes in the Gulf of Guinea
CGPCS	Contact Group on Piracy off the Coast of Somalia
EAC	East African Community
ECCAS	Economic Community of Central African States
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
EEZ	Exclusive Economic Zone
ESDP	European Security and Defence Policy
EUCOM	US European Command for West Africa
EU	European Union
EU NAVFOR	The European Union Naval Force
GNP	Gross National Product
LEDET	United States Coast Guard Law Enforcement Detachments
LON	League of Nations
ICC	International Criminal Court
ICC	The Inter-regional Coordination Centre
ICC	International Chamber of Commerce

ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IGAD	Intergovernmental Authority for Development
ILC	International Law Commission
IMB	International Maritime Bureau
IMO	International Maritime Organization
IRTC	Internationally Recommended Transit Corridor
MEND	Movement for the Emancipation of the Niger Delta
MSC-HOA	Maritime Security Centre-Horn of Africa
NATO	North Atlantic Treaty Organization
NIMASA	The Nigerian Maritime Administration and Safety Agency
PACOM	The US Pacific Command for islands off the coast of East Africa and the Indian Ocean
PIU	Project Implementation Unit
ReCAAP	East Asian Regional Cooperation Agreement on Combatting Piracy and Armed Robbery Against Ships in Asia
SADC	South African Development Community
SHADE	Shared Awareness and De-confliction
SUA	Suppression of Unlawful Acts against the Safety of Maritime Navigation
TFG	Transnational Federal Government
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDOC	United Nations Office of Drugs and Crime
WFP	World Food Programme

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CHAPTER 1

INTRODUCTION: SCOPE OF THE STUDY

*'Many pirate attacks are hit-and-run robberies. In others, crew members are kidnapped for ransom, even tortured and killed. Countless vessels have been hijacked, their nameplates and paperwork swiftly changed, and turned into ghost ships used by syndicates for drug and slave smuggling.'*¹

1.1 Background

The history of maritime piracy can be traced to the advent of maritime trade and carriage of goods by sea.² It was prevalent during the middle Ages given that it was often indistinguishable from warfare as princes were strictly responsible for the acts of piracy of their subjects.³ Over the centuries, commentators have consistently pointed to intractability of the practice.⁴ Thus although the world's seas and common areas were rendered relatively safe for business during most of the 20th century, the decade of the 1990's saw a sharp rise in

1. John M. Glionna, 'A welcome voice in a sea of chaos', Los Angeles Times 13 November 2006

2. See Goodwin JM 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part' (2006) 39 *Vanderbilt Journal of Transnational Law* 977; Jesus JL 'Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 *International Journal of Marine and Coastal Law* 364.

3. Lewis E 'Responsibility for Piracy in the Middle Ages' (1937) 19 *Journal of Comparative Legislation and International Law* 77, p.77.

4. Havet J, *Les Courts Royales de Iles Normands Depuis le Treizieme Siecle Jusqu'a Nos Jours* (Paris, 1878) 231; Richmond CF, Royal 'Administration and the Keeping of the Seas', 1422-85 (D.Phil. Thesis, Oxford University, 1963) 4.

maritime piracy to the point of adversely impacting upon global business. The past 20 years has witnessed a serious increase in maritime piracy in some war torn and economically depressed regions. Well-trained guerrillas experienced in armed warfare and equipped with modern technology, satellite telephones, powerful boats, and missiles, constitute the contemporary personnel of piracy.⁵ However, pirate assaults are not solely confined to war torn areas, but also occur across well-known trade and tourist routes. Assaults have been carried out across the Gulf of Aden or Gulf of Guinea for example. The rebirth of piracy is confirmed by statistical data from the International Maritime Bureau (IMB)⁶ and the International Maritime Organization (IMO)⁷ that shows that the number of piratical attacks since the end of the Cold War in the Gulf of Aden and Gulf of Guinea increased on an exponential scale in the first decade of the 21st century. These are large coastal areas with small national naval forces and weak regional security cooperation mechanisms. Also, the laws of the littoral States within the inlet or those that have territorial jurisdiction are largely insufficient. This may be attributed to the absence of well-established legal infrastructure or simply the lack of political will (see Appendix 4). There exists, in addition, confusion about the status of pirates captured at sea by non-coastal States, as well as the legality of their prolonged detention, trial or rendition to third countries for prosecution and sentencing. The taxpayers of the State that

5. Weir EG 'Fish, Family, and Profit: Piracy and the Horn of Africa' in Elleman B, Forbes A, and Rosenberg D (Eds), *Piracy and Maritime Crime: Historical and Modern Case Studies* (Naval War College Press, Newport, 2010) 213.

6. See Abhyankar J, *Piracy and Maritime Violence: A Continuing Threat to Maritime Industry* (ICC – IMB, Hong Kong, 2002) 8. See also Bowden A *et al* 'The Economic Cost of Maritime Piracy' (2010) One Earth Future Working Paper 1, 12; Chalk P 'Contemporary Maritime Piracy Off the Horn of Africa: Scope, Dimensions, Causes and Responses' (2010) 16 *Brown Journal of World Affairs* 89, 89-102.

7. 'International Maritime Organization, Reports on Acts of Piracy and Armed Robbery Against Ships' (IMO, Paris, 2011). See also other IMO reports discussed in Chapters, 2, 3, and 4 *infra*.

detains the alleged pirates or imprisons them after conviction in a court of law have to bear the cost of prosecution and incarceration. This cost may even be higher where the pirate(s) seeks to remain indefinitely on the grounds that they fear persecution if returned to home countries. They are also entitled to protections against non-refoulement.

It is submitted here that piracy in its modern form in the Gulf of Aden and Gulf of Guinea is a transnational crime that may best be contained through a regional legal infrastructure. It is also argued that the multilateral approach of linking enforcement jurisdiction to universal jurisdiction is problematic because it translates into 'relational statism' that is, where States pursue only their self-interests. Moreover, it may provoke conflict between a non-coastal State that asserts jurisdiction and a coastal State with territorial jurisdiction in cases where the attack is carried out on the high seas but the hijacked vessel is moved into the territorial waters of the latter State. In agreement, Jan Klabbers recently reinforces the matter that it cannot be convincingly argued that the suppression against piracy is a matter of 'Global law.' He emphasises the fact that States preserve too much freedom, and maybe the term of 'Global law' or 'Global governance' are best seen as metaphors, and that legal approaches remain 'decidedly local'⁸. Sofia Galani, in agreement states that sovereignty poses a problem in the nature of the term 'piracy.' She reinforces that universal jurisdiction 'does not appear to be exercised as frequently as might be expected', and that in fact over time piracy 'has become the case that it is the nature of the act, rather than the lack of jurisdictional competence over actors'⁹. Douglas Guilfoyle talks of piracy not being a norm or criminal law as such but

8. Klabbers, Jan , 'Piracy in Global Law and Global Governance, The Law and Practice of Piracy at Sea' *European and International Perspectives*, edited by Panos Koutrakos and Achilles Skordas, (2014), Oxford ; Portland, Oregon: Hart Publishing, 329-342

9. Evans Malcolm D, Galani Sofia, '*Piracy and the Development of International Law*', *The Law and Practice of Piracy at Sea : European and International Perspectives*, edited by Panos Koutrakos and Achilles Skordas, (2014), Oxford ; Portland, Oregon : Hart Publishing, 343-365

rather a ‘jurisdictional device’¹⁰. Sofia Galani then refers to the idea that we should see our responses to maritime piracy ‘as a testing ground for evolution and innovation in developing the international order’ and with this line of thought as such, I put forward that consistency and clarity in the international legal situation may best be achieved by recourse to a traditional ‘auto-limitation’ approach whereby jurisdiction is essentially territorial and can only be exercised by a State outside its territory where it obtains the consent of the territorial State (perhaps through Convention or Treaty) or in accordance with a permissive rule derived from international custom. (*See Appendix 1 and 3*)

1.2 Aims, Objectives and Research Questions

This study seeks to propose an appropriate mechanism for the arrest, prosecution and sentencing of convicted pirates captured in the Gulf of Aden and Gulf of Guinea. It endorses a multilateral approach but places particular emphasis on a cosmopolitan model whereby enforcement jurisdiction may only be asserted by the State with territorial or personal jurisdiction or by another State with the consent of the latter. The research will seek to provide answers to the following questions and/or concerns with the objective of shedding some light on the problems affecting this area of the law. Additionally, it is also the hope of the research that the answers will assist in further developing knowledge on the subject which may ultimately lead to the development of legal solutions which can be applied for the benefit of the maritime industry. There are three central questions that must be addressed in approaching these objectives.

10. *Ibid*, 333.

The first concerns the approach to the definition of the term ‘piracy’ in a maritime context for analytical purposes. Currently, there are legal issues related to what might be seen as an overly restrictive technical definition of the offence, and which have compromised the arrest and prosecution of alleged pirates in several instances. The concept appropriate to the critical commentary and to the empirical aspects of the research project takes the technical legal definition as part of its subject matter, and thus is important to propose a definition that is less ambiguous and does not rely on terms that are open to several interpretations.

Secondly, given that the coastal States in the Gulf of Aden and Gulf of Guinea are largely poor, weak, lacking in resources, and suffer from corruption in the public sphere, we must ask whether regional frameworks of littoral and landlocked countries facing the same challenges can be expected to prove effective in the attempt to implement anti-piracy policies.

Thirdly, as is well known, in the event of a hot pursuit it is impossible to bring the pursuit to a close within the territorial waters of coastal States. In some cases ships are pursued across the high seas and across borders ending up in territories incapable of feasible arrest and prosecution. Further problems arise where the territorial waters of a weak State are handicapped by the absence of a navy and the lack of effective anti-piracy legislation. Some key international instruments provide for universal jurisdiction on the high seas to facilitate the arrest and prosecution of pirates in such cases. However, this raises the question of whether such jurisdictional shifts depart too dramatically from Westphalian principles of sovereignty, and whether such departures can be regarded as justified. These issues constitute the basis of the challenges in the development of international law that arise and confront the

States that act as the main players in the Gulf of Aden and Gulf of Guinea in their attempt to deal with the problem of maritime piracy.

The questions can be summarised as follows:

1. Is there a need to propose a less ambiguous definition of ‘piracy’?
2. Do regional frameworks of littoral and landlocked countries facing the same challenges prove effective in the attempt to implement anti-piracy policies?
3. In assessing universal jurisdiction, does this depart too dramatically from Westphalian principles of sovereignty in the facilitation of arrest and prosecution of pirates in territorial waters?

Aims and objectives can be summarised as follows:

1. To assess multilateralism: Universal v Cosmopolitan in Gulf of Guinea and Gulf of Aden
2. To propose the rationale for a regional International Tribunal
3. To review and appraise relevant cases, statutory instruments and academic literature on the subject.
4. To make relevant recommendations and solutions based on the findings of the research.

1.3 Methodology

Writing a straightforward account of one’s methodological approach is extremely difficult unless one has a routinised, fixed, quasi-empirical, ‘quantitative or qualitative’ research task to pursue. In addition, the methodology section for a legal thesis presents a set of problems specific to the discipline. In a thesis such as this one, which might be described as a contextually jurisprudential examination of aspects of maritime criminality from the

perspective of international law, one must draw upon a range of approaches and technique and it would be wise from the outset to be candid about this methodological eclecticism. It is not an overtly empirical thesis but avails itself of empirical observations where appropriate, it is not overtly historical, but draws on historical data and narratives, and it is not purely doctrinal 'Black Letter' or case based, but draws on doctrine and cases where necessary. It draws comparisons of the law and political and economic context of various States but one would hesitate to announce it as a 'comparative thesis'. In short the account of the issues presented is based on a variety of research methods that contribute to an analytical evaluation – i.e. an approach that attempts to give a critical assessment and appraisal of the way law relates to the set of social, economic and political phenomena that provides the context for maritime activity that will be described as piratical. Something should be said about what is useful –and what is not so useful - about labels such as 'Black Letter', 'empirical' and 'comparative'.

A Black Letter approach is assumed to be a disinterested (objective) analysis of empirical legal materials: statutes, case reports, conventions, national legislation and so on. In the sense that these materials are objects which contain words of a certain kind and a certain amount and which can be photographed or reported, then they are empirical objects. We can look at them, count the words in a particular paragraph, state whose names are mentioned, who are the authors, or what date was it incorporated into law or published. This constitutes an analysis of sorts - but when we announce that we are 'analysing a range of materials' - what precisely do we do we mean? We can only mean that we aim to consider these case reports or conventions or newspaper articles or book chapters as being relevant to our research task. When we are prepared to be candid about why and how these materials are relevant, then we are coming close to what might be meant by 'analysis'. For example, if we scrutinise a report

which talks about policy aims and about some form of intervention geared towards achieving them, and we think the aims or the intervention is controversial or unfair or immoral or, conversely, effective and entirely even handed, then we have already created an evaluative political dimension to the materials. In terms of our research task we are looking for pointers to some kind of solution or suggestion then we must be (will be) always critical of certain types of activity or certain types of thinking. So, the 'Black Letter' approach is much more than the Black Letter approach. A Black Letter approach cannot confine itself simply to the text of legislative documents, case reports or treaties: it must set these documents in at least an historical – even if narrowly contemporary – context, and that context will always be economic and political. Thus the narrowest conception of a Black Letter law approach to legal scholarship must incorporate commentary and analysis from secondary sources - even if these sources are one's own attempts to merely 'describe' the context and related legislation. A review and analysis of the opinions of other scholarly parties will thus inevitably form the basis of the secondary research material. This secondary research can only be assumed to be designed to contribute and enrich the account of the particular area of research that has been selected. There is no way to avoid decisions about including or excluding secondary literature and no way of avoiding the process of dissecting, evaluating and synthesising the arguments one has chosen to include. Thus Black Letter law necessarily involves a theoretical dimension operating on a criterion of *theoretical* relevance. The range of resources used in any analysis that initially prides itself on being confined to Black Letter concerns must necessarily include the primary sources in question, and if, as is the case in the thesis in hand, the primary sources and primary activity is international by its very nature, that is, the very origin of these sources is international and ranges over several jurisdictions, then what started out as a Black Letter approach and became unavoidably theoretical and critical, now inevitably becomes 'comparative' analysis in a very obvious sense.

More specifically, this study adopts a comparative perspective in order to identify, analyse and compare the different ways of dealing with legal and security challenges in the Gulf of Aden and Gulf of Guinea¹¹. Whilst one cannot avoid a discourse of comparison – in the very obvious sense outlined above - there is as much hidden depth to the idea of comparative analysis as there is to the idea of ‘Black Letter’ analysis. One cannot compare any object or process to another without an agenda.¹² Lord Bowen described the comparative lawyer as ‘a man who knows little about the law of every country except his own.’¹³ Koopmans on his part argued that comparative law lacks a fixed method or technique of comparison.¹⁴ Nonetheless, the comparative method requires the researcher to make two methodological choices. First, the comparison must be critical in accordance with a common set of criteria applicable to all elements under scrutiny and not limited to a description of the similarities or differences of the legal orders being compared.¹⁵ In this regard, emphasis must be placed on the practicability and justification of legal solutions in each system according to a criterion of propriety and success independent of *all* the elements under scrutiny. As such, this study discusses the merits of the particular solutions to the problem of piracy implemented in the Gulf of Aden and Gulf of Guinea that suggests a set of normative criteria that makes some

11. Muller-Graff P ‘Modern Comparative Law: The Forces Behind and the Challenges Ahead in the Age of Transnational Harmonisation’ in Engelbrekt AB and Nergelius J (Eds), *New Directions in Comparative Law* (Edward Elgar, Cheltenham, 2009) 255-261.

12. See Siems M, *Comparative Law* (Cambridge University Press, Cambridge, 2014) 33-35.

13. Schlesinger RB, *Comparative Law: Cases – Text – Materials* (3rd Edition, The Foundation Press, New York, 1970) p.1-2.

14. Koopmans T (Ed), *Constitutional Protection of Equality* (AW Sijhoff, the Netherlands, 1975) 8.

15. Zweigert K and Siehr K ‘Thering’s Influence on the Development of Comparative Legal Method’ (1971) 19 *American Journal of Criminal Law* 215, 220.

claim to universality across *all* legal orders. This implies at very least that the laws of common law and civil code countries may be compared. In fact, comparisons between civil law and common law systems dominated the comparative law landscape for a while.¹⁶ Nonetheless, what is important is the form of technique adopted, and whether the comparison is internal, external, inventive or historical.¹⁷ The Gulf of Aden and Gulf of Guinea comprise both common law and civil law countries and their laws on piracy are compared. However, given the number of countries in both regions, an external comparison would not only have been an unwieldy task but would have distracted the researcher from focusing on the *function* of the laws in regard to the investigation, prosecution, and sentencing of pirates.

A functional approach to comparative analysis focuses on the effects of the laws rather than the specific provisions and doctrinal constructs.¹⁸ For the functional method, the function of the law is the *tertium comparationis* or the social purpose of the law.¹⁹ It has been described as the ‘principle’ to which the comparative method adheres.²⁰ It is uncertain whether the functional method may be effectively called a ‘method’ or it is simply a ‘principle’ that guides the comparative method. The simple rationale of the functional method was deemed

16. See Sitek B, Szczerbowski JJ, and Bauknecht AW (Eds), *Comparative Law in Eastern and Central Europe* (Cambridge Scholars, Newcastle, 2013) 1-2.

17. Lasser M ‘Comparative Law and Comparative Literature: A Project in Progress’ (1997) *Utah Law Review* 474, 474-480.

18. Michaels R ‘The Functional Method of Comparative Law’ in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) 341-343.

19. Brand O ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies’ (2007)

32 *Brooklyn Journal of International Law* 405, 409; Bogdan M, *Comparative Law* (Kluwer, Deventer, 1994) 60.

20. Kiikeri M, *Comparative Legal Reasoning and European Law* (Kluwer, Dordrecht, 2001) 28.

appropriate for this study because it is suitable when comparing legal systems that face similar problems.²¹ One system might adopt similar but not the exact same measures from the other in order to solve the same problem, and both might be successful. A functional approach is concerned with achieving desirable ends even if not establishing homogeneity of means to be adopted by various systems. I was more interested in analysing the *dicta* of courts and provisions of statutes (including international conventions) as responses to similar situations faced by countries in the Gulf of Aden and Gulf of Guinea. The *dicta* and statutes are understood in relation to the function they fulfil in society. Hence, the judicial decisions in courts of countries that have tried pirates from the Gulf of Aden or the Gulf of Guinea are set up to be functionally equivalent in their settings but may not always be successful given lack of legislature and so on. They set out to fulfil similar functions: deterring and punishing piracy. I therefore followed the advice by Zweigert and Kotz in that the methodological principle of comparative law is that of functionality.²² The effects of legal institutions set up in response to the threat posed by piracy are explained as functions and not as doctrinal constructs.²³

The thesis seeks to determine the function of the applicable laws in two different regions faced with a sharp rise in piratical attacks over the past couple of decades. Whilst acknowledging the relevance of the social and cultural body of non-legal norms that might plausibly be said to influence the increase of maritime piracy, the focus is upon what can be

21. Michaels R, *Ibid.* fn. 18 *supra* p. 369.

22. Zweigert K and Kotz H, *An Introduction to Comparative Law* (Trans by Weir T, 3rd Edition, Oxford University Press, Oxford, 1998) 34.

23. Michaels, *Ibid.* fn. 18 *supra* p.365.

reasonably distinguished as the formal, posited law. Non-legal norms can be critically analysed and assessed as part of a project in addressing how situations and characteristics in such territories can be improved in the long run as a measure to reduce piracy. This, however, is a longer term project to obtaining a higher level of sustainability in territorial States. But, notwithstanding the value of this type of study, the author maintains that a formal focus is neither precluded nor less valuable by way of its concentration of formal legal processes and materials. The study seeks to assess the scope for a feasible and timely response to the increase of attacks by building on current legislation.

1.4 Philosophy

The philosophy of law in the form of Jurisprudence subjects law and legal institutions to close conceptual scrutiny.²⁴ It focuses on questions relating to the nature of legal systems and the alleged validity of laws posited in these systems. Depending on one's perspective, it is a search for the authoritative essence of law as distinct from the claims of other normative systems, or an ideological critique of the claim to its essential distinction.²⁵ Both these perspectives are thus 'normative' in the sense that neither can reach completion without moral judgment. In light of this one could say that the approach of the thesis is largely normative and prescriptive. I attempt to critically examine the challenges in enforcing piracy laws in the Gulf of Aden and Gulf of Guinea and attempt to analyse the efficacy or otherwise principles of relevant legislation and compare them between legal systems. I do not seek, however, to achieve the chief aims of analytic jurisprudence which has been said to be that of

24. See Finnis J, *Philosophy of Law: Collected Essays: Volume IV* (Oxford University Press, Oxford, 2011) 157- Also H.P.Olsen and S. Toddington *Law in its Own Right* (Hart Publishing, Oxford, 1999) Chapter 1.

25. *Ibid.*

explaining what separates law as a system of valid norms from other informal systems of norms.²⁶ To explain the distinction other than by way of a simplistic appeal to officialdom, procedure and codification, demands a foundational specialism; for the serious debate is about the relationship between obligation and coercion and the reasons underpinning the justifications for imposing obligations and/or employing coercion in response to non-compliance. An approach to legality in society can hardly avoid a simultaneously normative (moral), analytical, and critical approach and thus an appeal to a range of potentially problematic conceptual frameworks of description and explanation. Brian Leiter argued that ‘the philosophy of law was one of the few philosophical disciplines that took conceptual analysis as its principal concern’ noting that most other disciplines had taken a ‘naturalistic’ (by which, following Quine, he meant empiric-pragmatic) turn, incorporating the tools and methods of the natural and technological sciences.’²⁷

Conceptual analysis of law leads to the espousal or rejection of two types of theories: theories which confirm a relationship between law and morality, and theories which deny this relationship or the influence of morality on the development of the law. There are several ways of thinking about the philosophy of law in ways which support, rebut or at least revolve around these fundamental positions. Natural Law, Legal Idealism, Legal Positivism, Legal Realism, and Critical Legal Studies, spring to mind, and so does the outright rejection of law’s validity in Marx. My strategy has been to adopt an approach close to the flexibility of Hart’s ‘inclusive’ positivism in that, for the purposes of empirical, doctrinal and conceptual analysis, a plausible distinction between law on the one hand, and culture/politics/morality on

26. Burke R, *Criminal Justice Theory: An Introduction* (Routledge, Abingdon, 2012) 59-60.

27. Leiter B ‘The Naturalistic Turn in Legal Philosophy’ (2001) *APA Newsletter on Law and Philosophy* 142, 142.

the other, can be coherently drawn without recourse to a complete and indefinitely lengthy immersion in the depths of moral epistemology and the philosophy of method. In this research, I placed a reliance on broadly positivistic assumptions because the bulk of analysis is confined to the applicable statutes and judicial decisions as responses to the problem of piracy.

1.4.1 ‘Modest ‘Legal Positivism

Legal Positivism since Hart is based around the idea that the only *valid* sources of law are those that can be traced to an empirical rule of recognition, and that the identification of this rule of recognition does not require the exercise of moral judgement.²⁸ This, as John Gardner points out, is better regarded as a ‘source thesis’ than a ‘separation thesis, although the issue of the separation between law and morals is in any event unavoidable. For the most part the idea of a ‘rule of recognition’ coincides with a common-sense understanding of law as a body of enshrined legal principles and a superstructure of usually codified rules developed and put in place by a national government or an international governmental organisation.²⁹ The device is the answer to the big question in Legal Positivism, ‘what is law?’ This is an important question in this context given that the nature of piracy is largely undefined in the laws of most States in the Gulf of Aden and Gulf of Guinea. Thus, it is often uncertain which law governs violent attacks against vessels at sea and it is uncertain whether international instruments may be said to be *the law* in cases where there is no local law criminalising those particular types of attacks. The empirical (Empiricist) origins and sympathies of Positivism in general and Legal Positivism in particular focuses on

28. Hart, H.L.A. *The Concept of Law* (Oxford. Clarendon) 1961.

29. See Segal JA and Spaeth HJ, *The Supreme Court and the Attitudinal Model* (Cambridge University Press, Cambridge, 1993) 33-55.

the confirmation of the observable facts of existence. It tries to define the law by giving empirically grounded accounts of the applications of parliamentary enactments or judicial decisions which allow society to be regulated. If a rule or judgment is acknowledged by a State's parliament or court, it will be admitted as law in the eyes of Legal Positivists. On the other hand, if a norm is affirmed by anyone other than legislators or judges, it will not be admitted as law by the positivists, even where a particular norm is heralded as desirable or indispensable in popular demands for legitimacy.³⁰ However, this is not dispositive of the issue: it must be noted that 'customary' international law or 'peremptory norms' are treated as law irrespective of the fact that they have not been incorporated into the laws of a State. This implies the adoption of the 'cosmopolitan' theory of law in a bid to reconcile the universality of customary international law and the partiality of positive law.³¹ It has been argued that cosmopolitan law supplements both national and international law by remedying their deficiencies. This is because in the case of countries such as the UK, the legal norms that qualify as cosmopolitan are not just parts of international law or regional customs but actually form part of the *ius gentium* that is integral to the common law.³² This may be distinguished from legal 'statism' that asserts that the only law is the State's law, or that the prescription by a State is the only legal order valid and effective in a defined territory.³³

30. See generally, Raz J 'Authority, Law and Morality' (1985) 68 *The Monist* 295, 296-324.

31. Post R, *Another Cosmopolitanism* (Oxford University Press, Oxford, 2004) 3.

32. Walters MD 'The Common Law Constitution and Legal Cosmopolitanism' in Dyzenhaus D (Ed), *The Unity of Public Law* (Hart, Oxford, 2004) 451.

33. La Torre M, *Law as Institution* (Springer, New York, 2010) 108.

Legal Positivism is thus not a restrictive theory of law; it is open to an expansive range of putatively valid regulation because, importantly, it admits of a wide range of potentially recognizable sources.³⁴ However, there are three principles of Legal Positivism that give it some disciplinary boundaries. The first is the ‘social fact’ dimension that holds that legal

34. Despite the Positivist demand for a firm rule of recognition, the astoundingly wide range of possible sources of law is in fact Hart’s second longest footnote in the entire text of *The Concept of Law* (See the endnote to page 98, Chapter VI, at p.246 of the 1961 edition).

[...] *Sources of law*. Some writers distinguish ‘formal’ or ‘legal’ from ‘historical’ or ‘material’ sources of laws (Salmond, *Jurisprudence*, 11th ed., chap.v). This is criticized by Allen, *Law in the Making*, 6th ed., p.260, but this distinction, interpreted as a differentiation of two senses of the word ‘source’, is important (see Kelsen, *General Theory*, pp. 131-2, 151-3). In one sense (i.e. ‘material’, ‘historical’) a source is simply the causal or historical influences which account for the existence of a given rule of law at a given time and place: in this sense the source of certain contemporary English rules of law may be rules of Roman law or Canon law or even rules of popular morality. But when it is said that ‘statute’ is a source of law, the word ‘source’ refers not to mere historical or causal influences but to one of the criteria of legal validity accepted in the legal system in question. Enactment as a statute by a competent legislature is the *reason* why a given statutory rule is valid law and not merely the *cause* of its existence. This distinction between the historical cause and the reason for the validity of a given rule of law can be drawn only where the system contains a rule of recognition, under which certain things (enactment by a legislature, customary practice, or precedent) are accepted as identifying marks of valid law.

But this clear distinction between historical or causal sources and legal or formal ones may be blurred in actual practice and it is this which has led writers such as Allen (op.cit.) to criticize the distinction. In systems where a statute is a formal or legal source of law, a court in deciding a case is bound to attend to a relevant statute though no doubt it is left considerable freedom in interpreting the meaning of the statutory language (see Chapter VII, s. 1). But sometimes much more than freedom of interpretation is left to the judge. Where he considers that no statute or other formal source of law determines the case before him, he may base his decision on e.g. a text of the Digest, or the writings of a French jurist (see, for example, Allen, op.cit., 260 et seq.) The legal system does not *require* him to use these sources, but it is accepted as perfectly proper that he should do so. They are therefore more than merely historical or causal influences since such writings are recognized as ‘good reasons’ for decisions. Perhaps we might speak of such sources as ‘permissive’ legal sources to distinguish them both from ‘mandatory’ legal or formal sources such as statute and from historical or material sources.’

See also Leiter, Brian, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111 *Ethics* 278, 278.

validity is a matter of facts – not moral judgment; the second is the conventionality dimension that advocates that society paves the way to legal validity through social convention or generally accepted standards; and thirdly there is what we can refer to as a ‘separability dimension’ that contrasts Positivism to Natural Law and holds (at least in ‘inclusive’ forms of Positivism) that although moral principles may be expressed in and through law, morality is not an essential or necessary component of the concept of legal validity.³⁵ The Positivist themes developed in this study adopt in this sense, a separability dimension. This is, however, a modest separability thesis to the effect that law and morality are plainly distinct ideas. This modest approach is in contrast to ‘Hard positivism’ that seeks to prohibit the incorporation of moral constraints on legal validity in a legal system. Joseph Raz famously insists, in keeping with a source thesis approach, that the existence of the content of law is determined by reference to its sources without the need to consider or refer to moral argument.³⁶ In addition, ‘hard’ positivists have the view that in certain circumstances moral constraints and standards can be deliberated upon; however, they cannot be regarded as law or incorporated in to law. But there is something unsatisfying about the ‘hard’ positivist account of the relationship between law and morality.

The law on a question is settled when legally binding sources provide its solution. In such cases judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources and does not call for moral acumen. If a legal question is not answered by standards deriving

35. Hart HLA ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 593-594; Klaus F ‘Farewell to “Legal Positivism”: The Separation Thesis Unravelling’ in George RP (Ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, Clarendon Press, 1996) 119, 120.

36. Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, (1979, p. 47)

from legal sources then it lacks a legal answer - the law on such questions is unsettled. In deciding such cases courts inevitably break new (legal) ground and their decision develops the law.... Naturally, their decisions in such cases rely at least partly on moral and other extra-legal considerations.³⁷

If an issue can be resolved by a judge by merely applying previous court decisions, then it is clear to say that the issue is settled by law. If this is not the case, then the issue is simply unsettled. Where the judge may look to moral standards here, she is simply going beyond the law. But in what sense are we to understand the ‘development’³⁸ of the law?

It is true that ‘soft’ positivists such as Hart *would* countenance the incorporation of morals within laws. That is why he argued that ‘the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values ... such as the Sixteenth or Nineteenth Amendments to the United States Constitution respecting the establishment of religion or abridgements of the right to vote.’³⁹ Hence, although the separability dimension produces a tension here, it must be acknowledged that there are moral pressures that create the need for legal validity.⁴⁰ Indeed, Klaus tells us that a separability thesis which holds that law must be strictly unburdened by moral ideas will entail immense problems for any viable discourse. Any mention of morality in the operation of law would not be compatible with the basic tenets of Positivism. But this should not lead us to infer that identifying and assessing

37. Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979)

38. *Ibid.*

39. *Ibid.*, 250.

40. *Ibid.*

legal reasoning and the operation of legal institutions cannot be seen as a qualitatively distinct investigation from the study of morality and culture *bearing upon* legislation – after all, the *weather* has a bearing on the development of legislation.

The motivation, therefore, for adopting a ‘modest’ separability thesis’ is to avoid the artificial imposition of philosophically generated semantic restrictions on a discourse that is, in other than ‘hard’ positivist terms, plainly coherent and understandable. My remit is simply to identify the documented responses of legislators and courts to the threat posed by piracy and relate these to an empirical account of the plausibly related consequences. Normatively speaking, the recommendations in this study are intended to relate to the nature and operation of the piracy laws, and one must acknowledge not only that this will inevitably touch upon moral considerations extraneous to legal materials, but that some of these considerations might relate more or less directly to the particular and contingent cultural norms of the regions dealing with the phenomenon of piracy. I have already acknowledged that the exploration of the cultural context of laws is a valuable aspect of social and legal research; but I am not primarily aiming to propose a better system of non-legal norms. Hart noted that the separation or separability thesis is no more than the ‘simple’ contention that, ‘It is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.’⁴¹ Thus, although this study accepts that piracy laws are culturally embedded, and that it would be foolish to imagine that one could quarantine one’s inquiries in respect of pristinely distinct realms of legal and cultural (moral) phenomena, by the same token, it is surely possible to speak coherently and specifically about one, rather than the other. The research does not focus, prioritize or even give equal weight to the

41. Hart HLA, *The Concept of Law* (2nd Edition, Clarendon, Oxford, 1994) 181-182.

influence of culture and morality, given that the courts do not enforce the culture, but do seek to enforce enacted laws.

1.5 The Lacuna in the Literature

We noted earlier that there is a gap in the literature and in the thinking about the effect of piracy on the littoral States and on the user states in the Gulf of Guinea. The problem arises from the contradiction between acknowledging the enforcement rights of littoral states, yet failing to acknowledge the discrepancies between these states in respect of the resources required for *enforcement* of these rights. This detachment in thinking leaves space for new and innovative research to assess the most efficient and effective ways to balance the responsibilities of securing the Gulf of Guinea. This could lead to a better mode of cooperation based on the common perception of threat that is shared amongst the littoral States and further between the littoral and user States. This thesis argues that such a situation could be managed in a way where the security issue could be resolved in the Gulf of Guinea without violating the national sovereignty of the littoral States.

The concept of multilateralism is assessed on two levels, one on the principle of universality and the other on the cosmopolitan theory. The thesis adopts the cosmopolitan theory in a bid to reconcile the universality of customary international law and the partiality of positive law. Thus a multilateral approach, whereby utilising a cosmopolitan approach supplements both national and international law by remedying its insufficiencies.

This implies that an exclusive focus on the State with territorial jurisdiction would be ineffective in combatting piracy where they lack enforcement or prescriptive jurisdiction, and

it is imperative that a multilateral approach is adopted. Nonetheless, this does not imply that the doctrine of universal jurisdiction is more appropriate. Thus it supports the argument to the effect that piracy may be effectively contained where extraterritorial jurisdiction is limited only to cases where the crime allegedly committed constitutes a clear violation of a peremptory norm or jus cogens and where the State with territorial jurisdiction or the flag State consents to the exercise of extraterritorial jurisdiction by another State. It also reinforces the argument in favour of adopting a doctrinal or positivist approach, as well as cosmopolitan, whereby the flag State or home State of the company that owns the vessel would have jurisdiction if the attack occurred in a place where no other State has jurisdiction. Further, universal jurisdiction does not provide any credible solution to the problem of piracy as the court system is a problem.

Analysing this from a contextually jurisprudential approach means that it narrowed down to the applicable statutes and judicial decisions as responses to the problem of piracy, and therefore only the prescriptive and enforcement jurisdiction is analysed through the legislative approach. The effects of the laws and focused upon than the provisions and constructs. In addition, discussions surrounding the rationale of a regional International Tribunal to punish the offenders of piracy have been put forward, in order for a consistent approach being used when hearing such cases. In summary, identifying the gap in the literature points to the need for a re-contextualization of an existing technique (doctrine of universal jurisdiction in Somalia) in a new setting (Gulf of Guinea).

1.5.1 Table: Mapping of Original Contribution

In line with the doctoral assessment guidelines which requires an original contribution as one of the outcomes of the research, the table below is intended to provide a mapping of the areas where original contribution to the debate occurs in this dissertation.

Original contribution to knowledge in the field	Chapter of contribution
Adopts a cosmopolitan theory in a bid to reconcile the universality of customary international law and the partiality of positive law	Chapter 3, 4
Proposes the rationale for an International Tribunal	Chapter 6
Recommendations based on research findings	Chapter 7

1.6 Conceptual Framework and Research Design

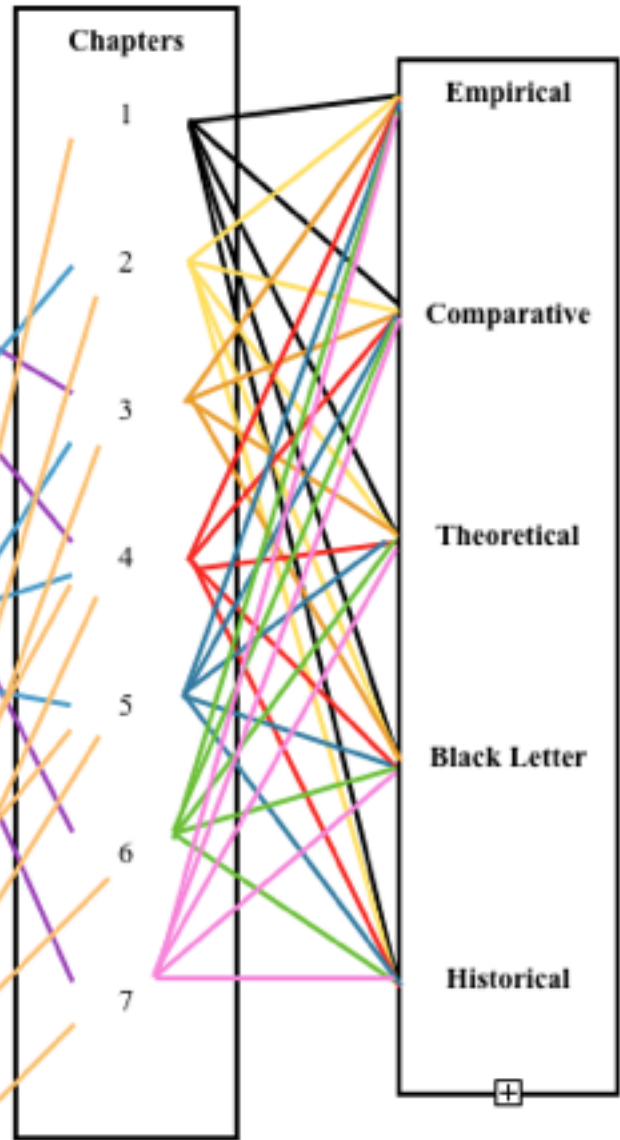
The conceptual framework of the research is represented below in a diagrammatic form illustrating the link between the dissertation aims and objectives, the research questions, the methodology and the research contribution. These four aspects of the research are then plotted against the various chapters showing where each aspect occurs in the dissertation.

- Chapters**
1. Introduction: Scope of the Study
 2. The evolution of maritime piracy: A legal and historical analysis
 3. Maritime piracy under international law: The question of jurisdiction
 4. Piracy in the Gulf of Guinea
 5. Piracy in the Gulf of Aden
 6. The prosecution of pirates and the case of an international tribunal

- Contributions**
1. Adopts a cosmopolitan theory in a bid to reconcile the universality of customary international law and the partiality of positive law
 2. Purposes the rationale for a regional International Tribunal
 3. Recommendations based on research findings.

- Research Questions**
1. Is there a need to propose a less ambiguous definition of 'piracy'?
 2. Do regional frameworks of littoral and landlocked countries facing the same challenges prove effective in the attempt to implement anti-piracy policies?
 3. In assessing universal jurisdiction, does this depart too dramatically Westphalian principles of sovereignty in the facilitation of arrest and prosecution of pirates?

- Aims and Objectives**
1. To assess multilateralism: Universal v Cosmopolitan- Gulf of Guinea and Gulf of Aden
 2. To propose the rationale for a regional International Tribunal
 3. To review and appraise relevant cases, statutory instruments and academic literature on the subject
 4. To make relevant recommendations and solutions based on the findings of the research



1.7 Chapter Outline

This report is divided into chapters, sections and subsections. The table below provides a summary of the various issues discussed in the constitutive chapters of the report.

Chapter	Outline
I. Introduction	<ul style="list-style-type: none">• Discusses the theoretical background of the study• Introduces the objectives of the study and questions that the researched sought to answer• Outlines the gap in literature and maps out the original contribution• Provides a chapter outline
II. The Evolution of Maritime Piracy: Legal and Historical Analysis	<ul style="list-style-type: none">• Discusses the history and causes of piracy in the Gulf of Aden and Gulf of Guinea• Shows the link between the ambiguity of the term ‘piracy’ and the confusion about the status of the pirates captured at sea• Demonstrates the importance of the positivist approach and cosmopolitanism in prosecuting

<p>III. Maritime Piracy under International Law: The Question of Jurisdiction</p>	<ul style="list-style-type: none"> • Critically analyses the concepts of universal jurisdiction and extraterritorial jurisdiction • Examines the risks associated with undermining the Importance of Westphalian principles to jurisdictional frameworks • Determines the limits of national criminal jurisdiction under public international law as regards prosecuting pirates • Reinforces the argument that the strict doctrinal or positivist approach must be adhered to as a prerequisite for arresting and prosecuting pirates
<p>IV. Piracy in the Gulf of Guinea</p>	<ul style="list-style-type: none"> • Explains the high level of piratical attacks in the Gulf of Guinea and identifies security challenges facing States in the region • Critically analyses the multilateral approach that has been adopted by States in the region to contain piracy
<p>V. Piracy in the Gulf of Aden</p>	<ul style="list-style-type: none"> • Explains the high level of piratical attacks in the Gulf of Aden and identifies security challenges facing States in the region • Critically analyses the multilateral approach that has been adopted by States in the region to contain piracy

<p>VI. The Prosecution of Pirates and the Case for an International Tribunal</p>	<ul style="list-style-type: none"> • Discusses the impediments to the prosecution of pirates in States with territorial jurisdiction • Examines international efforts at enhancing the prosecution of pirates • Develops the argument for the establishment of an International Tribunal
<p>VII. Conclusion</p>	<ul style="list-style-type: none"> • Concludes the study by showing how the objectives were achieved and questions answered • Provides a summary on the discussion of the structure and functioning of the International Tribunal proposed as a solution to the problem of the prosecution of pirates

CHAPTER 2

THE EVOLUTION OF MARITIME PIRACY: A LEGAL AND HISTORICAL ANALYSIS

*'For most of their history, pirates had to be the enemies of some before becoming the enemies of all.'*⁴²

2.1 Introduction

Despite longstanding efforts to develop strategies and legal instruments to counter the phenomenon, it remains a major concern to stakeholders of the maritime industry, including coastal States. Different types of piracy exist in different regions of the world, creating different types of victim and different effects on economies. This heterogeneity of the phenomenon hinders the attempt to establish international strategies aimed at consistent and coherent prosecution and sanctioning of pirates across the globe. This Chapter undertakes a legal and historical analysis of the evolution of maritime piracy in order to explore the major factors that compromise the enforcement of international law. The objective is to work towards an appropriate response to maritime piracy that takes account of the sovereignty of the coastal State, yet which does not deny the international community the right to intervene when and where coastal States are either unwilling or unable to arrest and prosecute pirates.

I turn first to an account of the problems arising from the attempt to define piracy for the purpose of stabilising the legal conception of the offence. I will show that the unduly

42. Lauren Benton, 'Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction' (2011) XXIII(1) *International Journal of Maritime History*, 240

restrictive definition has hampered the efficacy of the legal response. This theoretical point introduces some historical observation on late mediaeval piracy in the Aegean and Mediterranean seas to the present day in the Horn of Africa. I then discuss attempts to codify the rules of customary international law on piracy, placing an emphasis on the provisions of the United Nations Convention on the Law of the Sea (UNCLOS).

In summary Chapter 2 aims to:

- Discuss the history and causes of piracy in the Gulf of Aden and Gulf of Guinea
- Shows the link between the ambiguity of the term ‘piracy’ and the confusion about the status of pirates captured at sea
- Demonstrate the importance of a positivist (‘modest separability’ thesis) approach and cosmopolitanism in prosecuting pirates

In pursuing these aims, Chapter 2 seeks to address the following question and concern of the dissertation as stated in Chapter 1 *supra*; i.e.:

[...] the approach to the definition of the term ‘piracy’ in a maritime context for analytical purposes. Currently, there are legal issues related to what might be seen as an overly restrictive technical definition of the offence, and which have compromised the arrest and prosecution of alleged pirates in several instances. The concept appropriate to the critical commentary and to the empirical aspects of the research project takes the technical legal definition as part of its subject matter, and thus is important to propose a definition that is less ambiguous and does not rely on terms that are open to several interpretations.

2.2 Conceptualising the Offence of Piracy

The sea is both a highway and an international border, and violence that occurs in this setting often falls in the grey area between military combat and civilian conflict. Thus there is a natural uncertainty about how to characterise actions and their perpetrators at sea. An attack on a ship originating in one country in the maritime territory of another country could be an sovereign act of defending territory – or of initiating military aggression against another country, or an intervention by enforcement officers on a vessel (home or foreign) suspected of committing some offence prohibited by that State, or simply a commercially criminal assault upon a vessel and the persons operating it regardless of its or their origins, purposes, nationality or territorial location. This latter seems to be closer to the idea of piracy, but even in these few permutations we can see the source of uncertainty and ambiguity surrounding decisions relating to legality *per se*, and in particular, to issues of detention, trial, or rendition of persons and property apprehended to countries making claims to jurisdiction over the types of actions and events just described. Over the years national courts, parliaments and international bodies have defined the term in many different ways. Todd notes that the word ‘piracy’ has been applied to a variety of unlawful acts over the centuries, including plunder, robbery and murder; although it is mostly used today to describe an attack without lawful authority against a vessel at sea for the purpose of plunder.⁴³ Kelley also notes that although the term ‘piracy’ bore many definitions over the centuries, it has generally been regarded as crimes on the high seas that were punished swiftly and harshly.⁴⁴

43. Todd P, *Maritime Fraud and Piracy* (2nd Edition, *Lloyd's List*, London, 2010) para 1.016-1.018.

44. Kelley RP ‘UNCLOS, but NO Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy’ (2011) 95 *Minnesota Law Review* 2285, 2288.

What distinguishes piracy from other crimes that might be committed on the high seas (such as terrorism) is the motive of the attacker. However, there is a fine line between piracy and terrorism given that they are both unlawful activities that require States and other geostrategic entities to harmonise their interests and approaches to policy.⁴⁵ Some international instruments that deal with violence on the high seas such as the Convention for the Suppression of the Unlawful Acts Against the Safety of Maritime Navigation of 1988 (SUA) focus on ‘terrorism aboard or against ships.’⁴⁶ However, terrorism is a more specific notion and presents a bigger challenge as regards the implementation of international legal norms. In the case of *United States v Yousef*, the Court held that⁴⁷

Customary international law currently does not provide for the prosecution of “terrorist” acts under the universality principle, in part due to the failure of States to achieve anything like consensus on the definition of terrorism.

There is scope for more clarity and certainty in defining piracy as a particular type of unlawful attack not least because it should be possible to avoid the impasse of wrangling over the legitimacy of instances of political violence from a plurality of ideological perspectives.

Kontorovich, perhaps formalistically, therefore describes piracy as ‘the paradigmatic crime for which international law authorizes and even requires universal enforcement and

45. Paleri P ‘Maritime Priorities and Challenges in Asia: An Indian Perspective’ in Ho J and Bateman S (Eds), *Maritime Challenges and Priorities in Asia: Implications for Regional Security* (Routledge, Oxon, 2012) 272.

46. The need for forming of the said Convention revealed mainly after the *Achille Lauro* case in 1985 in order to regulate matters which until this time had not been predicted in legal texts.

47. *United States v Yousef*, 327 F.3d 56, 97 (2d Cir. 2003), Pg. 46

punishment.’ Nonetheless, piracy is the not only the concern of international law. Fakhry argues cogently that the definitional problem stems from the fact that there are two sources of our legal understanding of definitions, one based on international law and one based on municipal law.⁴⁸ He says that that international law *restricts* the concept since it does not apply to attacks perpetrated in territorial or internal waters.⁴⁹ On the other hand, municipal laws where piracy laws have been incorporated, whether criminal or private (carriage of goods by sea and insurance), emphasise the traditional approach to piracy that is, punishing attacks on a vessel irrespective of the vessel, location and perpetrator. However, this conception of municipal law is generic or at least focused on English law, and does not help in the examination of the problem of piracy in countries with insufficient laws such as those in the Horn of Africa or Gulf of Guinea. It is true that the international law of piracy does not extend to maritime terrorism (since it is restricted to acts committed for private ends); however, ideological attacks perpetrated in internal or coastal waters are still within the jurisdiction of Coastal and flag States.

When talking of ‘international law’ the definition often referred to is that of Article 101 of UNCLOS, which is to the effect that ‘piracy’ comprises ‘any illegal acts of violence or detention, or any act of deportation, committed for private ends by the crew or the passengers of a private ship or a private aircraft.’ This definition was taken with only minor changes from Article 15 of the High Seas Convention 1958, which in turn was taken from the articles

48. Fakhry A ‘Piracy across Maritime Law: Is There a Problem of Definition?’ in Chircop A, Letalik N, McDorman TL and Rolston SJ, *The Regulation of International Shipping: International and Comparative Perspectives* (Koninklijke, Leiden, 2012) 97.

49. *Ibid.* See also Rothwell DR and Stephens T, *The International Law of the Sea* (Hart, Oxford, 2010) 162.

of the International Law Commission on the law of the sea.⁵⁰ The Commission's articles were also based on Article 3 of the Harvard Research in International Law Draft Convention on Piracy.⁵¹

It has been argued that the term 'private ends' is not restrictive as generally contended when examined in context. The argument here is that the term was used to refer to 'gains or other private ends of the doers'⁵² which simply implies the 'piratical intent to plunder.'⁵³ Thus, what is important is that violence was perpetrated on the high seas without a government commission or letter of marque. This implies that the permission of a State and interpretation by courts (usually domestic courts) actually determines whether an act constitutes piracy. Hence, maritime piracy is a transnational and international problem that is resolved from a national perspective. Nonetheless, some countries have simply integrated the provisions of UNCLOS in their domestic legislation. For example, Article 101 of UNCLOS was integrated in Section 26 of the UK Merchant Shipping and Maritime Security Act 1997. Where such an integration has not been done, it is expected that the term 'piracy' under a municipal law will be much broader. The Privy Council for example defined piracy as 'any armed violence at sea which is not a lawful act of war.'⁵⁴ Such a broad definition certainly overlaps with the

50. See Guilfoyle D 'Piracy and Terrorism' in Koutrakos P and Skordas A (Eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart, Oxford, 2014) 36.

51. Harvard Research on International Law 'Part IV: Piracy' (1932) 26 *American Journal of International Law* Supplement 739, 743.

52. Zollmann C, *Bishop on Criminal Law* (9th Edition, TH Flood & Co, Chicago, 1926) 406.

53. Lauterpacht H, *Oppenheim's International Law* (5th Edition, Longmans, Green & Co, 1937) 486.

54. *In re Piracy Jure Gentium* [1934] AC 586, 598.

scope of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) which focuses on maritime terrorism.

From a legal viewpoint, the definitional problem is also related to the fact that modern pirates tend to operate in regions with large coastal areas, small national naval forces, and weak regional security cooperation mechanisms, where the laws of the coastal or territorial States are largely insufficient.⁵⁵ Sometimes the governments are either too weak or non-existent, corruption is rampant, and impoverished coastal communities act autonomously.⁵⁶ In this regard, Article 100 of UNCLOS is important given that it provides a mechanism for maritime piracy suppression that requires the participation of more States than the coastal or territorial States in providing navigation security or safety. In fact, all the States that have ratified the Convention have the obligation to participate and cooperate in efforts to combat maritime piracy. Article 14 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 the jurisdiction of any State.’

In light of the above, it may be said that according to UNCLOS, which is deemed to be a codification of customary law,⁵⁷ only the occupants of a ship who commit a violent act against the occupants or cargo of the other ships may be called pirates. Thus, if the crew of a

55. Aaron Cooper, Somali piracy: a legal maelstrom, (2012), Westlaw article, Cov. L.J. 83

56. Whitman, S., Williamson, H., Sloan M., & Fanning, L. (2012). Dalhousie Marine Piracy Project: *Children and Youth in Marine Piracy - Causes, Consequences and the Way Forward*, (MarineAffairs Program Technical Report #5).

57. Kelley RP ‘UNCLOS, but NO Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy’ (2011) 95 *Minnesota Law Review* 2285, 2287.

ship or the passenger of the ship takes some kind of action against their own ship they would not be called pirates. Also, piracy is deemed to be an international crime that requires an international solution. This contention is based on the thesis by Cicero which is to the effect that a pirate is not included in the list of lawful enemies, but is the common enemy of all; and pirates and other men there ought to be neither mutual faith nor binding oath.”⁵⁸ He then said pirates ought to be regarded as *hostis humani generis*, which may be translated as ‘common enemies of mankind’.

What is problematic is the fact that States that are not flag States and do not have a territorial claim may have enforcement and adjudicative jurisdiction. It is important to note that a State generally has jurisdiction only within its territory. In the landmark *Lotus Case (France v Turkey)*, the ICJ held that a State ‘jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.’⁵⁹ This is no doubt a ‘positivistic’ (although pre-Hart)⁶⁰ approach that is essentially deferential to the traditional understanding of State consent. As shown in subsequent chapters, the *opinio juris* has since evolved to the point where international law is said to be neutral on the international lawfulness of certain acts or omissions. It is argued here that it has evolved beyond the clarity provided by the positivist approach. Thus, consistency and clarity may best be achieved by returning to the positivist

58. Thomas J.R. Stadnik, Esq. Pirates - The Common Enemies of All, the Enemies of the Human Race, the Law of War and The Rule of Law, Lexis Nexis Legal Newsroom, International law, 05-05-2009, 01:20 PM

59. *Lotus Case (France v Turkey)*, ICJ, 1927, para 45.

60. This is ‘Pre Hart’ in the theoretical sense because he criticised the idea of consent and auto limitation in Chapter X of *The Concept of Law*.

approach whereby jurisdiction is essentially territorial and can only be exercised by a State outside its territory if it obtains the consent of the territorial State (perhaps via a Convention) or it is in accordance with a permissive rule derived from international custom.⁶¹ This implies that the term ‘piracy’ ought to be defined in accordance with the laws of the territorial State or States with enforcement jurisdiction, and the provisions of UNCLOS (where the territorial State is a signatory). It is difficult to envisage an approach that ensures more clarity and consistency. In order to understand the importance of this approach, it is important to analyse the historical development of maritime piracy as a special type of crime.

2.3 Some Historical Observations

The history of maritime piracy, as noted, is co-extensive with maritime trade. Seafaring raiders from southern Europe threatened the Aegean and Mediterranean seas in the 14th century BC.⁶² Pirates attacked Roman ships and seized their cargoes, grain and olive oil. In this period the Phoenicians were also specialized in kidnapping boys and girls on their voyages who were then sold as slaves. Piratical acts were also frequent in the 8th Century BC, which was known as the Classical Antiquity period of piracy, where the Illyrians, Tyrrhenians, Greeks, Romans, and Phoenicians attacked and plundered vessels in coastal waters and on the high seas.⁶³ By the 3rd century BC, the most notorious pirates were the Illyrians who regularly raided the Adriatic Sea. They were then confronted by forces of the

61. (ICJ, 1927) para 47.

62. Killebrew AE and Lehmann G ‘Introduction: The World of the Philistines and Other “Sea Peoples”’ in Killebrew AE and Lehmann G (eds), *The Philistines and Other ‘Sea Peoples’ in Text and Archaeology* (Archaeology and Biblical Studies, Society of Biblical Literature, Houston, 2013) 2, 15.

63. Konstam Angus, *Piracy: The Complete History*, (2008), Osprey Publishing

Roman Republic that conquered Illyria in 168 BC, and as a result the unlawful practice was eradicated from the area.⁶⁴ As such, from the perspective of the leaders of the Roman Republic, they had enforcement jurisdiction owing to their territorial claim of Illyria. Thus, they arrested and sanctioned the Illyrian pirates on the grounds that they perpetrated unlawful acts within the Roman territory. This implies that piracy was only eradicated because of the link between State authority and the State's claim over a particular geographical territory.

In the 1st century BC, an important contingent of pirates began to operate in Cilicia along the Anatolian Coast and threatened the trade of the Roman Empire in the Mediterranean. This was outside the Empire's territorial jurisdiction. Prior to the establishment of a sophisticated pirate network along the Anatolian Coast, Julius Caesar who was 25 years old at the time and travelling to Rhodes, was captured by Cilician pirates on the Aegean Sea.⁶⁵ The pirates demanded 20 talents of silver (620 kg of silver or 600,000 in today's US dollars). After the ransom was paid and Caesar freed, he captured the pirates, took all their possessions, as well as the fifty talents of silver. He then delivered the pirates to the authorities at the prison in Pergamum and travelled to meet the proconsul of Asia, Marcus Junius, to petition to have the pirates executed. The proconsul objected. Caesar travelled back to Pergamum and ordered that the pirates should be crucified under his own authority. Although the insurgents became aware of the penalty of such criminal activities, Caesar had exercised criminal jurisdiction of an extraterritorial nature. However, given that ever increasing size of the Roman Empire no

64. *Ibid.*

65. Freeman Phillip, *Julius Ceaser*, (2008), Simon and Schuster

sovereignty problems concerning extraterritorial jurisdiction were raised until after the fall of the Empire and the rise of smaller European kingdoms with recognised boundaries.⁶⁶

There were several prominent piratical attacks in the ensuing centuries. During the period of 258-264 AD, towns along the Black Sea coast and Aegean coast, and towns reaching into Cyprus and Crete were looted by Gothic pirates. In 286 AD, a military commander was appointed by the Romans to eliminate the Frankish and Saxon pirates. In 450 AD, Irish pirates captured and enslaved the famous Irish saint St. Patrick. Thus, the motivation of the pirates had evolved from simply plundering or stealing cargo. Between 700 AD and 1100, a period known as the medieval ages of piracy, the Vikings were notorious for attacking and plundering vessels at sea.⁶⁷ The name 'Viking' comes from a language called 'Old Norse' and means 'a pirate raid.' When the Germanic Norse seafarers went off raiding ships, it was known to be said that they were 'going Viking'. However, the motivation was not always to steal. For more than one century, the Vikings carried on with the piratical activities of stealing treasure and fighting, whilst many of them settled in the new lands as farmers, craftsmen or traders.⁶⁸

The period between 1620 and 1720 saw piracy flourish into its 'golden age'.⁶⁹ Different categories of personnel emerged during this period: privateers, buccaneers and corsairs. However, privateers were classed as being lawful pirates authorized by their governments

66. Ryngaert C, *Jurisdiction in International Law* (2nd Edition, Oxford University Press, Oxford, 2015) 52-53.

67. Derry TK, *A History of Scandinavia* (University of Minnesota Press, Minneapolis, 2012) 16

68. Jones Gwyn, *A History of the Vikings*, 2nd Edition (2001), Oxford University Press

69. Konstam Angus, *Piracy: The Complete History*, (2008), Osprey Publishing

through a licence known as a ‘letter of marque’ which allowed for enemy ships to be attacked and pillaged. The licence was to grant a form of immunity because punishment for such an offence was death. Privateer’s profits were shared with the government. The most famous privateer of this time was Sir Francis Drake. Buccaneers on the other hand were a combination of pirates and privateers who operated from a base in the West Indies. These buccaneers were known for attacking Spanish ships in the Caribbean.⁷⁰ Corsairs were either Muslim or Christian pirates active in the Mediterranean. Barbary corsairs were Muslim pirates operating solely from the North African States of Algiers, Tunis, Tripoli and Morocco given authority by their government to attack the ships of Christian countries. On the other hand, the Maltese Corsairs were Christian and were granted a licence by the Christian Knights of St John to attack the ‘barbarian’ Turks.⁷¹

Some historians such as Von Martens sought to distinguish between ‘privateers’ and ‘pirates’ in the 18th Century. He wrote that the privateer operated in a context of war and captured ships with a commission or letter of marque from a State, unlike the pirate that had no authority and plundered regardless of war or peace.⁷² He however conceded that both terms were used indiscriminately prior to the 18th Century and many privateers became pirates.⁷³ As such, piracy, whether by independent or State-sponsored criminals, was prevalent during that

70. *Ibid.*

71. *Ibid.*

72. Von Martens GF, *Essai Concernant les Armateurs, les Prises et Surtout les Reprises: D’Après les Loix, et les Usages des Puissances Maritimes de l’Europe* (Gottingen, 1795) 12.

73. *Ibid.*

time because the acts of these varied ‘pirates’ were often indistinguishable from warfare as princes were strictly responsible for the acts of piracy of their subjects.⁷⁴ The princes were for example required to protect seaborne trade by defending the coastal areas. Their duties in this respect became known as ‘keeping the sea’ or the ‘safeguard of the sea’. Fulfilling these duties at the time was particularly challenging given the level of technology. The fact many economies depended on the revenues of coastal trade made it pressing for governments to provide security at sea against both pirates and foreign armies. As such, the word ‘piracy’ as understood then was not restricted to the unlawful acts of plunderers on the high seas. Rodger therefore noted that the word is applied with caution in the medieval context given that the high seas were generally deemed to be ‘a lawless realm beyond the frontiers of all nations, where neither law nor truce nor treaty ran.’⁷⁵ Piracy was simply deemed to be synonymous with disorder. The English Offences at Sea Act 1536 for example made piracy a felony but did not define the term. Thus, the statute was enforced against any violence at sea not deemed to be a lawful act of war.⁷⁶

From the above, it may be said that the authority of the State played an important role in shaping the concept of piracy, given that some of those who attacked and plundered vessels on the high seas had a mandate from their government. These pirates were not self-funded criminals that sought to achieve only private ends. The activities that might have been linked

74. Lewis E ‘Responsibility for Piracy in the Middle Ages’ (1937) 19 *Journal of Comparative Legislation and International Law* 77, p.77.

75. Rodger NAM ‘The Naval Service of the Cinque Ports’ (1996) III *The English Historical Review* 646, 646.

76. Sundberg JWF ‘Piracy: Air and Sea’ (1971) 20 *DePaul Law Review* 341. See also Constantinople GR ‘Towards a New Definition of Piracy: The *Achille Lauro* Incident’ (1986) 26 *Virginia Journal of International Law* 370.

to piracy moved further afield from the Mediterranean when, in the early 19th century, Chinese pirates emerged. They were active in the waters of Strait of Malacca, the Philippines, Singapore and Malaysia.⁷⁷ Piracy became a global phenomenon and a major problem for international commerce although it was difficult to fix a meaning to the term that was accepted across the board.

Today, there are several hot spots for piracy including the Gulf of Aden, the Somali coast (Horn of Africa), the Gulf of Guinea, Strait of Malacca, and the Indian Ocean. This study focuses on the causes of the rise in maritime piracy in these distinct areas of Africa. Although, as I have explained earlier, we face challenges in reaching a precise legal conception of piracy, there is in a sense less ambiguity surrounding contemporary activity than was the case in earlier times. Pirates no longer set out to plunder ships on the high sea for private profit with a commission from their home States. However, tackling this problem remains a major international security challenge because of the question of jurisdiction. From the historical development, it is clear that most States favoured what we can refer to as the pre-Hartian positivist approach of linking enforcement jurisdiction to territorial jurisdiction. However, the severity of the crimes committed by pirates and the inability or unwillingness of territorial States to arrest and sanction pirates has led to the shift towards expanding the jurisdictional reach of States that do not have territorial jurisdiction. This is how the Supreme Court of the United States justified the State's assertion of jurisdiction of an extraterritorial nature in *United States S v Smith*:

So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat piracy as an

77. Konstam Angus, *Piracy: The Complete History*, (2008), Osprey Publishing

offence against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.⁷⁸

In line with this, the US Congress in 1909 passed an Act: To Codify, Revise and Amend the Penal Laws of the United States which provided that:

‘Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.’⁷⁹

The implementation of this approach of universal jurisdiction is however confronted with two problems, namely ascertaining the definition of the ‘law of nations’ and requiring the United States to arrest the pirate and bring him to the United States for trial. Thus, the law of nations in this case are said to be the provisions of UNCLOS upon the high seas. In such an instance, it is difficult to ascertain the approach that will be adopted where the territorial State has not ratified the Convention. Also, as regards States exercising universal jurisdiction, it is uncertain whether the accused pirate who is tried in a foreign State may challenge the legality

78. *United States v Smith*, 18 U.S. (5 Wheat) 153, 162 (1820).

79. 18 USC Ch. 81: Piracy and Privateering. From Title 18—Crimes and Criminal Procedure Part I—Crimes enacted June 25, 1948, Ch. 645, 62 Stat. 774

of the process in his home State. Where emphasis is placed on universal jurisdiction, several States may assert legal jurisdiction depending on the specifics of the attack. One State may assert jurisdiction due to the location of the attack, another due to the nationalities of the victims (i.e. crew), another due to the country of registry of the vessel, and another on the basis of Article 14 of UNCLOS requiring all signatory States to participate in the arrest and prosecution of the pirates.

Piracy will thrive in a permissive political environment. Such an environment would exhibit a lack of resources of the local State's security forces, cultural acceptability, and the opportunity for reward. Maritime piracy is inherently dangerous, but it remains a profitable activity and worth the risk for thousands of unemployed people living in desperately poor and often instable countries.⁸⁰ Thus, piracy stems from internal problems and shortcomings, and it may be argued that for acts of piracy to be suppressed, the solution must come from within the coastal State. This reinforces the contention that the obligation to act should be on the coastal State. The historical background above shows that although cooperation between States was imperative, piracy was effectively suppressed because the coastal States asserted jurisdiction. The next section examines some key international instruments in order to determine the effectiveness of the current positive international law.

2.4 Codification Efforts in the International Arena

During the era of the League of Nations there was an attempt to provide a general agreement on maritime piracy. An Assembly Resolution of 1924 was passed and the League appointed a

80. Altafin, Chiara, 'The Threat of Contemporary Piracy and the Role of the International Community', *International Institute of Humanitarian Law*, January 01/2014, ISSN 2280-6164, pp. 6

sub- committee of its Committee of Experts for the progressive codification of International law. In a report named the Matsuda Report, the subcommittee stated that ‘according to international law, piracy consists in sailing the seas for private ends without authorisation from the government of any State with the object of committing depredations upon property or acts of violence against persons.’ However, this definition did not deal with an armed rising of the crew with the object of seizing the ship on the high seas, and as a result was not deemed to be an adequate definition of piracy.⁸¹

A questionnaire on piracy consisting of the Matsuda Report and the Matsuda’s draft provisions for the suppression of piracy was submitted to a number of States. Many of them did not acknowledge the desirability or the possibility of a convention on the question. Some criticized the Report and even the transmission of Report to States because of ‘the present immature stage’, not of the subject in itself, but of the Report.

Efforts by the League ultimately fizzled out and the subject was dropped from conferences for two reasons: first, piracy seemed not to be an urgent problem, and secondly, it was not likely that an agreement would be reached. As a result, from this point onwards until the development of any codified law, prosecutors had to rely on practice and identify the ‘proper law’ under consideration whether it was municipal or international law. Eventually, the customs observed by many States found their way into the modern law of the sea sometime in the 20th century. Customary international law as regards piracy was established by Article 15 of the Geneva Convention on the High Seas and Article 101 of UNCLOS. They created a unique framework for an international regime for the suppression of piracy by adopting the

81. Bardo Fassbender, Anne Peters, *The Oxford Handbook of the History of International Law*, (Oxford University Press, Oxford, 2012) p.127

doctrine of universal jurisdiction requiring all signatory States to capture and prosecute pirates they find on the high seas. Articles 3 and 56(1) of UNCLOS define the high seas as all parts of the sea, excluding the internal or territorial waters of a State, which extend out 12 nautical miles and the EEZ, which extends out 200 miles. Thus, the high seas include the EEZ as well for the purposes of piracy under UNCLOS.

As noted, the provisions enshrined in the 1958 Convention on the High Seas were based on the International Law Commission's (ILC) draft convention and later inserted into UNCLOS. The latter is the most recent legislation that deals with the crime of maritime piracy and has been signed by 157 States. Thus, it is generally considered to be reflective of customary international law. This is based on the multilateral recognition of the customs enshrined in the

Convention. It is akin to multilateralism or the 'international governance of the many'.⁸² Although this has the advantage of minimising 'bilateral discriminatory arrangements that [are] believed to enhance the leverage of the powerful over the weak and to increase international conflict,'⁸³ the fact that many States endorse a particular approach does not necessarily make it just. This is especially the case where facts are assessed with a cosmopolitan view of global justice whereby international institutions are deemed to be at the service of moral ideals rather than the interests of States.⁸⁴ It follows from here that those that endorse multilateralism also favour relational statism whereby emphasis is placed on States pursuing their self-interests in a reasonably fair manner. On the other hand, those that believe

82. Miles K 'Multilateralism with Small and Large Numbers' (1992) 46 *International Organization* 681, 681.

83. *Ibid.*

84. See Maffettone S 'Normative Approaches to Global Justice' in Telo M (Ed), *Globalisation, Multilateralism, Europe: Towards a Better Global Governance?* (Ashgate, Surrey, 2013) 128-129.

that multilateralism does not always provide the most apposite solutions to international legal problems, favour cosmopolitanism and the positivist approach of territorial jurisdiction. The arguments put forward in this thesis are more in line with the latter stance. The shortcomings of multilateralism and statism are seen in the implementation of international conventions that have been ratified by most States across the globe such as UNCLOS

2.4.1 The Implementation of UNCLOS

The definition of piracy in section 101 of UNCLOS raises problems in regard to the arrest and prosecution of alleged pirates. An important ingredient of the act of piracy is the contribution of ‘any illegal acts of violence or detention, or any act of depredation.’ Whilst violence constitutes an essential part to be proved, there remains a problem as to what types of violence may amount to piracy. It may be argued that murder on board a vessel alone could suffice.⁸⁵ However, violence can be directed to persons or property on board. Also, an attempt to commit an illegal act is not included in the definition of piracy.⁸⁶ As such, there is much confusion as regards the implementation of the provisions of UNCLOS by municipal courts. In *United States v Said*,⁸⁷ for example, the government attempted to prosecute individuals who had unsuccessfully attacked a US Navy dock ship for acts of piracy committed in the Horn of Africa, and the court held that ‘piracy’ as defined by ‘the law of

85. D.P.O’Connell (I.A.Shearer Ed), *The International Law of the Sea*, Vol.2 (Oxford, Clarendon Press, 1984) pp. 969-970; G.Gidel, *Le droit international public de la mer: le temps de paix*. Vol 1, Introduction, La haute mer (reprint, Paris, Duchemin, 1981), p.309

86. A British proposal to include attempts in the definition of piracy was defeated by twenty-two votes to thirteen, with seventeen abstentions. United Nations Conference on Law of the Sea, Official Records, Vol. I, A/CONF.13/40, 1958, p.84

87. WL3893761 (E.D. Va., August 17, 2010).

nations' (UNCLOS) requires a robbery on the high seas. Thus, the individuals could be prosecuted only for the offence of committing violence against a person on a vessel. However, in *United States v Hassan*,⁸⁸ the court held that the definition of 'piracy' according to the law of nations (UNCLOS) does not require an actual robbery at sea; thus, the defendants who had unsuccessfully attacked a US Navy frigate could be prosecuted for piracy.

Despite this, it may be said that courts would generally lean towards the idea that piracy includes both violence and an attempt to commit violence. In *Ahmed v Republic*,⁸⁹ the Kenyan Principal Magistrate noted that piracy under Article 101 of UNCLOS consists of 'violence, detention, and the causing of harm or damage' amongst other acts. However, it is uncertain why the term 'piracy' as defined by UNCLOS has to be interpreted broadly. As noted above, the delegates at the United Nations Conference on the Law of the Sea did not intend the definition to include attempts given that a proposal from the British delegation to this effect was defeated. Equally, in *United States v Said*, the court noted that the accused could be tried for other offences such as attack to plunder a vessel (punishable by a prison term of 20 years in the United States), acts of violence against persons on a vessel (also punishable by an imprisonment term of 20 years in the United States), and conspiracy to perform acts of violence against a person on a vessel. The divergent decisions of the US and Kenyan courts above shows that customary international law is sometimes ambiguous, and reliance on multilateralism and universal jurisdiction may be dangerous. This is because the courts of the coastal State and home State of the vessel may interpret the customary

88. WL4281892 (E.D. Va., October 29, 2010).

89. Crim. No. 434 of 2006 (Chief Mag. Ct. November 1, 2006) 155.

international law rule differently, leading to challenges of the legality of their decisions. However, where emphasis is on territorial jurisdiction there is room for less confusion since precedent will be set by the most superior court of the coastal State.

The implementation of UNCLOS is also problematic as regards the ‘private ends’ requirement.⁹⁰ Unlawful acts must be ‘committed for private ends by the crew or the passengers of a private ship or private aircraft.’ It is uncertain what constitutes an illegal act being committed for ‘private ends.’ This is particularly difficult as the money gained from the piratical act could be attached to many political aspects such as financing terrorism. As such, the simple distinction between the two different but related concepts is that in order for marine terrorism to occur it needs to be committed with a ‘political motive’, while maritime piracy must be committed for ‘private ends.’⁹¹

This implies that private ends do not include any illegal acts carried out for political purposes and motives. Political motive in this context may be defined as ‘of or relating to the government or public affairs of a country.’⁹² As a result, in order to understand if an act has been committed for private or political purposes the motives of the offender must be ascertained. Given that the term ‘political’ is rather broad; the drafters of the Convention intended that a violent act on board a vessel should be deemed piratical if it was not backed

90. Crippa, Matteo, ‘Communis Hostis Omnium: Navigating the Murky Legal waters of Maritime Piracy’ In Brief: Second International Counter-Piracy Conference. Dubai, June 29, 2012,

91. Shaw M, *International Law*, (Cambridge University Press, Cambridge, 6th edn, 2010) p.615.

92. Tanaka Y, *The International Law of the Sea* (Cambridge University Press, Cambridge, 2012), 356

by any authority.⁹³ This means that the acts of privateers in the 18th and 19th centuries would not be considered piratical since they carried a letter of marquee and their profits were shared with the State. This is reasonable on the grounds that the State that issues a letter of marquee to a privateer ought to be held responsible.

The legislation confines piratical acts ‘by the crew or the passengers of a private ship or private aircraft.’ A ship or aircraft is considered a pirate ship or aircraft if the dominant person in control intends it to be used for the purposes of committing acts referred to in the definition of piracy set out under 101 UNCLOS as any ‘acts of violence.’ These vessels and aircraft on military or government service or insurgents are in support of a political cause. Thus, if a military or governmental ship or aircraft is taken over and operated by pirates, or if the crew of these types of ship decide to mutiny and employ the ship or aircraft for piratical purposes, then, it might be argued, legal stipulations of what constitutes piracy do extend to this situation as set out under Article 102 UNCLOS. On the other hand, there has been much debate in this regard about the actions of the Sea Shepherd Conservation Society. This is a non-profit organization that seeks to protect marine life. Its vessels seize, scuttle or disable whaling vessels solely for the conservationist purpose of preventing whaling and seal hunting. One would not automatically regard this as a piratical act, but this raises two issues in relation to the deficiencies of drafting in this regard. One is that we would assume that piracy (as plunder) suggests unlawful gain or profit, whereas the environmentalists can be seen as self-less, unpaid guardians of our environmental well-being. This is contentious either way as we shall see below. But, from an entirely different perspective, unilateral acts of environmental activism (even if it is action against persons or companies breaking pollution

93. See Brierly JL, *The Law of Nations: An Introduction to the International Law of Peace* (6th Edition, Clarendon, Oxford, 1963) 31. See also, Guilfoyle D, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge, 2009) p.37.

or conservation laws enacted by a state) runs close to the notion of terrorism. Also, it is uncertain whether anything not sanctioned by a government may be said to constitute private ends. Sea Shepherds do not fit in to the traditional paradigm of piracy because it may be argued that their goals are political, viz., protecting marine animals and the environment. Nonetheless, they do not act on a mandate from a government.

In the Belgian case of *Castle John v NV Babeco*,⁹⁴ Greenpeace, an environmental group, took action against two Dutch Vessels on the high seas. The Dutch vessels released toxic waste into the sea. Greenpeace employees boarded, occupied and caused damage to the Dutch vessels. The Court of Cassation ruled that the acts committed by Greenpeace were for ‘private ends’ and therefore constituted an act of piracy. In other words, Greenpeace had attacked and damaged a private ship in order to achieve private gain.⁹⁵

In a subsequent case of *Cetecean v Sea Shepherds*⁹⁶ in the United States, activists working for Sea Shepherds targeted and attacked *Cetecean*, a whaling research ship of Japan’s Institute of Cetacean Research that was conducting studies in the Southern Ocean. Judge Kozinski held that Sea Shepherds had satisfied the “private ends” requirement of UNCLOS. He noted that that Sea Shepherds may be considered pirates under international law, regardless of their political and non-pecuniary motivation:

94. (1988) 77 ILR

95. For a thorough analysis of the case, see Menefee SP ‘The Case of the John Castle, or Greenbeard the Pirate? Environmentalism, Piracy and the Development of International Law’ (1993) 24 *California Western International Law Journal* 1, 1-16.

96. *Institute of Cetacean Research v Sea Shepherd Conservation Society*, United States Court of Appeal, No. 12-35266, D.C. No. 2:11-cv-02043-RAJ

You don't need a peg leg or an eye patch. When you ram ships, hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.⁹⁷

Kontorovich, in echoing Kozinski's view argues that the relevant distinction under UNCLOS is between on the one hand, private ends committed by private parties, and on the other, acts committed by governments. Kontorovich says:

It does not turn on whether the actor's motives are pecuniary, political, operating under mistake of fact, or simply insane. Private ends are those ends held by private parties. The converse is also true: a government-owned ship in government service cannot commit piracy even if it attacks another vessel solely to enrich itself.

Kontorovich's argument is that as long as Sea Shepherds were acting as private parties - and not governmental agents - their actions satisfy the "private ends" requirement of UNCLOS irrespective of the fact that their goals might be purely political. However, this argument was rejected by Heller. He argued instead that the "private ends" requirement of UNCLOS excludes all politically motivated acts, not simply those committed by governments or governmental agents. This is because historically politically-motivated violence on the high seas has not always been considered piracy under international law. Rather it has been regarded as criminal on the grounds that the perpetrator breached the laws of the State that

97. *Institute of Cetacean Research v Sea Shepherd Conservation Society*, United States Court of Appeal, No. 12-35266, D.C. No. 2:11-cv-02043-RAJ

had jurisdiction to prosecute him. This implies that as long as the Sea Shepherds were acting toward a political goal their actions could not satisfy the “private ends” requirement, and thus could not be considered pirates under UNCLOS. Kontorovich and Heller both appear to

agree, however, that the acts perpetrated by Sea Shepherds could be considered acts of maritime violence under the SUA, the Convention that provides a framework for prosecuting maritime crimes on the sea. They both disagree as regards the scope of UNCLOS. The problem with Kontorovich’s argument is that it leads to the contention that UNCLOS and SUA overlap, although the latter Convention was not intended to replace the former. Despite this, the simple question that needs to be answered is, ‘What constitutes ‘private ends’ in the international law of piracy?’ It has been noted that proving *animus furandi* (the intention to steal for personal pecuniary gain) is not required to satisfy the private ends requirement under UNCLOS, and neither is violence committed on the high seas under the authority of a State.

There is much scope between these extremes to interpret the actions akin to those of Sea Shepherds and Greenpeace. For example, if the term ‘private ends’ is to be given a narrow meaning and the prosecutor in each case required to establish the perpetrator’s subjective intent (whether it was private/pecuniary or political), then the acts of pirates off the coast of Somalia or in the Gulf of Aden might be excluded from piracy under UNCLOS because their alleged motivation was the protection of their waters from illegal fishing exploitation and environmental dumping. On the other hand, it is difficult to conclude that the actions of Sea Shepherds fit the traditional paradigm of piracy. This is because the goals of the Sea Shepherds are certainly political and non-pecuniary. The Ninth Circuit Court in *Cetecean v Sea Shepherds* may have adopted a formalistic approach and adopted a wide interpretation of Article 101 of UNCLOS in holding that they were pirates. A more flexible approach in

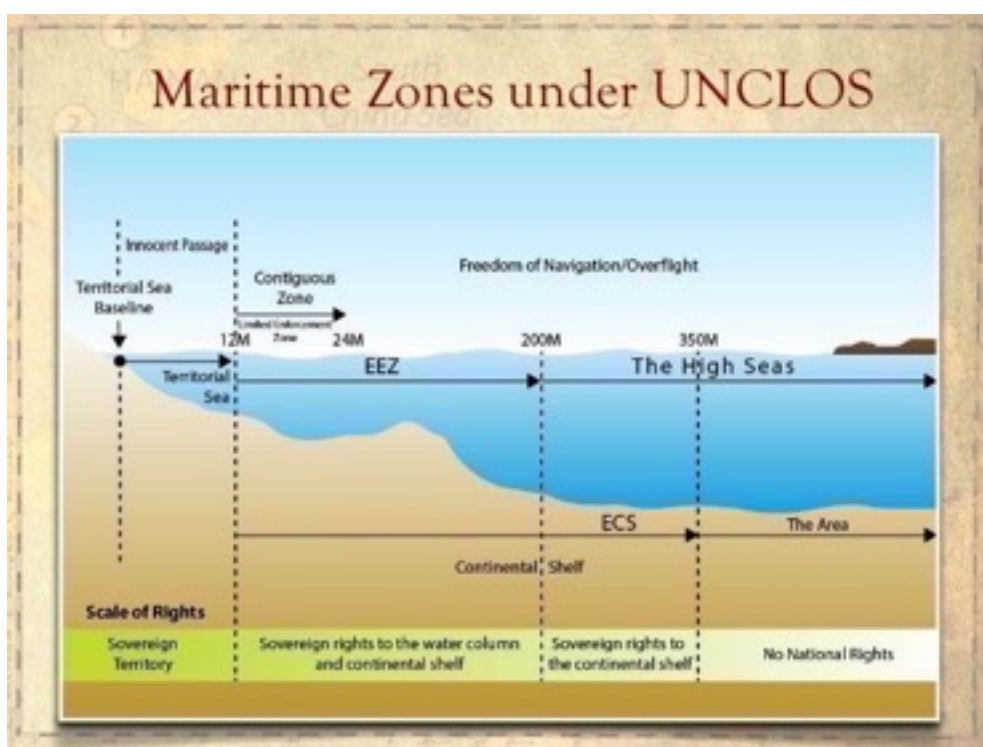
interpreting the provisions of UNCLOS would certainly prevent the injustice of treating environmental activists as pirates. The Ninth Circuit Court noted that in the past the issue of whether a politically motivated act was a piratical act drew substantial support from many governments. The laws of piracy were stretched in their interpretation and application by some national courts to cover other unlawful, politically related acts against ships and persons on board, such as terrorist acts. The Court then argued that since the adoption of UNCLOS and SUA Conventions, national courts are less likely to consider politically-motivated acts as piracy. This is because these acts are covered by Article 3 of the said SUA Convention. It is therefore logical that the ‘private ends’ criterion of Article 101 of UNCLOS excludes acts of violence and depredation perpetrated by environmental activists in relation to their quest for marine environment protection. As such, the Court adopted a narrow interpretation of UNLCOS and declined to treat the anti-whaling activists as ‘pirates’.

UNCLOS gives us a further problem in that for an act to be defined as piracy it must be carried out ‘against another ship or aircraft.’ This is considered as ‘the two vessels requirement’, *viz.*, the pirate vessel and the victim’s vessel. This implies that the attack or taking over of a ship by its *own* crew or passengers is not a piratical act. This was the subject of the case of *Achille Lauro*. Four members of a Palestinian liberation group aboard an Italian vessel hijacked it and demanded the release of Palestinian prisoners.⁹⁸ Given that they had already boarded the vessel, this was designated as hijacking and not piracy. This is consistent with the argument above that the acts of violence perpetrated by Sea Shepherds and Greenpeace do not constitute ‘piracy’ but maritime crimes.

98. For the facts and commentary, see Pancraccio JP ‘L’Affaire de Achille Lauro et Le Droit International’ (1985) 3 AFDI 221, 221-236.

UNCLOS also requires acts of piracy to be committed ‘[o]n the high seas, against another ship or aircraft, or against persons or property on board such ship.’ *Figure 1* below shows what constitutes the high seas in this context.

Figure 1. Diagram showing delineation of the maritime sea zones



The high seas constitute ‘the open ocean which is not within the territorial waters or jurisdiction of any particular State.’ In other words the high seas are free from the jurisdiction of any State with regard to any pirate attacks that take place. That is why it is stated 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 the jurisdiction of any State.’⁹⁹ In order to understand where the

99. UNCLOS, Article 100.

high seas zone begins and ends, it is important to explain and ascertain the other sea zones, working from the nearest ashore to further outwards.

With regard to the territorial sea, Article 2 of UNCLOS states that ‘The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.’ The territorial waters of coastal States measures out at 12 nautical miles from the land, which is confirmed in Article 3 of UNCLOS. Within this distance the coastal state has sovereign rights to adjudicate over any pirate attacks that take place here. However, given that piracy must be directed on the high seas, this implies that where an attack takes place on the territorial sea, UNCLOS will not apply since this is not ‘outside the jurisdiction of any State.’

The above does not apply, however, in the EEZ. Article 55 of UNCLOS states that ‘The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.’ If we refer to *Figure 1.* above we can see that that it follows on immediately after the territorial sea. Article 56 provides that ‘The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.’ Article 56 further provides that there are certain duties regarding this zone that lay within the jurisdiction of the coastal state. The rights of the coastal State include ‘sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to

the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.’ It then provides that in exercising its rights and performing its duties in the EEZ, ‘the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.’

Some care in interpretation is required here given that Article 101 states that piracy must be directed on the high seas in a place outside the jurisdiction of any State, yet it makes no mention of the EEZ. Article 56 then provides that duties regarding this zone lay within the jurisdiction of the coastal State. There is also the contiguous zone which does not extend beyond 24 nautical miles from the baselines as shown in *Figure 1.* above. Article 33 of UNCLOS provides that in this zone, the coastal State may exercise the control necessary to prevent the infringement of its customs, fiscal, immigration or sanitary laws and regulations. Thus, seemingly illegal acts of violence committed in the EEZ may also be qualified as piracy under the corresponding cross-reference set out in Article 58(2) of UNCLOS. This Convention seems to favour the positivist approach whereby the coastal State is required to assert jurisdiction in territorial waters unless the attack takes place on the high seas where any State may exercise its right to repress piracy. It is argued above that this approach ensures consistency, although it may be problematic where the coastal State has neither the resources nor the political will to stop attacks not only within the EEZ or the contiguous zone but the high seas as well as its own internal waters. Also what might prove problematic is that even though UNCLOS authorizes states to act upon piracy in the EEZ, states may be reluctant to do this as a fear of interfering with the rights of the state claiming the EEZ.

2.5 UNCLOS and Modern Piracy

Ghosh's analysis of modern piracy suggests that the problem is a manifestation of several underlying socio-political issues that affect a given region.¹⁰⁰ This implies that piracy in one area is often unique and unrelated to piratical attacks in other regions of the world. This might explain why it is difficult to define the term 'piracy' in a manner that can be accepted by all. It also explains the dangers of universal jurisdiction given that what may be considered 'piracy' by the courts of the vessel's home State might be said to be a simple criminal act by a court of the coastal State. As such, it is important to ascertain the factors affecting different regions by categorising or classifying the various types of piracy that are in existence today.¹⁰¹ Piracy has been categorised by commentators in differing modes. While some have categorised such acts on a regional or geographic basis, others choose to classify them according to the intensity or the kind of acts of piracy that are committed. There are for example the 'Asian',¹⁰² 'South American',¹⁰³ 'West African'¹⁰⁴ and 'Somalian' or 'Horn of Africa',¹⁰⁵ types of piracy. This in line with piracy being classified according the regional and geographical approach.

100. P. K. Ghosh, *Somalian Piracy: An Alternative Perspective*, ORF Occasional paper #16, 2010, Observer Researcher Foundation

101. Talley W, *Maritime Safety, Security and Piracy* (Informa, London, 2008) 107

102. See Beckman RC, War CG and Forbes VL 'Acts of Piracy in the Malacca and Singapore Straits' (1994) IBRU Maritime Briefing 1; Tarling N, *Piracy and Politics in the Malay World: A Study of British Imperialism in Nineteenth-Century South East Asia* (FW Cheshire, Sydney, 1963).

103. Brombacher D and Maihold G 'Maritime Security in Latin America' in Mair S (ed), *Piracy and Maritime Security* (SWP, Berlin, 2011) 49-55.

104. Tull DM 'West Africa' in Mair S (Ed), *Piracy and Maritime Security* (SWP, Berlin, 2011) 28-33.

105. See Mason C 'Piracy: A Legal Definition' (2010) Congressional Research Service Report 1.

Piracy can be explained in terms of greed and bureaucratic corruption in the coastal State or as a survival strategy arising from high unemployment. Either way, significant increases in the quantity of goods transported across oceans by the world's merchant ships create lucrative targets for bandits.¹⁰⁶ In addition, environmental damage caused by the oil industry has adversely affected the lucrative fishing and agricultural industries, thus limiting legitimate options for local youths to enter the economy.¹⁰⁷ The fact that the cause of piracy can be attributed to factors that are endemic in the coastal States makes it difficult to provide solutions from a multilateral perspective. This again shows that universal jurisdiction is less likely to be as effective as the enforcement jurisdiction of the coastal State. In line with the intensity approach of the acts committed it can be stated that Somalian piracy is distinctly different from the rest in that it involves hijacking merchant cargo vessels, ocean liners or luxury yachts exclusively for collecting ransom from the concerned shipping company. The use of violence has until recently been minimal with the hostages normally being treated well. A comprehensive analysis of the Somalian case is carried out in Chapter 5. This study thus focuses on piracy in East and West Africa. It discusses the factors that are peculiar to each region and shows how their piratical acts differ. East Africa piracy involves hostage-taking and seizing vessels which transit through the Gulf of Aden. With the lack and ineffective patrol and control of State actors in Somalia, the pirates roam over the vast expanse of the undefended coastline and tow boats back to their hiding place whilst awaiting large ransom payments for the crew and cargo.

106. P. K. Ghosh, *Somalian Piracy: An Alternative Perspective*, ORF Occasional paper #16, 2010, Observer Researcher Foundation

107. Daxecker, Ursula Elisabeth, Prins, Brandon C 'Insurgents of the Sea: Institutional and Economic Opportunities for Maritime Piracy', *Journal of Conflict Resolution*, 0022002712453709, first published on August 16, 2012

I intend to show in Chapter 4 that the operational context in West Africa is altogether different. State authority and control over the far shorter and multiple coastlines are significantly more robust. There are a large number of anchored vessels at berth, or waiting for a space at the port for the collection of crude oil or the delivery of refined fuel. Attacks often occur in the port loading or unloading. Attacks on vessels here are successful because of weak law enforcement and policing, corrupt local officials and a burgeoning informal economy centred on the illicit trade in oil and hydrocarbons. Ships are not generally seized in West Africa as they cannot be kept at anchor for too long given that there is no space and government laws only allow ships to be held for only a short period of time, to load or unload cargo. Hence, West African pirates sometimes loot tankers of their valuable cargo for quick resale on the lucrative and sizeable black market. The attackers rarely engage in hostage-taking. They are more concerned with the valuables rather than the wellbeing of ship personnel, which results in a higher prevalence of violence against crew who are considered a disposable asset.¹⁰⁸

2.6 Summary

The ambiguity of the term ‘piracy’ is at the root of the confusion about the status of pirates captured at sea, as well as the legality of their prolonged detention, trial or rendition to countries with territorial jurisdiction. The term ‘piracy’ bore many definitions over the centuries, although focus is now placed on the definition in Article 101 of UNCLOS. This definition is shown to be quite ambiguous given that it uses terms that are open to several interpretations in different States. Piracy must for example be carried out on the ‘high seas’

108. Sibun, Jonathan, ‘Typhon fights back against Pirates’, The Telegraph, 8:29PM GMT, 15 Jan 2012

and for 'private ends'. Also, only the occupants of a ship who commit a violent act against the occupants or cargo of another ship may be called pirates. Thus, if the crew of a ship or the passenger of the ship takes some kind of action against their own ship they would not be called pirates. It is then submitted that the Convention seems to favour the positivist approach whereby the coastal State is required to assert jurisdiction unless the attack takes place on the high seas where no State has obligatory jurisdiction. However, the fact that recourse is had to the Convention adopted by 157 States may be said to reflect the multilateral recognition of the customs enshrined in the Convention, and this is akin to multilateralism or the 'international governance of the many' or 'relational statism'.

It was however argued that a broadly positivist approach and cosmopolitanism are more coherent and ensure consistency. This is because piracy in one area is often unique in itself and unrelated to piratical attacks in other regions of the world. Thus, modern day piracy has been categorised by commentators in differing modes. While some have categorised such acts on a regional or geographic basis, others choose to classify them according to the intensity or the kind of acts of piracy that are committed. The fact that the cause of piracy may be attributed to factors that are endemic in the coastal States makes it difficult to provide solutions from a multilateral perspective. This also shows that universal jurisdiction is less likely to be as effective as the enforcement jurisdiction of the coastal State.

CHAPTER 3

MARITIME PIRACY UNDER INTERNATIONAL LAW: THE QUESTION OF JURISDICTION

*'An investigator finds that instead of a single relatively simple problem [defining piracy], there are a series of difficult problems which have occasioned [at different times] a great diversity of professional opinion.'*¹⁰⁹

3.1 Introduction

What is entailed by the legal term “Jurisdiction”?¹¹⁰ Colangelo in his illuminating research article titled as “*What is Extraterritorial Jurisdiction?*” defines the antecedent term as connoting a legal term for “power”, or alternatively, to “speak the law”. The antecedent literature also propounds the fact that jurisdiction is not a monolithic concept and enfolds under its ambit three distinctive yet overlapping conceptualisations, namely; prescriptive jurisdiction, adjudicative jurisdiction and also enforcement jurisdiction. Akin to the term jurisdiction the notion of the term extraterritorial does not conjure as a monolithic term. In common parlance the term is indicative of “something...beyond territorial limits”. Since the year 2000 there has been an increased tendency of national courts to assert universal jurisdiction in the prosecution of piracy and other crimes against customary international law. This essentially challenges Westphalian principles of sovereignty, non-interference, and equality amongst States that set the foundation of modern jurisdictional law and the prevailing world order. This Chapter examines the risks associated with the shift away from

the Westphalian principles and a possible undermining of their importance to jurisdictional frameworks. In respect of this I want to defend the view that an orthodox ‘consent’ or auto-limitation approach should be adhered to, whereby jurisdiction is essentially territorial and can be exercised by a State outside its territory only where it obtains the consent of the territorial State in question. This consent might arise *via* a Convention or perhaps in accordance with a permissive rule derived from international custom relating to the prerequisite for arresting and prosecuting pirates. It begins with an overview of the concept of universal jurisdiction. It shows how universal jurisdiction and extraterritorial jurisdiction have been exercised by different courts in different countries in the prosecution of pirates. This is followed by the critical examination of the exercise of international criminal jurisdiction. The objective is to determine the limits of national criminal jurisdiction under public international law with regard to the prosecution of crimes that are deemed to violate peremptory norms. In light of these limits, the exercise of jurisdiction to prosecute piracy is then analysed.

In summary, Chapter 3 aims to:

- Analyse the concepts of universal jurisdiction and extraterritorial jurisdiction
- Examine the risks associated with undermining the importance of Westphalian principles to jurisdictional frameworks
- Determine the limits of national criminal jurisdiction under public international law as regards prosecuting pirates
- Defend the argument that a ‘consent’ or ‘auto-limitation’ approach to jurisdiction should be adhered in approaching the authoritative arrest and prosecution of pirates

109. Harvard Research in International Law, ‘Part IV: Piracy’ (1932) 26 *American Journal of International Law Supplement* 739 (hereafter Harvard Research), 764

110. Colangelo, A.J. (2013). What Is Extraterritorial Jurisdiction. *Cornell L.Rev.*,99,1303.

In pursuing these aims, Chapter 3 seeks to address the question and concern of the dissertation as stated in Chapter 1 *supra*; i.e.:

[...] as is well known, in the event of a hot pursuit it is impossible to bring the pursuit to a close within the territorial waters of coastal States. In some cases ships are pursued across the high seas and across borders ending up in territories incapable of feasible arrest and prosecution. Further problems arise where the territorial waters of a weak State are handicapped by the absence of a navy and the lack of effective anti-piracy legislation. Some key international instruments provide for universal jurisdiction on the high seas to facilitate the arrest and prosecution of pirates in such cases. However, this raises the question of whether such jurisdictional shifts depart too dramatically from Westphalian principles of sovereignty, and whether such departures can be regarded as justified. These issues constitute the basis of the challenges in the development of International Law that arise and confront the States that act as the main players in the Gulf of Aden and Gulf of Guinea in their attempt to deal with the problem of maritime piracy.

3.2 Universal jurisdiction

Universal Jurisdiction as a premier concept has been explored by several academicians in the field of *Law and Jurisprudence*. Universal Jurisdiction as deductively induced after an in-depth analysis of a plethora of literatures, trespasses from the rubric of national jurisdiction and over to the domain of international or global jurisdiction.¹¹¹ Within the boundaries of universal jurisdiction, several academicians have noted that international law (Randall, 1998)

has introduced several principles to determine the exercise authority (by a particular state) on matters which affect the interests of other states. Having argued thus, a poignant question can be posed within the domain of the present research, how effective can universal jurisdiction prove within the scope of Maritime piracy? In tandem with the same it can be argued that, As stated in Chapter 2, UNCLOS [United Nation Convention of the Laws of the Sea] adopted the aforementioned doctrine of universal jurisdiction through which any State is imbued with the power to deal with particular crimes on the high seas without the need for a connection between the criminal acts and the State.¹¹² Article 105 of UNCLOS therefore empowers State signatories to ‘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.’ This follows from the tradition under international law wherein a pirate was treated as a *hostis humani generis* or an enemy of all mankind.¹¹³ As noted in Chapter 2, universal jurisdiction in this context is intrinsically linked to relational statism and multilateralism. Thus, all relations and ideas are determined by States acting in a multilateral forum. In the Kenyan case of *Republic v Chief Magistrates Court, Mombasa Ex-Parte Mohamud Mohamed*

111. Randall, K. C. (1987). Universal jurisdiction under international law. *Tex. L. Rev.*, 66, 785.

112. See Kontorovich E ‘A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists’ (2010) 98 *California Law Review* 243, 244.

113. Oppenheim L, *International Law: A Treatise* (Volume II, 2nd Edition, Longman, Green & Co, New York, 1905) 325-326.

Hashi & 8 Others,¹¹⁴ the applicants were arrested in the Gulf of Aden in the Indian Ocean by a German Naval Vessel with the help a U.S. helicopter. They were then taken to Mombasa in Kenya and placed in the custody of the Kenyan police. Later, they were charged with the offence of piracy contrary to sections 69(1) and 69(3) of the Penal Code, Chapter 63 of the Laws of Kenya, for attacking the sailing vessel named *MV Courier* while armed with three AK 47 Rifles, one Tokaley pistol, one RPG-7 portable rocket launcher, one SAR 80 rifle and one Carbine rifle, and putting the lives of the crew in danger.

The applicants filed a judicial review application in the High Court of Kenya challenging the charges on the basis that the alleged offence took place on the high seas of the Gulf of Aden. The High Court noted that Kenyan courts did not have the jurisdiction to try the applicants since ‘the offence alleged was committed outside the territorial jurisdiction of Kenya and outside the Kenyan waters...neither a Kenyan citizen or Kenyan property was involved...the arrest was made by the German Navy taking part in operations in the Gulf of Aden.’ The High Court further held that:

The High Seas are not and cannot be a place in Kenya or within the territorial waters of Kenya. In fact, by definition, they are strictly deemed to be outside the jurisdiction of all States in the world or on earth unless some law in the state brings it into their local jurisdiction whether through Municipal Law or an International Convention.¹¹⁵

It then concluded that the trial court acted without jurisdiction when it took the pleas of the applicants and entertained the case up to the close of the prosecution’s case. The whole

114. [2010] eKLR.

115. *Ibid.*

process was therefore null and void, *ab initio*. The High Court of Kenya had ignored the provisions of UNCLOS providing for universal jurisdiction for the crime of piracy. Thus, the Court of Appeal found little difficulty in overturning the High Court's decision. The Court of Appeal held that the High Court had failed 'to appreciate the applicability of the doctrine of universal jurisdiction in reference to the case at hand.' Hence, States that have ratified UNCLOS are required to cooperate in arrests and prosecution of persons that allegedly commit piracy attacks on the high seas.

Prior to delving into the intricate as well as the nuanced links between *customary international law* in tandem with the prosecution of pirates in the high seas, it is pertinently significant to clarify the conceptual bearings of the aforementioned concept. First and foremost, it becomes inimically significant within the ambit of the present study to clarify the theoretical and also the pragmatic scope of *customary international law* since the antecedent concept forms the foundational bedrock whose violation atones inimically atones for the prosecution of individuals or groups associated with maritime piracy. What then, is connoted by customary international law? Customary international law, also commonly referred to as CIL, refer to those facets of international law which relegate themselves to an in-depth analysis of custom. However, in exploring the ideologue of Customary International Law takes into account the theory of the same propounded by Jack L. Goldsmith and Eric A. Posner¹¹⁶ in their path-breaking research article titled as, "A Theory of Customary International Law" divulge from the usual explanations associated with the elucidation of CIL, which are essentially based on *Opinio Juris*, Legality, Morality and other related concepts. The aforementioned authors opt for an explanation in the rubric of various *logical structures* rooted in historical contingencies. According to the authors of the antecedent literature, it can be decreed that a wide ambit of rules associated with CIL thus, reflect pure

coincidence of interest, rather than international cooperation. Thus it can be deductively argued that Customary International Law is not a homogenous term and is susceptible to interpretation from a plethora of approaches. For instance, according to *Anthea Elizabeth Roberts*, in her essay titled as “Traditional and Modern Approaches to Customary International Law: A Reconciliation” argues that over the numerous span of academic years, the concept of customary international law has been examined through numerous vantages, be it a traditional approach,¹¹⁷ wherein CIL is examined through the pertinent state practice, or be it the modern approach, which emphasizes upon the concept of *opinio juris*. Furthermore, in the context of exercising universal jurisdiction, it is primarily significant to undertake a vivid examination of the laws or the primary theoretical principles namely, *aut dedere aut punir* as well *aut dedere aut judicare*. A pertinent question which may be prudently posed at this juncture is, what is the inimical requirement of universal jurisdiction in the wake of the existence of sovereign laws as practiced and implemented by numerous nations? The root idea of exercising universal jurisdiction is to prosecute or extradite (*aut dedere aut judicare*) those individuals or groups of individuals who are privy to have committed grave crimes outside the territory of their nations be it in any form of international wrongdoing, it could manifest in the form of the emergent “*borderless cyber-crimes*”¹¹⁸ or the currently discussed omnipresent forms of maritime piracy,¹¹⁹ a form of borderless crime that not only primarily affects the largest and widest transport networks but also the global economic development due to the “borderless nature” of the antecedent form of crime. In congruence with the aforementioned proposition, the researcher quotes verbatim Bassiouni et al (1995)¹²⁰ in their poignant research endeavour titled as, “*Aut Dedere Aut Judicare: the duty to extradite or prosecute in international law*”

“.....An obligation to prosecute or extradite appears in various forms in a number of multilateral conventions and other instruments dealing with the suppression of particular international offences. The implication of that obligation with respect to these offences bespeaks widespread (or increasing) recognition of the principle that states are bound to act either through prosecution or through extradition to ensure that individuals who perpetrate harm inimical to fundamental interests of the international community are brought to justice.”

The aforementioned quotation, thereby, highlights or elucidates the preponderant justification of the existence of the principles of *Aut Derere Aut Judicare*, as well as *Aut Derere Aut Punir*, Both the terms have Latin origins etymologically wherein the former implies, a duty to extradite or prosecute an obligation which is not predominantly imposed by any treaty in particular, rather by the customary or the general international law subsequently. One might ask a prudent question at this juncture, as to what is the ideological backing behind the aforementioned legal principles. According to Bassiouni (1995) et al as they explicate in their anterior research work, in contradistinction to the concept of the “pluralistic society” associated with the Westphalia conception of sovereignty, the idea of general international jurisdiction which provides the theoretical as well as practical justification for the implementation of the two aforementioned principles, is based on the concept of a world community. Quoting the anterior author verbatim, the above stated proposition is brought into a starkly explicative light, “Similarly, it might be said that an obligation on the part of state officials to cooperate in assuming the repression of offences harmful to the international community as a whole is a basic postulate inherent in the concept of a world community.”(pp. 15). Moreover, the term *aut dedere aut judicare* refers to a modern adaption of the archetypical term put into usage by Grotius, *aut dedere aut punire* (either extradite or punish) .

In consonance with the antecedent proposition it was conceded by Grotius that there is in existence a general “obligation” to extradite or punish in tandem with those junctures or spheres of offences wherein another state suffers.

As discussed above, the universal jurisdiction as well as extraterritorial jurisdiction has been used in a synonymous manner in innumerable contexts by a plethora of academicians, legal theorists as well as practitioners. As can be conceded from the aforementioned proposition, extraterritorial jurisdiction is not a homogenous terminology and incurs various components that are inimical to its implementation; namely, principles of *active personality*, *passive personality* and *protection*. The term “passive personality jurisdiction”¹²¹ essentially refers to the inimically controversial component of extraterritorial criminal jurisdiction wherein under the particular procedure, the state can exercise criminal jurisdiction solely based on the nationality of the victim. Why is the aforementioned legal term then susceptible to controversy and deliberation? In response to the antecedent interrogative proposition, it would be prudent to quote verbatim Watson, in his illuminating work titled as, “Passive Personality Principle”

*“.....Passive personality jurisdiction is probably the most controversial form of extraterritorial criminal jurisdiction. Many countries, including the United States, have traditionally opposed this theory of jurisdiction. **These states have argued that it would be unfair for state A to prosecute a foreign national for a crime committed on foreign soil solely because the victim is a national of state A.**”¹²².*

The root causes of the substantial criticism of passive personality jurisdiction is based on the assumption of three causes, according to Watson, namely; firstly, passive personality

jurisdiction is said to be deeply intrusive or impinge on the sovereignty of the states involved. Secondly, it also has been empirically argued that Passive Personality jurisdiction deprives the potential defendants of the notice that their conduct can be construed as criminally tainted, since the applicable rule of criminal law will futuristically or retrospectively be based on the national background of the victim. And lastly, critics of passive personality jurisdiction imply towards the impracticality of the antecedent component of extraterritorial jurisdiction. In tandem with its coexistent component, the active personality principle is closely associated with the ethos of nationality. Quoting Deen- Racsmany verbatim in order to substantiate the aforementioned proposition which is put forth as follows,

“.....The Rome Statute of the International Criminal Court (ICC) attributes a central role to the nationality of the accused. It provides that unless the situation in which the crime was committed was referred to the court by the Security Council under the chapter VII of the United Nations Charter.... The court may exercise its jurisdiction of one or more of the following states are parties to the this statute or have accepted the jurisdiction of the court

- a. The state on the territory of which the conduct in question occurred for; if the crime was committed on board a vessel or an aircraft , the state of registration of the vessel or the aircraft*
- b. The state of which the person accused of the crime is a national.”¹²³*

It can be deduced with respect to the tenets of active and passive personality jurisdiction that those are inimically based upon the notion as well as the criterion of nationality. Under the tenet of **active personality jurisdiction**, the state incurs a fundamental right to apply its laws in order to prosecute the illegal conduct committed by its citizens overseas. And lastly within the ambit of **Protective Jurisdiction**, it is unequivocally accepted that every country is

competent to take any measures that are compatible with the law of nations in order to safeguard its national security interests.

Similar observations have been made in courts of other countries. In the case of *United States v Yousef*,¹²⁴ the Court also recognised its right to exercise universal jurisdiction. It noted that the doctrine was adopted under international law in regard to piracy because ‘of the threat piracy poses to orderly transport and commerce between nations.’ Thus, apart from seizing or destroying cargo and inflicting bodily harm on merchants and the crew of vessels, their attacks often lead to an increase in the price of goods thereby causing more than just the victims of the attacks to suffer.¹²⁵ Equally, the interests of several States are affected by a single attack since one State often hosts the company that owns the vessel, while the vessel flies the flag of another State, and the port of unloading the cargo may be in a third State. Rogo argues that since the high seas may be viewed as a ‘no man’s land’, it is only logical that criminal acts that are perpetrated there should not be left unpunished just because there is a lack of national or territorial jurisdiction by any given State.¹²⁶ In fact, one of the

116. Goldsmith, J. L., & Posner, E. A. (1998). A Theory of Customary International Law. *University of Chicago Law School, John M. Olin Law & Economics Working Paper*, (63).

117. Roberts, A. (2001). Traditional and Modern Approaches to Customary International Law: A Reconciliation. *The American Journal of International Law*, 95(4), 757-791.

118. Pocar, F. (2004). New challenges for international rules against cyber-crime. *European Journal on Criminal Policy and Research*, 10(1), 27-37.

119. Fu, X., Ng, A. K., & Lau, Y. Y. (2010). The impacts of maritime piracy on global economic development: the case of Somalia. *Maritime Policy & Management*, 37(7), 677-697.

120. Bassiouni, M. C., & Wise, E. M. (1995). *Aut dedere aut judicare: the duty to extradite or prosecute in international law*. Martinus Nijhoff Publishers.

121. Watson, G. R. (1993). Passive Personality Principle, The. *Tex. Int'l LJ*, 28, 1.

122. *Ibid*, pp.2

123. Deen-Rcsmany, Z. (2001). The nationality of the offender and the jurisdiction of the International Criminal Court. *The American Journal of International Law*, 95(3), 606-623.

124. 327 F.3d 56, 104 (2d Cir. 2003).

125. Kontorovich E ‘Implementing *Sosa v Alvarez-Machain*: What Piracy Teaches About the Limits of the Alien Tort Statute’ (2004) 80 *Notre Dame Law Review* 111, 139-153.

126. Rogo, Ronald, “The code is the law!”, December 26, 2012, Daily Archives, A Contrario, *International Criminal law*

justifications of universal jurisdiction is that all States must ensure that acts that are contrary to customary international law must be punished. Randall also suggests that the definition of piracy is best dealt with universally by all on the high seas as a cooperative measure.¹²⁷ Even with the case of privateers, when they acted outside of their letters of marque, their home States did not support them. Thus, where one State arrests pirates on the high seas and prosecutes them, the home States of the pirates are less likely to protest. This may be contrasted with cases where one State arrests and prosecutes former military officers or political leaders of another State on grounds of war crimes, human rights violations or torture. Nonetheless, the argument for the expansion of universal jurisdiction to include other crimes against customary international law such as war crimes and genocide is that universal jurisdiction was never about piracy specifically, but simply about allowing all States to punish the most horrible of offences.¹²⁸ Even Kissinger had argued that ‘The doctrine of universal jurisdiction asserts that some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or the sacrosanct nature of national frontiers.’¹²⁹ Equally, just after the Second World War, Wright had argued that although piracy was the ‘classic illustration of offences against universal law’ the latter concept could be extended to ‘other offences ... inherent in the conception of a world community.’¹³⁰

127. Randall KC ‘Universal Jurisdiction under International Law’ (1988) 66 *Texas Law Review* 785, 793.

128. See Bradley CA and Goldsmith JL ‘Customary International Law as Federal Common Law: A Critique of the Modern Position’ (1997) 110 *Harvard Law Review* 815, 838-841.

129. Kissinger H ‘The Pitfalls of Universal Jurisdiction’ (2001) (July/August) *Foreign Affairs* 86, 86.

130. Wright Q ‘War Criminals’ (1945) 39 *American Journal of International Law* 257, 280, 283.

What these justifications show is that the doctrine of universal jurisdiction is a double-edged sword that was largely limited to piracy on the high seas because it was the least harmful option politically or diplomatically in combating the phenomenon. This explains why the doctrine is readily abandoned where its invocation would raise tensions between States.¹³¹

The case of *United States v La Jeune Eugenie*,¹³² illustrates this: enforcement of jurisdiction by the United States over a then important ally (France) would have damaged relations. Aware of this, Justice Story refused to exercise such jurisdiction stating that ‘rarely was there a case more likely to [...] excite the jealousies of a foreign government zealous to assert its own rights.’¹³³

The Kenyan Court of Appeal in *Republic of Kenya v Chief Magistrates Court, Mombasa Ex-Parte Mohamud Mohamed Hashi & 8 Others* on its part invoked the communal spirit recommended by UNCLOS in the exercise of universal jurisdiction in order to overturn the High Court’s decision that Kenyan courts had no jurisdiction because the attack occurred outside Kenyan water and neither a Kenyan citizen nor Kenyan property was involved. It is arguable whether the Kenyan Court of Appeal would have readily exercised universal jurisdiction if that meant undermining the interests of a key ally. In other words, it is uncertain whether the Kenyan Court of Appeal would recommend the doctrine of universal jurisdiction where the exercise of such jurisdiction would be interpreted by an ally State as undermining its sovereignty. It is at best speculation to contend that the Kenyan Court of

131. Morris MH ‘Universal Jurisdiction in a Divided World: Conference Remarks’ (2001) 35 *New England Law Review* 337, 340.

132. 26 F.Cas. 832 (D. Mass. 1882).

133. *Ibid*, 841.

Appeal would not be disposed to apply UNCLOS if such application would raise tension between Kenya and a key ally. Nonetheless, it has been contended that States often exercise universal jurisdiction if they do not fear retaliation by the defendant's home State.¹³⁴ Also, as shown in *United States v La Jeune Eugenie*, courts of signatory States have wide discretion in determining whether universal jurisdiction should be exercised in a given case. Strapatsas defined universal jurisdiction as that which may be exercised by all States 'even against the wishes of the State having territorial or any other form of jurisdiction.'¹³⁵ This suits the multilateral approach and relational statism but, as shown below, universal jurisdiction may sometimes lead to a dangerous encroachment on the sovereignty of a State and create conflict given that it is not premised on the idea of State consent. This is especially so with the prosecution of broadly defined offences such as 'piracy.'

3.3 International Criminal Jurisdiction

The scope of national sovereignty under public international law generally determines the limits of national criminal jurisdiction. This is linked to the three central principles of Westphalian sovereignty: first, that states are to be regarded as equal under international law, that each State has sovereignty over its territory and internal affairs, and that states should refrain from interference in another State's internal affairs.¹³⁶ It follows therefore that

134. Anderson K 'What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and US Policy on Detainees at Guantanamo Bay Naval Base' (2002) 26 *Harvard Journal of Law and Public Policy* 591, 595.

135. Strapatsas N 'Universal Jurisdiction and the International Criminal Court' (2002) 29 *Manitoba Law Journal* 1, 11.

136. Osiander A 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 *International Organization* 251, 251.

Westphalian philosophy must accept a ‘territoriality’ principle whereby a sovereign State is exclusively entitled to prosecute crimes committed within its borders. These principles generally set the foundation of modern jurisdictional law and the prevailing world order. In the landmark Hague lectures of 1964, Mann described jurisdiction as follows:

If a State assumed jurisdiction outside the limits of its sovereignty, it would come into conflict with other States which need not suffer any encroachment upon their own sovereignty ...the connection between jurisdiction and sovereignty is, up to a point, obvious, inevitable, and almost platitudinous, for to the extent of its sovereignty a State necessarily has jurisdiction.¹³⁷

As such, the concepts of territory, sovereignty and jurisdiction are interrelated and constitute core features of a State.¹³⁸ However, due to the complexity of cross-border transactions sometimes involving several States, it is questionable whether a State’s jurisdiction should be determined by territorial factors exclusively. Certainly, more than one State has an interest in regulating such transactions. This creates the potential for conflict since the different interested States may adopt different jurisdictional approaches. One such approach is ‘extraterritoriality’. The national courts of various States have to entertain cases with many international elements and may be forced to assert extraterritorial jurisdiction in order to

137. Mann FA ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *Recueil Des Cours* 1, 30.

138. Brownlie I, *Principles of Public International Law* (8th Edition, Oxford University Press, Oxford, 2012) 299.

resolve the disputes. Thus, the way they apply their domestic laws may impact upon relations with other interested States.¹³⁹

UNCLOS provides that any State may have jurisdiction as regards incidents that occur on the high seas. The jurisdiction of the flag State can be considered to be an extension of the Westphalian territoriality principle, since vessels may be ‘treated as islands of a nation’s territory outside its primary borders.’¹⁴⁰ However, where the offence occurs in an EEZ or contiguous zone, it is difficult to argue that the exercise of jurisdiction by any State of whom the alleged offender is not a national is an usurpation of the sovereignty of the State with territorial jurisdiction. This then intensifies conflict between States and threatens the stability of the international legal order.¹⁴¹ Brownlie argues that conflict might be avoided if the exercise of extraterritorial jurisdiction is made through policies such as non-intervention, proportionality, mutuality and accommodation.¹⁴² But he notes that there must be a sufficient nexus or *bona fide* connection between the State exercising extraterritorial jurisdiction on the one hand, and the State to whom the offender in the incident in question is alleged to be a national. This implies that the State must be able to invoke one of the following principles: nationality, passive personality or protective. In the latter instance, the criminal activities committed abroad have harmful consequences on the prosecuting State.

139. Stigall DE ‘International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in US Domestic Law’ (2012) 35 *Hastings International and Comparative Law Review* 323, 323.

140. Kontorovich E ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’ (2004) 45 *Harvard International Law Journal* 184, 188.

141. Bassiouni MC ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 *Virginia Journal of International Law* 81, 90.

142. Brownlie, fn. 128 *supra* p. 313-314.

The above avenues for exercising extraterritorial jurisdiction may still deepen conflict between States given that it would be difficult to justify the protective or passive personality principle in cases where the crime committed is a violation of a peremptory norm or *jus cogens*. The courts of the State with territorial jurisdiction may decide that harm caused by the activities is diffuse or indirect, while the courts of the State asserting extraterritorial jurisdiction may hold that the interests of the State have been affected adversely. As such, there is good reason to limit extraterritorial jurisdiction only to cases where the crime allegedly committed constitutes a clear violation of a peremptory norm or *jus cogens* and where the State with territorial jurisdiction or the flag State consents to the exercise of extraterritorial jurisdiction by another State. This reinforces the importance of adopting a ‘consent’ approach, as well as cosmopolitanism perspective on, which is said in Chapter 2 to be the most practicable approach.

This involves returning to the simple and yet unambiguous definition of jurisdiction which is ‘the right to prescribe and enforce rules against others.’¹⁴³ This implies that in each case the question about jurisdiction requires determining which State has the right to prescribe and enforce rules against the alleged perpetrators of the crime. The argument here is that the most suitable State to assume responsibility in this regard is the one entitled to assert a form of sovereignty. A State may have prescriptive jurisdiction, which is the right to enact laws that apply in a given area. It may also have adjudicative jurisdiction, which is the right to subject persons to its laws. It may also have enforcement jurisdiction, which is the right to compel compliance with its laws. Each of these types of jurisdiction is governed by a complex set of

143. Lowe VA, *International Law* (Oxford University Press, Oxford, 2007) 171.

international laws, which include both hard and soft law.¹⁴⁴ With regard to international criminal law, the most important question concerns which State should exercise *enforcement* jurisdiction. This is because many of the rules are enshrined in international agreements or enacted by established international institutions. As such, extraterritorial jurisdiction may be deemed to be the exercise of enforcement jurisdiction in the territory or jurisdiction of another State.¹⁴⁵ As noted above, where the law is an ‘empty recommendation’ if force is not included by the competent authority, this is a potential cause of conflict between States as Kant famously pointed out in his doctrines of ‘perpetual peace’.¹⁴⁶ Thus, it is imperative to limit the assertion of *extraterritorial* jurisdiction by allowing only States with territorial jurisdiction to exercise enforcement jurisdiction or where such a State does not have the requisite resources, it must be exercised with its consent.

3.4 The Question of Piracy

The term “pirate” derives its root from the Latin word “*pīrāta*” within whose ambit the notion of ‘*sea robber*’ originated and from the Greek word “*peirātés*”¹⁴⁷ which means ‘attacker’ or ‘marauder’ as a noun originating from the verb “*peiran*” signifying ‘attempt’ or ‘attack’. In consonance with the aforementioned etymological roots, a pirate etymologically refers to an person who undertakes *an attempt of attack or an actual attack on someone*. Based on its origin, the notion of attempt and the actual perpetration of the preponderant act have been embedded within the notion of pirate in a prior fashion. Furthermore, the definition of the word “Piracy”, encompassing the pertinent acts committed by pirates, has evolved throughout the due course of the history basing itself on the occurrence of the act itself and also on the *modus operandi* of the perpetrator and as an addendum the particular era. Dating back to a particularly dated span of temporal epoch, the notion of piracy has solely been related to the pertinent sea transportation and maritime activities; subsequently the usage of

the aforementioned term has been extended to the realm of the air transportation sector, to the domain of intellectual property and other fields such as broadcasting. Maritime piracy as well as armed robbery with water borne transports relegated to the high seas forms one of the contemporary challenges of the maritime industry. The aforementioned two phenomena impinge globally on the maritime trade and security. In the contemporary epoch, it can be empirically stated that *the Gulf of Aden* And the *Indian Ocean* is considered within the ambit of high risk areas in terms of piracy and armed robbery against ships activities. With pertinence to the aforementioned empirical statements,, both the international community as well as the coastal States of the pertinent regions have deployed a plethora of effort in order to decipher a manner in which to address the antecedent problem. Relevant statistics state that the Resurgence act of Piracy and Armed Robbery in the Gulf region has been established since the year 2008. Statistics have recorded 45 attacks in 2010, 58 attacks in the first 10 months of 2011 from January to September 2012, 34 attacks has been reported (2016). In tandem with the aforementioned discussion, as depicted in *Chapter 2*, States have generally been made aware to exercise universal jurisdiction in the cooperation to arrest and prosecution of pirates due to international customs established in the 18th and 19th centuries, as well as UNCLOS. This is largely because most pirates targeted vessels in the high seas, outside the territorial jurisdiction of States. Nonetheless, it may be argued that the vessels were still within the flag jurisdiction of the States in which they were registered. Also, the victims on board the vessels were citizens

144. See Blakesley CL and Stigall DE ‘The Myopia of US v Martinelli: Extraterritorial Jurisdiction in the 21st Century’ (2007) 39 *Georgetown Washington International Law Review* 1.

145. Stigall DE ‘Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law’ (2013) *Notre Dame Journal of International and Comparative Law* 1, 10.

146. Loudon RB, Kant: *Anthropology from a Pragmatic Point of View* (Cambridge University Press, Cambridge, 2006) 235.

147. Randrianantenaina, J. E. *Maritime Piracy and Armed Robbery Against Ships: Exploring the Legal and the Operational Solutions. The Case of Madagascar.*

of specific States. Thus, some jurisdictional rules still applied as regards piracy owing to the fact that States could justify the arrest and prosecution of pirates on the grounds of flag jurisdiction and passive personality jurisdiction. As such, it may be said that although piracy shows the limits of territorial jurisdiction, it does not preclude the exercise of jurisdiction in accordance with established international law rules. The latter instance is tantamount to the exercise of universal jurisdiction by any State. It is shown above that some States may assert extraterritorial jurisdiction in order to arrest and prosecute pirates. Nonetheless, following the strict doctrinal or positivist approach, the flag State ought to have jurisdiction if the attack occurred in a place where no other State has territorial jurisdiction. It is argued here that this approach enhances consistency by being in line with state sovereignty, unless express consent is put in place, and thus no encroachment of sovereignty.

Notwithstanding, universal jurisdiction has been legitimised over the past centuries as regards piracy. In *United States v Smith*, the Court described this stance as ‘the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever.’¹⁴⁸ Nonetheless, at the time, there were no established international rules on what constitutes piracy and how it ought to be prosecuted. Despite the guidance provided by UNCLOS, there is still much uncertainty in this regard. In Chapter 2, it is shown that much confusion stems from the lack of a precise definition of the term ‘piracy’ and tendency of the national courts of signatory States to rely on their own subjective interpretations. Moreover, in some cases such as privateers, the attackers set out with a mandate from their governments. These uncertainties raise questions about the rationale of universal jurisdiction. In *United States v Smith*, the Court held that ‘Piracy, according to the law of nations, is incurred by depredation on or near the sea, without

148. (5 Wheat) 153, 162 (1820).

authority from any prince or state.’¹⁴⁹ About a century earlier, the Court had argued that ‘piracy is only a sea term for robbery, piracy being a robbery committed while in the jurisdiction of the admiralty.’¹⁵⁰ Then two decades after *United States v Smith*, it was held that ‘robbery on the high seas is piracy under the law of nations by all authorities.’¹⁵¹ Towards the end of the 20th century, a Court in the UK noted on its part that ‘the essential elements of this crime are no more and no less than those which are requisite to a relevant charge of robbery where that crime is committed in respect of property on land and within the ordinary jurisdiction of the High Court.’¹⁵²

This shows that States have exercised universal jurisdiction over piracy only to the extent of their courts’ delineation of the content of piracy under ‘the law of the nations’. In other words, whatever constitutes piracy under the law of the nations from the perspective of a court guides the exercise of universal jurisdiction. Rubin was able to demonstrate that universal jurisdiction in the context of piracy has always been a question of theory rather than of practice. This is because the vast majority of prosecutions for piracy did not rely on the universal principle.¹⁵³ He found only five cases in more than a century.¹⁵⁴ It must be noted that universal jurisdiction is not mandatory but optional and the courts of each State decides

149. *Ibid*, 163.

150. *R v Dawson*, 8 *William III*, 1696, 5 State Trials, 1st ed. 1743.

151. *Dole v New England Mut. Marine Insurance Co.*, 7 F. Cas. 837, 847 (CCD Mass 1864).

152. *HM Advocate v Cameron*, 1971 SLT 202, 205.

153. Rubin AP, *The Law of Piracy* (2nd Edition, Naval War College Press, New Port, 1988) 302, 348.

154. *Ibid*.

whether to exercise such jurisdiction or not. At the beginning of last century, Barbour deplored the fact that the UK and Spain often overlooked piratical attacks when it suited their interests.¹⁵⁵ Thus, they would refrain from arresting pirates where the attacks of the pirates were directed at vessels of rival States.¹⁵⁶ However, when the Israeli Supreme Court decided to exercise universal jurisdiction in order to prosecute foreign nationals for crimes against humanity, they relied on the piracy cases as precedent.¹⁵⁷ What is intriguing is that the Israeli case then became the precedent for the exercise of universal jurisdiction over non-piratical crimes. Thus, in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet*,¹⁵⁸ the Court cited the Israeli Supreme Court's decision in *Attorney-General of Israel v Eichmann* to focus on the international and universal character of crimes against humanity and noted that courts have an independent source of jurisdiction derived from customary international law, which is part of the unwritten law of Israel. The Israeli Supreme Court however had noted that whenever a State arrested an offender, it had to first offer to extradite him to the State in which the offence was committed in order to prevent the violation of the latter State's territorial sovereignty. As such, the Israeli Supreme Court was cautious and recommended the positivist approach as the first step. Its decision may be distinguished from that of the Court in *R v Bow Street, Ex Parte Pinochet* that concluded that English courts have extraterritorial criminal jurisdiction as regards crimes of universal jurisdiction. This was certainly a leap from the rather cautious position adopted by the Israeli Supreme Court. Extraterritorial criminal jurisdiction must be a function of the operation of national

155. Barbour V 'Privateers and Pirates of the West Indies' (1911) 16 *American Historical Review* 529.

156. *Ibid*, 530.

157. See for example, *Attorney-General of Israel v Eichmann* 36 ILR 277, 299-300 (1962).

158. [1999] UKHL 17.

sovereignty under public international law; else the fundamental principle of Westphalian sovereignty may be fall into disrepair. The license to assert extraterritorial criminal jurisdiction is given by the sense of outrage vis-à-vis crimes against humanity or other crime that is believed to constitute a violation of peremptory norms. In *Demjanjuk v Petrovsky*¹⁵⁹ for example, the Court held that States may exercise universal jurisdiction over torture wherever it has been perpetrated due to the *jus cogens* nature of the international crime of torture.

In fact, since the end of last century, courts in many Western States (Western Europe and North America) have increasingly exercised universal jurisdiction to prosecute war crimes. Some countries such as Belgium have been enacted laws that specifically grant their domestic courts universal jurisdiction. In 1999, it enacted the Law of 10 February 1999 governing the punishment of serious breaches of international humanitarian law. Other Western States such as Denmark arrested and indicted Iraqi senior military officers with genocide against Iraqi Kurds in Iraqi territory.¹⁶⁰ However, it is uncertain whether there is universal consensus on the content of these crimes and the legitimacy of the assertion of universal jurisdiction by courts in Western States in the specific circumstances in which they have. Reydams therefore observed that the establishment of International Tribunals that exercise universal jurisdiction is ‘not a policy choice, but rather a cultural preference, more akin to a dietary taste or a religious choice than an argument deduced from empirical reason.’¹⁶¹ What remains true is that States tend to take into account the likelihood of the defendant’s home State retaliating

159. (1985) 603 F. Supp. 1468.

160. Kontorovich, fn. 130 *supra* p.198.

161. Reydams L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, Oxford, 2003) 81.

before asserting extraterritorial or universal jurisdiction. Thus, it is less likely that universal jurisdiction is exercised against the interests of powerful States. This once again shows the importance of the strict doctrinal or positivist approach.

3.5 Summary

This Chapter has analysed the increased tendency of national courts to assert universal jurisdiction in the prosecution of pirates. It showed that the pirate has traditionally been treated under international law as a *hostis humani generis* or an enemy of all mankind. Thus, any State has the power to deal with piracy on the high seas without the need for a connection between the piratical acts and the prosecuting State. UNCLOS adopted the doctrine of universal jurisdiction in this regard empowering State signatories to seize pirate vessels and arrest the persons and seize the property on board. It was shown that the courts in different countries however assert universal jurisdiction not necessarily because of the license given by UNCLOS but because piracy is deemed to pose a serious threat to orderly transport and commerce between nations. The interests of several States may be affected adversely by a single piratical attack. However, if this attack occurs on the high seas, and none of the affected States would have territorial jurisdiction then universal jurisdiction is important because it is only logical that piratical acts that are perpetrated there should not be left unpunished just because there is a lack of national or territorial jurisdiction by any given State. Also, piracy is best dealt with by universal jurisdiction since the acts of pirates are not endorsed by any State. In the same vein, the doctrine of universal jurisdiction has been expanded to include crimes against customary international law in order to enable States to punish the most horrible offences.

However, it was noted that universal jurisdiction is a double-edged sword that may sometimes lead to a dangerous encroachment on the sovereignty of a State and create conflict, given that it is not premised on the idea of State consent. This explains why the doctrine is readily abandoned where its invocation would raise tension with influential States. This is the same problem caused by the assertion of extraterritorial jurisdiction. It challenges Westphalian principles of sovereignty, non-interference, and equality amongst States that set the foundation of modern jurisdictional law and the prevailing world order. Thus, it is submitted that there is good reason to limit extraterritorial jurisdiction only to cases where the crime allegedly committed constitutes a clear violation of a peremptory norm or *jus cogens* and where the State with territorial jurisdiction or the flag State consents to the exercise of extraterritorial jurisdiction by another State. This reinforces the argument in favour of adopting a strict doctrinal or positivist approach, as well as cosmopolitanism. Where this approach is adopted, the flag State would have jurisdiction if the attack occurred in the territorial waters where that specific State lacks territorial jurisdiction. This enhances consistency by being in line with state sovereignty, unless express consent is put in place, and thus no encroachment of sovereignty.

CHAPTER 4

PIRACY IN THE GULF OF GUINEA

“Piracy is defined as happening `outside the jurisdiction of any state’, so outside 12 miles is piracy. If it’s inside 12 miles we classify that as armed robbery against ships. The difference is jurisdiction. Piracy is a universal crime and states have an obligation to intervene. Inside 12 miles it is the coastal state’s responsibility.”¹⁶²

4.1 Introduction

This Chapter examines the phenomenon of piracy in the West coast of Africa, with emphasis on the Gulf of Guinea. It seeks to explain the high level of piratical attacks and identify the security challenges confronting the States in the region. It also seeks to determine whether the doctrine of universal jurisdiction may be appropriate in combating piracy in the region. This follows from Chapter 3 where it was shown that the doctrine is a double-edged sword in that because it is not unequivocally based on consent, might sometimes lead to encroachment and fuel conflict between States. In pursuing these misgivings this chapter attempts to determine whether it would be beneficial to adopt instead the explicitly consensual and cosmopolitan approach suggested hitherto. This proposes a system whereby the flag State that is the victim of a piratical attack would have automatic jurisdiction only if :

- (a) the attack occurred in a place where no other State has territorial jurisdiction,

162. Trelawny Chris, deputy director of the Maritime Safety Division at the International Maritime Organization (IMO), sourced at Irin News ‘Defining Piracy in the Gulf of Guinea’, London, 10 December 2012

or, in a situation where *consent* is obtained from the State which *does* have territorial jurisdiction in some sense,¹⁶³ yet lacks the requisite enforcement resources.

It begins with an analysis of the paradigm of piracy in the Gulf of Guinea, setting the background with a discussion of the statistics on piratical attacks over the past decade. The enclaves and trouble spots in the region are identified, as well as the primary actors responsible for the sharp rise in the number and level of the attacks. It concludes with a discussion of the multilateral approach that has been adopted by the affected States to contain piracy. It explains why the approach has not been effective and what needs to be done.

In summary Chapter 4 aims to:

- Explain the high level of piratical attacks in the Gulf of Guinea and identifies security challenges facing States in the region
- Analyse the multilateral approach that has been adopted by States in the region to contain piracy

In pursuing these aims, Chapter 4 seeks to address the question and concerns listed and outlined in Chapter 1, namely, that ... *given that the coastal States in the Gulf of Aden and Gulf of Guinea are largely poor, weak, lacking in resources, and suffer from corruption in the public sphere, we must ask whether regional frameworks of littoral and landlocked countries facing the same challenges can be expected to prove effective in the attempt to implement anti-piracy policies.*¹⁶⁴

163. i.e., at least in a prescriptive sense of jurisdiction – e.g., Liberia and Togo have piracy laws

164. See Chapter 1 supra p.20, para 2

4.2 The Gulf of Guinea

The world's number two continent both in terms of size and in context of population is Africa. With an approximate stretch of 30.2 million km², measuring around 11.7 million square miles inclusive of adjacent islands, it covers 6 percent of the Earth's surface area and 20.4 percent of the total land area globally. Its population is currently 1.1 billion people according to the 2013 statistics and accounts for around 15 per cent of the global population. The Mediterranean Sea is on the northern coast of continent, the Suez Canal on the northeastern coast, the Red Sea along the Sinai Peninsula; the Indian Ocean on its southeastern coast and the Atlantic Ocean on the western coast. The Gulf of Guinea is in the north-eastern-most part of the Atlantic Ocean. It extends from Cape Lopez in Gabon to Cape Three Points in Ghana and its coastline includes the Bight of Benin and the Bight of Bonny. The origin of the Gulf's name is uncertain. It is one of the oldest and most widely used geographical terms in that part of Africa.¹⁶⁵ Some have argued that it is a mangled form of the name Ghana, used by Portuguese explorers in North Africa,¹⁶⁶ while others have noted that although the modern application of the name dates from the 15th century with the Portuguese explorers in the Gold Coast region, it was used in the 14th century by Genoese cartographer, Giovanni di Carignano.¹⁶⁷

165. Hale TA 'From the Griot of Roots to the Roots of Griot: A New Look at the Origins of a Controversial African Term for Bard' (1997) *Oral Tradition* 249, 255.

166. See Bovill ED, *The Golden Trade of the Moors: West African Kingdoms in the Fourteenth Century* (2nd Edition, Princeton: Wiener, 1995) 116.

167. Ortiz F, *Glosario de Afronegrismos* (El Siglo XX: Habana, 1924) 245.

The region remains the world's poorest inhabited continent. The main sectors in the economy are agriculture and mining, while tourism plays a crucial role in some areas. For some time now, the Gulf of Guinea in West and central Africa has been one of the world's main oil and gas exploration hotspots. There are eight oil producing States in the Gulf with a tenth of all oil reserves in the world and producing more than 5 million barrels of crude oil per day.¹⁶⁸ The production sector has shown rapid growth and is big enough to export goods across the globe; further the oil export revenues of Angola and Nigeria have the possibility to alter the lives of millions of individuals. The largest producer, Nigeria, boasts of 150 million people, about 15 per cent of the continent's population. It is also the 12th largest oil producer in the world with 2.4 million barrels produced per day. However, it ranks very low in the Failed States Index. Most of its large population are impoverished, especially those of the Niger River Delta region, where most of the oil fields are located. The local officials are very corrupt and largely rely on the profits from foreign oil and gas producers. This has caused resentment in the region with the local people believing the foreign oil companies and corrupt officials collude in despoiling them of their natural resources. This feeling of resentment coupled with the region's lawlessness has sustained the armed struggle waged by local militias, which in turn has led to several piratical attacks against vessels in the area.¹⁶⁹ The local Islamic terrorist group, Boko Haram, has also benefited from the disorder and confusion caused by the frequent piratical attacks by militias.¹⁷⁰ As such, in 2004, the International Maritime Organization (IMO) rated the Gulf of Guinea second in the world in respect of the

168. Oliveira RS, *Oil and Politics in the Gulf of Guinea* (Columbia University Press, New York, 2007)

169. Tepp E 'The Gulf of Guinea: Military and Non-Military Ways of Combatting Piracy' (2012) 14 *Baltic Security and Defence* 181, 191.

170. Boot M 'Pirates, Then and Now: How Piracy was Defeated in the Past and Can be Again' (2009) 88 *Foreign Affairs* 94, 103.

number of piracy attacks, the first being the Strait of Malacca.¹⁷¹ The number of attacks only increased since then and in 2011, the Lloyd's Joint War Committee elevated the Gulf to the same risk category as Somalia and classified it as 'a war risk zone for shipping.'¹⁷² The re-emergence of pirate attacks across African waters is therefore a matter of crucial significance to both the African States and the global society. However, piracy in African waters over the past ten years has chiefly been limited to three areas viz. the Somali coast/the Gulf of Aden along the East African Coast; Nigeria's territorial waters and the Gulf of Guinea in West Africa; and the Mozambique Channel/Cape sea route in Southern Africa. The Gulf of Guinea has witnessed a sharp rise in the number of violent attacks of vessels at sea by armed gangs.

4.3 Overview of Piracy Statistics

As shown in Chapter 2, the term 'piracy' has not been defined with precision. Under UNCLOS, it is deemed to be depredation on the 'high seas' including contiguous zones and EEZ. The term *EEZ or Exclusive Economic Zones* refers to that particular sea zone prescribed by UNCLOS, over which the state wields special rights pertaining to the exploration and use of marine resources, using energy production from water and wind. On the other hand, *Contiguous Zone* refers to the seaward area of the territorial sea within which the coastal sea may exercise the pertinent control in a rudimentary manner with an aim to prevent or punish infringement of its customs, fiscal, immigration and sanitary laws and regulations that occur within its territory or territorial sea. For instance, *O.S. Stokke*, 2007, in his poignant research work based on the similar field of interest titled as, "A legal regime for the Arctic?: Interplay with the Law of the Sea Convention" poignantly argue that *The Law of the Sea Convention*¹⁷³ acts as a constraint with respect to the regional environmental regimes, especially with respect to **navigation beyond the territorial sea**. In tandem with the same, the existing soft-law institutions, predominantly the *Arctic Council*, have in the

contemporary times strengthened the nuances of the environmental governance in the pertinent region by firstly, improving upon the knowledge base, secondly, enabling practical guidance with relevance to risk reduction, subsequently, highlighting in broader regulatory manner the Arctic dimension of shortfalls such as the long-range transported hazardous compounds and lastly supporting the capacity of Arctic States to implement existing commitments. However, the latter (Exclusive Economic Zone) comprise a substantial part of a State's territorial waters. Thus the two distinct zones are contextually governed by the axiomatic domain of territorial waters, precisely and dominantly the contiguous zones. In addition, the same pirates sometimes operate within internal waters and on the high seas. This is often the case with attacks in the Gulf of Guinea. Thus it is more pragmatic to use the term 'piracy' to describe armed robbery against vessels in the Gulf of Guinea, whether in internal waters or the EEZ.

171. *Shafa BM, Maritime Security in the Gulf of Guinea Sub-region: Threats, Challenge and Solutions (US Army War College, Carlisle, 2011) 12.*

172. *Fiorelli M 'Piracy in Africa: The Case of the Gulf of Guinea' (2014) KAIPTC Occasional Paper No 37 3, 5.*

173. *Stokke, O. S. (2007). A legal regime for the Arctic?: Interplay with the Law of the Sea Convention. Marine Policy, 31(4), 402-408.*

Armed attacks against vessels in this area over the past century are relatively well documented.¹⁷⁴ There were for example many cases of armed attacks against vessels by armed groups of rival coastal kingdoms seeking control over influential commerce and trade routes.¹⁷⁵ However, over the past couple of decades, the attacks have been linked to the carriage of oil and the scale of the social, environmental and economic scale effects of oil production in the Niger Delta region. As noted by Tepp, the factors that have caused the sharp rise in piratical attacks over the past two decades in the region include ‘legal and jurisdictional weakness, favourable geography, conflict and disorder, underfunded law enforcement, inadequate security, permissive political environments, cultural acceptability, and promise of reward.’¹⁷⁶ Thus, the occurrence of piracy is not simply due to lack of security at sea but an incidental product of state failure and corruption. Neethling points out that it is a ‘culmination of years of inattention, desperation and lawlessness in the area bordering the globally vital shipping route.’¹⁷⁷ Also, other States in the region have paid less attention to the issue since the attacks are largely perpetrated by armed militias based in Nigeria and the victims have equally been foreign companies producing oil and gas in the country.¹⁷⁸

174 See Neethling T ‘Piracy around Africa’s West and East Coasts: A Comparative Political Perspective’ (2010) *South African Journal of Military Studies* 89; Ukiwo U ‘From “Pirates” to “Militants”: A Historical Perspective on Anti-state and Anti-Oil Company Mobilization among the Ijaw of Warri, Western Niger Delta’ (2007) 106 *African Affairs* 587; Lloyd PC ‘The Itsekiri in the Nineteenth Century: An Outline Social History’ (1963) 4 *Journal of African History* 207.

175. Ukiwo, fn. 162 *supra* p.588.

176. Tepp, fn. 158 *supra* p.188.

177. Neethling, fn. 162 *supra* p.102.

178. Vrey F ‘Bad Order at Sea: From the Gulf of Aden to the Gulf of Guinea’ (2009) *African Security Review* 17

This demonstrates the futility of universal jurisdiction in cases where only the interests of a single State are adversely affected by the piratical attacks. Thus, other States are not willing to exercise universal jurisdiction under UNCLOS where they are not directly affected by the attacks. This also shows that an exclusive focus on territorial jurisdiction may be problematic given that the State that has jurisdiction over the waters wherein the attacks are perpetrated may be reluctant to enforce the jurisdiction due to a political stalemate, corruption or incompetence. Nonetheless, it is argued in Chapter 3 that the flag State jurisdiction is an extension of territorial jurisdiction. In this regard, the State in which the vessel is registered or the home State of the company that owns the vessel may be entitled to exercise enforcement jurisdiction. That is why the European Union, China and the US have been deeply involved in developing and implementing counterpiracy strategies in the Gulf of Guinea.

The IMO has compiled several reports of piratical attacks (using the broad definition of ‘piracy’ discussed in Chapter 2) in the Gulf of Guinea between 2005 and 2013¹⁷⁹. The analysis in this Chapter is largely based on the statistics in these reports and those of the International Maritime Bureau (IMB). They show that there were 23 recorded attacks in 2005, 60 in 2007, and 64 in 2012; thus increasing in nature. The IMB has noted that only about half of the piratical attacks in the area are actually reported by the masters of the vessels and charterers.¹⁸⁰ This may be due to the fear of subsequent reprisals or the exponential increase of premiums by maritime insurers. The latter may even stop insuring vessels where the

179. See *Appendix 2*; for figures in the period 2011-2015, ICC IMB Piracy and Armed Robbery Against Ships – 2015 Annual Report

180. International Maritime Bureau, Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report 2009 (IMB, London, 2010) 41.

attacks remain unchecked. The IMO has also noted that there were 5 armed attacks against vessels in internal waters in 2005 and 31 attacks in 2007. The most remarkable attack was that of a Russian crude oil tanker, *Shkotovo*, in 2006 well within the EEZ, about sixty nautical miles off the Guinean coast. The attackers used automatic rifles and rocket-propelled grenades and successfully took over the tanker. This showed the vulnerability of vessels in the region and the inclination of the pirates to use high levels of violence. What is most troubling is that very little has been done by the States with territorial jurisdiction to contain the piracy. Thus, in 2012 alone, 17 out of 25 attacks were successful.¹⁸¹

As noted above, not all regions or States in the Gulf of Guinea have been affected by piracy. Also, the nature of the various attacks is not always similar. Some areas are enclaves or trouble spots while other areas are low risk. Examples of low risk areas include Cape Verde and Angola. In fact, despite the high level of traffic of oil tankers in Angolan waters, there are seldom any reported attacks in the area. In fact, the first reported major attack there was that on the oil tanker, *Kerala*, in February 2014.¹⁸² The lower level of corruption in the country and the absence of armed groups seeking a share of the profit of oil production may explain why Angola is low risk. Other low risk areas include Gabon, Ghana, and Sao Tome Principe. However, the level of traffic off the coasts of these countries is relatively low. Also, attacks in the waters of Cameroon and Equatorial Guinea drastically reduced between 2009 and 2014.¹⁸³ Thus, most of the incidents reported are theft from vessels in anchorages and ports.

181. Kamal-Deen A 'The Anatomy of Gulf of Guinea Piracy' (2014) *Naval War College Review* 93, 95.

182. *Ibid*, 96.

183. *Ibid*.

The enclaves are the areas from which the pirates operate, while the trouble spots are areas where attacks are common. The enclaves include Guinea and Nigeria. Many of the pirates operate from Guinea and attack vessels off its coast. Examples of major violent attacks include the attack on *Shkotovo* and *Maersk Belfast* in 2006, *Isola Verde* in 2009 and *Songa Emerald* in 2010,¹⁸⁴ and *Constanza* in 2012.¹⁸⁵ However, the primary enclave is the Niger Delta in Nigeria. The swampy coastal areas in the Niger Delta are among the richest oil and gas regions on the planet,¹⁸⁶ but also host a very impoverished community. This has engendered an armed struggle against the national and local authorities and foreign oil companies. The key players in this struggle are described in the next section. The attacks and clashes with forces of the federal government are quite common that they have become routine. Hence, Guinea and Nigeria are not only enclaves but also trouble spots. Nigeria is both the primary enclave and the most dangerous trouble spot given that in 2008 it accounted for about 80 per cent of all piratical attacks in the Gulf of Guinea.¹⁸⁷ Other trouble spots include Cote d'Ivoire and Sierra Leone where violent attacks are frequently perpetrated against vessels.

184. International Maritime Bureau, Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report 2010 (IMB, London, 2011) 7.

185. *Ibid*, 18.

186. Enemugwem JH 'The Niger Delta of Nigeria: A World Class Oil Region in Africa, 2000-2006' (2012) *Africana* 166, 167.

187. International Maritime Bureau, Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report 2008 (IMB, London, 2009) 2-6.

4.4 Primary Actors Responsible for the Attacks

4.4.1 MEND

The most notorious militant group in Nigeria is the Movement for the Emancipation of the Niger Delta (MEND). It is actually an umbrella association for many armed groups that engage in activities against the local and federal governments and foreign oil companies. They generally seek a share of the oil revenue.¹⁸⁸ This is coined as ‘community interests’, although they mostly perpetrate criminal activities to protect or secure these interests. Initially, they kidnapped foreign workers of oil companies for ransom. The operation was directed by the local MEND leader or commander of an *Okrika* (semiautonomous area within MEND’s jurisdiction).¹⁸⁹ They are also notorious for destroying oil pipelines and attacking offshore oil platforms. Despite the response from the government in hastily creating a joint task force of security agencies, the influence of MEND continued to grow towards the end of last decade, extending their activities to kidnapping and killing naval personnel.¹⁹⁰ Following the attacks on a mobile drilling rig, *Bulford Dolphin*, in April 2007, the tankers, *Mystras* and *Trident VIII*, in May 2007, and the floating production, storage and off-loading unit, *Bonga*, in 2008, the federal government were forced to negotiate with leaders of MEND.¹⁹¹ These incidents supported fears that the sophisticated installations of oil companies were not safe

188. Enemugwem, fn. 174, *supra* p.167.

189. Oguniya IS ‘Domestic Terrorism and Security Threats in the Niger Delta Region of Nigeria’ (2009) 20 *Journal of Social Science* 31, 32.

190. For an overview of the attacks, see Nodland A ‘Guns, Oil, and “Cake”’: Maritime Security in the Gulf of Guinea’ in Elleman BA, Forbes A and Rosenberg D (eds), *Piracy and Maritime Crime: Historical and Modern Case Studies* (Naval War College Press, Newport, 2010) 191-206.

191. International Maritime Bureau, *Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report 2007* (IMB, London, 2008) 66.

from the attacks by local militia population. MEND released a subsequent statement to the effect that it sought to disrupt oil export operations. It boasted about humiliating the Nigerian military and claimed it would even step up the attacks.¹⁹² Nigeria recorded the highest number of attacks against offshore platforms and the attacks impacted the operation of the platforms and floating storage facilities. The federal government then came to an arrangement with these local groups whereby the latter ceased attacking oil installations in exchange for a monthly allowance and training. A formal amnesty was offered in June 2009.¹⁹³

MEND's forces were demobilised and piracy attacks reduced in 2009 to 46 from a high of 60 in 2007. The IMB reported that the attacks continued to reduce in 2010. However, not all groups within MEND were happy with the arrangement. It was alleged that the allowances were not shared equally or some groups were not satisfied with their share. As such, in 2010, some splinter groups announced that they will resume the armed struggle. Piratical attacks therefore became once more prevalent, and in 2011 there were more than 60 attacks in the Gulf of Guinea. This clearly shows that the State with territorial jurisdiction is usually best placed to deal with piracy despite the fact that other States such as the flag States and the home State of the oil companies and expatriates may have more resources. Thus, even where the political leaders of the State with territorial jurisdiction are corrupt and incompetent as it is the case with Nigeria, the issue of piracy may not be effectively tackled without their input. Nonetheless, the arrangement soon fell through as splinter groups complained that MEND

192. Kamal-Deen, fn. 169 *supra* p. 98.

193. Bajpai S and Gupta J 'Securing Oil and Gas Infrastructure' (2007) 55 *Journal of Petroleum Science and Engineering* 174, 175.

commanders were kept in luxurious hotels and mansions while the majority of the fighters remained in poverty. The IMB reported that there were only 3 attacks between April and June 2009, and 7 attacks between October and November 2009.¹⁹⁴ Thus, the number of attacks began to rise by the end of 2009 as many of the MEND fighters became frustrated and disillusioned with the distribution of the allowances allocated by the federal government and oil companies. It has been intimated that there was a sharp divide between the younger fighters and the older leaders or commanders.¹⁹⁵

4.4.2 The Bakassi Pirates

Although Nigeria is the primary enclave in the Gulf of Guinea, piratical attacks have been perpetrated in Nigerian internal waters as well as within the EEZ by two groups based in neighbouring Cameroon. They include the Bakassi Freedom Fighters (BFF), and the Africa Marine Commando (AMC). The BFF is a group of Nigerians living in the peninsula of Bakassi at the extreme Eastern end of the Gulf of Guinea that was returned to Cameroon by Nigeria. The BFF opposes the transfer of sovereignty to Cameroon which was based on a decision of the International Court of Justice.¹⁹⁶ In 2008, they attacked a supply vessel, the *Sagitta*, within Cameroon's territorial sea, kidnapped and kept the crew for 11 days until a ransom was paid. The AMC on its part attacked a Chinese fishing vessel in 2010, and kidnapped and held the crew until a ransom was paid. However, unlike the Nigerian government, the Cameroonian government has reacted very forcefully to the piratical attacks

194. IMB, fn. 179 *supra* p.31-33.

195. Kamal-Deen, fn. 169 *supra* p. 99.

196. *Cameroon v Nigeria*, ICJ Reports 2002, 303.

and has succeeded in dismantling the groups within its territory. Thus, there have been very fewer attacks perpetrated by these groups in Cameroon. Nonetheless, it is claimed that the AMC was involved in the kidnapping of workers of oil companies in 2011.¹⁹⁷

4.4.3 Pirates in Benin

Benin is the second most volatile area after Nigeria. The aforementioned groups operating in the Niger Delta expanded their enclave in Benin and carried out several attacks off the coast of Benin in the middle of 2011. The pirates entered port areas of Benin and hijacked vessels. They even took the vessel, *Aristofanis*, to sea and discharged its cargo. This was followed by the hijacking of the oil tanker, *Duzgit Venture*, off the coast of Gabon. The pirates operating from Benin seized the vessel and ordered the captain to sail towards a barge where they planned to transfer the oil. However, they were unable to meet the barge. The pirates then disembarked and kidnapped the captain and another crew member and sailed four kilometres away to their enclave.¹⁹⁸ What was worrying was that the pirates were able to sail across the coastal waters of five different States without any navy attempting to stop them. Thus, this incident raised questions about the ability of the States with territorial jurisdiction in the Gulf of Guinea to contain piracy in the region. This in turn raises questions about the practicality of limiting the enforcement jurisdiction to States with territorial jurisdiction.

Nonetheless, the president of Benin showed political willingness by entreating the secretary-general of the United Nations to request the support of the international community. He also called upon the Nigerian government to help Beninese forces in combating piracy in its

197. Kamal-Deen, fn, 169.

198. IMB, fn. 179 *supra* p. 18.

waters. This led to the launching of Operation Prosperity that involved a joint patrol of Beninese and Nigerian forces patrolling the Benin seas. Benin had the operational command and Nigeria had the tactical command. It was reported a few months after Operation Prosperity was launched that the number of attacks off the coast of Benin had decreased drastically.¹⁹⁹ This demonstrated that a multilateral approach may be more effective in combating piracy, especially in cases where the State with territorial jurisdiction does not have sufficient resources to contain piracy off its coast. Interestingly enough, as the piratical attacks reduced following the launching of Operation Prosperity, the number of attacks off the coast of neighbouring Togo increased. There were attacks not only off the Togolese coast but also in ports. The IMB also reported that Togo had suddenly become a major trouble spot with as high as 15 attacks in 2012. As such, the pirates had simply moved their enclave from Benin to neighbouring Togo. This is due to the short distance between the coasts of Benin and Togo. Nonetheless, it is uncertain why the joint forces under Operation Prosperity did not also treat both coasts as a single operational area.

The worst attacks were perpetrated in September 2011. Two tankers, *Mattheos I* and *Northern Bell*, involved in a tanker to tanker shipment were hijacked about sixty nautical miles off the coasts of Benin and Togo.²⁰⁰ The crew of the latter vessel were able to overpower the pirates and take control once again. However, the pirates on the *Mattheos I* sailed it to an unknown port. The pirates who lost control of the *Northern Bell* returned to Togo and attacked and hijacked a chemical tanker, *Abu Dhabi Star*, flying the Singaporean flag. The pirates soon moved further into the Gulf of Guinea and hijacked *Orfeas* in October

199. International Maritime Bureau, Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report 2012 (IMB, London, 2013) 5, 6, 21.

200. *Ibid*, 25.

2012 off the coast of Cote d'Ivoire. They were able to take the *Orfeas* to the Niger Delta, about two thousand kilometres away. They then unloaded the cargo and released the vessel.

The expansion of the enclave to Togo and Cote d'Ivoire demonstrates the transnational character of the crime of piracy in the Gulf of Guinea. It also shows why it has been very difficult for a single State to contain the pirates. They operate from different States and attack vessels on the high seas; or they hijack vessels in ports and sail them across the high seas to the Niger Delta. The pirates therefore have a good grasp of the geography and shipping profile of the Gulf of Guinea since they have been able to take the hijacked vessels out of the reach of the forces of the State with territorial jurisdiction. This makes it imperative for other States affected to intervene. As such, a multilateral approach is the only effective way of containing piracy in the Gulf of Guinea. Nonetheless, this does not imply that all States must exercise universal jurisdiction simultaneously or be able to arrest and prosecute suspected pirates. As shown in Chapter 3, this approach causes confusion and engenders anarchy. The multilateral approach adopted by the Beninese government is more appropriate given that it involved setting up a joint force with the State with territorial jurisdiction having operational command, and the State (whose interests have also been adversely affected) with more resources having the tactical command. Also, if the consent of the State with territorial jurisdiction is not obtained, it is uncertain how another State may justify the arrest and prosecution of the pirates where the crime was committed within the internal waters of the State with territorial jurisdiction.

4.5 The Multilateral Approach

Member States of the Economic Community of Central African States (ECCAS), an initiative geared towards promoting collective autonomy and harmonious cooperation between central African States, adopted a Protocol on Maritime Security in 2009. A joint force was created and ECCAS was divided into zones facilitating the monitoring of the Gulf of Guinea. Joint patrols are required to act in accordance with the Yaoundé Code of Conduct. Member States of the Economic Community of West African States (ECOWAS), an organisation that seeks to achieve collective self-sufficiency for West African States, adopted the Protocol and set up a pilot Zone E that comprises the States most affected by the piratical attacks: Benin, Niger, Nigeria and Togo. However, several problems have been encountered in the implementation of the Protocol including poor communication between the armed forces of the respective States, lack of funding, and maritime boundary disputes.²⁰¹ These have made the joint patrol in Zone E especially very ineffective.

Apart from the efforts of West and central African States, the United States has also been able to help. In 2007, it set up the Africa Partnership Station that harbours swift and dock landing ships that are continuously present in the Gulf of Guinea. It also facilitates joint exercises between US forces and those of the affected States in the area, and helps in capacity building. It has also enhanced the implementation of the strategic goals of the US Africa Command (AFRICOM). The latter is a combatant command that was created for Africa in 2007 by the Bush administration. It is responsible for the military relations between the US and all African States, except Egypt. It took over the responsibilities of the US European

201. Kamal-Deen A and Tsamenyi M 'Fault Lines in Maritime Security: Analysis of Maritime Boundary Uncertainties in the Gulf of Guinea' (2013) 22 *African Security Review* 95, 96-100.

Command for West Africa (EUCOM), the US Central Command for East Africa (CENTCOM), and the US Pacific Command for islands off the coast of East Africa and the Indian Ocean (PACOM). It built upon the Pan Sahel Initiative of 2004 that was focused on counterterrorism and arms and drug trafficking.²⁰² The Africa Center for Strategic Studies at Fort McNair in the US also seeks to meet non-military maritime security needs in the Gulf of Guinea.

Boots notes, however, that the counterpiracy measures implemented at a multilateral level may only be successful if the States within the Gulf of Guinea are able to effectively prosecute the pirates and keep them in appropriate prisons. However, this may only be possible if the international community provides the necessary support to ensure that there are sufficient resources for the prosecution of the pirates, while corruption and mismanagement of local resources are minimised.²⁰³ This is because piracy in the area is delocalised with many splinter groups, and they are able to expand their enclave to other States. In this light, the European Union set up in January 2013 the Critical Maritime Routes in the Gulf of Guinea (CRIMGO) project with the goal of improving the safety and security off the coasts of seven States in the Gulf of Guinea. In May 2014, the Chinese People's Liberation Army Navy carried out joint antipiracy drills with military forces of Cameroon in the Gulf.²⁰⁴ As noted above, these efforts are not sufficient where the States with territorial jurisdiction do not show the requisite commitment. For example, of all the States in the

¹⁹⁰ For a review of the activities of AFRICOM, see McFate S 'US Africa Command: A New Strategic Paradigm?' (2008) 1 *Military Review* 88; McFate S 'US Africa Command: Next Step or Next Stumble?' (2008) 202. *African Affairs* 111.

²⁰³ Boot, fn. 159 *supra* p. 105.

²⁰⁴ Kamal-Deen, fn. 189 *supra* p. 109.

region, only Liberia and Togo have the appropriate piracy legislation. These States are signatories of UNCLOS and as shown in Chapter 2, they are required by the latter Convention to enact laws that cover all aspects of piracy. However, only Liberia and Togo have been able to do so, and they are not even trouble spots. The primary enclave and main trouble spot, Nigeria, only began the process of enacting legislation to fight piracy and other maritime crimes in January 2013.

Also, of all the States in the region, only Cote d'Ivoire is a party to all the instruments under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (SUA). This has been only since 2012. The oil producing States in the region (Nigeria, Angola, Gabon, Cameroon, and Congo) have not ratified the SUA Fixed Platform Protocol. The States that have ratified the SUA Convention (not all its Protocols) such as Benin, Ghana, Nigeria and Cote d'Ivoire are yet to incorporate the terms of the Convention into their national laws. This explains why States may patrol the high seas and their coasts but are unable to fully prosecute suspected pirates since they do not have the requisite judicial and prosecution structures. Even when they arrest the pirates, they cannot charge them with the criminal offences in the penal laws since the latter do not provide for a broad definition of piracy. Despite the lack of requisite commitment, the international planned crime of piracy is more harmful to these States.²⁰⁵ Interference of maritime transportation and access lower financial investment in specific areas, limit energy flows, international business, essential infrastructure, and the safeguarding of marine assets in addition to impeding security, law enforcement and humanitarian functions. The Gulf of Guinea is also one of the biggest sources of fossil fuels, in addition to being the area's chief

205. Stewart, M Patrick, How Transnational Crime Hinders Development—and What to Do About It, June 26 2012, *The internationalist*, Council Foreign Relations, 7.

consumer market. The States in this area export minerals (like diamonds), timber and agricultural products (including cacao and sorghum) via the Gulf of Guinea, which make the waters of the Gulf very important to the economic survival of the States. Incidents in the maritime sphere also impede access to undersea areas and assets, like fibre optic cables and energy and mineral reserves for oil and gas.

As such, it is incumbent upon States in the Gulf of Guinea to devise and fully implement a multilateral strategy. The intelligent norm has been that ‘failed States’ or ‘ungoverned spaces’ are requisite breeding grounds for illegal actions such as terrorism, drug trafficking, arms smuggling, and piracy. Furthermore, commentators such as Stewart Patrick have contended that illegal players may actually discover that ‘vulnerable but operative’ States are more feasible surroundings to function in than weakened States, given that the vulnerable States, in spite of their issues, are related with the international economy and provide more opportunities in terms of cargo vessels sailing across their waters.²⁰⁶ The main enclaves and trouble spots in the Gulf of Guinea are vulnerable but operative States.

4.6 Summary

This Chapter has examined the phenomenon of piracy in the West coast of Africa, with emphasis on the Gulf of Guinea. It has explained the high level of piratical attacks and identified the security challenges confronting the States in the region. It was stated that for some time now, the Gulf of Guinea has been one of the world’s main oil and gas exploration hotspots with eight States producing a tenth of all oil reserves in the world, and more than 5 million barrels of crude oil per day. It was also noted that most of the populations in these

206. Stewart, Patrick, *Weak Links, Fragile States, Global Threats, and International Security*, 2011, Oxford University Press, 8

States are impoverished, especially those of the Niger River Delta region, where most of the oil fields are located. This is because the local officials are corrupt and largely rely on the profits from foreign oil and gas producers. This has caused resentment in the region with the local people which, coupled with the region's lawlessness, has sustained the armed struggle waged by local militias. This in turn has led to several armed attacks against oil tankers on the high seas, in internal waters, and in ports. Thus, the occurrence of piracy is not simply due to lack of security at sea but an incidental product of state failure and corruption. However, piracy in the area is delocalised, with many splinter groups that are able to expand their enclave to other States. This implies that an exclusive focus on the State with territorial jurisdiction would be ineffective in combating piracy and it is imperative that a multilateral approach is adopted. Nonetheless, this does not imply that the doctrine of universal jurisdiction is more appropriate.

It was shown that despite several international counterpiracy strategies, including AFRICOM involving the US, and EUCOM and CRIMGO involving the European Union, piracy may only be successfully contained if the States within the Gulf of Guinea are able to effectively prosecute the pirates and keep them in appropriate prisons. Thus, piratical attacks are still relatively high because the States in the Gulf do not show the requisite commitment. For example, of all the States in the region, only Liberia and Togo have the appropriate piracy legislation; only Cote d'Ivoire is a party to all the instruments under the SUA Convention; and the oil producing States in the region (Nigeria, Angola, Gabon, Cameroon, and Congo) have not ratified the SUA Fixed Platform Protocol. It was then shown that the multilateral approach adopted by the Beninese government is more appropriate given that it involved setting up a joint force with the State with territorial jurisdiction having operational command, and the State with more resources having the tactical command. This supports the

argument developed in Chapter 3 to the effect that piracy may be effectively contained where extraterritorial jurisdiction is limited only to cases where the crime allegedly committed constitutes a clear violation of a peremptory norm or *jus cogens* and where the State with territorial jurisdiction or the flag State consents to the exercise of extraterritorial jurisdiction by another State. It also reinforces the argument in favour of adopting a doctrinal or positivist approach, as well as cosmopolitanism, whereby the flag State or home State of the company that owns the vessel would have jurisdiction if the attack occurred in a place where no other State has territorial jurisdiction.

CHAPTER 5

PIRACY IN THE GULF OF ADEN

*Certainly, the agreements in to which states enter with multinational corporations may be viewed as an exercise of their sovereignty and not as an impairment of it. If many countries prefer to provide multinational corporations with access to their territory because of advantages they believe it brings them in providing capital, employment or an infusion of technology, this is because they choose to do so.*²⁰⁷

5.1 Introduction

This Chapter examines the unique case of piracy in the Gulf of Aden. It places emphasis on piratical attacks off the coast of Somalia in the Horn of Africa. Somalia is a failed State after decades of civil war, political stalemate, and international terrorism. Pirates have onshore support from corrupt officials or terrorist organisations in order to secure safe access to ports. As such, this is the case of a State with territorial jurisdiction that does not have the capacity to arrest and prosecute pirates. This Chapter seeks to determine whether the doctrine of universal jurisdiction may be appropriate in combating piracy in such a case. It follows from Chapter 4 where it was shown that universal jurisdiction is not a suitable alternative given that it provides for a dangerous encroachment on the sovereignty of the State with territorial jurisdiction.

207. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977), 262-263

This Chapter begins with a brief description of the Gulf of Aden and the paradigm of piracy in the area. It then discusses the proximate and root causes of piracy and identifies some of the key actors. It concludes with an analysis of international efforts both within and outside the formal framework of UN resolutions. The successes and shortcomings of these efforts are analysed in light of the question of the most appropriate type of jurisdiction.

In summary Chapter 5 aims to:

- Explain the high level of piratical attacks in the Gulf of Guinea and identifies security challenges facing States in the region
- Analyse the multilateral approach that has been adopted by States in the region to contain piracy

In pursuing these aims, Chapter 5 seeks to address the following question and concern of the dissertation research as stated in Chapter 1 such that ... *given that the coastal States in the Gulf of Aden and Gulf of Guinea are largely poor, weak, lacking in resources, and suffer from corruption in the public sphere, we must ask whether regional frameworks of littoral and landlocked countries facing the same challenges can be expected to prove effective in the attempt to implement anti-piracy policies.*²⁰⁸

5.2 The Gulf of Aden

Historically known as the Gulf of Berbera, this Gulf was named after a seaport city in Yemen whose natural harbour was used as the transshipping point for trade *via* the Red Sea in the 1st

208. See Chapter 1 *supra* p.20, para 2

century BC.²⁰⁹ Since the Iron Age many rulers have sought to possess the city given its strategic position on the sea route between Europe and India.²¹⁰ As such, the city and the Gulf have seen attacks against vessels throughout history. The Gulf is located between Somalia in the Horn of Africa, and Yemen on the south coast of the Arabian Peninsula. As noted above, it connects with the Red Sea via the Bab-el-Mandeb strait. The strait has been described as a maritime ‘chokepoint’²¹¹ serving as a strategic shipping route between the Mediterranean Sea and the Arabian Sea in the Indian Ocean through the Suez Canal. Traffic in the Gulf is high and has been estimated at about 21,000 vessels each year.²¹² It is therefore one of the most important sea lanes on the planet and gateway for marine transport between the United States, the Middle East and Asia.²¹³ Eight percent of world trade passes through the Suez Canal and about three million barrels of crude oil pass through the Gulf each day.²¹⁴

The high level of traffic in the Gulf and the high-value cargoes may therefore explain why it is a piracy hotspot. Equally, the prevalence of automated vessels with very few people on

209. Dumper M and Stanley BE (Eds), *Cities in the Middle East and Africa: A Historical Encyclopaedia* (ABC-CLIO, Santa Barbara, 2007) 9.

210. Inalcik H and Quataert D (Eds), *An Economic and Social History of the Ottoman Empire: 1300-1914* (Cambridge University Press, Cambridge, 1994) 326.

211. Coito JC ‘Pirates vs Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden’ (2013) 173 *California Law Review* 173, 179.

212. Thomas AR, *Supply Chain Security: International Practices and Innovations in Moving Goods Safely and Efficiently* (Greenwood, Santa Barbara, 2010) 148.

213. Coito, fn 199 *supra* p. 179.

214. World Bank, *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation* (World Bank, Washington DC, 2013) 15.

board explains the sudden rise in the number and severity of piratical attacks over the last decade. Onuoha and Ezirim note that the attacks increased from 8 in 2004 to 116 in 2009. Also, 177 hostages were taken in the Gulf in 2007, and 857 in 2009.²¹⁵ In 2012 alone, 212 hostages were taken.²¹⁶ Ploch *et al* estimate the cost of piracy on the global economy at between 7 and 12 billion US dollars.²¹⁷ They state that losses are being sustained by many businesses because many commercial carriers have decided to circumnavigate the Cape of Good Hope in a bid to avoid the Somalian coast. The World Bank gives a good example of the options facing vessels that intend to sail from Liverpool in the UK to the Mombasa port in Kenya.²¹⁸ If they have to use the shortest route of 6,363 nautical miles, they would have to go through Gibraltar and the Suez Canal. This exposes their cargo and crew to piratical attacks in the Gulf of Aden. Thus, they would be forced to employ the longer route of sailing around the Cape of Good Hope which is 8,981 nautical miles. This in turn causes delays and increases the cost of fuel.²¹⁹

Pirates also prevent the transportation and distribution of humanitarian aid, especially to the millions of Somalians affected by drought that rely exclusively on food aid.²²⁰ Also, the tourism industry in the Horn of Africa has been adversely affected with the World Bank

215. Onuoha F and Ezirim G 'Sea Piracy and Maritime Security: The Problem of Intervention in the Suppression of Piracy off the Horn of Africa' (2010) 7 *Journal of Marine Research* 48, 48-49.

216. Coito, fn. 199 *supra* p.180.

217. Ploch, L *et al* 'Piracy of the Horn of Africa' (2011) *Congress Research Service* 1, 13.

218. World Bank, fn. 202 *supra* p. 16.

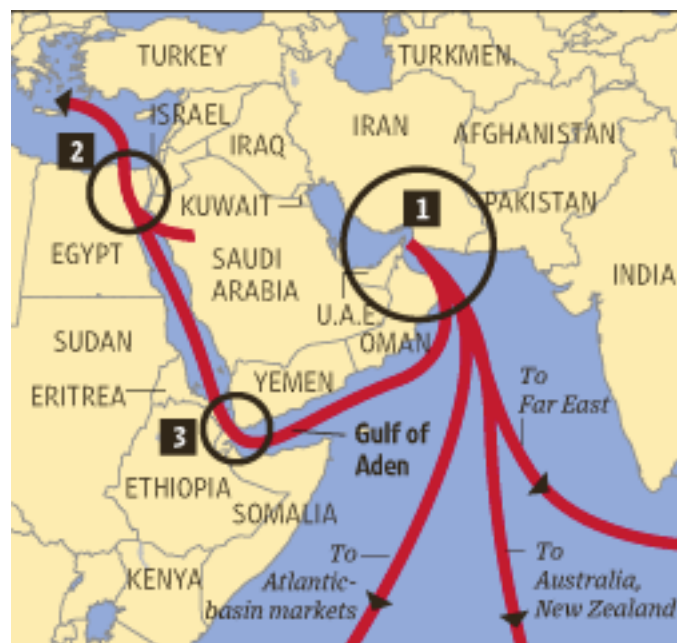
219. *Ibid.* 24.

220. *Ibid.* 15.

noting that visitor arrivals in affected countries (including East African countries) declined by 6.5 per cent between 2006 and 2013.²²¹ This concerns mostly high-income visitors from Europe and North America.

The International Maritime Bureau (IMB) noted in 2009 that most of the attacks in the Gulf take place off the Somalian East coast in the Indian Ocean and off the coast of Oman. The pirates, however, are mostly based in Somalia. *Figure 2* below shows the location of these key areas. It also shows that the Gulf of Aden is a key world trading route allowing access to and from the Suez Canal. It is, therefore, a vital and important waterway integral to the world economy as regards the transportation of Persian (Iranian) oil.

Figure 2. Map showing the vital maritime shipping routes surrounding Somalia



221. *Ibid.* 36.

5.3 Historical Background

Although there were occasional piratical attacks reported in the Gulf in 1950s,²²² few attacks were reported until the 1990s. The opposition movement in the 1980s and early 1990s, the Somali National Movement, often generated income from hijacking vessels for ransom and/or reselling the cargo.²²³ However, in most cases at the time, the pirates did request a ransom. They mostly attacked fishing vessels and stole catches. Hijackings for ransom effectively began at the turn of the 21st century and has since reached epidemic proportions. As noted above, the rampant attacks occur close to the Somali coast and coastline of India, along the Arabian Sea, and down in to the Gulf of Aden which has been termed the ‘pirate alley.’²²⁴ However, the entire region surrounding Somalia is now plagued by piracy. The area of operation relates to an ‘ever-expanding triangle.’²²⁵ This triangle stretches from Yemen and Oman to Seychelles and the United Republic of Tanzania, and even to Mozambique. This is because the pirates use hijacked vessels as ‘mother ships’ to carry out other attacks further off from the coast of Somalia, in the region of less than 200 nautical miles from India and 120 miles from Maldives.²²⁶ As such, they operate well beyond the territorial jurisdiction of any of the States in the Gulf of Aden. This was initially a Somali problem given that the pirates initially focused on attacking ships in the Western Indian Ocean, off Somalia’s

222. Murphy MN, Somalia - *The New Barbary? Piracy and Islam in the Horn of Africa* (Columbia University Press, New York, 2011) 11.

223. World Bank, fn. 202 *supra* p. 180.

224. Weintrit A and Neumann T, *Safety of Marine Transport: Marine Navigation and Safety of Sea Transportation* (Taylor & Francis, London, 2015) 33.

225. *Ibid.*

226. United Nations, Security Council, S/2011/30

Eastern coast. However, the ships which operated on that part of the sea moved further out to the high seas in order to avoid these attacks. The pirates then shifted their focus to the wider Gulf of Aden which is close to Somalia's northern shoreline, this being a vital waterway of the world economy where there is a very high concentration of merchant ships transiting. The reasons why piracy suddenly reached epidemic proportions at the turn of the 21st century may only be understood in the full context of political and economic factors. These factors are more poignant in the case of the piracy in the Gulf of Aden, when compared to piracy in the Gulf of Guinea, which is loosely connected to political factors. These factors point to the fact that the participation of the Somalian Government is imperative for the development of any durable solution to the problem of piracy in the Gulf. The next section discusses these factors and shows how they constitute the proximate and root causes of the sharp rise in piracy at the turn of the 21st century.

5.4 Proximate and Root Causes

In 1991, the ousting of President Said Barre did not only mark the end of a totalitarian and regime but also marked the onset of the gradual fragmentation of the Somali Democratic Republic along tribal lines, and the genesis of a prolonged and very violent civil war.²²⁷ The country was subsequently largely split into three entities, namely Puntland, Somaliland and Southern Somalia. Puntland is in the north-east and occupied by the Hartri/Darood clans. It is governed from the city of Garowe. The former President belonged to these clans, as well most members of the cabinet until 1991. Somaliland on the other hand is in the North-West and occupied by the Isaaq and Dir clans and governed from the city of Hargeisa. Southern

227. See Walls M 'The Emergence of a Somali State: Building Peace from Civil War in Somaliland' (2009) 108 *African Affairs* 371, 385-389.

Somalia is the most disorganised of the three entities. There are no state structures and designated political decision-makers. Local war lords determine education, health and security policies.²²⁸ The UN Security Council noted that even though Puntland was more stable and had better structures, its government comprised some rogue elements who profited from piracy rather than support efforts to eradicate the phenomenon.²²⁹ The state of Puntland was set up in 1998 with General Abdulahi Yussuf Ahmed as leader. He later on became the President of the patched up Transitional Federal Government of Somalia between 2004 and 2008. He took pride in building a strong military and police force. However, many subjects of these security forces became rebels and pirates at night, thereby enabling pirates to enjoy a high standing in the community.²³⁰ Within the same period, the country's navy fell apart and disbanded. As a result Somalia's coast line was left unprotected, and fishing vessels from other countries started to partake in illegal fishing in the unprotected region. In light of the encroachment by foreign fishing vessels, piracy in the region has in some instances been described as 'a reactive expression of self-defence against international illegal fishing that robs Somali fishermen of the means to make a living.'²³¹ This description is favoured by many Somalians but disputed in many quarters on the grounds that although illegal fishing by foreign trawls was occurring at an economically relevant scale, it is uncertain whether fishing

228. See Hohne MV 'Political Identity: Emerging State Structures and Conflict in Northern Somalia' (2006) 44 *Journal of Modern African Studies* 397, 400-406; Weber A 'State Building in Somalia – Challenges in a Zone of Crisis' in Bruchhaus E and Sommer MM (eds), *Hot Spot Horn of Africa Revisited: Approaches to Make Sense of Conflict* (Munster, 2008) 14-27.

229. Rudloff B and Weber A 'Somalia and the Gulf of Aden' in Mair S (Ed), *Piracy and Maritime Security* (SWP, Berlin, 2011) 35.

230. *Ibid.*

231. *Ibid.* 37.

represents an important source of income to local communities. Also, there are other alternative sources of income; fishing accounted for just 2 per cent of the country's Gross National Product (GNP) in 1990 when the number of piratical attacks became alarming.²³² As such, a combination of political and economic factors, including overfishing by foreign vessels, high unemployment, corruption, civil war, and the neglect of coastal regions by political authorities led to the unprecedented surge in piratical attacks. Somalia is therefore a very good example of a failed State that is unable to offer security, healthcare, and security to its citizens. It is also unable to collect taxes from foreign fishing vessels, thereby drastically limiting its resources and undermining its legitimacy. Given that there are not any rules, pirates have more control even than the ruling Transitional Federal Government. The law enforcement agencies are small and the judicial systems face a severe lack of assets. Not only are the number of lawyers and judges and even imprisonment facilities limited, there is no access to even primary items and machinery such as communications systems, computers and printers; actually in many situations even the essential office supplies are also not present.

Due to the sudden existence of an unprotected territorial water space, ships from other countries began dumping toxic waste, including radioactive nuclear waste in the area²³³. As such, in this case, the State with territorial jurisdiction was literally unable to exercise enforcement jurisdiction and it became imperative for the international community to step in and deal with the pertinent and growing problems of illegal fishing and dumping. However, given that this was a slow process, some local fisherman resorted to taking up arms and

232. World Bank, *Somalia - From Resilience towards Recovery and Development: A Country Memorandum for Somalia* (World Bank, Washington DC, 2006) 26.

233. Lewis A, *Security, Clans and Tribes: Unstable Governance in Somaliland, and the Gulf of Aden* (Palgrave Macmillan, New York, 2015) 97.

attacking commercial ships passing through the region. This was done as an attempt to stop the dumping of toxic waste in their territorial waters and the illegal fishing. However, the resultant effect was that violence was understood to be the proximate solution to problems. Moreover, the only people generating income were soldiers being paid by the Transitional Federal Government, members of the terrorist group, al-Shabbab, and pirates that engaged in hostage taking.

Although the nexus between piracy, illegal fishing and toxic waste dumping has not been satisfactorily established, piracy has in essence become an organised, lucrative and attractive criminal activity undertaken for heinous ends within the war economy of Somalia. Illegal fishing and piracy were the most lucrative businesses in addition to human, drugs and arms trafficking, and roadblocks.²³⁴ As noted above, this is good example of a case where the State with territorial jurisdiction is unable to enforce both its domestic laws and international law to arrest and prosecute pirates. In fact, senior members of the government allegedly profited enormously from the war economy and foot-soldiers either became part-time pirates or joined local militia in order to ensure a stable income.²³⁵ Thus, the only way in which piracy in the area, which is quite an important trade route, could be contained was by the invocation of universal jurisdiction by other States with more resources. However, even in such an instance, a single State with sufficient resources to combat the pirates on the high seas would certainly be unable to provide the requisite comprehensive solution to the intricate and complex problems. The solution must necessarily deal with the displacement and wave of refugees, the collapse of social and family structures, and culture of violence. Thus, although a State invoking universal jurisdiction may provide security

234. Security Council, Report of the Monitoring Group on Somalia Pursuant to the Security Council Resolution (1853(2008), S/2010/91, 2010) 34-38.

235. Marchal R 'Warlordism and Terrorism: How to Obscure an Already Confusing Crisis? The Case of Somalia' (2007) 83 *International Affairs* 1091, 1104.

to the merchant ships at sea, it would not address the root causes, and the pirates would simply move their enclave. In other words, until southern Somalia and Puntland are stable, the heavy-handed intervention by another State or the international community will not provide a durable solution. This implies that the State with territorial jurisdiction, the Federal Government of Somalia or the three entities, must be involved in the process. It equally implies that universal jurisdiction does not ensure a viable outcome since the consent of the State with territorial jurisdiction is imperative.

5.5 Primary Actors

There is so much confusion and chaos in Somalia that it is difficult to identify and categorise pirate groups according to political motives or regional enclaves as it is the case in the Gulf of Guinea. There are several enclaves, diverse motives and a wide variety of actors. These also make it difficult to characterise piracy in the region in light of a steadfast definition. Some of the attacks occur in internal waters, while others occur on the high seas but are coordinated from the mainland. Nonetheless, this analysis is limited to piratical attacks committed for private ends on the high seas or within the contiguous zone or EEZ.

There are more pirate groups in Puntland and Central Somalia than in Southern Somalia that is controlled by warlords and terrorist organisations. The pirate groups are usually small and supported by investors who may hail from other parts of the country or even abroad. The most important pirate groups in Central Somalia are from the Hawiye Habar Gidir clan, and

specifically from the Sacad and Saleeban sub clans.²³⁶ The groups that dominate this criminal industry have ties to insurgent and terrorist organisations. Sometimes they use the same fighters and/or share the ransom proceeds. Thus, these proceeds have allegedly financed the operational and logistical needs of terrorist organisations in the country.²³⁷

Given that none of the ransom demands have had a political dimension, it has been concluded that piracy in the Gulf of Aden is devoid of ideological and political motives.²³⁸ Also, the pirates are not Islamists since they are not reluctant to attack ships owned or controlled by Muslims and carry out attacks during Islamic holidays or Ramadan. Nonetheless, in some cases, the pirates attack vessels based on directives from insurgent and terrorist organisations. They then share proceeds with these organisations and require permission from the latter in order to carry out attacks in given areas. As such, although the terrorist organisations are not pirate groups per se (they do not perpetrate attacks for private ends), they largely support the disparate pirate groups across the country and sometimes require a fee from the pirate groups.

5.5.1 *Al-Shabaab*

This is a Somalian terrorist group that has pledged allegiance to the international terrorist organisation, al-Qaeda. Also known as the Mujahedeen Youth Movement and Party of the Youth, it is part of the Islamic Courts Union that disbanded after it was routed by the

236. Shortland A and Vothknecht 'Combating Maritime Terrorism' (2011) 27 *European Journal of Political Economy* S133, S134.

237. *Ibid.*

238. *Ibid.*

Transitional Federal Government of Somalia in 2006.²³⁹ It was somehow able to maintain a group of about 9000 militants under a single command and was also able to hold parts of the Somali capital city, Mogadishu for about 5 years. It now currently holds only a few rural villages.²⁴⁰

The leaders of the group hail from different clans and regions and were mostly trained in Afghanistan and the Middle East. However, the foot soldiers were trained locally and sometimes recruited by force. Nonetheless, the latter are mostly concerned with local problems and nationalist issues. This may explain why piracy was said to be linked originally to illegal fishing. Many local fighters sought to stop overfishing by foreign trawls went on the seas with arms and attacked these trawls. Given al-Shabaab's extensive network, many warlords and criminal gangs have forged alliances with the terrorist organisation. This facilitates land-based kidnappings of expatriates and air workers. It has been noted that since 2008, members of the al-Shabaab have not engaged in sustained combats with individual pirate groups and have instead cooperated in many areas.²⁴¹ Al-Shabaab has for example acted as a secondary market for hostages of pirates that happen to have a political value. On the other hand, al-Shabaab uses pirate groups to perpetrate political violence by hijacking ships flying the flags of certain countries.²⁴² Also, al-Shabaab trains some pirates and allows the latter to use the ports they control. Portions of the ransom are then paid to the terrorist

²³⁹. Hansen SJ, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group* (Oxford University Press, Oxford, 2015) 2-3.

²⁴⁰. *Ibid.*

²⁴¹. Marchal R 'A Tentative Assessment of the Somali Harakat Al-Shabaab' (2009) 3 *Journal of East African Studies* 381, 403.

²⁴². World Bank, fn. 220 *supra* p. 73.

organisation. However, Bahadur has argued that the Islamic Courts Union (al-Shabaab's predecessor) had forbidden piracy on the grounds that it was contrary to Islamic law.²⁴³

Sharia law forbids abduction, violence against hostages and extortion. Nonetheless, Bahadur does not state that al-Shabaab has interpreted Islamic law in a similar manner since breaking away from the Islamic Courts Union.

There is evidence that there have been violent conflicts between pirate groups and al-Shabaab where the former have without permission hijacked vessels in ports controlled by the latter or have attacked ships owned by suppliers and financiers of al-Shabaab.²⁴⁴ However, there is also evidence that al-Shabaab has trained pirate groups and benefited financially from the piratical attacks they perpetrated.²⁴⁵ One of the pioneers in piratical attacks in Somalia, Mohamed Abdi Hassan Afweyne, for example negotiated an agreement with al-Shabaab in 2009, whereby the terrorist organisation agreed not to interfere with the activities of pirate groups within the Harardheere area in exchange for the payment of \$100,000 per vessel that was successfully ransomed.²⁴⁶ As such, *MV Albedo* was hijacked in November 2010 while anchored at Haradheere and did not move far away from its original position during the prolonged ransom negotiation, implying that al-Shabaab and the pirates were working

243. Bahadur J, *The Pirates of Somalia: Inside Their Hidden World* (Random House, New York, 2011) 6.

244. World Bank, fn. 220 *supra* p. 74.

245. *Ibid.*

246. *Ibid.*

together or the latter had obtained permission from al-Shabaab to keep the hijacked vessel within the area.²⁴⁷ The pirates in the area and al-Shabaab are said to have sub clan ties.²⁴⁸

From the above, it may be contended that ties between pirate groups and terrorist organisations such as al-Shabaab enabled the pirate groups in Somalia to develop both horizontally and vertically. The terrorist organisations have enabled the pirate groups to acquire sophisticated weapons and gadgets to enable them attack vessels deep into the Gulf of Aden and even the Indian Ocean. They are able to use satellite phones and rocket-propelled grenades and convert fishing vessels into ‘mother ships’ that can freely survey the coast and target cargo vessels or bulk carriers. They have also developed vertically in regard to the number of attacks they are able to perpetrate. As noted above, the allied terrorist organisations turn a blind eye to the pirate groups allowing the latter to attack not only cargo vessels and bulk carriers but also fishing trawls, tugboats and even ships from the World Food Programme (WFP) of the UN.²⁴⁹ The WFP ships roughly around 30,000 to 40,000 metric tons of food assistance every month to the Horn of Africa. Due to piracy, it became very expensive and dangerous to send food assistance to Mogadishu. In July 2007, the IMO and WFP issued a joint report expressing serious concern over the collapsing maritime security situation along the Somali coast and calling on the UN to act to prevent and suppress acts of piracy in the region. Before the 1990, vessels were relatively safe when they kept at least 50 nautical miles from the coast. However, with the horizontal and vertical expansion of

247. Shortland A and Varese F ‘The Business of Pirate Protection’ (2012) EUSECON Economics of Security Working Paper 75.

248. *Ibid.*

249. Onuhua F ‘Sea Piracy and Maritime Security in the Horn of Africa: The Somali Coast and Gulf of Aden in Perspective’ (2009) 18 *African Security Review* 36, 36.

piracy, vessels were advised to keep at least 200 nautical miles from the coast,²⁵⁰ that is out of the EEZ.

5.6 The Question of Multilateralism

Piracy in the Gulf of Aden provides a good case for multilateralism given that the State with territorial jurisdiction, Somalia, is a completely failed State with no political leadership and war lords governing different zones. However, the piratical attacks adversely affect international trade and no durable solution may be had from the State of Somalia. In fact, the international insurance company, Lloyds, suggested that companies all around the world would have to pay a ‘piracy tax’ in order to maintain the global trading networks and prevent an international economic meltdown.²⁵¹ This shows that the economies of different countries are interdependent, and if Somalia is unable to combat piracy in the Gulf of Aden, other countries are going to suffer. Property and ships of companies operating in other States are threatened, as well as important sea lines and the free flow of trade. With more than 200 ships passing close to the Somali coast every day, piracy in the area is a concern to major players in the global economy. Many industries have been negatively impacted, including oil and gas and fishing. Also, the lives of the citizens of several countries are put in jeopardy.

However, no State has been able to invoke universal jurisdiction in order to arrest and prosecute the pirates operating in the Gulf of Aden. As mentioned in the previous section, the surge of piratical attacks in the region is a symptom of a very complex set of problems that

250. Wambua PM ‘Enhancing Regional Maritime Cooperation in Africa: The Planned End State’ (2009) 18 *African Security Review* 49, 49.

251. Lloyd’s, *Global Recession: The Magnifying Glass for Political Instability* (Lloyd’s, London, 2009) 7, 35.

requires the input of Somalia (at least the Transitional Federal Government) before any durable solution may be had. The initial response by other States (who do not have territorial jurisdiction) was to establish a strong military presence on the high seas and protect vulnerable commercial vessels passing close to the Somalian coast.²⁵² In December 2008, the European Union (EU) for example set up the EU NAVFOR Atalanta. This was the first maritime deployment by the EU under the European Security and Defence Policy (ESDP). The primary role of this operation was to protect World Food Program shipments and other commercial ships. Participants were given authorization to ‘employ the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may have been committed in the areas where they were present.’ The European Council continued the official order for Operation ATALANTA for another year to December 2010. The operation was to consist of up to twenty ships and in terms of personnel, over 1,800 staff.

From September 2009, a number of countries including Spain, France and Sweden provided permanent personnel and support. The EU NAVFOR was able to set up an online command Centre called the Maritime Security Centre- Horn of Africa (MSC-HOA) to monitor any ships passing through the waters and provide live information on possible threats to the ships. The type of tracking system employed by the MSC-HOA is similar to a system employed by the US Navy’s Maritime Liaison Office in Bahrain and the United Kingdom’s Maritime Trade Operations office in Dubai.

252. Houben M ‘Operational Coordination of Naval Operations and Capacity Building’ in Tardy T (ed), *Fighting Piracy off the Coast of Somalia Lessons Learned from the Contact Group* (EU Institute for Security Studies, Paris, 2014) 28.

In January 2009, the US set up the Combined Task Force that was part of the Combined Maritime Forces with a mandate to combat piracy in the Gulf of Aden. Eight months later, NATO set up Operation Ocean Shield. Representatives of these three forces held meetings in Bahrain to coordinate their efforts. These were called Shared Awareness and De-confliction (SHADE). What is interesting about SHADE is that it was open to all the stakeholders in operations in the Indian Ocean. Thus, not only the EU and US participated in SHADE.

A maritime security patrol area was created in the Gulf of Aden by the Combined Task Force in August 2008 to ensure safe passage for ships carrying cargo. This security zone comprises routes going both eastwards and westwards in order to ‘to de-conflict commercial transit traffic with Yemeni fishermen, provide a measure of traffic separation, and allow maritime forces to conduct deterrent operations in the Gulf of Aden with a greater degree of flexibility.’ All US ships traversing the waters in the area surrounding the Gulf of Aden are urged to travel using the recommended routes to increase the chances of a safe journey. This minimised the attacks and the need to arrest and transfer pirates to Somalia. The Combined Task Force operated together with the United States Coast Guard Law Enforcement Detachments (LEDET) in assisting and providing advice on operations which include boarding. The LEDET has also helped in training personnel on how to gather evidence, interpret maritime legislation and other issues which are relevant to their presence on the gulf. Other countries such as Russia and India have also provided naval assistance in the region to anti-piracy campaigns. Although these countries do not operate in accordance with the policies of the Combined Task Force, there are ongoing efforts to integrate their efforts with force. However, the operations are coordinated under SHADE.

It is also important to mention NATO's 'Operation Allied Provider' that has provided temporary security to the WFP shipments to the region. After three months of operations NATO recalled Operation Allied Provider and handed over the protection responsibilities to the EU's naval force which is a part of Operation Atalanta. NATO then launched Operation Allied Protector in March 2009 under the control of the Standing NATO Maritime Group 1. NATO subsequently deployed Operation Ocean Shield under the control of Standing NATO Maritime Group 2 to take over the reins from Operation Allied Protector in August 2009.

Operation Ocean Shield's main role was to prevent piratical attacks and engage pirates in any attacks that occurred whilst they were on patrol. They also helped States in the Gulf of Aden in capacity building. In this regard, the flagship of the fleet made visits to the Puntland government as well as the Bosaso port in Somalia to discuss security and maritime shipping with the officials there. By August 2009, there were ships from the UK, Greece and Italy amongst others participating in Standing NATO Maritime Group 2.

It is important to note that although proving burdensome on global costs and efforts, all of these coordinated naval efforts have likely contributed to the present reduction in the total number of reported and attempted attacks. In fact, naval forces apparently 'thwarted 126 attacks in 2008, 176 in 2009 and 127 in 2010.'²⁵³

Furthermore, no WFP ship has been hijacked since the ships began receiving escorts from the above navies. Also, ships travelling through the Gulf of Aden corridor have not been successfully attacked and ransomed since naval forces began organizing commercial shipping vessels into transit groups. This process has allowed the navies to closely watch a designated

253. Dutton, M Yvonne, *Gunslingers on the High Seas: A Call for Regulation*, , *Duke Journal of Comparative & International Law* 2013 Vol. 24:107

number of ships and have promptly responded when they received distress calls. The naval forces have also successfully captured pirates who have attacked or attempted to attack ships at sea. Reports indicate that between January and August 2009 alone, the foreign naval forces encountered more than 500 pirates, 10 of whom were killed, 282 of whom were disarmed and released, and 235 of whom were transferred for prosecution.²⁵⁴

The anti-piracy naval patrols, however, simply do not have the capacity to secure the safe passage of every transiting ship. In many cases, pirates are able to board and take hostages within fifteen to thirty minutes of being sighted. This amount of time is too short for a naval ship to respond unless it is only a few miles away. Major General Howes for example said that ‘83 [ships] would be needed in order to provide response conditions of half an hour.’ On the other hand, William Wechler, the Deputy Assistant Secretary of Defence for Global Threats (for the US) said that pirates were now able to cover an area as large as 2.9 million nautical miles and took the rather cynical view that it would not be possible to regulate such a large expanse.²⁵⁵ There are also fears among States that the pressures of lowering costs and budgeting will reduce the amount available for piracy defence. This has led to considerations of the use of private military companies to take on the burden of ensuring the safety of ships against pirates.²⁵⁶

254. *Ibid.*

255. Osei-Tutu, Ama Joana , ‘The Root Causes of the Somali Piracy’ March 2011, KAIPTC Occasional Paper No. 31, Training for Peace

256. P. K. Ghosh, ‘Somalian Piracy: An Alternative Perspective’, ORF Occasional paper #16, 2010, Observer Researcher Foundation

Resolution 1816 of the UN granted member States the right to treat Somali territorial waters as the high seas. States cooperating with the Transitional Federal Government were allowed, for a period of six months, to enter the territorial waters of Somalia and use ‘all necessary means to repress acts of piracy and armed robbery at sea, in a manner consistent with relevant provisions of international law.’ Although this resolution provided a proximate and effective solution against piracy off the Horn of Africa, it did not address the root causes. That is why despite the fact that over \$1 billion has been spent annually, the issue of piracy is still very much part of the region’s most crucial problems.²⁵⁷ It is interesting that the provisions of UNCLOS providing for universal jurisdiction in the case of the arrest and prosecution of pirates were unable to provide an effective solution here given that attacks on the high seas were coordinated from Somalia; or vessels were hijacked on the high seas and then moved to Somali ports. Thus, the UN resolution had to specifically grant the right to treat Somali territorial waters as the high seas to States cooperating with the Transitional Federal Government of Somalia. This shows the importance of territorial jurisdiction and also the futility of universal jurisdiction when the consent of the State with territorial jurisdiction is not obtained.

EUNAVFOR’s Operation Atalanta, NATO’s Operation Ocean Shield and the US-led Combined Task Force have no doubt been instrumental in increasing collaboration and information-sharing between maritime stakeholders. The broad aim of these operations is to detect, disrupt and suppress pirate activity launched from Somalia. Although initial efforts were concentrated in the Gulf of Aden, as attacks began to take place further away from the coast of Somalia and into the Indian Ocean, warships with helicopter capacity began to patrol an area of approximately 2.5 million square nautical miles, encompassing the Gulf of Aden,

257. Bellish, J ‘The Economic Cost of Somalia Piracy’ (2012) Working Paper, Oceans Beyond Piracy 1.

the Somali Basin, the Arabian Sea and the stretch of Indian Ocean from East Africa to the Indian coast and as far south as Madagascar. Successful patrols are also carried out unilaterally, including by the Russian, Chinese and Indian navies, particularly within the internationally recommended transit corridor (IRTC) to ensure that the busy shipping route through the Gulf of Aden operates securely.

There has been a significant decline in the number of piratical attacks as a result of international navies patrolling the Gulf of Aden.²⁵⁸ However, many Somali pirates have simply shifted focus to the Indian Ocean, and are now able to operate hundreds of nautical miles from the Somali coastline, often with the support of terrorist organisations like al-Shabaab. This explains why attacks still take place, although less frequently. Their mother ships tend to operate out of the Somali ports controlled by terrorist groups or corrupt government officials such as the ports of Bosaso, Mogadishu, as well as the Yemeni ports of Al Mukalla and Ash Shihr.

The presence of several countries working together makes a valuable case for multilateralism. The success of the concerted military operations became a strategic interest for many countries that were adversely affected by piracy in the Gulf of Aden. However, the relatively successful SHADE operation has not affected other root causes of the surge in piracy such as high unemployment, endemic corruption, and the influence of war lords. This may be due to the fact that the States in the Gulf of Aden did not fully participate. On the other hand, the fact that the States that set up the strong military presence in the Gulf and directed operations did not have territorial jurisdiction certainly raises many legal issues. Hence, the Contact Group on Piracy off the Coast of Somalia (CGPCS) set up a special working group on legal issues to this effect. Since 2009, the working group has held 15 meetings during which legal

258. See *Appendix 2*; figures of recent decline, ICC IMB Piracy and Armed Robbery Against Ships – 2015 Annual Report

guidance was provided to all States and private organisations involved in the implementation of counter-piracy measures. The objective was to determine a common legal approach to piracy given the ambiguity of UNCLOS as shown in Chapter 2. The working group also sought to develop a legal and practical framework through which pirates may be arrested and prosecuted. It was however uncertain whether the convicted pirates have to be transferred to Somalia to serve their sentence. That requires strong local ownership of the legal process. At the time of setting up the Working Group, it was thought that pirates caught and transferred to Somalian authorities were released immediately due to the absence of a prosecution system.

The UN Special Adviser on Legal Issues related to Piracy off the Coast of Somalia noted in 2011 that Somalia did not have an effective system for prosecution and thus could not prosecute pirates. As such, it was important to establish a regional or International Tribunal for piracy outside Somalia. This implies that other States would commit to prosecute suspected pirates until Somalia would have the capacity to establish a viable system for prosecution. This no doubt imposes a financial and political burden on the other States that are required to fund the prosecution, as well as the stay of the pirates in their penitentiary institutions. The UN Special Adviser however recommended that it may be best for the convicted pirates to serve out their sentences in institutions that are close to relatives. Thus, the Working Group sought to set up a system whereby convicted pirates could serve part of their sentence in the State in which they were convicted and then later on transferred to Somalia to serve out their sentence. This is referred to as the Post Trial Transfer mechanism. As such, States like Seychelles have arrested, prosecuted and convicted pirates and then transferred to prisons in Somalia.

5.7 Summary

This Chapter has examined the unique case of piracy in the Gulf of Aden, with emphasis on piratical attacks off the coast of the failed State of Somalia in the Horn of Africa. It was noted that the Gulf of Aden has been the transshipping point for trade via the Red Sea since the 1st century. It remains a strategic shipping route between the Mediterranean Sea and the Arabian Sea in the Indian Ocean through the Suez Canal with traffic estimated at about 21,000 vessels each year. Since the early 1990s, there has been a consistent increase in the number of piratical attacks in the gulf. In fact, by the turn of the 21st century, they had reached epidemic proportions. Rampant attacks occur close to the Somali coastline in the Indian Ocean, and along the Arabian Sea, and down into the Gulf of Aden which has been termed the 'pirate alley'. Following a prolonged civil war, Somalia was split into three entities, namely Puntland, Somaliland and southern Somalia. The country's navy fell apart and disbanded. Its coast line was left unprotected, and fishing vessels from other countries started to partake in illegal fishing at unprecedented levels. The law enforcement agencies of the Federal Transitional Government are small and the judicial systems face a severe lack of assets. However, piracy has become an organised, lucrative and attractive criminal activity undertaken for heinous ends within the war economy of Somalia.

In light of the above analysis we have a good example of a case where the State with territorial jurisdiction is unable to enforce either its domestic laws and international law to arrest and prosecute pirates. In fact, senior members of the government allegedly profited enormously from the war economy and foot-soldiers either became part-time pirates or joined local militia in order to ensure a stable income. What is interesting here is that although the piratical attacks adversely affect international trade, no State has been able to invoke universal jurisdiction in order to arrest and prosecute the pirates operating in the Gulf of

Aden. Nonetheless, there have been coordinated naval efforts of several countries that have contributed to the significant reduction in the total number of reported attacks. Resolution 1816 of the UN granted member States the right to treat Somali territorial waters as the high seas. However, the right is granted specifically only to States cooperating with the Transitional Federal Government of Somalia. This shows the importance of territorial jurisdiction and also highlights the deficiencies of universal jurisdiction in cases where the consent of the State with territorial jurisdiction is not obtained. A consent based approach is surely the way to increase the likelihood of successful operations and to optimise the effect of measures aimed at alleviating root causes of the surge in piracy such as high unemployment, endemic corruption, and the influence of war lords.

CHAPTER 6

THE PROSECUTION OF PIRATES AND THE CASE OF AN INTERNATIONAL TRIBUNAL

*'Pirates are generally described as sea robbers. They are deemed hostes humani generis, enemies of mankind, warring against the human race... Pirates are highwaymen of the sea, and all civilized nations have a common interest, and are under moral obligation, to arrest and suppress them.'*²⁵⁹

6.1 Introduction

It has been shown in the previous Chapters that the States with territorial jurisdiction in the Gulf of Guinea and Gulf of Aden have generally been ineffective in prosecuting alleged pirates. This is attributable to a variety of reasons including the lack of political will, lack of the appropriate infrastructure, and the non-existence of penal laws specifically criminalising piratical acts. Thus the response of the criminal justice system of these States remains a major handicap. Where alleged pirates are arrested by the navies of other States within the Gulf of Aden, what becomes of them when handed over to the Somalian authorities is very much uncertain. The fact that the country is split into (at very least) three distinct regions, with several war lords controlling different parts makes it difficult to contend that the central government would be able to control the process. Also, the States that arrest the pirates are sometimes unable to prosecute them because the attack occurred, or arrest was made, in the contiguous zone or EEZ which, technically, is considered as the territorial waters of the home

²⁵⁹. Edwin D. Dickinson, "Is the Crime of Piracy Obsolete," *Harvard Law Review* 38 (1925) 351, n.63

State. Moreover, where they are prosecuted and imprisoned in the States that make the arrest, the pirates become a burden to their taxpayers. Another issue that cannot be overlooked is that of returning them to Somalia when they are likely to be tortured and killed. This Chapter discusses the above impediments with the objective of showing that there is a strong case for the establishment of an International Tribunal.

In summary Chapter 6 aims to:

- Discuss the impediments to the prosecution of pirates in States with territorial jurisdiction
- Examine international efforts at enhancing the prosecution of pirates
- Develop the argument for the establishment of an International Tribunal

6.2 The Prosecution by States with Territorial Jurisdiction

We saw in previous Chapters that for the purposes of consistency and coherence, pirates ought to be prosecuted and sentenced by the States with territorial jurisdiction or with the consent of the latter. However, there are important jurisdictional, logistical and ethical difficulties related to the prosecution of alleged pirates in the States with territorial jurisdiction. It is therefore unsurprising that it has been reported that over 90 per cent of the alleged pirates captured at sea have been released because the States of the Gulf of Aden were not prepared to detain and prosecute them.²⁶⁰ Thus, many foreign navies capture the

260. United Nations, Secretary-General, Report of the Special Adviser to the Secretary-General on Legal Issues related to Piracy off the Coast of Somalia, UN Doc. S/2011/30, (25 Jan 2011), paras 14, 43-44, 59.

pirates, seize their weapons and vessels and send them away.²⁶¹ Also, due to the confusion and uncertainty as regards the outcome of the process, more than 1000 alleged Somali pirates captured in the Gulf of Aden were said to be awaiting trial in 20 States.²⁶²

There is so much to be done to improve the capacity of the States of the Gulf of Aden or Gulf of Guinea in order to enable them to prosecute and imprison pirates on a consistent basis that it is difficult to see how the processes of collecting and preserving evidence and sharing of information may be enhanced. Moreover, the laws of these countries do not make piracy a universal offence in light of the provisions of UNCLOS. Thus, persons that perpetrate piratical acts in their internal waters (including within the EEZ that may be 200 nautical miles from the shore) cannot be arrested and prosecuted by any other State, whose navy may be present in the area.²⁶³ Despite the fact that UNCLOS (specifically Article 100) provides for universal jurisdiction, it has been pointed out that prior to the exponential increase in the number of piratical attacks off the Somali coast or in the Gulf of Guinea, there were few cases in which the alleged pirates were arrested and prosecuted by a State that was unconnected to the ship that was attacked or the victims on board the ship.²⁶⁴ This reinforces the argument developed in Chapters 2 and 3 that universal jurisdiction fuels uncertainty and

261. Shnider S 'Universal Jurisdiction over "Operation of a Pirate Ship": The Legality of the Evolving Piracy Definition in Regional Prosecutions' (2012/2013) 38 *North Carolina Journal of International Law and Commerce* 492, 535.

262. United Nations, Secretary-General, Report of the Secretary General Pursuant to Security Council Resolution 1950, UN Doc. S/2011/662, (Oct 25 2011) para 58.

263. Churchill RR and Lowe AV, *The Law of the Sea* (3rd Edition, Manchester University Press, Manchester, 1999) 210; O'Connell DP, *International Law of the Sea* (Volume 2, Clarendon Press, Oxford, 1984) 967.

264. Shnider, fn. 249 *supra* p. 493.

confusion and may even provoke conflict between the prosecuting State asserting universal jurisdiction and the State with territorial jurisdiction.

6.2.1 International Efforts

The United Nations General Assembly Resolution 65/37 of December 7, 2010 called upon member States ‘to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy.’²⁶⁵

In this light, it advised member States to adopt national laws that reflect the provisions of UNCLOS.²⁶⁶ The Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs and the IMO have published guidelines geared towards helping States interested in enacting new statutes on piracy or amending existing legislation.²⁶⁷ They would ensure that the provisions of the statutes of these States are consistent with those of UNCLOS relating to piracy. In the same vein, the United Nations Security Council has passed a number of resolutions calling on member States to enact laws criminalising piracy. The States are enjoined to enact laws with a broader scope than UNCLOS in order to facilitate the prosecution and sentencing of pirates. However, it is only logical that international efforts would not be sufficient unless they are enforced within a regional security infrastructure. What was required by the United Nations Resolution 65/37 was something in the mould of the East Asian Regional Cooperation Agreement on Combating Piracy and Armed Robbery

265. United Nations Assembly Resolution 65/37 of December 7, 2010, para 86.

266. *Ibid.*

267. See Boon KE, Aziz H, and Lovelace DC (Eds), *Piracy and International Maritime Security: Developments Through 2011* (Oxford University Press, Oxford, 2012) 486-488.

against Ships in Asia (ReCAAP), which had very successfully provided a regional infrastructure for the implementation of consensual solutions in East Asia.²⁶⁸

However, in the absence of such a structure in the Horn of Africa or Gulf of Aden and Gulf of Guinea, an attempt was made in a first instance to work within existing regional organisations such as the African Union (AU),²⁶⁹ the East African Community (EAC), the Intergovernmental Authority for Development (IGAD), and the South African Development Community (SADC). This attempt proved to be unfruitful for a wide variety of reasons, mostly political, which would not be discussed here. It was then thought that it might be best to establish an independent structure outside of these extant organisations. This led to the creation of regional structures to govern the processes in the Gulf of Aden and Gulf of Guinea. The efforts in both regions are not coordinated from the same platform. They are conducted in parallel despite the fact that they have similar objectives and focus on piracy in Africa. As regards the Gulf of Aden, consensual solutions were implemented through the Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden and the Red Sea Areas Process. It is referred to here as the Djibouti Code of Conduct. The next section examines the process of implementing a consensual counter-piracy policy through the Code.

268. See Mui YL 'Enhancing Regional Cooperation in Fighting Piracy and Robbery Against Ships in Asia' in Zha D (Ed), *Managing Regional Energy Vulnerabilities in East Asia: Case Studies* (Routledge, Cheltenham, 2013) 87-105. It has however been argued that some of these claims are exaggerated. See Guilfoyle D, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge, 2009) 60-61.

269. See Baker ML, 'Toward an African Maritime Economy: Empowering the African Union to Revolutionise the African Maritime Sector' (2011) 64 *Naval War College Review* 43, 43-47.

6.2.1.1 The Djibouti Code of Conduct

The Code was developed following a number meetings sponsored by the IMO between 2005 and 2008. They were held in three countries in the Gulf of Aden and East Africa: Yemen, Oman, and Tanzania. As noted above, the goal was to set up a regional structure through which a common counter-piracy policy would be implemented.²⁷⁰ A draft memorandum of understanding and a Code of Conduct were tabled at the meeting in Tanzania in April 2008. On January 29th of the following year, the Code was formally adopted by representatives of the governments of the Gulf of Aden and Red Sea States, as well as Jordan, France, and South Africa, and observes from UN specialised agencies, and other IMO member States. Unlike the ReCAAP, the Djibouti Code is not open to accession by any State. Article 16(1) of the Code provides that it is open to accession only to participants of the meeting of January 29, 2009. Thus, it is open only to 21 States, most of them in the Gulf of Aden or with a Western Indian Ocean coast. It was originally signed by 9 of these States²⁷¹ but by March 2010, 13 States had signed the Code, including some of the States that act as enclaves of pirates in the Gulf of Aden, namely Somalia, Djibouti, and Yemen.²⁷² The objective of Code is stated as follows:

to promote greater regional co-operation and thereby enhance their effectiveness in the prevention, interdiction, prosecution and punishment of those persons engaging in

270. Kraska J, 'Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea' (Praeger, Santa Barbara, 2011) 147; Adler E and Greve P 'When Security Community Meets Balance of Power: Overlapping Regional Mechanisms of Security Governance' (2009) 35 *Review of International Studies* 59, 60.

271. United Nations, Secretary-Generals Report on SC Res, 1846, November 13, 2009, para 16.

272. Geiss R and Petrig A, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, Oxford, 2011) 48.

piracy and armed robbery against ships on the basis of mutual respect for the sovereignty, sovereign rights, sovereign equality, jurisdiction and territorial integrity of states.²⁷³

In spite of the fact that the Djibouti Code was borne out of the inability of coastal States such as Somalia and Djibouti to combat piracy off their shores, it is interesting to note the emphasis placed on ‘mutual respect for the sovereignty, sovereign rights, sovereign equality, jurisdiction and territorial integrity of states.’ This shows that these States still prioritise their sovereign rights and would only accept a solution that involves the recognition of these rights. Given that the Djibouti Code is modelled on ReCAAP,²⁷⁴ it seeks to enhance a coordinated flow of information through a system of focal points in the different signatory States and piracy information exchange centres in Tanzania, Kenya, and Yemen.²⁷⁵ Also, Article 9 of the Code provides for the development of common reporting criteria. This is to ensure that the threat of piracy across the Western Indian Ocean and Gulf of Aden is accurately accessed. The Code is generally divided into three parts. The first part elaborates on the signatories’ willingness to cooperate and implement the provisions of the Code. The second part discusses the core components of the Code and provides parameters of the technical contributions required from some key States; and the third part provides parameters for the joint training of maritime security forces at the Djibouti Regional Training Center. The Project Implementation Unit (PIU) has been charged with coordinating and steering the process since April 2010. It is based at IMO’s headquarters in London. The PIU also

273. Preambular, para 11 of the Code.

274. For an overview of the ReCAAP mechanism, see Ho J ‘Combating Piracy and Armed Robbery in Asia: The ReCAAP Information Sharing Centre (ISC)’ (2009) 33 *Marine Policy* 432.

275. For a comparison between the ReCAAP and the Djibouti Code, see Geiss and Petrig, note 260, 49-51.

manages the voluntary trust fund. Several members of the United Nations and IMO have made contributions to the fund, including France, Japan, the Netherlands, and the Republic of Korea. This demonstrates that the Code has received wide support. The UN Security Council Resolution 1918 welcomed the progress being made to implement the Code and called upon the signatory States to implement it as fully as possible.²⁷⁶

Nonetheless, it seems the Code's success is limited to the originality or novelty of the approach rather than effective results on the ground in terms of the number of arrests and prosecutions of pirates. Thus, Geiss and Petrig note that the Code may be referred to as 'a milestone development' and 'a central instrument in the development of regional capacity.'²⁷⁷ This implies that it is a commendable starting point for the successful cooperation and coordination in the Gulf of Aden, although the results of the cooperation and coordination are not yet obvious. Notwithstanding, six years on and it was uncertain whether the Code may develop a robust infrastructure that can cope with the wider broader security challenges. However, only recently in 2015, 6 years after it was formally adopted, the Djibouti Code has announced amendments to include tackling other illicit maritime activity that threatens the safety and security in the region. The expansion includes other crimes such as marine terrorism, human trafficking, illegal, unreported and unregulated fishing and environmental crimes. Moreover, the expansion of the Code includes capacity building programmes to counter the threat of piracy in order for the sustainable development of the maritime sector.²⁷⁸

There is yet to be a regional maritime security force. This may be due to the fact that there is

276. Para 3.

277. Geiss and Petrig, fn. 260 *supra* p. 49.

278. IMO announces amendments to the Djibouti Code of Conduct, 16 November 2015

some confusion as regards whether the Code binds signatory States. It was designed as a nonbinding agreement but is deemed to be legally binding on States that have committed to implement its provisions.²⁷⁹ Nonetheless, the participating States have not expressed the willingness to sacrifice some part of their sovereignty in favour of a multinational operational force. The fact that they insisted on the emphasis on their sovereign rights indicates that the creation of such a force may be uphill task. It worth mentioning that the States could not agree on having a single information sharing centre and three had to be set up in three different countries. They could not equally agree on having a political oversight body that would determine the future of the Code. Thus, they have to turn to the IMO to act as such a forum. Also, the fact that none of the regional organisations such as the AU or EAC is involved is quite indicative of the level of political cooperation between the participating States. It is equally uncertain why two influential States that share the Western Indian Ocean, India and Pakistan, were not part of the process. Both countries are quite experienced in fighting piracy and would have made significant contributions to the joint effort ²⁸⁰.

As such, the Djibouti Code will continue to be the first step of a journey of a thousand miles that has only really just begun. As of now, what is most frustrating is that there is no multinational force patrolling the Western Indian Ocean and arresting pirates. Also, there is no multinational structure through which pirates arrested on the Western Indian Ocean coast may be prosecuted and sanctioned. The participating States are required to amend their

279. Geiss and Petrig, fn. 260 *supra* p.50.

280. See for example, Paleri P 'Maritime Challenges and Priorities in Asia: An Indian Perspective' in Ho J and Bateman S, *Maritime Challenges and Priorities in Asia: Implications for Regional Security* (Routledge, Oxon, 2012) 272-281; Bueger C 'The Human Face of Piracy: Pakistan's Response' (2013) *Research Portal for Maritime Security* [Online] Available at: <http://piracy-studies.org/the-human-face-of-piracy-pakistans-response/> [August 22, 2015].

national laws to ensure that they criminalise piracy but there is nothing within the Code to compel them. It is expected that they would refer to the guidance documents on the elements of national legislation. Nonetheless, many States in the Gulf of Aden have adopted the definition in UNCLOS; some have incorporated the words of the Convention, while others refer to the obligations enshrined in the Convention in relation to piracy offences. These disjointed approaches may frustrate the joint efforts in prosecuting and sentencing pirates. It may for example be difficult for a country with a civil law (continental European) system to gather evidence for the prosecution of alleged pirates in a country with a common law system where the state attorney must prove all elements of the criminal offence beyond reasonable doubt or where the criminal law requires all elements of the offence to be described for enforcement purposes.²⁸¹ However, what is important to note is that the laws of many States that have signed the Djibouti Code are still less developed than expected. This makes it difficult to ensure that acts of violence at sea against are investigated and prosecuted on a consistent basis. Also, the fact that some of the key States in the Gulf of Aden such as Eritrea and Somalia (enclaves of pirates) opted to stay out of the SUA Convention makes it even more difficult to ensure that piratical acts were prosecuted and punished on a consistent basis.

6.2.2 Prosecutions in the Gulf of Aden

Despite the size of the task to establish consistent prosecution of alleged pirates through an established infrastructure, a number of States in the Gulf of Aden have committed to investigating and prosecuting pirates. Some of them include Seychelles, Tanzania, and Mauritius. The strongest commitment has been made by Kenya which has prosecuted

281. Shnider, fn. 249 *supra* 520.

hundreds of alleged pirates. It received assistance from the United Nations Office of Drugs and Crime (UNODC) to strengthen its judicial structures and penitentiary institutions. Thus, in 2006, when the US Navy captured pirates that had taken over an Indian registered vessel, the *Safina al-Bisarar*, about 300 miles off the coast of Somalia (out of the EEZ), the alleged pirates were transferred to Kenya in spite of the fact that neither the pirates nor the victims were from Kenya. A Kenyan court tried, convicted and sentenced them to seven years imprisonment in Kenya.²⁸² Shnider states that between 2009 and 2010, over 50 pirates were convicted and sentenced in Kenya.²⁸³ However, Kenyan courts at the time were grappling with inconsistencies between different provisions of their penal code as regards piracy. Section 5 of the Penal Code of the Laws of Kenya (Chapter 63) for example provides that ‘The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.’ However, section 69(1) (which was later on repealed by the Merchant Shipping Act 2009) provided that every ‘person who in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of Piracy.’ In *Hashi*,²⁸⁴ the High Court held that both provisions were inconsistent and section 5 limiting the jurisdiction of Kenyan courts took precedence over section 69 as regards the definition of piracy. Notwithstanding, given that section 69 had been repealed in 2009, its provisions could not be considered.

282. The conviction rested on the definition of piracy in UNCLOS. See *Republic of Kenya v Hassan M. Ahmed & Nine Others*, Mombasa High Court Criminal Appeal Nos 198-2007 of 2008.

283. Shnider, note 249 p.537.

284. [2010] eKLR 9.

However, the Merchant Shipping Act 2009 (section 369) adopted the definition of piracy in UNCLOS. Thus, it provides that piracy is any act of violence or detention on the high seas committed for private ends. Interestingly, it does not specify that Kenyan courts would have jurisdiction even where the offence was committed on a ship outside of the Kenyan territory, and irrespective of the nationality of the alleged pirates. Mutoka nonetheless argues that this statute (when read together with the Constitution of Kenya, 2010) expands the jurisdiction of Kenyan courts in that regard.²⁸⁵ Her interpretation is strange since nothing in the provisions indicate that this is the case. Article 165(3) of the Constitution notes that the High Court has unlimited original jurisdiction over civil and criminal matters; and section 430(1) of the Merchant Shipping Act provides that any offence under the statute shall be deemed to have been committed in any place in Kenya where the accused may be for the time being. It is difficult to contend both provisions expand the jurisdiction of Kenyan courts given that unlimited original jurisdiction does not imply that Kenyan courts may assert extraterritorial jurisdiction. Thus, it is logical to agree with the High Court in *Hashi* that had argued that the controlling provision as regards the definition of piracy is Section 5 of the Penal Code.

It is therefore unsurprising that an International Crimes Division was later on created at the High Court in Kenya. However, the argument put forward by Chief Justice Willy Mutunga to justify the creation of this special division was more political than legal. He noted that international crimes constituted a ‘mortal threat’ to the Kenyan economy.²⁸⁶ Nonetheless, the division was tasked with dealing with transnational offences, including money laundering, terrorism, human trafficking, and piracy. The division was expected to be modelled on the

285. Mutoka R ‘Assessing Current Trends and Efforts to Combat Piracy: A Case Study’ (2013) 46 *Case Western Reserve Journal of International Law* 125, 132.

286. *Ibid*, 133.

International Criminal Court and adopted the rules and procedures of the latter court.²⁸⁷ It must also be noted that Kenya is the exception, since very few States outside the Gulf of Aden have accepted to prosecute and sentence pirates; and this has only been in cases involving Somali pirates and where the interests of these States were directly involved. The trials of pirates in France have been for attacking French vessels such as the attack on the *Carre D'As* in 2011, and *Le Ponant* in 2012. Equally, the trial of pirates in Germany has been for the seizing of a German registered vessel, the *MV Taipan*; and the prosecution of pirates in Italy was for the hijacking of a cargo ship flying the Italian flag, the *Monte Cristo*.²⁸⁸ Nonetheless, although alleged pirates have been detained by French, Spanish, German and Dutch authorities, only the latter had exercised universal jurisdiction and prosecuted the alleged pirates in a court of law in the Netherlands. In May 2010, 5 pirates were tried and convicted in a Dutch court and then sentenced to five years imprisonment.²⁸⁹ The reason for the approach adopted by the Netherlands may be the broad scope of its national law on piracy. Article 381 of the Dutch Penal Code defines a pirate as a person who enters into service or is serving as a master on a vessel with knowledge of the fact that the vessel is intended for the commission of acts of violence against other vessels on the high seas. Thus, Dutch courts are empowered to entertain cases of piracy on the high seas. Article 4 of the Dutch Penal Code also provides for the universality principle of jurisdiction when criminal acts of piracy are committed. This may be contrasted with Germany that does not have any provisions that specifically refer to 'piracy'. Section 316(c) of the German Criminal Code punishes attacks on air and maritime traffic. Spain on its part had no rules governing piracy

287. *Ibid.*

288. Shnider, fn 249 *supra* p. 531-533.

289. Mansuma K 'Prosecuting Pirates in the Netherlands: The Case of the MS Samanyolu' (2010) 49 *Military Law and Law of War Review* 146, 147.

until 2010. The Organic Law of 10/1995 was amended in 2010 to include the definition of piracy as any person using violence, intimidation or deception to seize or destroy a ship or other vessels or platform at sea. Lastly, the Belgian legislator has empowered the Belgian Public Prosecutor to prosecute any person suspected of piracy outside of Belgium where the vessel that was attacked is registered in Belgium or where the alleged pirates were arrested by the Belgian navy. This was recently demonstrated in the case of Mohamed Abdi Hassan who was suspected of organising an attack on a stone dumping vessel called “Pompeii” in 2009 whereby ten crew were held ransom for over 70 days for demands of two million euros. In October 2013, Abdi, also known as “Afweyne” or “Big Mouth” in English was enticed into visiting Belgium for a fictional film project. The operation came about after the Belgian authorities gave the Public Prosecutor the green light to arrest and prosecute those involved in piracy, as mentioned above. The operation was a success with Abdi receiving twenty years imprisonment and a strong message to anyone involved in such crimes.²⁹⁰ The Belgian authorities have made it clear that they will go to extraordinary lengths to ensure these crimes will not go unpunished and justice need not be limited to a particular location where there are inadequacies or limited infrastructures in dealing with such crimes.

The above provisions show that ironically, it is the States whose vessels or nationals are attacked on the high seas that are more likely to adopt laws providing for universal jurisdiction rather than the States from where the pirates operate. It seems the latter States are more concerned with violations of their sovereign rights by the former States, thus making it difficult to adopt a common approach to combat piracy.

290. Steinberg, Richard H., *Contemporary Issues Facing the International Criminal Court*, (2016), Brill Nijhoff

Nonetheless, where the attack occurs on the high seas, it is less likely that the sovereign rights of any coastal State may be violated by the navy of another State that intervenes and arrests the pirates. It is the rights of the State in which the vessel is registered or the State where the victims are domiciled that may be violated by the intervening State. The State in which the vessel is registered has territorial jurisdiction, while the State where the victims are domiciled has personal jurisdiction. For the purposes of consistency, the intervening State must be either of these States or must act with their consent.

6.2.3 Prosecutions in the Gulf of Guinea

Although the States in the Gulf of Guinea are less splintered than those in the Gulf of Aden, it is surprising that the rate of prosecution of alleged pirates in the Gulf of Guinea is much lower. This is especially the case with Nigeria, which has a well-established criminal justice system that dates back to the 19th century.²⁹¹ The low rate of prosecution of pirates may be attributed to a variety of reasons, including the failure to completely incorporate relevant international instruments such as UNCLOS and SUA into domestic laws.²⁹² Also, it is uncertain which government body is responsible for maritime security, whether the federal police, the navy, the Nigerian Maritime Administration and Safety Agency (NIMASA), or the private security forces employed by shipping companies. There is also confusion as regards the court with subject matter jurisdiction. Section 251(1) of the Constitution of the Federal Republic of Nigeria 1999 and section 21 of the Admiralty Jurisdiction Act 1991 provide that the Federal High Court, and not the state High Court, has exclusive jurisdiction for maritime

291. Out N 'Colonialism and the Criminal Justice System in Nigeria' (1999) 23 *International Journal of Comparative and Applied Criminal Justice* 293.

292. See Tepp E 'The Gulf of Guinea: Military and Non-Military Ways of Combating Piracy' (2012) 14 *Baltic Security and Defense* 181.

or admiralty and related criminal matters. However, it does not specify the procedure for trying maritime crime in the Federal High Court. It is uncertain which law this court should apply. This is because local laws do not define the term ‘piracy’. Section 1 of the Terrorism [Prevention] Act 2011 for example does not make mention of the term. Given that section 36(12) of the Constitution provides that a person shall not be convicted of an offence unless the offence is defined in a written law, it is difficult to even charge many alleged pirates. The Federal High Court may not rely solely on UNCLOS definition because this definition is restricted to the crimes committed on the high seas for private ends. Thus, attacks perpetrated by rebels of the Niger Delta within Nigeria’s territorial waters do not constitute piracy as regards UNCLOS.

In light of the above shortcomings, the Security Council issued a resolution that stated as follows:

States of the region of the Gulf of Guinea to take prompt action, at national and regional levels with the support of the international community where able, and by mutual agreement, to develop and implement national maritime security strategies, including for the establishment of a legal framework for the prevention, and repression of piracy and armed robbery at sea and as well as prosecution of persons engaging in those crimes, and punishment of those convicted of those crimes and encourages regional cooperation in this regard.²⁹³

The Security Council thus promotes a two-pronged approach that involves building regional maritime security architecture, and enhancing the security governance of the littoral States in the Gulf of Guinea. This led to the Yaoundé summit in June 2013 whereby the coastal States

in the Gulf Guinea joined member States of the Gulf of Guinea Commission, the Economic of West African States (ECOWAS), and the Economic Community of Central African States (ECCAS) to issue a memorandum on maritime safety and security in Central and West Africa. The Inter-regional Coordination Centre (ICC) was set up to implement the regional strategy for maritime security. They also issued a Code of Conduct governing the fight against piracy, armed robbery against ships, and illicit maritime activity in West and Central Africa. The Code of Conduct came to be known as the Yaoundé Code of Conduct, mirroring the Djibouti Code of Conduct, which as noted above, is modelled on the ReCAAP. However, despite the shortcomings of the Djibouti Code, the Yaoundé Code has failed to achieve a higher rate of prosecution of pirates that were captured by navies of non-coastal States in the Gulf of Guinea. Article 4(4) of the Yaoundé Code provides that the signatory States undertake to prosecute, in their local courts and in accordance with local laws, perpetrators of all forms of piracy. Article 4(5) also emphasises that the organisation and functioning of the system of prosecution and sentencing is the exclusive responsibility of each signatory State. Thus, despite the fact that Article 6(1)(a) notes that the signatory States should accept to cooperate in arresting, investigating and prosecuting alleged pirates, the Code has simply reiterated the status quo. The status quo as shown above is quite problematic given that many coastal States have not incorporated relevant international instruments into their domestic laws, making it difficult for their justice departments to prosecute alleged pirates. The outcome of the Yaoundé summit is therefore intriguing given that one of the reasons for holding the summit was the

293. Security Council Resolution 2018, UN Doc. S/RES/2018 (Oct 31, 2011), para 5.

increase in maritime insecurity in the region and the failure of coastal States to prosecute and imprison arrested pirates. Hence, there is good reason to wonder why the outcome of the summit is a statement emphasising the exclusive responsibility of the same coastal States to arrest, prosecute and imprison alleged pirates.

6.3 The Rationale for an International Court

It was shown in Chapters 2 and 3 that piracy is a transnational crime that is not limited to a geographical location. That is why UNCLOS is not effective in addressing the offence of piracy. The transnational nature of the offence also explains why relying on the national laws of a littoral State has proved to be ineffective. The offence often has a long start-to-end sequence that extends beyond territorial waters or the high seas. Thus, the pirates may sometimes attack and hijack vessels in the high seas and move the vessels into the internal waters of a coastal State in order to achieve a position of relative safety from law enforcement. Nonetheless, despite its transnational nature, it is the national courts of the States with territorial jurisdiction that have generally tried and sentenced alleged pirates. This explains the very low rate of prosecution in both the Gulf of Aden and Gulf of Guinea. Most of the coastal States do not have a sophisticated criminal justice system that could ensure the collection and storage of evidence and respect of the rights of the accused. Where the alleged pirates have been prosecuted in States with more reliable systems, the prosecutions have proved to be a logistical nightmare. Also, it is uncertain whether the court of a non-coastal State should be able to assert universal jurisdiction without the consent of the State with territorial jurisdiction or personal jurisdiction. Article 105 of UNCLOS provides that “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.” In other words the State that seizes any vessel on the high seas ought to be the one that actually prosecutes and sanctions the suspected pirates. This provision has largely been ignored as many States only arrest the pirates and “dump” them in the coastal States. For example, on February 19, 2012, four suspected Somali pirates captured by the Danish naval troops were taken to Kenya after being rejected by the government in Seychelles.

Kontorovich and Art estimate that ‘universal jurisdiction was used in prosecuting only 0.53 per cent of clearly universally punishable piracy cases between 1998 and 2007, with the figure increasing to 2.5 per cent between 2008 and June 2009.’²⁹⁴ They also note that Kenya accounts for all but three cases of invoking universal jurisdiction over piracy in the past 12 years, with responsibility for 79 per cent of cases.²⁹⁵ The State that arrests the alleged pirates may also be constrained by the international law principle of ‘non-refoulement’ whereby a State is forbidden from rendering a true victim of persecution to his or her persecutor. Article 3 of the European Convention of Human Rights (ECHR) for example states that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment.’²⁹⁶ Hence, sometimes the pirates cannot be returned to Somalia or Eritrea, and the trial State may be obliged to offer them asylum. This is because these countries are notorious for practices such as those prohibited by the ECHR. As such, besides the difficulties and costs associated with the prosecution of pirates, there is evidence that many States, and particularly Western States,

294. Kontorovich E and Art S ‘An Empirical Examination of Universal Jurisdiction for Piracy’ (2010) 104 *American Journal of International Law* 436, 438-439.

295. *Ibid.*

296. See also Article 3(1) of the Convention Against Torture; and Article 7 of the ICCPR.

are trying to avoid their duty to prosecute pirates because of fears that, if convicted, those pirates will then seek political asylum for themselves and their families.²⁹⁷ Middleton, a researcher for Chatham House, the London-based think tank, explains, ‘These countries don’t want to be bombarded by claims of asylum from the pirates, who would ask not to be deported to Somalia, a country at war.’²⁹⁸ In April 2008, the British Foreign Office warned the Royal Navy that arresting suspected pirates at sea could be potentially being a violation of their human rights. They were further warned that this could also lead to asylum claims by pirates seeking to relocate to Europe.²⁹⁹ The fears about asylum claims might not necessarily be hearsay. There have been reports which indicate that at least two of the pirates on trial for attacking a Dutch vessel have declared their intention to try to stay there as residents.³⁰⁰ However, it is shown above that the laws in many coastal States in the Gulf of Aden and Gulf of Guinea are not suited to deal with piracy, and thus ‘dumping’ pirates in these countries only compounds the problem. In the meantime, piracy is becoming a subculture in the African regions with devastating effects on the security of ships, crews, and cargo passing through international and territorial waters. Something needs to be done to ensure that the pirates are arrested, prosecuted, and punished. Some commentators have proposed the creation of an international court for the prosecution of pirates from poor developing countries.³⁰¹

297. Dutton Y. ‘Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?’ (2011) 34 *Fordham International Law Journal* 236.

298. *Ibid.*

299. *Ibid.*

300. Dutton Y. ‘Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court’ *Chicago Journal of International Law* Vol. 11, No. 1

301. Dubner BH and Greene K ‘On the Creation of a New Legal Regime to Try Sea Pirates’ (2010) 41 *Journal of Maritime Law and Commerce* 439, 463; Andersen E, Brockman-Hawe B, and Goff P, ‘Suppressing Maritime Piracy: Exploring the Options in International Law’ (One Earth Future, 2010) 18; Karim SMD ‘Prosecution of Maritime Pirates: The National Court is Dead – Long Live the National Court?’ (2014) 32 *Wisconsin International Law Journal* 37, 60.

Such a court may be a solution to the problem of the violation of the human rights of the alleged pirates in their home States, as well as the uncertainty as regards the legal status of alleged pirates transferred to a third country for prosecution. A good example is a Somali pirate captured by the US Navy and transferred to Tanzania for trial. In setting up the international court, the international treaty could expressly recognise such transfers. This also provides the unique scope for creating the jurisdiction for the prosecution of pirates who attack and hijack vessels in the high seas and move the vessels to the internal waters of a coastal State. It will also create jurisdiction for the prosecution of pirates who attack vessels with the intention of obtaining a ransom that will then be used to fund a rebel or terrorist movement. In the 2010 Report of the UN Secretary-General on the prosecution of pirates, the idea of an International Tribunal is discussed. It is proposed that such a Tribunal may be modelled on the Special Court of Sierra Leone and the Special Tribunal for Lebanon.

Nonetheless, it was noted that the State with territorial jurisdiction must enter into an agreement with the UN to this effect.³⁰² This once again shows that universal jurisdiction does not provide any credible solution to the problem of piracy.

Although an International Tribunal may not be established in Somalia, it may be established in another country in the region. However, previous UN-supported International Tribunals were established with clear geographical and temporal jurisdictions. This may be a problem here given the nature of the crime of piracy and the fact that an effective strategy must extend to the long-term.

302. United Nations, Secretary-General, Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, UN Doc. S/2010/394 (July 26, 2010) para 33-35.

6.4 Summary

This Chapter has shown that despite the fact that pirates ought to be prosecuted and sentenced by the States with territorial jurisdiction, or with their consent, the states of the Gulf of Aden and Gulf of Guinea exhibit important jurisdictional, logistical and ethical difficulties in this regard. In addition, the laws of these countries do not make piracy a universal offence in light of the provisions of UNCLOS making arrests impossible even where there might be a naval presence in the area in question from other capable states.

It was noted that international efforts would not be sufficient unless they were to be enforced within a regional security infrastructure. However, despite wide support, the success of the Djibouti and Yaoundé Codes is limited to the originality or novelty of the approach rather than effective results on the ground in terms of the number of arrests and prosecutions of pirates. The participating States have not expressed the willingness to sacrifice part of their sovereignty in favour of a multinational operational force. Neither could they agree on having a political oversight body that would determine the future of the Codes. It is the non-coastal States whose vessels or nationals are attacked on the high seas that are more likely to adopt laws providing for universal jurisdiction in order to facilitate the arrest and prosecution of alleged pirates by all States. There are however other problems with regard to the prosecution of pirates by States other than the States with territorial or personal jurisdiction. These include the uncertainty of the legal status of alleged pirates transferred to a third country for prosecution, and the possibility of the pirate seeking asylum in the prosecuting State due to the principle of non-refoulement. This is because they are likely to be tortured or killed if they are returned to their home States.

It is submitted, therefore, that an International Tribunal for the prosecution of pirates in the Gulf of Aden and Gulf of Guinea might well serve as a solution to these problems. The tribunal would also provide scope for creating the jurisdiction for the prosecution of pirates who attack and hijack vessels on the high seas and move the vessels to the internal waters of a coastal State.

CHAPTER 7

CONCLUSION: FINDINGS AND RECOMMENDATIONS

*'It dawned on the states that piracy is trans-national and nothing that could be handled by one nation alone. The sea doesn't respect borders.'*³⁰³

7.1 Summary of the Thesis

In this thesis I set out to propose an appropriate mechanism for the arrest, prosecution and sentencing of convicted pirates captured in the Gulf of Aden and Gulf of Guinea. I sought to do this by endorsing a multilateral approach that places particular emphasis on a cosmopolitan consent/ auto-limitation model whereby enforcement jurisdiction may accrue as described in Chapter 3. Three central issues arose:

The first concerned the approach to the definition of the term 'piracy' in a maritime context for analytical purposes. The second concerned the problem of resource deficiency and corruption in the coastal States in the Gulf of Aden and Gulf of Guinea. The third examined the consequences of the impossibility of bringing a pursuit to a close within the territorial waters of coastal States. In some cases ships are pursued across the high seas and across borders ending up in territories incapable of feasible arrest and prosecution. Some key international instruments provide for universal jurisdiction on the high seas to facilitate the arrest and prosecution of pirates in such cases. However, this raises the question of whether

303. Nazery Khalid, senior fellow at the Maritime Institute of Malaysia in Kuala Lumpur as cited in Michael Schuman, 'How to Defeat Pirates: Success in the Strait', Time World, 14 November 2012

such jurisdictional shifts depart too dramatically from Westphalian principles of sovereignty, and whether such departures can be regarded as justified.

7.2 Key Findings, Recommendations and Contribution

Respectively, I concluded that (a), regarding definition of the offence, the issue boiled down to questions of jurisdiction. Piracy is defined as an offence that takes place on the high seas, in which it is implied that piracy is exclusively the concern of international law. But as Fakhry says, the definitional problem stems from the fact that there are two sources of legal understanding: international law and municipal law. I thus proposed that consistency and clarity in the definitional approach may best be achieved by returning to the consent or auto-limitation approach whereby jurisdiction is essentially territorial and can be exercised only by a State outside its territory if it obtains the consent of the territorial State derived from international custom or convention. The definition 'piracy' ought then to be defined in accordance with laws of the territorial State or States with enforcement jurisdiction, and the provisions of UNCLOS where necessary.

On question (b), I sought in this study to put forward that the biggest challenge amounting to the rise in piratical attacks in Gulf of Guinea is one of security. This security challenge hinders the suppression of attacks and allows for the sharp rise of attacks and the levels of attacks. I noted that it is often suggested that, therefore, the most appropriate response would be to immediately invoke automatic universal jurisdiction as the most immediate and effective way to suppress the increasing number of attacks. However, I argued for the view that this doctrine of universal jurisdiction might be problematic - a double edged sword - that can lead to dangerous encroachment on the sovereignty of a State and create conflict since it

is not premised on the idea of State consent. Thus my strongest point in favour of a solution and the central contention of my work is that a cosmopolitan consent or 'auto-limitation' approach would be likely to produce coordinated action conducive to a more comprehensive solution whereby a flag State would have jurisdiction if the attack occurred in a place where no other State has territorial jurisdiction, especially given the nature and geographical nature of the attacks in Gulf of Guinea. A good example of the cosmopolitan approach is the case of Benin. The sharp increase in numbers of attacks led to the implementation of a regional framework. The president of Benin showed political willingness by entreating the Secretary General of the United Nations to request the support of the international community. Operation Prosperity had been created involved a joint patrol being set up patrolling the Benin seas. In the outcome it a few months after the operation had been set up followed that the number of attacks had been decreased drastically.

In respect of (c) the suggestion that we establish an International Tribunal for prosecuting pirates is a solution to the issue of piracy, I noted that, first and foremost States with territorial jurisdiction in the Gulf of Guinea and Gulf of Aden have generally been ineffective in prosecuting pirates which has led somewhat to continuing acts of piracy. This is because there has been a lack of a fear of punishment for committing this crime. Thus one of the strongest points in favour of an International Tribunal is that, in addition to establishing a standardised definition, establishing single presiding body for scrutiny of the offence would remove uncertainty of "what will happen next". For example where alleged pirates have been arrested by navies of other States in the Gulf of Aden, it is difficult to say whether the pirates will be punished or let go upon return in Somalia. This is made worse by the fact that Somalia is divided into three main segments, each controlled by war lords. The likely outcome is that when pirates are returned, they will be tortured or killed which is a serious violation of

Human Rights legislation. Other problems can also arise such as where pirates are returned to States where there is a non-existence of penal laws which criminalise piracy.

Further to the above, an International Tribunal would be an effective means of prosecuting pirates because 90 per cent of the alleged pirates captured at sea have been released because the States of the Gulf of Aden were not prepared to detain and prosecute them. This would set a precedent for other would-be offenders by showing that there are consequences to their actions. Having an International Tribunal would also be a clearer method of dealing with piracy cases because it would mean cases can be allocated to the specialist court rather than pirates awaiting trials in a number of different States. The idea of having an International Tribunal can also be developed as a positive contention because international efforts have proven successful. The East Asian Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) was able to provide a regional infrastructure for the implementation of consensual solutions in East Asia. The Inter-regional Coordination Centre (ICC) is another body which has also been set up to implement the regional strategy for maritime security. They have also issued a Code of Conduct governing the fight against piracy. Given that justice cannot be done without a means of enforcement (and many coastal States suffer from a lack of adequate security forces), this certainly provides good guidance and sets a precedent for States to begin arresting suspected pirates, once they are in a position to do so. Once arrested, the accused can then be brought before the International Tribunal. The enforcement aspect however is currently seen as a difficulty given that a number of States are ill equipped to patrol and make the necessary arrests to stop offenders on the high seas.

7.3 Concluding Remarks

The doctrine of universal jurisdiction is a precarious alternative to a cosmopolitan consent/auto-limitation theory. It is a prelude to potentially dangerous encroachment upon the sovereignty of a State with territorial jurisdiction, however impoverished and troubled that State may be. Extending jurisdiction in the form of extraterritoriality is a less formal way of invoking universal jurisdiction *in effect*.

The doctrine of universal jurisdiction did, however, prove a good case for the multilateral approach that was adopted in Somalia for the reason that the State with territorial jurisdiction was a dramatically failed State with no unified political leadership, and thus no durable or viable prospect of solving the problems at hand. Intervention that envisaged co-operation and an aspiration to gain consent of the Trans-Federal Government allowed for the legitimate implementation of Resolution 1816 by the UN: in effect granting member States the right to treat Somali territorial waters as the high seas. It did not address the root causes of piracy, but provided an effective and immediate solution to the situation on the seas. This resolution thus brought about the first response ever to piracy in precisely the condition described in my argument for the cosmopolitan consent /auto limitation approach.³⁰⁴ A military presence was set up to operate in and out of waters and conduct deterrent operations in the Gulf of Aden, and were able to exercise territorial jurisdiction because of the consent that was given by the Trans-Federal Government. Even this military presence, however, was not sufficient to secure safe passage of every transiting ship, thus *a fortiori*, we see the need for extraterritorial jurisdiction and the endorsement for a multilateral approach that places particular emphasis on the cosmopolitan model.

304. See Chapter 3

APPENDICES

APPENDIX 1

Compilation of the Official response from the FCO (UK Foreign and Commonwealth Office) Maritime Security Unit; supporting the importance of sovereign rights, and any intervention to deter piracy must be borne by consent of the State with territorial jurisdiction

‘The UK takes threats to maritime security in the Gulf of Guinea including armed robbery at sea and piracy very seriously, and we recognise that States in the region, including Cote D’Ivoire currently lack the maritime capacity to tackle these crimes. However, sovereignty is as important at sea as it is on land. As a maritime law student you will be aware that foreign flagged ships enjoy the right of innocent passage through the territorial waters of other states, but do not enjoy general enforcement jurisdiction there over criminal law. Piracy is a crime committed on the high seas and Article 105 of the UN Convention on the Law of the Sea (UNCLOS) provides states with enforcement powers only on the high seas. Therefore if the UK was to consider entering the territorial waters of a state such as Cote D’Ivoire this could not be done without prior agreement for specific law enforcement capabilities. Given the geography of the maritime domain in the Gulf of Guinea such activity would require agreements with a number of States and many of these would not be supportive of the idea of having foreign warships active in their territorial waters.

The UK has played a key role in joint naval operations in the Gulf of Aden and Indian Ocean to tackle Somali piracy and has worked with international partners to establish regional agreements and capacity to prosecute Somali pirates in the region. The situation in the Gulf of Guinea is very different to that in Somalia and therefore the solution to tackling maritime crime here will be very different. Whereas Somalia did not, the coastal States in the Gulf of Guinea have functioning governments and judicial systems. Although in many their governance and capacity is not yet capable of tackling these crimes the solution is not for a foreign state to step in to provide that policing and prosecuting capability. The States in the region are demonstrating political will and working together to build capacity and tackle these crimes as illustrated by the Heads of State Summit in Yaoundé in June where 23 States signed The Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa and approved joint regional strategies for joint naval patrols.

The international community, including the UK are working with the States in the region to develop their judicial, governance and maritime capabilities in order to address these threats and effectively tackle maritime crime. This includes providing training and support to judicial systems, navies, coastguards and police and where possible contributing to building maritime patrol capacities. In addition, we are working with the regional economic communities as they develop and prepare to implement joint regional strategies and patrols.

APPENDIX 2

Figures in support of the increasing and decreasing nature of piracy

ICC DMB Piracy and Armed Robbery Against Ships – 2015 Annual Report

TABLE 1: Locations of ACTUAL and ATTEMPTED attacks, January – December: 2011 – 2015

Location:	2011	2012	2013	2014	2015
S.E. ASIA					
Indonesia	45	31	105	100	108
Malacca Straits	1	2	1	1	5
Malaysia	18	12	9	24	13
Myanmar (Burma)	1				
Philippines	5	3	3	6	11
Singapore Straits	11	6	9	8	9
Thailand				2	1
FAR EAST					
China	2	1			4
South China Sea	13	2	4	1	
Vietnam	8	4	9	7	27
INDIAN SUB					
Bangladesh	10	11	12	21	11
CONTINENT					
India	6	8	14	13	13
SOUTH AMERICA					
Brazil	3	1	1	1	
Colombia	4	5	7	2	5
Costa Rica	3	1			
Dominican Republic		1	1		
Ecuador	6	4	2		
Guyana	1		2	1	
Haiti	2	2			2
Peru	2	3	4		
Venezuela	4			1	1
AFRICA					
Algeria		1			
Angola	1			1	
Benin	20	2			
Cameroon		1		1	1
Dem. Republic of Congo	4	2		1	3
Dem. Rep. of Sao Tome & Principe				1	
Egypt	3	7	7		1
Gabon			2	1	
Ghana	2	2	1	4	2
Guinea	3	3	1		3
Gulf of Aden*	37	13	6	4	
Ivory Coast	1	5	4	3	1
Kenya	1	1	1		2
Liberia				1	2
Mauritania			1		
Morocco			1	1	
Mozambique		2	2	1	1
Nigeria	10	27	31	18	14
Red Sea*	39	13	2	4	
Sierra Leone	1	1	2	1	
Somalia*	160	49	7	3	
Tanzania		2	1	1	
The Congo	3	4	3	7	5
Togo	6	15	7	2	
REST OF WORLD					
Mediterranean Sea	1				
Oman	1*			2	
Papua New Guinea					1
Total at year end	439	297	264	245	246

All incidents with * above are attributed to Somali pirates

APPENDIX 3

A short 10 minute email Question and Answer session with Person X, a Navy member working on the flight deck of Ship Y in Somalia, at Branch Z. (Consent has been given for personal details to be obtained upon request)

1. What are the major problems that these pirates are causing?

This question really depends on the category of persons you are asking. If you were to ask a holiday maker on a cruise liner, it is obvious that they would complain about their holiday being ruined. On the other hand if you were to ask the owners of oil refineries around the world they would talk about the economic impact and the amount of money their companies are losing due to the pirates commandeering their ships through the Gulf of Aden. I think personally with the economic impact, if every company in the world that runs ships through this area then they have to employ armed personnel, or invest in protective measures as a deterrent on board or they could risk losing their ship, goods and also some personnel as the pirates are known to be ruthless. You might ask why do these pirates even risk attacking ships in the Gulf of Aden at all, but if you look at a world map you can see that the Sea of Aden/ Red sea leading to the Suez Canal saves an awful long journey around the bottom of South Africa .

The Pirates are not always interested in the value of the cargo as a few billion pounds worth of crude oil is useless to them, it is more about hostages and ransoms. They will not always hijack large ships as was shown when a British couple were taken hostage last year on their tiny yacht on a world cruise.

Concentrating on the economic side of things and looking at what it could change is the value of things for us, i.e. pretty much everything you can make from crude oil, e.g. plastic, and also the cost of goods and food being transported. These companies do have armed personnel to help the transporting of goods but require funding and this has a knock on economic effect.

2. As it can be seen the law is not really effective in the area of piracy, what do you feel could be done in order to stop these sea crimes from happening?

I will digress here and explain why nothing from within Somalia can or has been done and how it all started. I'm not sure if you know or not but Somalia is actually split in two, much like Korea. North Somalia which is rarely mentioned is a government lead and fairly stable country with very little crime as I'm aware of. When the country became separated, the South was mainly populated on the coast as small fishing villages which became lead by gangs or militias and this is when they started hijacking ships. In order to combat piracy and for it to be stopped it really has to come from within Somalia itself.

3. When you may have caught pirates from committing a crime where have you taken them?

We can't arrest them. When caught they have all weapons seized and are released. From here they sail back to port, re-arm and then sail back out and look for ships. Most pirate vessels spotted by the Navies patrolling the waters off Somalia will ditch over board or do their best to conceal their weapons. They disguise themselves as fishing vessels most of the time so it is very hard to actually catch them attempting to hijack a ship.

4. Common things that pirates do and rare things that you have only come across a couple of times?

Common things...pirates aren't afraid to die and it has been known for them to open fire at navy ships. This tends to be rare as the sight of military aircraft and ships is normally enough for them to throw their weapons over the side and claim they're fishing even though sometimes they are over 200miles off the coast. The Ships that deal with piracy tend to be the faster destroyer and frigates (Type 45s and Type 23s) with one helicopter spot (usually a Royal Navy Lynx)

5. How do you feel about piracy?

Obviously, something does need to be done about it. The Navies across the world are doing a great job at providing a deterrent but they are not the answer to solving it. The Sea of Aden and the Arabian sea are huge areas and it's impossible to police it all as pirates have been spotted as far as India and as south as Madagascar. As I said earlier it really has to be from within Somalia.

6. Main areas of the world you think it takes place?

Somalia is probably the most publicised in the media and news networks on our side of the world but Malaysia has a huge and very similar problem with pirates around the busy shipping lanes in the Java Sea and Malacca strait.

Pictures to accompany anti-piracy works carried out by the Navy in Somalia



Royal Marines Interception Vessel



Royal Navy Lynx



Navy Lynx Aids Capture of Suspected Pirates- A Royal Navy Lynx helicopter has helped arrest 12 armed suspected pirates who attempted to launch an attack on a merchant vessel sailing 260 miles off the coast of Somalia.

Flight 217 from 815 Naval Air Squadron is currently deployed on board the French frigate FLF Surcouf as part of Operation Atalanta, the EU's counter-piracy mission off the Horn of Africa.



This is after the Navy received a distress call from a merchant vessel reporting she was under attack from six men armed with RPG's (rocket propelled grenades). Also it claims 'men' but these pirates can be as young as 12.



.....Mini Gun MK44 Used against Pirates and also...



GPMP (General purpose machine gun) used on pirates.

APPENDIX 4

Table of Countries in the Gulf of Guinea and Gulf of Aden which Show Signatories to UNCLOS and the SUA Convention as well as Showing Which States Have Their Own Domestic Laws Against Piracy as of 2016 as Noted by the International Maritime Organization and Oceans Beyond Piracy Organization.

List of Countries in Gulf of Guinea	Signatory to UNCLOS	Signatory to SUA	Domestic Law for Piracy
Angola	Yes	No	No
Benin	Yes	No	Yes
Burkina Faso	Yes	No	No
Cameroon	Yes	No	Yes
Cape Verde	Yes	No	No
Congo (Democratic Republic)	Yes	No	No
Congo (Republic)	Yes	Yes	Yes
Gambia	Yes	No	Yes
Ghana	Yes	No	Yes
Guinea	Yes	No	Yes
Guinea Bissau	Yes	No	No
Ivory Coast	Yes	Yes	Yes
Liberia	Yes	No	Yes
Mali	Yes	No	No
Mauritania	Yes	Yes	No
Niger	Yes	No	No
Nigeria	Yes	Yes	No
Sao Tome & Principe	Yes	No	Yes
Senegal	Yes	No	Yes
Sierra Leone	Yes	No	No
Togo	Yes	No	Yes
List of Countries in Gulf of Aden	Signatory to UNCLOS	Signatory to SUA	Domestic Law for Piracy
Burundi	No	No	No
Djibouti	Yes	Yes	Yes
Eritrea	No	No	No
Ethiopia	No	No	No
Kenya	Yes	No	Yes
Rwanda	No	No	No
Seychelles	Yes	No	Yes
Somalia	Yes	No	No
Yemen	Yes	No	Yes

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