



# **The International Fight against Modern-Day Piracy – Are the Legal Regulations enough ?**

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## 1 Introduction

Piracy is known as a maritime problem for thousands of years, indeed as long as ships were sailing through oceans and maritime trade has been existed between countries. It has a long term history in the international maritime system as it can be guessed that piracy has existed as long as the oceans were plied for commerce<sup>1</sup>. Also today, Piracy is still alive in the modern world<sup>2</sup>. The popular modern picture of pirates sees them as rebellious, cool and clever teams who operate outside the restricting bureaucracy of modern life. This picture is supported and intensified by romantic literature (“Treasure Island” by Robert Louis Stevenson) or adventure Hollywood movies (“Pirates of the Caribbean” by Disney Motion Pictures) showing pirates as funny weird and sympathetic heroes following in their deep heart just the good and best. The same view can be shared when we look on piracy from a historically perspective. In the past, countries favored pirates because they aided their home country by targeting the travel routes of other countries. But as soon as the trade relations between countries strengthened, pirates began to be seen as nuisances rather than heroes. The more the trade relations strengthened, the picture of piracy changed and countries began fighting against it<sup>3</sup>.

Also in the modern world of today, Pirates are not romantic figures<sup>4</sup>. In the contrary, modern-day piracy is a violent, bloody and ruthless practice<sup>5</sup> and has nothing in common with the picture shown in modern literature or movies. Modern pirates use for their attacks small speedboats supported by high class mother-ships as well as rocket launchers at the ships’ hull.

They are equipped with the most current and new high-technology systems, machine guns,

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<sup>1</sup> Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part [notes]*, In: Vand. J. Transnational L., Vol. 39, (2006), at 977.

<sup>2</sup> Timothy H. Goodman, *Leaving the Corsair's Name to Other Times – How to enforce the law of the Sea Piracy in the 21<sup>st</sup> Century through regional international agreements*, In: Case West. Reserv. Journ. of Int'l L, Vol. 31, (1999), at 139; Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law*, Springer Verlag, (2007), at 17; Rainer, *Piraterie und widerrechtliche Handlungen gegen die Sicherheit der Seeschifffahrt*, In: Ipsen, Jörn (ed.) *Recht – Staat – Gemeinwohl: Festschrift für Dietrich Rauschnig*, C. Heymanns Verlag, (2001), at 501-505.

<sup>3</sup> Joshua Michael Goodwin, *supra* note 1, at 980 f.

<sup>4</sup> Katie Smith Matison, *The Big Business of Maritime Piracy and the Modern Corsair: Dead Men Tell no Tales*, In: *Journal of Transport, Law, Logistics and Policy*, Vol. 76, (2009), at 372.

<sup>5</sup> Jayant Abhyankar, *Contemporary Piracy*, In: BIMCO Bulletin, (October 1996), at 58.

bombs, GPS navigation systems, mobile phones, small radar sets, and high quality telescopes<sup>6</sup>. The tactics of them are sophisticated and aggressive. Modern-day pirates are acting like organized criminals. Whereas in the past pirates tended to board ships to steal money or valuable items of cargo, today they hijack vessels and steal the entire vessel and cargoes, the crews will be killed or set adrift, the vessel will be renamed and its distinctive marks will be repainted at sea to create a so-called “phantom ship”. Pirates prepare also registration documents and bills of lading so that the hijacked cargo and the vessel can be sold<sup>7</sup>. The hijacking of ships and cargoes (not for money, but for political reasons) links pirates with terrorists<sup>8</sup>. There is an overlap in piracy and terrorist’ activities. This trend started with the “Achille Lauro” incident in 1985. Thereby, Palestinian terrorists boarded the Italian vessel “Achille Lauro” in Egyptian territorial waters and threatened to kill the passengers unless fifty Palestinians held in Israel were released. During the seizure of the ship a wheel-chair-bound American-Jew was murdered<sup>9</sup>. The 9/11 attacks increased this trend and new genre of maritime terrorism.

This master thesis will examine whether the existing legal regulations and jurisdictions do combat these developments of modern day piracy as it is a matter of urgency to decrease piracy incidents and the upcoming threat of maritime terrorism. It will be considered whether the existing regulations cover all acts of modern-day piracy, and whether universal jurisdiction recognized under international law for piracy also covers terrorism on sea<sup>10</sup>. Another question of this thesis is, whether there is an effective anti-piracy enforcement existing. The current developments of piracy acts seem to require a more effective worldwide enforcement regulation and authority. Such authority could maybe be implemented by establishing an international juridical body for piracy. This master thesis will examine whether such an international juridical body could be implemented from a legal point of view and how it can be structured.

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<sup>6</sup> George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, In: Tulane Law Review, Vol. 81, (June 2007), at 1435; Graham Gerard Ong, *Pre-empting Maritime Terrorism in Southeast Asia*, In: Viewpoints: Institute of South East Asian Studies (ISEAS), (November 29, 2002) at 3.

<sup>7</sup> Report of the UN Secretary General: Oceans and the Law of the Sea, UN Doc. A/56/58 (9 March 2001), at 179-180.

<sup>8</sup> Strati, Gavouneli & Skourtos, *Unresolved Issues and New Challenges to the Law of the Sea - Time Before and Time After*, Vol. 54, (2006), at 175.

<sup>9</sup> Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, In: 82 AJIL 1988, at 289.

<sup>10</sup> Angelos M. Syrigos, *Developments on the Interdiction of Vessels on the High Seas*, Vol. 54, Leiden, (2006), at 176.

## 1.1 Legal Sources and Methods

This master thesis can be characterized as a thesis in international criminal maritime and enforcement laws. It examines international Laws of the Sea as well as international and national criminal jurisdiction and enforcement measures against piracy. The main legal questions within this thesis are whether the existing international and national regulations are sufficient and effective enough to combat the increasing threat of modern day piracy and the new genre of maritime terrorism. The changing nature of today's maritime piracy requires the existing regulations to be flexible and dynamic.

Therefore, this thesis shall discover the existing law to combat the modern-day piracy acts and terror on sea. As well, it should be sorted out what kind of possibilities and proposals are in discussion by scholars and legal regimes to improve the enforcement activities and prosecution against piracy and terror on sea to effectively decrease them.

The relevant legal sources are treaties and different soft law instruments. Here, the Convention on the High Seas<sup>11</sup>, LOS Convention<sup>12</sup> as well as the SUA Convention<sup>13</sup> with its amended Protocol<sup>14</sup> do apply. There are as well several regional non-binding soft law treaties on piracy implemented by regional legal regimes and the IMO (International Maritime Organization) as well as by the IMB (International Maritime Bureau). These soft law treaties are as well a relevant source with regards to the topic of this master thesis. Soft law treaties are non-binding legal regulations, but they are important and significant with regards to interpretation of existing hard law regulations and instruments like LOS Convention or SUA Convention. As well it has to be kept in mind that soft law treaties can be implemented into hard law treaties. Therefore, soft law treaties with regards to piracy will influence the direction of political discussions as well as about possible implementation of hard law regulations in the future.

Besides, with regards to interpretation of these regulations, the common principles as regulated in Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna

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<sup>11</sup> Convention on the High Seas, 29 April 1958.

<sup>12</sup> United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>13</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988.

Convention<sup>15</sup>) do apply. Article 31 thereby gives fundamental guidance how to interpret treaties. In relation to the Vienna Convention and the interpretation of piracy laws, especially the Draft Convention on Piracy prepared by the Harvard Research in International Law (Harvard Draft Convention on Piracy<sup>16</sup>) has to be taken into account. This Harvard Draft Convention on Piracy is a valuable collection of sources of any research in the international law of piracy. Although this convention has never been adopted, its impact upon the development of the law of piracy is unquestioned.

As well, case law influences existing hard law regulations and its interpretation. The problem of existing gaps in international law about piracy can best be examined with the case of the Belgian action against Greenpeace<sup>17</sup>. In this case a Belgian court ruled that the Greenpeace vessel *Sirius* had committed an “act of piracy” when it tried to prevent two Belgian vessels from dumping toxic waste in the North Sea. That was the only major case since implementation of UNCLOS that has been brought under the piracy provisions of the Convention on the High Seas or of the UNCLOS<sup>18</sup>. And the “pirates” have not even been “real pirates” but “just” the international association of Greenpeace. Case law can show in this regards the legal gaps which are existing in relation to effective piracy laws and piracy jurisdiction and can be used as guidance with regards to interpretation.

## 1.2 Summary of the Problem from a Global Perspective

The act of “piracy” is a criminal offence and consists of criminal acts of violation, detention, rape or depredation. The increasing and upcoming threat of maritime piracy and sea robbery is currently the biggest challenge the international maritime security has to

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<sup>14</sup> Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 01 November 2005.

<sup>15</sup> Vienna Convention on the Law of Treaties, May 23, 1969.

<sup>16</sup> Draft Convention on Piracy prepared by the Harvard Research in International Law, Harvard Law School, Research in International Law, Codification of International Law (pt. 4 Piracy), In: 26 AM J. Int'l. L 740, (supp.1983), at 743.

<sup>17</sup> M.S. Wady Tanker, M.S. Sirius N.V. Mabeco, N.V. Parfin v. 1 J. Castle 2 Neth. Stichting Sirius, 20 Eur. Trans. Law. 536 (June 12, 1985); Castle John and Neth. Stichting Sirius v. Nv Marjlo and N.V. Parfin, 77 Int'l Law Rev. 537, (Dec. 19, 1986).

<sup>18</sup> Samuel Pyeatt Menefee, *The Case of the Castle John, or Greenbeard the Pirate ? : Environmentalism, Piracy, and the Development of International Law*, In: 24 Cal. W. Int'l L.J. ,(1993), at 2.

face with<sup>19</sup>. Acts on piracy are dramatically on the rise<sup>20</sup>. Thereby, most disturbing seems to be the “growing nexus between maritime crime, terror organizations and failed or failing states”<sup>21</sup>. Piracy of today threatens not only economic interests, but also peoples live.

Admiral Arun Prakash, Chief of Naval Staff, Indian Navy, mentioned in a commentary in 2005:

“As things get hotter for the terrorists on land, I think it is quite logical that they will move seawards. So, there is potential for tremendous trouble at sea. It is likely to happen unless we work together on preemptive actions”<sup>22</sup>.

Also the U.N. General Assembly responded to the increased threat of piracy and urged

“all states... to take all necessary and appropriate measures to prevent and combat incidents of piracy and armed robbery at sea...and bring the alleged perpetrators to justice, in accordance with international law”<sup>23</sup>.

Modern-Day piracy is not anymore just lead by the intention of getting cash or becoming rich, but is focusing on social interests and motivated by political ideas thereby willing not just to threaten economic interests but also people’s live. Today, such kind of piracy is called “political piracy” or “maritime terrorism”. It is experienced that even Al-Qaeda has turned its sights to the seas by using vessels filled with explosives. They are known as the so-called “Al-Qaeda-Navy”<sup>24</sup>. The German Newspaper FAZ reported in January 2011, that the Islamic militia in Somalia does not only tolerate (they even tax) modern-day piracy, but also have called for a “Sea-Dschihad” against the international trade shipping<sup>25</sup>.

Today’s pirates are often trained fighters and piracy on the high sea is becoming a key tactic of terrorist groups having an ideological bent and a broad political agenda<sup>26</sup>. The likelihood for worldwide media coverage of an incident makes maritime terrorism an even

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<sup>19</sup> Philipp A. Buhler, *New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy*, In: Int'l Trade L.J., Vol. 8, (1999) at 61.

<sup>20</sup> Timothy H. Goodman, *supra* note 2, at 141.

<sup>21</sup> John I. Winn & Kevin H. Govern, *Maritime Pirates, Sea Robbers and Terrorists: New Approaches to Emerging Threats*, In: Homeland Security Rev., Vol. 2, (2008), at 132.

<sup>22</sup> *Ibid* at 131.

<sup>23</sup> G.A. Res. 32, U.N. GAOR, 53rd Sess., ¶122, U.N. Doc. A/53/L.35 (1998), <http://www.un.org/Depts/los/a53135e.htm>.

<sup>24</sup> George D. Gabel, *supra* note 6, at 1437 f.

<sup>25</sup> Stephan Löwenstein, *Eskalation am Horn von Afrika*, In: FAZ as of February 01, 2011, No. 26.

<sup>26</sup> Luft & Korin, *Terrorism goes to the Sea*, In: Foreign Affairs, Vol. 83., No. 6 (2004), at 61.

more attractive prospect<sup>27</sup>. With the upcoming and increasing threat of maritime terrorism and its overlapping with what was known in the past as piracy, there is a huge danger for energy markets as most of the world's oil and gas is shipped through the world's most piracy-infested waters.

There is still neither an international maritime peacekeeping force nor an international tribunal with jurisdiction to punish pirates. When the German vessel "Beluga Nomination" was captured in January 2011 by pirates in the Indian Ocean, no state felt responsible and sent any help to the vessel. After the release of the vessel, the ship-owner, Niels Stolberg, sent a report to all possible responsible observation and military units, he did not get any reply<sup>28</sup>. Same experiences have been made by several other international shipping companies which started to organize and protect themselves as the international community does not feel responsible and seems to be helpless in such kind of situations.

The problem from a global perspective is the regional and international cooperation with respect to greater efforts towards coordinated anti-piracy patrols and enforcement measures. For example, the European Union launched its operation "Atlanta" to combat piracy off the coast of Somalia<sup>29</sup> while the North Atlantic Treaty Organization (NATO) has also taken the lead in providing naval support. Several states like China, India, Iran, Malaysia and Russia offered their support<sup>30</sup>. But, these responses of the international community are diverse and it seems to be a challenge to coordinate that kind of enforcement activities, as there is neither yet a global international obligation for states to combat piracy on sea nor an international action force against piracy or maritime terrorism in place.

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<sup>27</sup> Carlo Tiribelli, *Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, In: Oregon Review of Int'l L., Vol. 8, (2006) at 133.

<sup>28</sup> Johannes Ritter, *Im Gespräch: Niels Stolberg, geschäftsführender Gesellschafter der Bremer Reederei Beluga Shipping GmbH*, In: FAZ as of February 01, 2011, No. 26, at 15.

<sup>29</sup> "Operation Atlanta" is conducted through the European Union-led naval force "EUNAVFOR". EUNAVFOR patrols the Gulf of Aden and the coast of Somalia to arrest, detain and transfer suspected pirates to the Republic of Kenya for prosecution.

<sup>30</sup> Donald R. Rothwell & Tim Stephens, *The International Law of the Sea*, (2010) at 164.

### 1.3 The Effects of Modern-Day Piracy

The impact of the modern-day piracy is enormous and considerable on international economies. It is a worldwide phenomenon thereby concentrating for the most part in several specific regions of the world (e.g. Somalia, Cape Horn, Straits of Malacca, Indonesian archipelago, Malaysia, the waters of Southeast Asia including the South China Sea, Thailand and the Philippines) of which are all extremely important locations for maritime commerce. With an increasingly globalised world and international marketplace, such acts do no longer affect just one country at a time<sup>31</sup>.

Maritime trade is heavily affected by this development. While the damage to one particular vessel and the owing shipping company by an act of piracy might be very limited (but expensive), consequences for the economic development of whole regions and of the long-term reaction of shipping companies have to be taken into account. For example, Somalia's development and political instability will be hampered by the fact that shipping companies steer clear of its coastline and avoid routes around it<sup>32</sup>. This is very cost effective for shipping companies as they have to take into account longer transportation routes. That leads again to higher freight and the higher freight to higher prices paid by the end consumer. Furthermore, the insurers are already raising their premiums if a vessel of a shipping company regularly passes through these areas. Some insurance companies classify vessels passing constantly through "dangerous waters" with a "war risk" and therefore with a high premium<sup>33</sup>. Another consequence is that insurers require shippers to avoid certain important routes in maritime commerce based upon a so-called "war risk clause" that excludes those geographical regions from coverage<sup>34</sup>.

Therefore, many shipping companies do not report incidents of piracy for fear of raising their insurance premiums and prompting protracted, time-consuming investigations<sup>35</sup>. It is estimated that the total damage caused by piracy – due to losses of ships and cargo and to

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<sup>31</sup> Ryan Olson, *International Piracy Laws and the Birth of Maritime Terrorism*, In: *Maritime Law Bulletin*, 15, at 17.

<sup>32</sup> Philipp Wendel, *supra* note 2, at 20.

<sup>33</sup> *Ibid.*

<sup>34</sup> Christopher M. Douse, *Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry*, In: *Tulane Maritime Law Journal*, 2010, at 287- 288.

<sup>35</sup> Luft & Korin, *supra* note 26, at 62.

rising insurance costs – to date amounts to 16 billion US-Dollars per year<sup>36</sup>. Also, the proceeds of a captured vessel have increased, whereas it was in 2009 between one to two million US-Dollars, the gains for a captured vessel became in 2010 three million US-Dollars<sup>37</sup>.

The traumatic events of September 11, 2001 have exposed the vulnerability of the global transport infrastructure both as a potential target for terrorist activities and a potential weapon of mass destruction. Consequently, any act of piracy or maritime terrorism could multiply if an attack would disrupt traffic in a major port or in an important shipping route. For example, in the Straits of Malacca, there are approximately 55.000,00 vessels passing through every year representing about 80 percent of the total oil transport to China, Japan and South Korea and 40 percent of global trade<sup>38</sup>. The fear that ships carrying fuel or chemical cargoes could be hijacked and used in indiscriminate terrorist attacks is rightly growing. This threat is disturbing the world's seagoing states, especially in relation to the vulnerability of oil tankers.

As mentioned above, it is assumed that the majority of incidents of piracy go unreported as many ship-owners hesitate to report because they are afraid of higher insurance premiums as well as of a loss in their reputation and image as shipping company and hauler<sup>39</sup>. Furthermore, some piracy acts against small local crafts may be not reported due to fear of reprisal.

Another reason of “non-reporting” are the enormous costs which arise while maintaining the ship in a port during a protracted investigation that may prove futile and followed by its consequence of delay in movement of cargo. A report of a piracy attack is estimated to cost a ship-owner about 25.000,00 US Dollars per day<sup>40</sup>. That is why ship-owners are today very reluctant to involve their ships in costly delays.

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<sup>36</sup> Ibid.

<sup>37</sup> Stephan Löwenstein, *supra* note 25.

<sup>38</sup> Philipp Wendel, *supra* note 2, at 20.

<sup>39</sup> National Union of Marine, Aviation and Shipping Transport Officers, *In the firing line* (2004), at 2; Leticia Diaz/Barry Hart Dubner, *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: A Proactive Approach to the Evolution of International Law*, In: 32 *Syracuse J. Int'l L & Com.* (2004), pp. 1 et seq., at 26.

<sup>40</sup> Katie Smith Matison, *supra* note 4, at 372.

As well, there is evidence of coastal state under-reporting of incidents. While some states may simply not be aware of all incidents that occur, others may be reluctant to concede that there are any well-grounded concerns about the safety of maritime traffic off their coasts<sup>41</sup>. As in certain regions, the states are reluctant to enforce piracy or their security forces do not have the required capacity, only a vessel can guarantee its own maritime security<sup>42</sup>. Ship crews have started to arm themselves or employ private escorts for cargo vessels<sup>43</sup>. One of these private escorts, the private company “Naval Guards” declares that there is a big demand for them. Their service can be booked for 5.000,00 to 12.000,00 US Dollars per day<sup>44</sup>.

Additionally, to strengthen the maritime security system, as of July 2004, the International Ship and Port Facility Security Code (ISPS) was adopted. The ISPS contains detailed mandatory security requirements for governments, port authorities and shipping companies as well as a series of non-mandatory guidelines regarding the implementation of these requirements. Besides others, the ISPS requires ships above 500 tons to be equipped with alarm systems that silently transmit security alerts containing tracking information in case of emergency<sup>45</sup>. Certainly, these technical frameworks for ensuring that ships are rendered as safe as possible from piracy or terrorist attacks do not guarantee that such attacks will not occur. Hence, only effective legal regulations as well as enforcement laws and jurisdiction can help to solve the problem in the future.

## **2 Assessment of existing Legal Regulations against Modern-Day Piracy**

Although it is a well-known principle of sovereignty that each state has universal jurisdiction to prosecute pirates, the above mentioned preponderance of attacks near states that lack resources to effectively prosecute pirates create a gap within the international

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<sup>41</sup> Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, (2009), at 51.

<sup>42</sup> In Somalia, no effective government exists and hence, no governmental patrol boats are controlling its coastal waters. The transitional government could only urge neighboring states to send warships to patrol Somalian waters.

<sup>43</sup> Aleksandr Antonovic Kovalev, *Contemporary issues of the Law of the Sea*, Utrecht: eleven, 2004, at 148.

<sup>44</sup> Gerd F. Michelis, In: *Yacht 11/2011, Somalisches Roulette*, at 52.

<sup>45</sup> Luft & Korin, *supra* note 26, at 68.

cooperation framework<sup>46</sup>. Piracy is a crime under both - the municipal law of individual states and a crime under international law. The following chapter will examine the discrepancy in the offense of piracy under international and national laws and how this offense is actually prosecuted and punished under domestic laws of coastal states. Furthermore, essential existing legal regulations with regards to piracy will be examined and the possible gaps within these regulations will be identified and discussed.

## **2.1 Existing Legal Regulations from an International Perspective**

Several United Nations instruments address the problem of piracy. The most important are the Convention on the High Seas<sup>47</sup>, the Convention on the Law of the Sea (LOS Convention or UNCLOS)<sup>48</sup> and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)<sup>49</sup> with its Protocol of 2005<sup>50</sup>.

Besides, these conventions, in the last years, several regional regulations were established in areas of great concern to combat piracy from a regional perspective. The “Regional Cooperation Agreement on Prevention and Suppression of Piracy and Armed Robbery Against Ships in Asia (ReCAAP)” has been adopted by 16 Southeast Asian states. Under this Agreement, an anti-piracy center was set up in Singapore which is gathering information on piracy acts and shares that with other state parties<sup>51</sup>. Furthermore, several regional institutions and authorities like the Comité Maritime International (CMI), the Baltic and International Maritime Council (BIMCO), the International Chamber of shipping (ICS), Interpol, the International Group of P&I Clubs (IGP&I), the ICC International Maritime Bureau (IMB), the International Maritime Organization (IMO) and the United Nations (Office of Legal Affairs/Division for Ocean Affairs and the Law of the

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<sup>46</sup> Diana Chang, *Piracy Laws and the Effective Prosecution of Pirates*, In: 33 Boston College International & Comparative Law Review, 2010, at 273.

<sup>47</sup> Convention on the High Seas, 29 April 1958.

<sup>48</sup> United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>49</sup> 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

<sup>50</sup> Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 01 November 2005.

Sea) have started to publish their own anti-piracy regulations. Whereby these regulations are soft-law regulations and non-binding, it has to be mentioned that its establishment can influence existing hard law conventions and give guidance for further legal developments.

But along with these various international conventions and soft law treaties that have come about in the last years, the question is still whether these regulations are addressing all legal problems to combat modern-day piracy and terrorism on sea.

## **2.2 Identifying Gaps in International Laws**

According to these concerns, it is questionable whether there is international piracy law in place that can properly contend with the current level of modern-day piracy and terror on sea<sup>52</sup>. The following chapter will examine the most important international anti-piracy regulations like Article 101 of UNCLOS and the SUA Convention with its supplemented Protocol and will clarify whether they encompass modern-day piracy and terror on sea or whether there are legal gaps in these regulations.

### **2.2.1 Definition of Modern-Day Piracy**

An important question with regards to the crime of piracy itself is whether the existing definition of piracy in international regulations applies to the changing nature of today's maritime piracy. There is one certainty in international law, and that is that, pirates are treated in the same way like terrorists: "As enemies of mankind<sup>53</sup>". Most authorities describe piracy as actions at sea that would be punishable as robberies if committed on dry land<sup>54</sup>.

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<sup>51</sup> Rothwell & Stephens, *supra* note 30, at 23; ReCAAP Info. Sharing Centre, About ReCAAP ISC, [http://www.recaap.org/about/about1\\_2thml](http://www.recaap.org/about/about1_2thml).

<sup>52</sup> Ryan Olson, *supra* note 31, at 19.

<sup>53</sup> Luff & Korin, *supra* note 26, at 68.

<sup>54</sup> Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, In: Harvard International Law Journal, Vol. 45, (2004) at 191.

As the definition of piracy in Article 15 of the 1958 Convention of the High Seas has been largely duplicated in 1982 in Article 101 at the United Nations Convention on the Law of the Sea (LOS Convention)<sup>55</sup>, this thesis will examine Article 101 of LOS Convention instead of Article 15 of the 1958 Convention on the Law of the Sea. Article 101 of the LOS Convention defines piracy as

- “a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)<sup>56</sup>.”

According to this provision in the LOS Convention, there are three main conditions that must be met before an incident can be characterized as an act of piracy: 1) It has to be determined whether the act occurred on the high seas or outside the jurisdiction of all states<sup>57</sup>, 2) The aggressors must have attacked the vessel from another vessel and 3) “private ends” must have been the sole motivation<sup>58</sup>.

According to this wording, it seems like that definition does not reach actions of those actors who attack ships and their passengers for political ends (like the Achille Lauro incident). It is questionable whether maritime terrorists who usually have a political goal are covered by Article 101 of the LOS Convention.

Furthermore, if a piracy act occurs within the territorial sea, this would not be “piracy” as defined in international law<sup>59</sup>. But official statistics reveal that most incidents of today’s piracy occur within territorial and port waters<sup>60</sup>. Another requirement of Article 101 which

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<sup>55</sup> United Nations Convention on Laws of the Sea, 10 December 1982; Philipp A. Buhler, *supra* note 19, at 67; Alfred P. Rubin, *Revising the Law of Piracy*, In: Cal. West.Int’l L. Journal, Vol. 21., (1990) at 136 .

<sup>56</sup> Article 101 United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>57</sup> Carlo Tiribelli, *supra* note 27, at 137; Strati, Gavouneli & Skourtos, *supra* note 8, at 118.

<sup>58</sup> *Ibid.*

<sup>59</sup> Rothwell & Stephens, *supra* note 30, at 162.

<sup>60</sup> 2000 Annual Report, IMO Reports on Acts of Piracy and Armed Robbery against Ships, MSC/Circ. 1991, March 31, 2001.

does not seem to apply to modern-day piracy is that more than one ship has to be involved in the action and that at least one of the ships is a pirate ship or a ship without national character<sup>61</sup>. A mutiny by the shipping crew itself or a hijacking by passengers (like it occurred in the Achille Lauro incident) thus would – if the wording of Article 101 should be interpreted strict - not constitute piracy. How Article 101 of the LOS Convention has to be understood and interpreted in modern times will be part of the next chapter of this thesis.

In the contrary to the LOS Convention, the IMB defines piracy and armed robbery at sea in more modern terms as:

“An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act”<sup>62</sup>.

Consequently, the IMB (International Maritime Bureau) definition covers acts of piracy within internal and territorial waters. Furthermore, the IMB’s view is that piracy does not necessarily need to be undertaken from another vessel or aircraft or requires the “private ends” motivation. The IMB attempt was to broaden the definition of piracy to encompass the practical changes in the nature of today’s piracy.

The same attempt was followed by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)<sup>63</sup> which entered into force 1992. The SUA avoids the word “piracy” itself to broaden the entire definition of it as well as for maritime terrorism. According to Article 3 para 1 of SUA

- “1. Any person commits an offence if that person unlawfully and intentionally:
  - (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
  - (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

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<sup>61</sup> Article 101 United Nations Convention on Laws of the Sea, 10 December 1982; George Constantinople, *Towards a New Definition of Piracy: The Achille Lauro Incident*, In: Virginia Journal of Int'l L., Vol.26, (1986), at 734.

<sup>62</sup> International Chamber of Commerce, International Maritime Bureau, Piracy and Armed Robbery against Ships, 2002, Annual Report (2003).

<sup>63</sup> 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
- (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).<sup>64</sup>”

According to the SUA “definition”, piracy is not limited to criminal actions on the high seas but also focuses on criminal actions during international transits, in ports, coastal zones or territorial waters<sup>65</sup>. Also, SUA does not make any distinction between private, commercial or political motivations<sup>66</sup>. Whether this regulation is enough to encompass all occurring piracy and maritime terrorist acts of today is questionable and will be part of the research under chapter 2.2.3 of this master thesis. Furthermore, it is questionable whether the definition of piracy in the SUA Convention and from the IMB implies that the definition of Article 101 of UNCLOS must be interpreted in a different way in the light of legal development.

## 2.2.2 Article 101 of UNCLOS

There have been many discussions about the legal wording of Article 101 of UNCLOS (respectively Article 15 of the Convention on the High Seas) and there is still the open legal question how this Article should be interpreted and whether it captures also the new development of piracy activities as described in the foregoing chapter of this thesis<sup>67</sup>.

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<sup>64</sup> Article 3 para 1 of 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

<sup>65</sup> Winn & Govern, *supra* note 21, at 138; Annual Report, International Chamber of Commerce, International Maritime Bureau, Jan.1 – Dec 31, 2002, *Piracy and Armed Robbery Against Ships*, at 3.

<sup>66</sup> *Ibid.*

<sup>67</sup> Malvina Halberstam, *supra* note 9, at 276 ff; Dr. Lawrence Azubuike, *International Law Regime Against Piracy*, In: 15, Annual Survey of International & Comparative Law, 43, 2009 at 46 ff; Diana Chang, *supra* note 46, at 281 ff; Tina Garmon, *International Law of The Sea*:

Thereby, there are three key questions that need to be answered in order to establish the scope of Article 101 and whether it covers modern-day piracy and terror on sea. These key questions relate to the wording of Article 101 as described under Chapter 2.2.1. The first question is the requirement of “private-ends” and how this can be interpreted, the second question is the interpretation of the “one-ship, two-ship – requirement” (also called “one-ship, two-ship-dilemma”) and the third question is how the “high seas” requirement of Article 101 can be understood<sup>68</sup>.

In the first instance, the private-ends requirement of Article 101 will be discussed. The private-ends requirement

(“any illegal acts of violence, detention or any act of depredation, committed for private ends”<sup>69</sup>)

covers piracy acts which are committed due to private gains or private reasons like hijacking a ship and reselling it as phantom ship, and thereby appears to exclude attacks by maritime terrorists because of their public motivation. But a strict interpretation of this wording “private ends” would already be problematic as no one usually knows the motivation of pirates when they capture a vessel. Or how would you know that pirates attacking a ship are those motivated by political ideals and are part of a group of extremists who intent on causing an economic downturn in the maritime markets ?<sup>70</sup>

If the private ends requirement of Article 101 of UNCLOS would exclude such an attack as the Achille Lauro incident which was politically motivated or attacks on ships by environmental extremists, these criminal activities could not be enforced by UNCLOS as they would not be a “piracy action” as defined in Article 101<sup>71</sup>. Therefore, terrorists on sea

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*reconciling the Law of Piracy and Terrorism in the Wake of September 11<sup>th</sup>*, In: 27 Tul.Mar.L.J.2002-2003, 257, at 262 ff.; Clyde H. Crockett, *Toward a Revision of the International Law of Piracy*, In: DePaul Law Review, Vol. 26, at 82 ff.

<sup>68</sup> Samuel Pyeatt Menefee, *Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity*, In: 5 ILSA J. Int'l & Comp. L, 309, 1998-1999, at 311.

<sup>69</sup> Article 101 United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>70</sup> John I. Winn and Kevin H. Govern, *supra* note 21, at 133; Robert Snodden, *Piracy and Maritime Terrorism: Naval Responses to existing and emerging threats to the global seaborne economy*, January 18, 2008, available at <http://warandgame.wordpress.com/2008/01/18/piracy-and-maritime-terrorism-naval-responses-to-existing-and-emerging-threats-to-the-global-seaborne-economy/>.

<sup>71</sup> George D. Gabel, *supra* note 6, at 1442; Tina Garmon, *supra* note 67, at 258/259.

like described in the first chapter, who usually have a political goal, would be automatically excluded from the consideration of piracy as defined in Article 101. In case the regulation in this Article was restricted only to acts motivated by personal gains, any other motivation – especially a political one – precludes piracy being committed<sup>72</sup>. The question is whether it was the intention to exclude such activities from the crime of piracy.

UNCLOS does not define what is actually meant under “private ends”, nor did the Convention on the High Seas. As there is no definition existing, the wording, respectively the objective, of the “private ends”-requirement in Article 101 has to be interpreted according to international laws. Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention) provides general rules for the interpretation of treaties like UNCLOS. Thereby Article 31 para 1 of the Vienna Convention states that

“a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose<sup>73</sup>.”

To examine the “object and purpose” of Article 101, it has to be looked back to the history of its creation. The requirement of “private ends” in Article 101 has historical roots<sup>74</sup>. As mentioned in chapter one of this thesis, in the past, pirates were not always frowned upon. States used pirates to protect themselves against enemies respectively other states<sup>75</sup>. Due to this historical picture of pirates, some scholars argue, that it is the very nature of piracy, that pirates must not be acting for any recognized state and therefore, any incident with political intention is excluded even if pirates are not acting for a state directly, but for their own political goals<sup>76</sup>. But it was never expressly suggested by anyone in the past, that the “private ends” requirement would exempt terrorist acts or that kind of modern day piracy occurring today.

Article 31 para 2 of the Vienna Convention requires an interpretation of treaties with regards to

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<sup>72</sup> Douglas Guilfoyle, *supra* note 41, at 32.

<sup>73</sup> Article 31 para 1 Vienna Convention on the Law of Treaties, May 23, 1969

<sup>74</sup> Dr. Lawrence Azubuike, *supra* note 76, at 52.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*; Thomas Joseph, *The Principles of International Law*, NABU Press, (2010), at 233.

- “a) any instrument relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty<sup>77</sup>.”

As the existing international regulations for piracy have been heavily influenced, established and developed by the Harvard Draft Convention on Piracy prepared by the Harvard Research in International Law, this Draft Convention has to be examined as source of Article 101 as well as with its background and the intention of its writers<sup>78</sup>. It can be said that the Harvard Draft Convention is the “cornerstone” of the existing international piracy laws<sup>79</sup>. The most relevant Article 3 for piracy definition within the Harvard Draft Convention on Piracy reads as follows:

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

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim or right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
3. An act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this Article<sup>80</sup>.”

But similar like UNCLOS, neither the Harvard Draft does provide a definition, what a “private act” exactly is or what “private ends” means<sup>81</sup>. Within this wording of the Harvard Draft, the writers already adopted the private ends requirement and excluded from the definition of piracy all piracy acts committed for political or other public ends<sup>82</sup>. This intention is based on the before mentioned history of piracy, as acts of political groups or acts of insurgency and states should be excluded<sup>83</sup>. The writers thereby ignored the fact that there can be differences in the degree of state involvement and in the very nature of

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<sup>77</sup> Article 31 para 2 Vienna Convention on the Law of Treaties, May 23, 1969.

<sup>78</sup> Philipp Wendel, *supra* note 2, at 20; Aleksandr Antonovic Kovalev, *supra* note 43, at 735.

<sup>79</sup> Clyde H. Crockett, *supra* note 67, at 83; Malvina Halberstam, *supra* note 9, at 277.

<sup>80</sup> Philipp Wendel, *supra* note 32, at 20.

<sup>81</sup> Tina Garmon, *supra* note 67, at 265.

<sup>82</sup> Clyde H. Crockett, *supra* note 67, at 87.

<sup>83</sup> Malvina Halberstam, *supra* note 9, at 277; Dr. Lawrence Azubuike, *supra* note 67, at 52; Douglas Guilfoyle, *supra* note 41, at 33.

political groups and their acts<sup>84</sup>. During the area while writing the Harvard Draft, the exclusion of political activities made sense. Piracy was only a concern as it interfered with commercial shipping and transportation<sup>85</sup>. But it is clear that they did not want to limit piracy to acts with intent to rob. It may be agreed that the threat of international peace and stability could be of grave significance, if a state whose interests have not been directly infringed, sought to punish a state which authorized an act of piracy<sup>86</sup>. Therefore, it is reasonable to opt for the rule that state acts will not be within the definition of piracy but this should not mean that all acts having political goals would be excluded. But in my opinion, it seems like the writers of the Harvard Draft failed to include a definition of piracy which would meet the political and social needs of the late twentieth century – just because they did not know these problems as the worldwide community has not yet to deal with them - when the Harvard Draft was created. Therefore, I agree with the legal writer George Constantinople who states that the drafters of the Harvard Draft gave no attention to acts of violence committed on the high seas for public ends, and thus they ignored the possible threat that organized insurgents, national liberation organizations and their splinter groups, informal groups and isolated individuals would attack and seize ships on the high seas<sup>87</sup>.

Therefore, according to the intention and the purpose of that wording in the Harvard Draft, I believe, that it is mistaken to assess that the writers deliberately wanted to exclude piracy acts with a political intention. It can be agreed with Douglas Guilfoyle's opinion that, if the wording of "private ends" will be understood so that a political motive could exclude an act from the definition of piracy, it is to mistake the applicable concept of "public" and "private" acts<sup>88</sup>.

As well, when looking at the later definitions of piracy which came up in the SUA Convention and in the IMB definition, it can be agreed that at the present, the traditional definition of piracy and interpretation of private ends in UNCLOS is too narrow to meet the prevailing political and social needs with regards to the international fight against

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<sup>84</sup> Ibid.

<sup>85</sup> Tina Garmon, *supra* note 67, at 263.

<sup>86</sup> Clyde H. Crockett, *supra* note 67, at 88.

<sup>87</sup> George Constantinople, *supra* note 61, at 752.

<sup>88</sup> Douglas Guilfoyle, *supra* note 41, at 36/37.

piracy<sup>89</sup>. The wording of “private ends” has to be understood and interpreted as “private acts” or “private interests”, so that all acts of violence that lack state sanction are acts undertaken “for private ends”<sup>90</sup>. Based upon this inclusion of political motive for private gains of pirates, the private ends requirement of Article 101 UNCLOS shall be interpreted with an extension to acts of terrorism on the sea<sup>91</sup>. This view of interpretation seems to be right.

Another deficiency involved the Article 101 definition’s requirement that the act derive from one vessel attacking another

(“[...] and directed: [...], against another ship”<sup>92</sup>),

leaving unanswered the question of whether internal seizures (like again the Achille Lauro incident) would qualify under the definition<sup>93</sup>. This problem is called the “one-ship, two-ship dilemma”<sup>94</sup>. Thus, two vessels are necessary for the perpetration of piracy<sup>95</sup>. The wording seems to exclude crew seizures or passenger takeovers of vessels from the concept of piracy as only a single ship would be involved in such cases<sup>96</sup>. For an act of terrorism to also be an act of piratical aggression, the attackers must have attacked the vessel “from another vessel”<sup>97</sup>. As described in the first chapter, modern day piracy often occurs by hijacking vessels (its cargo or passengers/crew) and selling them as phantom ships again. In an age when luxury liners and cruise ships carry passengers from many nations, threats of attack are as likely to come from within a ship as they are from without it<sup>98</sup>. Therefore, to meet as well the modern-day forms of piracy, the definition of piracy should include as piratical attacks as well attacks against a ship without requiring the involvement of “another vessel”. Some scholars – especially Diana Chang - argue that this

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<sup>89</sup> George Constantinople, *supra* note 61, at 737.

<sup>90</sup> *Ibid*; Tina Garmon, *supra* note 67, at 265; Malvina Halberstam, *supra* note 9, at 282.

<sup>91</sup> Tina Garmon, *supra* note 67, at 265; Dr. Barry Hart Dubner, *Piracy in Contemporary National and International Law*, In: 21 Cal. W. Int’l L.J. 139, 1990-1991, at 146.

<sup>92</sup> Article 101 United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>93</sup> Ryan Olson, *supra* note 31, at 17.

<sup>94</sup> Lawrence J. Kahn, *Pirates, Rovers and Thieves: New Problems with an Old Enemy*, In: 20 Tul. Mar.L. J. 293, 322 (1996) at 296.

<sup>95</sup> *Ibid*.

<sup>96</sup> Samuel Pyeatt Menefee, *supra* note 68, at 312.

<sup>97</sup> Article 101 United Nations Convention on Laws of the Sea, 10 December 1982; Carlo Tiribelli, *supra* note 27, at 137.

<sup>98</sup> George Constantinople, *supra* note 61, at 749.

would not make sense as it would mean to expand the UNCLOS definition of piracy to political terrorism and mutiny<sup>99</sup>. Chang believes that this would be ineffective as these have different root causes and different solutions than piracy does. Terrorists would typically seek to draw attention to a cause regardless of whether the offenders profit from the attack, while pirates are solely motivated by profit and seek to avoid attention<sup>100</sup>.

As I see it, this interpretation is not a correct view. First, from a practical point of view, the activities of pirates and terrorists on sea overlap and the incidents merge into one another. Terrorists are, like pirates, civilians who are not associated with a country, but through fear or panic, attack other civilians for purely personal gain<sup>101</sup>. Second, all acts of maritime terrorism should be tried to enforce by the existing legal regulations without exception whatsoever, because they run contrary to the fundamental human rights of life, liberty and security. And third, when looking back at the wording of Article 101, the definition further elaborates under b) that piracy also may consist of participating “in the operation of a ship [...] with knowledge of facts making it a pirate ship”<sup>102</sup>. With regards to this wording and due to a contextual interpretation, the wording “against another vessel” should be interpreted to also include takeovers by insiders<sup>103</sup>.

Also with regards to the rules of interpretation of Article 31 para 2 of the Vienna Convention, looking back to the Harvard Draft to the “one-ship, two-ship-dilemma”, the intention for the wording of Article 3 in the Harvard Draft, which includes the wording of “another vessel” as well, was to follow the rules of customary international laws regarding flag state jurisdiction<sup>104</sup>. As pirates neither belong to a state nor organized political society, the regulation in the Harvard Draft wanted to ensure that no state or nation has more right of control over pirates or more responsibility for their doings than another<sup>105</sup>. Therefore, writers of the Harvard draft stated that a criminal act done by a part of the crew or

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<sup>99</sup> Diana Chang, *supra* note 46, at 282.

<sup>100</sup> Rosemary Collins & Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, In: 40 *J.Mar.L. & Com.*89, (2009), at 100; Diana Chang, *supra* note 46, at 282; Helmut Tuerk, *Combating Terrorism at Sea – The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, In: 15, *U. Miami Int’L & Comp. L. Rev.*, 2008, 337, at 343.

<sup>101</sup> Strati, Gavouneli & Skourtos, *supra* note 8, at 115.

<sup>102</sup> Article 101 (a)(i) United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>103</sup> George D. Gabel, *supra* note 6, at 1443; Samuel Pyeatt Menefee, *supra* note 68, at 312.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

passengers of the vessel itself should be treated as piracy when the revolt is directed against the vessel<sup>106</sup>.

Certainly, it can be agreed that Article 101 contains a legal gap in here (like already with the “private ends requirement”) and this gap can just be filled by interpretation. But it cannot be agreed with some legal writers that there was the intention to limit Article 101 and to restrict any broader interpretation of its wording and to limit its expansion as well to the hijacking cases and terrorism on sea. Especially, as long as there is no further separate and detailed international regulation and definition taking this up.

It is also necessary to examine the requirement set out in Article 101 that the act must take place at the high seas in order to establish the content of the definition and to determine whether it covers modern-day piracy. The wording of Article 101 is thereby very clear just defining an act of piracy when it occurred

“[...] (i) on the high seas, [...]; or [...] in a place outside the jurisdiction of any State [...]”<sup>107</sup>.

According to this wording, to enforce and prosecute piracy according to UNCLOS, piracy must have occurred in a maritime zone outside the jurisdiction of any state. The problem is that this requirement does not meet the most recent developments, as the IMO and IMB statistics prove that modern-day piracy activities usually occur in territorial waters and ports of a coastal state (often while the ship is berthed or anchored) and very seldom on the high seas<sup>108</sup>. For special regions or areas, the “high seas” element applies, like for example to Somali piracy. But the “high-seas requirement” is a severe limitation on Southeast Asian piracy as most attacks there occur in narrow straits that fall within a nation’s territorial seas<sup>109</sup>. Therefore, unless a coastal state has municipal legislation defining and punishing piracy, the offenders will not be considered as pirates within the UNCLOS definition and

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<sup>106</sup> Malvina Halberstam, *supra* note 9, at 285; 1955 1 *J. Int'l L. Comm'n* at 42-43 (quoting Harvard Research, Piracy).

<sup>107</sup> Article 101 United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>108</sup> Pottengal Mukundam, *Piracy and Armed Robbery against Ships Today*, In: 2 *WMU J. of Maritime Affairs* (2003), pp. 167 et seq., at 175; Jesus, José Luis, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, In: 18 *Int'l Mar. & Coast. L.* (2005), pp. 363 et seq. at 383; George D. Gabel, *supra* note 6, at 1442.

<sup>109</sup> Diana Chang, *supra* note 46, 282.

therefore not be prosecuted for “piracy”<sup>110</sup>. The wording of Article 101 makes piracy an international crime as violence committed against vessels within territorial or internal waters is not piracy according to international law<sup>111</sup>. Therefore, the definition and enforcement of piracy incidents is left with the coastal states in situations in which Article 101 would not apply.

The problem hereby is especially in case a country is unwilling or unable to control piracy acts within its maritime zones (internal & territorial waters & contiguous zone & EEZ), the question is whether the international community could intervene.

According to my view, this issue comes up as the term of “High Seas” within Article 101 has remained consistent, but the general jurisdictional landscape has changed in the last years after drafting of UNCLOS<sup>112</sup>. The redefinition of the term of “High Seas” in the later draft of UNCLOS to exclude the EEZ and archipelagic waters substantially reduced theoretical jurisdiction over piracy as defined in international waters<sup>113</sup>. As the EEZ may extend up to 200 miles from the baseline of the coastal state, areas like the Malacca Strait would not be covered by Article 101<sup>114</sup>.

To answer the question, whether the international community could also intervene within other maritime zones, it has to be looked into the further regulations of UNCLOS. Article 86 of the “High Seas Part VII” of UNCLOS which includes as well the piracy Article 101 states that

“The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State<sup>115</sup>.”

Seen that question from this wording, the answer would be “no”, but the second sentence of Article 86 expands this limitation again by stating that

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<sup>110</sup> Tina Garmon, *supra* note 67, at 264.

<sup>111</sup> *Ibid.*

<sup>112</sup> Samuel Pyeatt Menefee, *supra* note 68, at 146.

<sup>113</sup> *Ibid.*; P.W: Birnie, *Piracy Past, Present and Future*, In: 11 *Marine Policy* 163, 165, 170 (1987), at 172-173.

<sup>114</sup> George D. Gabel, *supra* note 6, 1442; Tina Garmon, *supra* note 67, at 264.

<sup>115</sup> Article 86 United Nations Convention on Laws of the Sea, 10 December 1982.

“This Article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58<sup>116</sup>.”

And Article 58 para 2 of UNCLOS regulates that

“Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part<sup>117</sup>.”

So, Article 58 para 2 of UNCLOS supports the application of Article 101 at least to the EEZ as long as its application is not incompatible with Part V of UNCLOS on the EEZ<sup>118</sup>. I cannot see that Article 101 would be incompatible, so this indicates therefore that Article 101 would also apply to the EEZ of a state and not just to the high sea, and I would thereby follow the opinion of Barry Hart Dubner and Douglas Guilfoyle<sup>119</sup>. Critical on this view is, that it has to be kept in mind, that any vessel apprehending a pirate in this zone, would have to do so in a way that would not interfere with a coastal state’ rights, nor may it constitute any threat to the security of the coastal state<sup>120</sup>.

After all, it can be mentioned that it would be better to clarify the definition of Article 101 already in the wording of this Article, and include therein as well piracy committed in other maritime zones and not only on the high seas. Especially, as territorial and internal waters are not included in Article 101, and there is no regulation within UNCLOS which refers to it for territorial and internal waters. Due to this gap in international regulations, there exists the opportunity, that piracy acts occurring in these waters go unpunished or without redress<sup>121</sup>. Usually, if a foreign vessel will be under attack of pirates or terrorists in the territorial waters of a state, the state whose flag the vessel is flying, is entitled according to international law to demand that the other state in whose waters the incident occurred, punish the pirates or terrorists or otherwise redress the act. But some states are reluctant and if they would not follow the punishment requirement, they would be in breach of its international obligations but this does not help to enforce and combat the international fight against piracy although the victim state would have the normal remedies

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<sup>116</sup> Ibid.

<sup>117</sup> Article 58 para 2 United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>118</sup> Ibid.

<sup>119</sup> Barry Hart Dubner, *Recent Developments in the International Law of the Sea* In:, 33 Int’l Law 627, (1999), at 632; Douglas Guilfoyle, *supra* note 41, at 44.

<sup>120</sup> T.A.Clingan, Jr., *The Law of Piracy*, In: Piracy at Sea, at 170.

<sup>121</sup> Dr. Lawrence Azubuike, *supra* note 67, at 51; John E. Noyes, *An Introduction to the International Law of Piracy* In:, 21 Cal. W. Int’l L.J. 105, (1990), at 113.

available for such international delict<sup>122</sup>. In my opinion, this gap in international laws seems to be essential and has to be addressed for a legal change within the international community.

### 2.2.3 SUA Convention

With regards to the Achille Lauro incident and the before mentioned gaps of Article 101 of UNCLOS<sup>123</sup>, the UN General Assembly adopted in 1985 Resolution 40/61<sup>124</sup>.

This resolution requested the IMO

“to study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures<sup>125</sup>.”

Upon this request, the IMO adopted in 1988 the Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation (also “Rome Convention”) whereby they clearly endeavored to establish a legal basis for prosecuting maritime violence that did not fall within the UNCLOS piracy framework<sup>126</sup>. It became apparent, that legal measures were necessary to prevent all modern-day piracy acts and to ensure that perpetrators of such acts were made duly accountable. There was an important need for piracy rules relating to the arrest, prosecution and subsequent detention of those responsible for acts of maritime terrorism. The SUA Convention applies to ships navigating or scheduled to navigate

“into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States”<sup>127</sup>.

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<sup>122</sup> Dr. Lawrence Azubuikwe, *supra* note 67, at 51.

<sup>123</sup> *Ibid*, at 56: “Some characterized the hijacking of the Achille Lauro as piracy while others did not see it as such because of the perceived political motives of the hijackers and the fact that a second ship or vessel was not involved”. That is why the United States and other states that may have had an interest in prosecuting the attackers of the Achille Lauro were left without any authority under international law to do so; Tina Garmon, *supra* note 67, at 271 .

<sup>124</sup> Malvina Halberstam, *supra* note 9, at 291; Helmut Tuerk, *supra* note 100, at 339/340.

<sup>125</sup> Article 13, General Assembly, A/RES/40/61, 9 December 1985.

<sup>126</sup> Ryan Olson, *supra* note 31, at 18.

<sup>127</sup> Article 4 para 1 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, March 10, 1988.

The principal purpose of the SUA Convention was to enforce retribution and punishment for maritime crimes and to ensure that appropriate judicial actions are taken against persons committing unlawful acts against ships, which includes the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to destroy or damage it<sup>128</sup>. Furthermore, it should eliminate the three above mentioned issues of Article 101 of UNCLOS<sup>129</sup>. The preamble of the Convention thereby expresses a deep concern

“about the world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings<sup>130</sup>

and the SUA Conventions is therefore also seen as “genuine” anti-terrorism Convention<sup>131</sup>. It addressed terrorism at sea for the first time.

To eliminate the gaps of UNCLOS, as mentioned under chapter 2.2.1, Article 3 of the SUA Convention contains a definition of piracy as an offense where a person unlawfully and intentionally seizes or exercises control over a ship, performs an act of violence against a person on board a ship, destroys a ship or causes damage to a ship or to its cargo, also including destruction or damage to navigational facilities, or threatens to do so<sup>132</sup>. Noticeably, Article 3 does not contain any provision for jurisdictional limitation for special maritime zones. As well the motive requirement that UNCLOS contains in its “private end” element is left out<sup>133</sup>. It can be agreed with other legal writers that the wording in the SUA Convention makes no distinction between commercial or political motives<sup>134</sup>.

Rather, Article 9 of the SUA Convention spells out that

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<sup>128</sup> Katie Smith Matison, *supra* note 4, at 381; Carlo Tiribelli, *supra* note 27, at 135.

<sup>129</sup> Tammy M. Sittnick, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, In: 14 *Pac. Rim L. & Pol'y* 743, (2005), at 760.

<sup>130</sup> Preamble of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988.

<sup>131</sup> Helmut Tuerk, *supra* note 100, at 347

<sup>132</sup> Article 3 of Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988.

<sup>133</sup> Collins & Hassan, *supra* note 100, at 275.

<sup>134</sup> Winn & Govern, *supra* note 21, at 138.

“nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.<sup>135</sup>”

The SUA Convention applies to ships

“navigating or [...] scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single state, or [beyond] the lateral limits of its territorial sea with adjacent states [...] or [when] the alleged offender is found in the territory of a state party<sup>136</sup>.”

Thus, the SUA Convention is applicable to ships on an international voyage operating or scheduled to operate seaward of any state’s territorial sea<sup>137</sup>. It expands thereby the definition of UNCLOS on piracy as it applies to any ship navigating to, through, or from the territorial seas<sup>138</sup>. Unlike UNCLOS, the SUA Convention encompasses criminal actions committed during international transit, in ports, coastal zones or territorial waters<sup>139</sup>.

Anyways, there are as well legal issues with the SUA Convention. An issue that arises out of the SUA convention is its “extradite or prosecute” provision, which requires that the countries that apprehend the offenders are restricted to performing either extradition or prosecution<sup>140</sup>. Malvina Halberstam states that most legal writers see this requirement as the “heart” of the SUA Convention<sup>141</sup>.

The “extradite or prosecute” requirement is regulated in Article 10 para 1 of the SUA Convention and reads as follows:

“1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which Article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to

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<sup>135</sup> Article 9 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988.

<sup>136</sup> Article 4 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988.

<sup>137</sup> Helmut Tuerk, *supra* note 100, at 348.

<sup>138</sup> R. Chuck Mason, *Piracy: A legal Definition*, In: CRS Report for Congress, December 13, 2010, at 5.

<sup>139</sup> Winn & Govern, *supra* note 21, at 138.

<sup>140</sup> Strati, Gavouneli & Skourtos, *supra* note 8, at 127.

<sup>141</sup> Malvina Halberstam, *supra* note 9, at 292.

submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of the State.<sup>142</sup>”

According to the use of “shall” within this wording, the decision to prosecute and thereby enforce the SUA Convention is discretionary for the states<sup>143</sup>. There is no absolute obligation to extradite. It seems like the possibility of non-extradition for political offences as well as the right to grant asylum are maintained<sup>144</sup>. The problem is that, according to this regulation, when both, the coastal state and the potential state for prosecution refuse to pursue action or neither state is a party to the Convention, the pirates or terrorists will have impunity<sup>145</sup>. And unfortunately many states may not have treaties with those countries normally targeted for piratical or terrorist acts making offenders captured in those countries free from extradition unless the state agrees. Another problem is that the SUA Convention is just applicable for the states which signed it. Therefore, according to the legal status of the SUA Convention, a state would not have jurisdiction to prosecute unless the vessel committing piracy had navigated through a signatory state’s territorial waters<sup>146</sup>. Thus far, there are 156 countries<sup>147</sup> that have subscribed to SUA, but it is fact that this mandatory extradite or prosecute requirement deters many Southeast Asian states from ratifying it<sup>148</sup>. Apart of – for example the Southeast Asian countries – there is also a general lack of willingness by many other countries not to sign the SUA Convention. For example, general “piracy-countries” like Malaysia, Indonesia and the Philippines did not ratify the Convention<sup>149</sup>. Therefore, in case pirates will stay out of the range of these countries which are not a party to the SUA Convention, they can avoid any prosecution or extradition for those offenses committed<sup>150</sup>.

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<sup>142</sup> Article 10 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988.

<sup>143</sup> Tina Garmon, *supra* note 67, at 273; Carlo Tiribelli, *supra* note 27, at 149.

<sup>144</sup> Helmut Tuerk, *supra* note 100, at 349.

<sup>145</sup> Carlo Tiribelli, *supra* note 27, at 145.

<sup>146</sup> George D. Gabel, *supra* note 6, at 1444/1445.

<sup>147</sup> See International Maritime Organization, Status of Conventions – Summary, online at [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=247](http://www.imo.org/Conventions/mainframe.asp?topic_id=247).

<sup>148</sup> Diana Chang, *supra* note 46, at 275.

<sup>149</sup> Ryan Olson, *supra* note 31, at 18/19.

<sup>150</sup> Strati, Gavouneli & Skourtos, *supra* note 8, at 128.

Furthermore, according to the legal writer Eugene Kontorovich and his research, even the states which signed the SUA Convention, do not use it. The SUA Convention has apparently only been used in one instance since its existence<sup>151</sup>.

Another problem with the interpretation and application of the treaty stated by Malvina Halberstam is that some states interpret Article 10 of the SUA Convention so, that that state, in which the offender is found, has an obligation to prosecute only if a request for extradition is received<sup>152</sup>. And, in addition to this interpretation, some states have indicated that under their domestic law they cannot prosecute without a request for extradition. Halberstam states that the result of this opinion is that if jurisdiction is limited to the state of nationality and to the flag state, and these states do not request extradition, the offender may escape punishment, even if found in a state that would like to see him brought to justice<sup>153</sup>. And according to the intention of the SUA Convention which is expressly mentioned in its preamble, this cannot be the case. Halberstam's view is correct as it is very certain that this interpretation is not consistent with the legislative history of the SUA Convention. During the negotiation process of the Convention, there has been made proposals with regards to such a requirement, but it was rejected. So, the legislative history does not leave any doubt that the obligation to submit the offender to competent authorities is not dependant on a request for extradition<sup>154</sup>.

But even when this interpretation is wrong, it does not help if states are not willing to become a party of the SUA Convention and to ratify it or the affected state refuses to start any action. This is in my opinion very unsatisfactory. I agree with Halberstam that a multilateral convention which is designed to deter and punish pirates and terrorists, should provide the jurisdictional bases necessary to ensure that a state whose fundamental interests are threatened by a maritime terrorist or piracy act, has the right to prosecute the

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<sup>151</sup> Eugene Kontorovich, *A Guantanamo on the Sea: The Difficulties of Prosecuting Pirates and Terrorists*, at 18 online at

[http://papers.ssrn.com/sol13/papers.cfm?Abstract\\_id=1371122##](http://papers.ssrn.com/sol13/papers.cfm?Abstract_id=1371122##); For a record of the facts of that case, consider *United States v Shi*, 525 F3d 709 (9<sup>th</sup> Cir 2008).

<sup>152</sup> Malvina Halberstam, *supra* note 9, at 297.

<sup>153</sup> *Ibid.*

<sup>154</sup> Robert Rosenstock, *International Convention Against the Taking of Hostages: Another Community Step Against Terrorism*, In: 9 *Den.J. Int'l L. & Pol'y* 169, (1980), at 181.

perpetrators and that those who commit such acts do not escape punishment for lack of jurisdiction by an interested state<sup>155</sup>.

As well, in my view it is right, that the wording of Article 10 of the SUA Convention does not impose an absolute duty to punish because the state in whose territory the offender is found is only required “to submit the case without delay to its competent authorities for the purpose of prosecution”, which “shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that state.”<sup>156</sup> So, the punishment and enforcement of such piracy incidents is left with the states as described by the legal writer Carlo Tiribelli: “States make the law, States break the law, States enforce the law”<sup>157</sup>. But the law of nations can only be as strong as the states themselves want it to be<sup>158</sup>.

According to the definition of the offence mentioned under point 2.2.1 of this thesis, Article 3 of the SUA Convention deals with offences committed by natural persons. It does not deal with offences that might be committed by Governments or states-sponsored terrorism<sup>159</sup>. This is another lack in the regulations of the SUA Convention as it should pursue all kind of piracy activities.

With regards to the question whether the SUA Convention covers all acts of modern-day piracy, it has to be looked as well to Article 6 of the SUA Convention, which regulates that

- “1. Each State Party shall take measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:
  - (a) Against or on board a ship flying the flag of the State at the time the offence is committed; or
  - (b) in the territory of that State, including its territorial sea; or
  - (c) by a national of that State.
2. A State Party may also establish its jurisdiction over any such offence when:
  - (a) it is committed by a stateless person whose habitual residence is in that State; or
  - (b) during its commission a national of that State is seized, threatened, injured or killed; or
  - (c) it is committed in an attempt to compel that State to do or abstain from doing any act<sup>160</sup>.”

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<sup>155</sup> Malvina Halberstam, *supra* note 9, at 309.

<sup>156</sup> Helmut Tuerk, *supra* note 100, at 349.

<sup>157</sup> Carlo Tiribelli, *supra* note 27, at 153.

<sup>158</sup> *Ibid.*

<sup>159</sup> Carlo Tiribelli, *supra* note 27, at 150.

<sup>160</sup> Article 6 para 1 and 2 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988.

According to this wording, all these offences mentioned in Article 6 are limited to activities that are directed against the ship per se (including its cargo), the safe navigation of that ship, persons on board and maritime navigational facilities<sup>161</sup>. But this list does not include activities on the high seas which are simply supportive of terrorist acts. Hence, it does not affect terrorist activities which are not sufficiently precise to be considered as piracy<sup>162</sup>. The problem is that there is not yet an internationally uniform definition of piracy which could be included in the wording of Article 6 of the SUA Convention<sup>163</sup>.

After all, it can be seen that the SUA Convention does not aim at prevention, deterrence or suppression of those piracy or maritime terrorism activities before they occur. And, also the SUA Convention lacks in some parts of its regulations, and therefore – in my opinion – cannot be seen as an overall legal solution to combat the new and steady developing trends of piracy and maritime terrorism. Especially, as the SUA Convention is just binding for the state parties who signed it. Thus, the SUA Convention – like UNCLOS – seems to be ineffective to clearly cover and combat modern-day piracy occurring on seas today.

#### **2.2.4 Protocol of 2005 to the SUA Convention**

In the wake of the terrorist attacks of September 11, 2001, it became obvious that the 1988 SUA Convention required a revision and an update because the SUA Convention was focusing more on reactions to a terrorist attack rather than its prevention<sup>164</sup>. The IMO decided in November 2001 to update the SUA Convention<sup>165</sup>. So, the original 1988 SUA Convention and Protocol, was amended respectively by two 2005 SUA Protocols. The legal framework of that Protocol is set by the relevant international legal instruments against terrorism as well as UNCLOS and the “customary international law of the sea”<sup>166</sup>. With this wording and the reference to customary law, the drafters wanted to widen up the

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<sup>161</sup> Rothwell & Stephens, *supra* note 30, at 195.

<sup>162</sup> *Ibid.*

<sup>163</sup> George D. Gabel, *supra* note 6, at 1445.

<sup>164</sup> Helmut Tuerk, *supra* note 100, 352.

<sup>165</sup> IMO/Assembly/22/RES/924.DOC.

<sup>166</sup> Rothwell & Stephens, *supra* note 30, at 198.

scope of the SUA Convention so that the regulations are applicable as well to states which have not yet signed or ratified the SUA Convention.

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

“1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

- (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
  - (i) uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN<sup>167</sup> weapon and other nuclear explosive devices – in a manner that causes or is likely to cause death or serious injury or damage;
  - (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
  - (iii) uses a ship in a manner that causes death or serious injury or damage; or
  - (iv) threatens to commit any of these offences<sup>168</sup>.”

A problem of this core regulation is that its wording just attempts to define some aspects of international terrorism on sea (“to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”), but there is still no comprehensive definition of maritime terrorism or modern-day piracy. Also, the wording “unlawfully and intentionally” is not defined. Again, this is leading to interpretation problems and legal issues. For example, the question is what is meant by “intentionally” when it comes to seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which is likely to destroy or damage it<sup>169</sup>. The same happens with the wording “unlawfully”. It is not clear whether “unlawfully” refers to unlawful acts under international or national laws.

Like the SUA Convention, also the 2005 Protocol to the 1988 SUA Convention is only binding to state parties who signed it. The maritime states which are most affected by piracy are non-signatories to either the SUA Convention or its protocols, or none of the

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<sup>167</sup> BCN = Biological, Chemical, Nuclear.

<sup>168</sup> Article 3bis (1a) Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, November 01, 2005.

<sup>169</sup> Winn & Govern, *supra* note 21, at 138.

instruments at all<sup>170</sup>. Therefore, similar to the SUA Convention, according to my opinion, the amendments with the 2005 Protocol are so long ineffective as it does not bind the entire international community. So, its impact to the international fight against piracy is very little and - apart from that – I believe, the SUA Convention and its 2005 Protocol remain still more a reactive rather than a preventative nature with regards to piracy and maritime terrorism.

### **2.3 Existing Legal Regulations from a National Perspective**

As already described in the before mentioned chapter, apart from these international regulations, customary international law authorizes as well each state to prosecute piracy activities occurring within their territory based on their national criminal code. Due to the location of the piracy crime itself, and due to the fact that most states do not have the resources or are unwilling to respond effectively to a pirate attack, it is the coastal state which is the most appropriate entity to combat piracy<sup>171</sup>. In the territorial sea, other states than the coastal state do not have any jurisdiction for enforcement measures against piracy<sup>172</sup>. For centuries, nations have deemed pirates to be “hostis generis” (= enemies of all mankind), so that a state may use its own domestic laws to try to punish those committing piracy, regardless of the pirates’ nationalities or where the piratical acts took place<sup>173</sup>. As “enemies of mankind” it is recognized in customary international law, that states could exercise universal jurisdiction because the pirate commits hostilities upon the subjects and property of any and all nations, without regard to right or duty, or any pretence of public authority<sup>174</sup>.

The following chapter will examine whether national regulations are comprehensive enough and whether states use their own existing internal jurisdiction and criminal law

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<sup>170</sup> Bangladesh, China, India, Nigeria and Philippines have ratified the SUA Convention but not the SUA 2005 Protocols. Sri Lanka and Thailand have ratified only the SUA Convention. Indonesia, Malaysia and Somalia have ratified note of the SUA treaties or protocols; Winn & Govern, *supra* note 21, at 139.

<sup>171</sup> Leticia Diaz/Barry Hart Dubner, *supra* note 39, at 7.

<sup>172</sup> Philipp Wendel, *supra* note 2, at 18.

<sup>173</sup> Yvonne M. Dutton, *Bringing Pirates to Justice: A Case of Including Piracy within the Jurisdiction of the International Criminal Court*, In: Chicago Journal of International Law, Vol. 11, Issue 1 (summer 2010), pp. 197, at 203/204

<sup>174</sup> *Ibid.*

codes to combat against modern-day piracy and maritime terrorism within their own maritime zone.

## 2.4 Identifying Gaps in National Laws

Since piratical activities occur generally within regional boundaries, a logical counter would be to establish regional international agreements to combat piracy<sup>175</sup>. But the ability of states to suppress piracy is limited by international law, which promotes only individual state actions against pirates and makes no provision to encourage, much less coordinate, effective anti-piracy enforcement<sup>176</sup>. Although UNCLOS requires that

“all states shall cooperate to the fullest possible extent in the repression of piracy on the high seas”<sup>177</sup>,

no international authority has been named or established to ascertain whether or not a state meets its obligation<sup>178</sup>.

As mentioned above, from a national perspective, due to the location of the piracy act, national criminal codes of each state could apply as far as there are regulations included regarding piracy. In the territorial sea, other states than the coastal states do not have any jurisdiction for enforcement measures against piracy<sup>179</sup>. One legal problem hereby is, that many criminal codes do not themselves define “piracy” or the “piracy act”, but merely provide for jurisdictions over those committing piracy “as defined by the law of the nations”<sup>180</sup>. For example, China has no special anti-piracy laws but prosecutes piracy under its general criminal code<sup>181</sup>. Australia has – in contrary to China – incorporated all of UNCLOS’s piracy provisions into Part IV of its Crimes Act of 1914<sup>182</sup>. The same did the

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<sup>175</sup> Timothy H. Goodman, *supra* note 2, at 156.

<sup>176</sup> Bruce Blanche & Jean Blanche, *Fighting Pirates on the High Seas*, In: *Petroleum Economist*, November 1996, at 26.

<sup>177</sup> Art. 100 United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>178</sup> Timothy G. Goodman, *supra* note 2, at 156

<sup>179</sup> Rothwell & Stephens, *supra* note 30, at 22.

<sup>180</sup> Carlo Tiribelli, *supra* note 27, at 140; Alfred Rubin, *Revising the Law of Piracy*, In: 21 *Cal. W. Int'l L. J.*, 129, (1990), at 129-136.

<sup>181</sup> Diana Chang, *supra* note 46, at 280 – China has no word for “piracy” in its criminal code and thus it prosecutes pirates for armed robbery and murder instead.

<sup>182</sup> Collins & Hassan, *supra* note 100, at 102.

United States. They have enacted the majority of the provisions of SUA in their 18 U.S.C. § 2280<sup>183</sup>.

But when the national criminal code does not define the act of piracy or does not provide a separate single regulation for piracy acts, other existing criminal code regulations have to be interpreted by states. These gaps in national criminal laws put the burden of interpretation and definition of piracy upon national judges respectively the municipal legal systems. As customary international law provides no agreed-upon definition for what acts constitute the international crime of piracy, the affected states have to decide and interpret the internationally orientated definition of the offence and they do it differently<sup>184</sup>. Furthermore, national courts may not have sufficient legal capacity or expertise to adjudicate serious crimes of international concern.

Another legal problem in my view is occurring by the fact that in regions which involve a multitude of coastal states, pirates may escape a patrol boat of one coastal state simply by entering the territorial seas of another coastal state which is maybe unwilling to respond to a pirate attack and would then object to any enforcement measure by other states<sup>185</sup>. So, even states which have the necessary resources and procedures to prosecute piracy, political reasons may prevent a pirates' prosecution. For example, it has been examined that the states bordering the Malacca Strait are very reluctant to let other states undertake patrols in their territorial sea (especially patrols of the US navy and coast guard)<sup>186</sup>.

In Somalia – an area where currently most of pirate attacks occur - no governmental patrol boats are controlling its coastal waters although piracy represents a considerable international problem in its waters. As Christopher Joyner states it correctly in his legal article, with no operating official maritime policy presence at all – i.e., no coast guard, naval presence, patrol boats, defensive armaments, or staff training – the level of lawlessness in Somali waters is bound to grow<sup>187</sup>.

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<sup>183</sup> Violence Against Maritime Navigation, 18 U.S.C. § 2280 (1996).

<sup>184</sup> Carlo Tiribelli, *supra* note 27, at 140.

<sup>185</sup> Luff & Korin, *supra* note 26, at 69.

<sup>186</sup> Rothwell & Stephens, *supra* note 30, at 23.

<sup>187</sup> Christopher Joyner, *Law & Ethics, Navigating Troubled Waters – Somalia, Piracy, and Maritime Terrorism*, In: Georgetown Journal of International Affairs, Vol. 10, Issue 1, (summer/fall2009), pp. 83, at 85.

Besides, it can be reported that even in such states like the United Kingdom, pirates of certain nationalities will not be prosecuted, as the United Kingdom asylum laws might allow the offender to remain in the country indefinitely after trial. The British Foreign Office in London has stated in a legal opinion that Somalian pirates who would be subject to harsh treatment in Somalia cannot be deported as this would be against the British Human Rights Act<sup>188</sup>. The same applies to Portugal. The Portuguese government only arrests pirates when Portuguese nationals or ships are involved<sup>189</sup>. Thus, instead of bringing pirates to justice, a culture of impunity reigns, with captured pirates being released and permitted to continue their illegal activities<sup>190</sup>. Particularly Western states are avoiding their duty to prosecute pirates because of fears that – if convicted – those pirates will then seek political asylum for themselves and their families. Though, no country would be eager to have to import pirate clans<sup>191</sup>.

According to these facts, it seems like most states are shunning their judicial responsibility to prosecute the pirates who commit crimes in their territory or against their ships and crews. And the reasons for this refusal are – like mentioned above - many: Inadequate or non-existent national laws criminalizing the acts committed, concerns about the safety and impartiality of local judges, the difficulties of obtaining and preserving evidence, and fears that if convicted, the pirates will be able to remain in the country where they are prosecuted<sup>192</sup>. Due to these facts and situation, it is very obvious to me that - besides the international regulations on piracy - neither the national systems do work and are not prepared to combat the new developments of modern-day piracy.

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<sup>188</sup> Diana Chang, *supra* note 46, at 280.

<sup>189</sup> *Ibid.*

<sup>190</sup> Yvonne M. Dutton, *supra* note 173, at 216.

<sup>191</sup> Helmut Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, In: University of Miami International and Comparative Law Review, Vol 17, Issue 1 (fall 2009), pp. 1-42, at 38.

<sup>192</sup> Yvonne M. Dutton, *supra* note 173, at 200.

### 3 Future Prospects and Tendencies of Development of International Regulations against Modern-Day Piracy

As examined in the before mentioned chapter, many states do not have laws that would permit them to prosecute piracy offenses, either because they have not incorporated the provisions of UNCLOS or the SUA Convention, or because they do not have domestic laws that criminalize piracy. In both documents – UNCLOS and the SUA Convention, the United Nations have limited its member nations’ ability to respond to pirate attacks by preventing foreign incursions into the sovereign waters of another nation and thereby effectively crippling any opportunity to wage a fight against piracy<sup>193</sup>.

Another reason I believe is, that they are – simply said – unwilling or lazy to prosecute piracy. Besides, the current international regulations with regards to piracy have failed to evolve to reflect the times and places limitations on those who can best combat the pirate crisis, the pirate’ victims and private entrepreneurs<sup>194</sup>. As verified before, “piracy” – the world’s oldest crime against the law of nations – does not have an easily applied and universally accepted definition<sup>195</sup>. This is one of the core problems in my view.

Nevertheless, the need for regional cooperation with respect to greater efforts toward coordinated anti-piracy patrols is one universally agreed upon goal<sup>196</sup>. This in particular as many nations – like Somalia – that are located in “piracy territories” would be unequipped to prosecute piracy cases even if they had sufficient laws on their books. They simply do not have the political stability, institutions, or personnel to allow them to investigate and fairly adjudicate such matters<sup>197</sup>.

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<sup>193</sup> Matthew C. Houghton, *Walking the Plank: How United Nations Security Council Resolution 1816, while progressive, fails to provide a comprehensive solution to Somali piracy*, In: *Tulsa Journal of Comparative & International Law*, Vol. 16, issue 2 (Spring 2009), pp. 253, at 275.

<sup>194</sup> Ethan C. Stiles, *Reforming current International Law to combat modern Sea Piracy*, In: *Suffolk Transnational Law Review*, Vol. 27, issue 2, (2003-2004), pp. 299, at 325.

<sup>195</sup> Michael Davey, *A Pirate looks at the twenty-first century: The Legal status of Somali pirates in an age of sovereign seas and human rights*, In: *Notre Dame Law Review*, Vol. 85, issue 3, (March 2010), pp. 1197, at 1199.

<sup>196</sup> Zou Keyuan, *Enforcing the Law of Piracy in the South China Sea*, In: 31 *J. Mar. L & Com* 116 (2000), at 116; Ethan C. Stiles, *supra* note 194, at 325.

<sup>197</sup> James Kraska/Brian Wilson, *Combating pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, In: *Ocean & Coastal Management*, Vol. 52, (2009) pp. 516, at 518.

After all, the question is whether an international “criminal code” for piracy needs to be established. Besides, it is clear to myself that in order to successfully combat piracy and maritime terrorism, international assistance and cooperation is required.

### **3.1 Current Legal Development and Discussions from a Global Perspective**

As described in this thesis, international treaty and customary law provide for a narrow basis under which pirates can be apprehended on the high seas or elsewhere. Whether a pirate can be prosecuted depends on where the pirate is captured, the nationality of the pirate, the nationality of the ship that arrests him and the circumstances under which the pirate is arrested<sup>198</sup>. Therefore, the international community discusses whether an international new treaty with regards to piracy is required and could solve these problems.

Joseph M. Isanga states that fundamental to the discussion of establishment of a new international legal treaty with regards to the piracy crime is an agreed-upon definition of what is the crime, who are the offenders, and who may prosecute them<sup>199</sup>. As long as coastal states have no obligation to enact domestic laws aimed at combating acts considered to be piracy under international law, the piracy threat will remain and increase. The lack of uniformity in the definition of piracy throughout the world, in conjunction with the complete absence of any definition of piracy in some countries, will continue to impede efforts to reduce incidents of piracy. Therefore, I agree with Isanga, there is a need for an overall accepted definition of piracy which applies to all possible form of this crime, and that the improvement of domestic laws, especially those pertaining to jurisdiction over piracy, is vital to ensure an effective enforcement regime<sup>200</sup>. This problem could be solved by establishing an international code on piracy applicable to all states to harmonize several important legal structures on an international level. But, I believe, that it is questionable hereby whether to establish a new international code or whether better to expand the existing definitions and provisions in UNCLOS. Many commentators have suggested to extend the regime of piracy to territorial waters in UNCLOS but in such a way that a coastal

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<sup>198</sup> Joseph M. Isanga, *Countering persistent contemporary Sea Piracy: Expanding Jurisdictional Regimes*, In: *American University Law Review*, Vol. 59, issue 5, (June 2010), pp. 1267, at 1270.

<sup>199</sup> Christopher Joyner, *supra* note 187, at 86.

state's sovereignty would continue to be respected<sup>201</sup>. Modifications of UNCLOS can be done according to Article 311 of UNCLOS which provides that two or more state parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicably solely between them<sup>202</sup>. I agree that it would be easier to expand and extent the already existing regime of piracy in the UNCLOS provisions than establishing a totally new international code on piracy crime.

In addition to the need of a revision of international regulations on piracy, it is considered in the international law community to establish a coinciding international crimes court just for piracy acts, an international court of justice for piracy. Article 105 of UNCLOS provides thereby the following provision:

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. 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<sup>203</sup>.”

and authorizes with it for any state to seize a pirate ship or aircraft and its property on board, arrest the crew, and prosecute them through its own courts, as long as the seizure takes place on the high seas or on waters outside the jurisdiction of any state. But, there is again the problem, that UNCLOS does not provide a comprehensive definition what “piracy” means and Article 105 is again just limited to actions on the “high seas”. Furthermore, the “may- wording” of Article 105 does not make it obligatory for the states to take jurisdictional action<sup>204</sup>. And: This option has not been exercised much by states in the last years. Milena Sterio states in her legal article, that the reasons for this vary, but often there is only domestic criminal prosecution of pirates in place, the cost factors is too high for many states or states just simply want to avoid the hassle associated with prosecuting pirates because of fear that piracy trials will be difficult, lengthy, and

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<sup>200</sup> Joseph M. Isanga, *supra* note 198, at 1306/1307.

<sup>201</sup> Jose Luis Jesus, *supra* note 108, at 382; Joseph M. Isanga, *supra* note 198, at 1316.

<sup>202</sup> Article 311 United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>203</sup> Article 105 United Nations Convention on Laws of the Sea, 10 December 1982.

<sup>204</sup> Ved. P Nanda, *Maritime Piracy: How can International Law and Policy address this growing global menace ?*, In: *Denver Journal of International Law and Policy*, Vol. 39, issue 2, (2011), pp. 177, at 182; J. Ashley Roach, *AGORA: Piracy Resolutions, Countering Piracy*

burdensome on that nation's judiciary<sup>205</sup>. I believe that it is usual behavior of nations not to be interested to play the role of the global policeman on piracy and to takeover sole responsibility. Therefore, in recent years, several ad hoc tribunals (e.g. International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, Iraqi High Courts) have been established and some nations transferred captured pirates to regional partners like Kenya<sup>206</sup>. But the acceptance of ad hoc tribunals for piracy prosecution is questionable. An ad hoc piracy tribunal needs an appropriate housing and detention facility, a trained judiciary, prosecution and defense counsel and to develop a uniform piracy law that would be applied to all captured pirates<sup>207</sup>. With regards to transfer of captured pirates to regional partnerships for their prosecution, the legality of such transfers to third parties is not given under international law as it is not provided for in Article 105 of UNCLOS ("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...")<sup>208</sup>. While the SUA Convention allows such transfers of pirates to third-party states, there is again the problem that many countries are not members of the SUA Convention<sup>209</sup>.

Besides, I see the problem that it could be, that the capturing nation is bound by various human rights conventions and therefore may not transfer pirates to third states if there is a risk that pirates will be tortured in such third states or that they will not receive a fair trial. Piracy cases ought to be tried in courts that are sufficiently equipped to handle piracy cases<sup>210</sup>.

Therefore, it is proposed to establish a permanent International Piracy Tribunal, modeled after the International Criminal court (ICC) with special piracy jurisdiction. Some other legal writers, like Yvonne M. Dutton, propose instead of this possibility to just expand the jurisdiction of the ICC. For this expansion, the Statute of the ICC would have to be

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*Off Somalia, International Law and International Institutions*, In: American Journal of International Law, Vol. 104, Issue 3, (July 2010), pp. 397, at 403.

<sup>205</sup> Milena Sterio, *Fighting Piracy in Somalia (And Elsewhere): Why more is needed*, In: Fordham International Law Journal, Vol. 33, issue 2, (January 2010), pp. 372, at 394/395.

<sup>206</sup> Milena Sterio, *supra* note 205, at 395, Yvonne M. Dutton, *supra* note 173, at 220, 221.

<sup>207</sup> Milena Sterio, *supra* note 205, at 396.

<sup>208</sup> J. Ashley Roach, *supra* note 204, at 403; Joseph M. Isanga, *supra* note 198, at 1275/1276.

<sup>209</sup> Milena Sterio, *supra* note 205, at 397.

<sup>210</sup> Joseph M. Isanga, *supra* note 198, at 1280.

amended to include the specific crime of piracy<sup>211</sup>. The establishment of a special international criminal court for piracy has been criticized because it leaves the crime of piracy under the domain of traditional universal jurisdiction, which would permit any state to prosecute suspected pirates regardless of their nationality<sup>212</sup>. Yvonne M. Dutton states correctly that the expansion of the ICC's jurisdiction on piracy would be less costly than the establishment of an entirely new international tribunal to adjudicate piracy cases<sup>213</sup>. Indeed, it would be maybe more practicable to create a separate chamber at the ICC to ensure that piracy cases would be investigated, prosecuted and adjudicated by those with the necessary expertise.<sup>214</sup> In the contrary, Helmut Tuerk (vice president of the International Tribunal for the Law of the Sea (ITLOS)) states that the ICC has been established to prosecute individuals for crimes for a much more serious nature than piracy, i.e., genocide, crimes against humanity, war crimes and the crime of aggression<sup>215</sup>. Tuerk therefore believes that the ICC would not be suitable for dealing with common criminals like pirates in cases where national tribunals are unwilling or unable to prosecute them. In addition, he reminds that the amendment of the statutes of the ICC would undoubtedly require a number of years<sup>216</sup>. In any case, I would not agree with these opinions of Tuerk, but I would agree that if there would be established a special chamber for pirates at the ICC, this requires time as the court judges would need to develop their expertise in maritime laws. Besides, it creates further costs. The same would be the case by establishing an entire new International Tribunal. Another discussion is whether the ITLOS should prosecute pirates<sup>217</sup>. ITLOS is already a functional tribunal and the judges are already trained on maritime laws. Thus, no additional training would be needed and no additional personnel costs incurred by any nation. In that case, ITLOS statute would need to be amended to face as well the crimes of piracy but commentators believe that this process would be less difficult than that needed to amend the ICC statute<sup>218</sup>. In my opinion, this would be the best solution to create an effective international tribunal on piracy crimes.

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<sup>211</sup> Joseph M. Isanga, *supra* note 198, at 1298; Yvonne M. Dutton, *supra* note 173, at 202.

<sup>212</sup> *Ibid.*

<sup>213</sup> Yvonne M. Dutton, *supra* note 173, at 232.

<sup>214</sup> *Ibid.*

<sup>215</sup> Helmut Tuerk, *supra* note 191, at 40.

<sup>216</sup> *Ibid.*

<sup>217</sup> Milena Sterio, *The Somali Piracy Problem: A Global Puzzle necessitating a global solution*, In: *American University Law Review*, Vol. 59, issue 5, at 1489.

As described before, lacking national and regional enforcement capability, Western navies are absolutely necessary to quell the rise of piracy. The United Nations Security Council as well as the IMO are in charge of organizing and implementing relevant naval control and enforcement measures, especially for certain piracy affected regions and they should use this capacity more effectively.

The United Nations Security Council passed several resolutions in 2007 and 2008 regarding piracy in Somalia. Resolution 1772 of 2007 stresses the importance of cooperation between the opposing factions in Somalia and reiterates the need for comprehensive and lasting cessation of hostilities<sup>219</sup>. But the most significant resolution of the UNSC was resolution 1816 which authorizes any and all countries combating piracy off the Somali coast to engage pirates on land or sea provided that there is advance consent by the Somali Transitional Federal Government (hereby it has to be mentioned that the Somali TGF is nearly non-functional, therefore it is very questionable whether this condition of advance consent is sensible, it seems to be more a political diplomatically action)<sup>220</sup>. So, with this resolution, the UNSC made a legal exception by authorizing cooperating states to take the same steps with respect to piracy in the Somali territorial sea as the law of piracy permits on the high seas. Furthermore, the UNSC has endorsed actions by Canada, Denmark, France, India, the Netherlands, Russia, Spain, the United Kingdom, the United States, and other NATO forces to send warships to the Gulf of Aden region to combat pirates<sup>221</sup>. As well in Resolution 1846, the UNSC noted that the SUA Convention

“provides for parties to create criminal offenses, establish jurisdiction, and accept the delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat [of force] or any other form of intimidation<sup>222</sup>”

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<sup>218</sup> Milena Sterio, *supra* note 217, at 1490.

<sup>219</sup> Katie Smith Matison, *supra* note 4, at 386; J. Ashley Roach, *supra* note 204, at 412/413.

<sup>220</sup> SC Res. 1819, para 7(a), (b) (June 2, 2008) authorizing those states to “enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law [and to] use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery”; Michael Davey, *supra* note 195, at 1211.

<sup>221</sup> Christopher Joyner, *supra* note 187, at 88; J. Ashley Roach, *supra* note 204, at 401/402.

<sup>222</sup> SC Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

and thus urged state parties to the SUA Convention to fully implement their obligations under the Convention, including cooperating with the IMO to

“build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.”

With regards to these recent and ongoing resolutions of the UNSC, the UNSC has been successful in identifying the scope of Somali piracy and encouraging a coordinated international response, but its “real” effectiveness is questionable. While the UNSC resolutions have been helpful in combating piracy in some respects, they have not been provided adequate legal guideposts to foreign navies. According to my view, there is still the legal issue whether Western navies are allowed to act over the international law and the permissible extent of the use of their force<sup>223</sup>. The UNSC resolutions treat the enforcement jurisdiction exercised by foreign navies over pirates in Somali territorial seas as an exception to international customary law and not as a status quo<sup>224</sup>. In addition, these naval operations tend to be ad hoc and defensive in nature, but they fail to focus on remedying the political instability that allows piracy in these most affected regions<sup>225</sup>. Whether states which are parties to the SUA Convention are cooperative enough to establish a regional tribunal court on the basis of multilateral agreements and with the UN participation is as well more than questionable. This, although Article 100 of UNCLOS imposes one duty alone on states regarding piracy: “Cooperation”. Anyways, Article 100 of UNCLOS does not provide any detail on the nature of such cooperation<sup>226</sup>. But without any guidance of cooperation by an international body, states will have difficulties to organize a global cooperation to combat piracy from an overall perspective.

As well the IMO is reacting on the piracy threat but the results should be critically observed. The IMO’s initiatives have resulted in the establishment of several regional and sub-regional arrangements aimed at preventing, deterring, and repressing acts of piracy and armed robbery against ships.

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<sup>223</sup> Michael Davey, *supra* note 195, at 1212/1213.

<sup>224</sup> *Ibid*; Milena Sterio, *supra* note 205 at 390.

<sup>225</sup> Christopher Joyner, *supra* note 187, at 89.

<sup>226</sup> Article 100 United Nations Convention on Laws of the Sea, 10 December 1982 which provides: “All States shall co-operate 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”; Ethan C. Stiles, *supra* note 194, at 310.

In January 2009, the IMO held a meeting to conclude four resolutions: The most important resolution 1 – The Djibouti Code of Conduct – requires cooperation in a manner consistent with international law in the investigation, arrest, and prosecution of those reasonably suspected having committed acts of piracy, the interdiction and seizure of suspect ships, the rescue and care of ships, persons, and property subject to piracy, and a shared patrol<sup>227</sup>.

Additionally, the IMO implemented in 2009 two important sets of guidelines for a more effective fight against piracy. One was an update of the IMO’s guidance on combating piracy and armed robbery against ships and adopted a set of “best management practices” to deter such attacks<sup>228</sup>. These guidelines include several recommendations related to certain travel routes and more technical advice regarding preferred modes of communication and reporting, evasive maneuvering tactics, and other defensive measures<sup>229</sup>. The other adoption was on a guidance document in the form of a Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships to foster international cooperation and to coordinate governments’ actions<sup>230</sup>. Any decrease in piracy attacks cannot be seen for the time being. In practice, for me it is questionable whether such guidelines for best management practices to deter piracy attacks really help ship-owners and vessels in case of a piracy incident. Therefore it has to be kept in mind that there are as well the discussions to amend the provisions of UNCLOS and to allow crews on vessels to arm themselves and to allow them to use similar weapons like the one of pirates and to train them to effectively use them. This view is supported by the IMB as they believe ships and crews in known pirate waters must be armed in proportion to the seriousness of the piracy threat the waters pose<sup>231</sup>. They propose to include to UNCLOS the following provision:

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<sup>227</sup> Katie Smith Matison, *supra* note 4, at 385; IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Annex, IMO Council Doc. C 102/14 (April 03, 2009), available at <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>

<sup>228</sup> IMO, Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia: Best Management Practices to Deter Piracy in the Gulf of Aden and Off the Coast of Somalia Developed by the Industry, ¶¶ 5-6, IMO Doc. MSC.1/Circ. 1335 (September 29, 2009).

<sup>229</sup> Ved P. Nanda, *supra* note 204, at 188.

<sup>230</sup> *Ibid*; IMO, Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, Annex, IMO Assemb. Res. A. 1025 (26), (January 18, 2010).

<sup>231</sup> Ethan C. Stiles, *supra* note 194, at 313.

“A State shall have the right to arm any ship flying its flag with sufficient arms to protect its ships in any territory governed by this Convention<sup>232</sup>.”

Apart of this, if such a provision would be included in UNCLOS regulations upon piracy, it needs also to provide limits and guidance on this privilege to bear arms on vessels which are not warships or naval vessels. Ethan C. Stiles reminds that by allowing an arming of crews, there should be a legal requirement to file an inventory, to send inspectors to board and inspect the ship’s weapon inventories and some further control actions need to be implemented to prevent misuse of arms and weapons on board and in ports as well as any damage to third parties<sup>233</sup>. I see as well the danger that such kind of weapons could be misused and usually violation will be answered with violation. It could be that arming of ship crews could create more violence while a piracy incident and let it easier escalate. Therefore, I would have doubts whether such measures would help to limit the increase in piracy threat.

### **3.2 Conclusion and General Assessment of Past and Future Legal Developments and Regulations**

After all, the international community appears to understand the severity of the problem of modern piracy and also that it will not go away unless the international community takes aggressive action to combat it<sup>234</sup>.

As stated in this thesis, at present, no treaty expressly requires states to criminalize piracy, no agreement has been reached on what such laws should contain and no international court has overall jurisdiction to try pirates. The existing international law of piracy imposes no specific duties to prosecute or enact domestic law criminalizing piracy, though it does provide states with various kinds of authority to assist in the repression of piracy<sup>235</sup>.

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<sup>232</sup> IMB Press Release, *Organized Crime Takes to the High Seas, ICC Piracy Report Finds* (February 04, 2002), at [http://www.iccwbo.org/home/news\\_archives/2002/piracy\\_report.asp](http://www.iccwbo.org/home/news_archives/2002/piracy_report.asp).

<sup>233</sup> Ethan C. Stiles, *supra* note 194, at 315/316.

<sup>234</sup> Yvonne M. Dutton, *supra* note 173, at 212.

<sup>235</sup> J. Ashley Roach, *supra* note 204, at 415.

The presence of international navies may sometimes deter pirates, but navies are for fighting wars; they are neither pirate chasers nor can they be everywhere all the time to suppress every piratical act<sup>236</sup>. When asked about the presence of foreign military within Somalia's territorial waters, a Somali pirate replied:

“We are not scared of the U.S. troops or any other troops stationed off our waters. Why should we be scared ? [...] They have weapons, but so do we. And we are the ones with the human shields<sup>237</sup>.”

I believe that the problem should be met where it starts. Hence, once it is established why people engage in piracy and maritime terrorism, it is then possible to develop a comprehensive strategy for resolving the problem<sup>238</sup>. This is how an anonymous Somali pirate highlighted the interconnectivity of violence, piracy and a lack of governmental reaction:

“I am Somali; the gun is our government<sup>239</sup>.”

To make a long story short: After all discussions, the inability of states to police their own waters, the depressed economic conditions that give rise to crime, and the geographical and jurisdictional difficulties of policing states' waters combine to encourage piracy.

Therefore, in my opinion, it is essential that states cooperate in the repression of piracy under Article 100 of UNCLOS. States which have not yet criminalized acts of piracy in their domestic legislation or provided the necessary authorization under the pertinent international conventions and customary international law to prosecute and punish suspected pirates must do so as a matter of priority<sup>240</sup>. Bringing pirates to justice is essential for its deterrent effect. Prosecutions must be done in compliance with widely recognized principles of due process and applicable international human rights norms.

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<sup>236</sup> Christopher Joyner, *supra* note 187, at 89.

<sup>237</sup> Matthew C. Houghton, *supra* note 193, at 262.

<sup>238</sup> Matthew C. Houghton, *supra* note 193, at 257.

<sup>239</sup> Matthew C. Houghton, *supra* note 193, at 282.

<sup>240</sup> Ved. P. Nanda, *supra* note 204, at 204, Milena Sterio, *supra* note 205, at 392.

As shown in the chapter before, some commentators propose that pirates should be prosecuted at the place in the region where the piracy act was committed because of cultural, familial and linguistic considerations and the proximity to where the acts took place. I think this will again lead to uncontrolled enforcement acts and jurisdictional differences between countries which is unlikely to combat piracy on a comprehensive approach. Apart of that, it is unlikely that a national court would be located close to the offense and the evidences necessary to prosecute it. Pirate attacks usually involve perpetrators, victims and witnesses of many nationalities<sup>241</sup>. Just an international court would be able to provide justice that is fairer and more impartial than justice in national courts, given that the judges will not be linked to the state where the crime was committed or the defendants that committed that crime. Furthermore, an international court on piracy can apply international laws and rules and thereby ensures as well the uniformity in the application of laws and the sentencing of offenders<sup>242</sup>. As piracy affects not just one nation but rather the international community it is the kind of crime over which an international criminal court could properly pass judgement on behalf of the world community. In any case, whether a new international crime court will be implemented or the existing ICC's or ITLOS' authority will be expanded on piracy, there is a certain need for such a tribunal.

Finally, piracy as well as terrorism thrives in disordered states, war-torn regions, and impoverished areas. Piracy-fighting countries may need to undertake additional efforts to rebuild such states and regions and to ensure that such lawlessness does not occur in other regions in the world. Thus, the best long-term solution against the crime of piracy may be the developed world's commitment to re-establishing functioning order in developing and failed states<sup>243</sup>.

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<sup>241</sup> Yvonne M. Dutton, *supra* note 173, at 225.

<sup>242</sup> Yvonne M. Dutton, *supra* note 173, at 224/255.

<sup>243</sup> Milena Sterio, *supra* note 205, at 408; Joseph M. Isanga, *supra* note 198, at 1312.

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