



**PIRACY: A CRITICAL EXAMINATION OF THE DEFINITION AND SCOPE OF
PIRACY AND THE ISSUES ARISING THEREFROM THAT AFFECT
THE LEGAL ADDRESS OF THE CRIME GLOBALLY.**

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CONTENTS

CHAPTER 1: AN INTRODUCTION TO PIRACY	3
1.1 A Brief Background	3
1.2 The Problem of Maritime Piracy	3
CHAPTER 2: LITERATURE REVIEW AND METHODOLOGY	6
2.1 Aim of the Thesis and Area of Focus	6
2.2 Geographical scope	6
2.3 The Legal Issues Raised	7
2.4 Methodology	7
CHAPTER 3: THE DEFINITION OF PIRACY AND ITS LEGAL ISSUES	9
3.1 United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982 and its definition of Piracy	10
3.2 The definition of Piracy by International Maritime Bureau (IMB)	11
3.3 The Geographical Scope of the Offence	11
3.4.0 Limitations within the UNCLOS definition of piracy.....	12
3.4.1 Piracy and Terrorism: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) Convention, 1988	14
3.4.2 The Duty to Cooperate to suppress piracy: Public International Law relating to the Powers of Governments and their Navies over Acts of Piracy	19
3.5.0 Jurisdiction: Issues Relating to Capture, Detention and Prosecution of Pirates	20
3.5.1 Jurisdiction to Capture Pirates	20
3.5.2 Jurisdiction to Prosecute Pirates	22
3.6 The Effect on the Successful Address of Piracy Globally	29
CHAPTER 4: OTHER ISSUES/ PUBLIC INTERESTS	31
4.1 International Cooperation to Suppress Piracy	31
4.2 Application of Human Rights Law	33
4.3 Other concerns: Reconciling Public and Private Interests	35
CHAPTER 5: CONCLUSION: THE WAY FORWARD	37
5.1 Are The Current Legal Frameworks Adequate?	37
5.2 Conclusion	40

CHAPTER ONE

AN INTRODUCTION TO PIRACY

1.1 A Brief Background

Piracy constitutes a phenomenon that has existed as long as maritime trade; plus it has taken outstanding proportions in the last two decades. It is a breach to the most fundamental principles of modern civilization. In the worst-hit areas off the Horn of Africa¹, no seafarers can be safe at sea. Seaborne piracy against transport vessels remains a significant issue particularly in the waters between the Red Sea and Indian Ocean, off the Somali coast, and also in the Strait of Malacca² and Singapore, which are used by over 50,000 commercial ships a year.

Piracy is considered as one of the most hideous crimes (in international law), in relation to which criminal responsibility is allocated to the person committing the crime, as distinct from the usual case of allocation of state responsibility under international law. It has been described as a war-like act committed by non-state actors (private parties not affiliated with any government) against other parties at sea, and especially acts of robbery or criminal violence at sea. People who engage in these acts are called pirates. The term can include acts committed on land, in the air, or in other major bodies of water or on a shore. It does not normally include crimes committed against persons traveling on the same vessel as the perpetrator.

However, to obtain a satisfactory understanding of the gravity of the global situation as regards piracy, an overview of piracy in the modern age is necessary.

1.2 The Problem of Maritime Piracy

Maritime piracy is not a new phenomenon in the international system.^[3] Over the past decade, observers have increasingly recognized that piracy, while certainly not an existential threat to the global economic system, can pose significant challenges to international order and stability.^[4]

¹ For the purposes of this study, hereafter used generally to refer to Somalia and Gulf and Aden

² The Strait of Malacca is a narrow, 805 km (500 mile) stretch of water between the Malay Peninsula (Peninsular Malaysia) and the Indonesian island of Sumatra. http://en.wikipedia.org/wiki/Strait_of_Malacca

³ Although it has been a system-wide phenomenon, the practice has been especially prevalent in Southeast Asian waters. See Adam J. Young and Mark J. Valencia, "Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility," *Contemporary Southeast Asia*, 25/2 (August 2003), 270. See also Peter Chalk, "Low Intensity Conflict in Southeast Asia: Piracy, Drug Trafficking, and Political Terrorism," *Conflict Studies*, No. 305/306 (Jan/Feb 1998), 2.

Clearly, piracy poses a potential threat to international trade, 80 percent of which involves ocean transit. While the contemporary problem of piracy has yet to reach levels significant enough to directly threaten freedom of movement of cargo on the world's oceans, as it sometimes did in previous centuries, it has already on occasion caused significant increases in insurance premiums for those engaged in maritime trade, in addition to direct losses from hijacked and stolen goods.^[5] Although the threat to maritime trade is most acute in strategically important passageways such as the Malacca Straits and the South China Sea - through which a large percentage of the world's trade passes - it can be felt anywhere. For instance, the attack on the oil tanker M/V Limburg in October 2002 caused a 300 percent increase in insurance premiums for Yemeni shippers and reduced Yemeni port shipping volumes by 50 percent. As such, maritime piracy has the potential to become a serious nuisance in an era of increasing globalization. The Gulf of Aden or Horn of Africa is the most renowned example in recent times. The Gulf of Guinea too has also witnessed piratical activities in recent years.

A resurgence of maritime piracy raises concerns beyond the direct threat to international trade. Terrorist organizations for example may adopt methods used by, or ally themselves with, pirates to strike at the economic order that nations seek to promote and pursue. Regular attacks on shipping, combined with spectacular attacks on key ports (such as Singapore), could significantly increase the costs of international maritime commerce and could undermine international stability. As the rise of container shipping and on-demand production has made international commerce much more dependent on reliable timing and shipping schedules, a serious attack against one of the world's most strategic commercial routes or ports could have devastating effects on the international economy.⁶

⁴ See Helen Gibson, "A Plague of Pirates: Modern Buccaneers with Machine Guns instead of Cutlasses are Once again the Scourge of the Oceans," *Time Magazine* 150/7, (August 18, 1997). Some experts have called the severity of this threat into question. The former commander of U.S. Pacific Command, for instance, recently dismissed the threat to the world's strategic maritime lines of communication. See Dennis Blair and Kenneth Lieberthal, "Smooth Sailing: The World's Shipping Lanes are Safe," *Foreign Affairs* Vol. 86, No.3 (May/June 2007): 7-13

⁵ Earlier in this decade, for instance, Lloyd's of London, one of the primary providers of maritime insurance policies, classified the Malacca Straits as a "war zone," a designation that increased insurance premiums between 0.1 and 1 percent of the value of ships used. This designation was revised in 2006. See K.C. Vijayan, "Malacca Strait is off war risk list but piracy attacks up last month," *The Straits Times*, Friday, August, 11, 2006. Accessed online, <http://www.mindef.gov.sg/scholarship/ST%20-%20Reading.pdf>.

⁶ See especially Marc Levinson. *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*. Princeton: Princeton University Press, 2006. The adoption of "on-demand" logistics reduces the inventory of supplies and parts that businesses maintain. While this greatly reduces the costs of doing business, it also means that businesses become more vulnerable to supply disruptions.

Moreover, the decreasing number of "hub ports," able to accommodate increasingly large container ships, makes the international economy even more vulnerable to such attacks.⁷

This research paper is therefore most relevant today as it comes amidst the growing incidence of piracy globally, especially along the African coastline. The surge⁸ in piracy off the Somali coast spurred a multi-national effort to patrol the waters near the Horn of Africa. Despite the overlying obstacles and difficulties in the global implementation of national and international legislation for the effective address of piracy, efforts are continuously being made towards counteracting the crime especially in this region. However, it seems this may not be the only area under pirate attack in recent years. The upsurge of piracy recorded globally in recent years is an indicator, not just of its growing intensity in already established target areas, but also of the emergence of new target zones.

The last three years have witnessed incidents of piracy along the African coastline. The Gulf of Aden (Horn of Africa) in particular is now the number one area of attention; the Gulf of Guinea too (especially along the Bakassi Peninsular and the Coast of Cameroon) has been witness to pirate attacks. In this regard, this work is to ascertain the possibilities of a blueprint approach in the global fight against piracy.

⁷ Daniel Y. Coulter, "Globalization of Maritime Commerce: The Rise of Hub Ports," in Tangredi (ed.), *Globalization and Maritime Power* 133–142.

⁸ <http://www.economist.com/node/18070160>

CHAPTER TWO

LITERATURE REVIEW AND METHODOLOGY

2.1 Aim of The Thesis And Area Of Focus

The overall objective of this research is to examine those issues that constitute an obstacle in the legal address of piracy, as a guide to understanding the current possible responses to the piracy threat. From a completely global perspective, it thus seeks to analyze and ascertain the legal issues affecting the implementation of piracy laws globally.

The study focuses on the definition of piracy and the (legal) issues arising therefrom. By critically analyzing these issues, the study implicitly questions the possibility of a blueprint towards an effective global address of piracy. In brief, the paper previews the position for piracy-affected countries in general, as regards the legal assessment and effective legal address to piracy within the ranks of international piracy law. This is to be achieved from a globally analytical perspective.

2.2 Geographical Scope

The geographical scope is more-or-less unlimited as the legal issues raised are examined from a global perspective. However, much is made to the Gulf of Aden in general, otherwise referred to as the Horn of Africa. This is so because Piracy off the Horn of Africa remains the most recent area of attention, not just in the recent enactments of maritime legislation, but also in their implementation and modification. It is in this line of thought that substantive existing legislation on piracy and the legal issues to be examined within this work make allusions to both global references and piracy in the Gulf of Aden.

It must be understood that existing international acts of legislation on piracy, though influenced by certain incidences, were drafted not just on the incidence of a particularly affected country or region, but rather from a global point of view so as to extend their applicability. Undoubtedly, no country can outstandingly tackle piracy solely at all levels, considering the complexities overlying the application of international conventions as opposed to the national laws of states. This is more the case for countries sharing a common coastline. Therefore, be it Cameroon, Nigeria or Ghana in the Gulf of Guinea, or Somalia, Kenya in the Gulf of Aden, or

even Malaysia, Indonesia and Singapore in the Strait of Malacca, there are bound to be problems whether legal, political, economic or social in the effective address of piracy.

It is only by examining the legal issues of piracy within the global context that the possibility of a blueprint, in terms of legal address to piracy on a global scale, will be determined.

2.3 The Legal Issues Raised

With particular reference to the legal issues involved and having understood the meaning of piracy from the definitions above, the general questions will be:

- ❖ How best can piracy be addressed amidst the inadequacies and limitations inherent in the relevant legal texts and their application? Amidst these problematic aspects, is it possible to create a blueprint solution for fighting piracy internationally?

To adequately address these questions require a detailed understanding of the legal issues concerning piracy as well as those aspects that hinder the effective address of piracy. These issues will focus in particular on:

- Whether public (governmental) interests involved can be easily resolved;
- Whether the legal regimes relating to piracy are sufficient or need to be updated.

As such, the main issues to be addressed include the following:

- The Definition of Piracy and the legal issues arising therefrom;
- Other issues of Public interests: The Human Rights Law Perspective
- International Cooperation: Is it satisfactory? For example, is enough assistance being given to Kenya in the Gulf of Aden in its prosecution efforts?

2.4 Methodology

This article is organized in five chapters. Chapter one constitutes a background introduction to piracy and outlines the problem of modern maritime piracy and the potential threats the phenomenon poses to international security, governance, and commerce.

Chapter Two defines the framework upon which the thesis has been accomplished, outlining the scope, aims and objective, as well as the method of writing.

As regards Chapters Three and Four, a critical approach is adopted in examining the various legal issues raised, pertaining to piracy and the Law of the sea, such as those arising from

the definition and scope of piracy as prescribed by international conventions, as well as other interests in the global address of piracy. This approach is relevant here principally because these chapters examine the main issues raised in the study and how they affect the implementation of the relevant legislations on piracy from a fundamentally global perspective.

Chapter Five re-examines the issues raised in Chapters three and four with a view to drawing the final conclusion while proposing recommendations towards a more effective legal address in the fight against piracy. It thus outlines a number of potential solutions to the problem, weighs their relative merits and the likelihood of their adoption. In this way, it answers the question on whether a blueprint towards a more effective global approach in the fight against piracy is possible.

CHAPTER THREE

THE DEFINITION OF PIRACY AND ITS LEGAL ISSUES

For a long time, piracy has been an area of major dispute and controversy regarding litigation. The term ‘piracy’ has also been used vaguely to refer to raids across land borders by non-state agents. Caution dictates therefore, that a proper foundation for this study be laid by fully comprehending what piracy entails. This implies grasping the definition, nature and extent of piracy in setting the basis for addressing the issues raised in context. This chapter thus covers the definition of piracy and the legal issues arising there-from.

In general, states’ enact legislation on piracy primarily in the deterrence, disruption and prevention of acts of piracy, and in the bringing of pirates to justice. Though prosecution of pirates is generally covered by a host of international conventions⁹ and the national legislation of states, the key definitions to piracy have been given by a number of international conventions, the most renowned being the 1982 United Nations Convention on the Law of the Sea(UNCLOS)¹⁰ and the International Maritime Bureau (IMB).¹¹ The Geneva Convention and the UNCLOS define piracy in almost identical terms. This study refers principally to the UNCLOS. The HSC however, continues to be relevant for those States not a party to UNCLOS. The provisions of these treaties, in particular Articles 100 to 107 of UNCLOS, provide the legal framework for the repression of piracy under international law.¹²

⁹ These conventions include the Third United Nations Conference on the Law of the Sea, Dec. 10, 1982, S.Treaty Doc. No. 39, 103d Cong., 2d Sess. (1992); 21 I.L.M. 1261, U.N. Doc., reprinted in United Nations, the Law of the Sea: United Nations Convention on the Law of the Sea, A/Conf. 62/122 (1982), U.N. Sales No. E.83.V.5 (1983), available at http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm [hereinafter UNCLOS] and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 672, available at http://www.unodc.org/unodc/terrorism_convention_maritime_navigation.html [hereinafter SUA Convention] (last visited May 9, 2009); see infra Part IV.A.

¹⁰ United Nations Conference on the Law of the Sea: Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312 [hereinafter Geneva Convention].The Convention, concluded in 1982, replaced four 1958 treaties. UNCLOS came into force in 1994, a year after Guyana became the 60th state to sign the treaty. To date, 161 countries and the European Community have joined in the Convention. However, it is uncertain as to what extent the Convention codifies customary international law.

¹¹ A branch of the International Chamber of Commerce specialized in maritime affairs.

¹² The preambles to UNSCR 1848 and 1851 (2008) reaffirm ‘that international law, as reflected in [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities’; see also operative paragraph 3, UNSCR 1838 (2008).

3.1 United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982 and its definition of Piracy

As regards the definition of piracy, there are two common definitions. The first, used by the International Maritime Organization (IMO), derives from the 1982 UNCLOS also called the Law of the Sea Convention (LOSC) or the Law of the Sea treaty. The 1982 UNCLOS is the international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which took place from 1973 through 1982. It lays down the legal framework for addressing piracy.

UNCLOS defines piracy in its Article 101 as consisting of any of the following acts:

"(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(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)."¹³

This provision is complemented by article 110 of the said Convention which gives the right to a warship to board a ship where there is a reasonable ground to suspect that it is engaged in an act of piracy. In terms of Resolution 1816 of the United Nations Security Council, a mechanism is provided for the hot pursuit of pirates from international waters into Somali waters.¹⁴

Generally speaking, the LOSC defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the

¹³ United Nations Convention on the Law of the Sea (UNCLOS) of December 10, 1982, Part VII: High Seas, Article 101

¹⁴ See Kraska J., and Wilson, B., Piracy Repression, Partnering and the Law, 2009, 40 JMLC 43-58, at 56 .

management of marine natural resources. However, the UNCLOS definition restricts acts of piracy to the “high seas” and “outside the jurisdiction of any state.”¹⁵

3.2 The definition of Piracy by International Maritime Bureau (IMB)

The IMB offers another definition of piracy. It defines piracy 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.¹⁶ The IMB’s definition is broad and includes any attack or attempted attack on a ship, whether it is anchored, berthed or at sea. The International Maritime Organization (IMO) has attempted to close the definition gap by using both the UNCLOS and IMB definitions.¹⁷ Yet even using these two definitions does not account for extortion by port officials or differentiate maritime terrorism as shall be seen below. As such, the international community is facing many problems today in bringing pirates to justice as shall be examined ahead.

By way of explaining terms, the three components of maritime industry most affected by maritime crime are the shippers (manufacturers that own the cargo), carriers (companies that own the vessels), and insurers of the ships and cargoes.

3.3 The Geographical Scope of the Offence

Piracy may be committed anywhere seaward of the territorial sea of a State.¹⁸ Equally, the jurisdiction and powers granted to States to suppress acts of piracy apply in all seas outside any State’s territorial waters.

However, the reference in Article 101 to piracy occurring on the “high seas” may be slightly misleading. Article 86, UNCLOS prima facie excludes the Exclusive Economic Zone (EEZ) from being part of the high seas. This might suggest that piracy in the EEZ is a matter for the coastal State. However, Article 58(2) provides 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”. This makes it plain that the provisions of the high seas regime

¹⁵ Only 122 reported pirate attacks, or 27 percent of actual and attempted attacks against vessels, took place on the high seas in 2003. The rest of the attacks occurred in ports and territorial waters well inside the jurisdiction of a state.

¹⁶ “Piracy and Armed Robbery Against Ships,” Annual Report, International Chamber of Commerce, International Maritime Bureau, Jan. 1–Dec. 31, 2003, 3.

¹⁷ U.N. International Maritime Organization, MSC.4/Circ. II 53, June 1, 2004, 1.

¹⁸ This is consistent with the position adopted in Article 4(4) of the Djibouti Code of Conduct.

(including all provisions on piracy) “apply to the exclusive economic zone in so far as they are not incompatible with” UNCLOS provisions on the EEZ.¹⁹

Within the EEZ the coastal State enjoys sovereign rights “for the purpose of exploring and exploiting, conserving and managing ... natural resources” and jurisdiction over certain other subject matters (Article 56, UNCLOS). Nothing in Article 56 is incompatible with the UNCLOS provisions on piracy, and therefore under Article 58(2) the general law of piracy applies to all pirate attacks outside territorial waters. If acting in another States’ EEZ a government vessel engaged in suppressing piracy is obviously obliged to have “due regard” for the coastal State’s rights in matters of natural resources, marine pollution, etc in any action it takes.²⁰

3.4.0 Limitations within the UNCLOS definition of piracy: What exactly constitutes Piracy?

First, any act, in order to qualify as piracy, must be committed on the high seas. This means that acts committed in the territorial waters of any state would not qualify as piracy,²¹ even though they include the violent seizure of a victim vessel by an aggressor vessel, for solely private aims, such as monetary gain or hostage taking. Acts referred to as “piracy” routinely committed in the early 2000’s in Southeast Asia, in the territorial waters of Singapore, Malaysia and Indonesia, were *stricto sensu* not piracy under the UNCLOS definition.²² Similarly, acts committed by the Somali pirates in the Somali territorial waters would not constitute piracy, simply because they take place in the wrong geographic zone.

The second most obvious limitation within the UNCLOS definition is that it only covers, under Article 101(a)(i), attacks committed from a private vessel against another vessel.²³ It therefore does not cover the seizure of a vessel from within by passengers, stowaways or its own crew. Therefore, any act that fulfills the legal requirements of piracy must involve two vessels:

¹⁹ See, eg.: Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 165.

²⁰ Art 58(3), UNCLOS.

²¹ *Id.* at 92-93.

²² American Society of International Law, Annual Meeting, March 26, 2009, Piracy off Somalia: the Challenges for International Law (author was in attendance) [hereinafter ASIL Meeting].

²³ The reference to “a place outside the jurisdiction of any State” in Article 101(a)(ii), UNCLOS is intended to cover events on islands which are terra nullius and not part of any State’s territory.

the victim vessel and the aggressor vessel. Hijackings such as the *Achille Lauro*²⁴ incident would therefore not be piracy under the treaty-law definition.²⁵ Thus, if pirates board the victim vessel on shore and overtake it during the victim vessel's voyage on the high seas, such an act would not qualify as piracy because no aggressor vessel was involved.²⁶ Thus, if the Somali pirates were to board a foreign ship in a port, posing as crew members, and to overtake the ship on the high seas, this act would not qualify as piracy. In the 1980's, when members of a PLO faction overtook an Italian cruise ship, the *Achille Lauro*, the act did not constitute piracy under UNCLOS because the aggressors had boarded the ship in its last port; thus, no aggressor vessel was ever involved and the UNCLOS conditions were not satisfied.²⁷ Moreso, UNCLOS makes it quite clear that government vessels cannot commit piracy, unless the crew mutinies and uses the vessel to carry out acts of violence against other ships (Article 102). Outside of mutiny any unlawful acts of violence by a government vessel against another craft are a matter of State responsibility, not the law of piracy.

Some slight ambiguity is introduced by the words "any illegal acts of violence or detention, or any act of depredation" in Article 101(a). One could ask under what system of law acts must be "illegal"; or whether there is a meaningful difference between the use of the words "acts of violence" (plural) and "act of depredation" (singular). The ordinary meaning, object and purpose of these words would suggest a broad approach should be taken. Piracy has always been an international crime enforced by national laws, the exact terms of which have varied between jurisdictions. It may be difficult to give these words the kind of clear and precise meaning that would accord with modern expectations that criminal offences should be precisely drafted in advance. It is perhaps better to consider Article 101(a)(i) as setting out the jurisdiction of all States to: (1) prescribe and enforce a national criminal law of piracy; and (2) take action to suppress and prosecute piratical acts of violence on the high seas.

Much more controversy has been caused by the words "for private ends" in Article 101(a). It has often been held that the requirement that piracy be for "private ends" means that an

²⁴ Which fact prompted the drafting of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988. For a detailed description of the *Achille Lauro* incident, see Nicolas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 18 (2006) at 25-27.

²⁵ Which fact prompted the drafting of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, as discussed below.

²⁶ *Id.*

²⁷ Dahlvang, *supra* note 24, at 22

act committed for “political” motives cannot be piracy. Thus some commentators hold that “terrorism” can never be “piracy”. An alternative view holds that the relevant distinction is not “private/political” but “private/public”.²⁸ That is, any act of violence on the high seas not attributable to or sanctioned by a State (a public act) is piracy (a private act).²⁹ This approach accords both with the drafting of the relevant UNCLOS provisions, which make it clear that a public vessel cannot commit piracy, and with some modern case-law indicating that politically motivated acts of protest can constitute piracy.³⁰ In the Somali context seizing private vessels in order to demand large ransoms from private companies - without any claim to be acting on behalf of a government or making demands of any government – can only be an act “for private ends”.

Third, if a piracy-like act is committed by a group with links to a specific state, the state action character of the act would defeat the purely private aims requirement of UNCLOS because of the alleged link between piracy and state action.³¹ Thus, with respect to the *Achille Lauro* incident, it was questionable whether the hijacking qualified as piracy because the hijackers had specific links to a state or a state-like entity (PLO).

3.4.1 Piracy and Terrorism: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) Convention, 1988

Following the *Achille Lauro* incidence, the Maritime Safety Committee of the IMO issued a circular (MSC/Circ.443) on measures to prevent unlawful acts against passengers and crews on board ships. According to the circular, governments, port authorities, administrators, ship-owners, shipmasters, and crews should take appropriate measures to prevent unlawful acts that may threaten passengers and crews. The Convention for the Suppression of Unlawful Acts

²⁸ For example: M. Halberstam, “Terrorism on the high seas” (1988) 82 AJIL 269, 276-284; Michael Bahar, “Attaining Optimal Deterrence at Sea” (2007) 40 Vanderbilt Journal of Transnational Law 1, 32; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), 36-40. Note also the change in the French text from ‘buts personnels’ in Article 15, HSC to ‘fins privées’ in Article 101, UNCLOS.

²⁹ Historically there was a debate about the status of insurgents in a civil war and whether they could be classed as pirates if they: (1) attacked the vessels of the government they were attempting to overthrow; or (2) enforced a blockade on government ports against ‘neutral’ shipping. There is no suggestion Somali pirates are insurgents engaged in either activity. On the debate see: I. A. Shearer (ed.), D. P. O’Connell, *The International Law of the Sea* (Oxford: Clarendon, 1984), vol. 2, 975-6; Hersch Lauterpacht, ‘Insurrection et piraterie’ (1939) 46 *Revue Générale de Droit International Public* 513.

³⁰ *Castle John v. NV Mabeco*, (Belgium, Court of Cassation, 1986) 77 *International Law Reports* 537.

³¹ LCDR Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 *NAVAL L. REV.* 73, 87 (2008) [hereinafter Peppetti], at 92 (arguing that the “pirate ends” restriction has contributed to the most commonly adopted view that acts of violence committed for religious, ethnic or political reasons, such as acts of maritime terrorism, cannot be treated as piracy).

against the Safety of Maritime Navigation thus came into effect and was adopted in Rome in 1988. The main purpose of the SUA Convention therefore, is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include 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. The convention obliges Contracting Governments either to extradite or prosecute alleged offenders. A later Protocol of the SUA convention against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, extended the provisions of the convention to unlawful acts against fixed platforms too. The two instruments entered into force on March 1, 1992. Another protocol known as the 2005 Protocol to SUA Convention has added more to the original SUA Convention.

Piracy, as seen above, is defined internationally as illegal acts of violence or detention committed for private ends by the crew or passengers of a private ship on the high seas against another ship, or against persons or property on board.³² ‘Piracy’ therefore does not include acts with governmental objectives, acts committed within the territorial sea, in port or internal waters, or acts which involve only one ship.

Terrorism on the other hand, while having no internationally agreed definition, usually involves indiscriminate violence with the objective of influencing governments or international organizations for political ends. The international maritime community, recognizing the need to expand the definition of modern-day piracy in order to encompass the acts like the *Achille Lauro* hijacking, drafted the Convention.³³ The sponsoring governments who first introduced a draft text for the Convention (Austria, Egypt and Italy) cited as part of their reason for doing so the restrictions inherent within the definition of piracy: that it necessarily involved an act for private ends, and in requiring an attack from one vessel against another it could not cover the internal seizure of a vessel.³⁴

Recognizing the narrow scope of the piracy definition under UNCLOS, they attempted to come up with a broader definition of illegal violence at sea, which would capture acts such as the *Achille Lauro* hijacking. Under the SUA Convention, an act can qualify as “piracy” even though

³² The International Maritime Bureau definition is wider: ‘The act of boarding any vessel with intent to commit theft or any other crime... and with the intent or capacity to use force in furtherance of that act.’

³³ SUA Convention, supra note 9.

³⁴ IMO Doc. PCUA 1/3 (3 February 1987), Annexe, paragraph 2.

it is not committed on the high seas.³⁵ Similarly, an act can qualify as “piracy” even though only one vessel (the victim ship) may be involved.³⁶ The SUA Convention, however, does not use the term “piracy” at all³⁷ and is listed on the U.N. website as an anti-terrorist convention.

Thus the principal reasons the SUA Convention was seen as necessary were first, as noted above, the law of piracy did not cover internal hijacking of vessels; and second, that while there existed treaties concerning the hijacking and sabotage of airplanes³⁸ no similar conventions yet existed for the shipping industry. It is unsurprising, then, that the SUA Convention is closely modeled on the conventions concerning offences aboard or against aircraft. The sponsors’ explicit aim was to devise a comprehensive convention that would cover all forms of violence against shipping.

Article 3 of the SUA Convention creates a number of offences. Most relevant for present purposes is Article 3(1)(a), stating that “any person commits an offence if that person unlawfully and intentionally ... seizes or exercises control over a ship by force or threat thereof or any other form of intimidation”. There is no requirement that the seizure be internal or be politically motivated. Thus any pirate seizure of a vessel off Somalia will clearly fall within this definition. Attempting, abetting and threatening such an offence are equally crimes under the Convention (Article 3(2)).

The only case in which the Convention would not apply is where the offence was committed solely within a single State’s territorial sea and the vessel was not scheduled to navigate beyond that territorial sea and the suspected offender was subsequently found within that coastal State’s territory. This follows from Article 4, which states that the Convention applies either “if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States” or “when the offender or the alleged offender is found in the territory of [another] State Party”. As piracy attacks of Somalia are now generally (or invariably) committed far outside territorial waters, Article 4 is no obstacle to the SUA Convention’s application.

³⁵ SUA Convention, supra note 7, Art. 4; see also Peppetti, supra note 31, at 94.

³⁶ In fact, under SUA, any person who “seize or exercises control over a ship by force or threat thereof or any other form of intimidation” would violate the convention. SUA Convention, supra note 9, Art. 3.

³⁷ Dahlvang, supra note 24, at 23 (noting that the SUA Convention does not refer to piracy by name).

³⁸ Convention for the Suppression of Unlawful Seizure of Aircraft 1970, 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 UNTS 177.

It is perhaps important to note that the SUA Convention does not expressly cover the crime of piracy and that its offences are not coterminous with the crime of piracy as defined under UNCLOS. The SUA Convention creates a separate offence as among State parties. However, the type of piracy commonly committed off Somalia involves both an attack from one vessel against another and acts of violence intended to seize control of a ship. Such acts can clearly constitute both piracy and an offence under the SUA Convention. Not all piracy will fall within the SUA Convention, of course. An act of theft ('depredation') that did not endanger the safety of a vessel, and was committed by one vessel against another, could be an example of piracy which would not be a SUA Convention offence. Conversely, as noted, the internal hijacking of a vessel would be a SUA Convention offence but not piracy. The crimes are distinct but may overlap on some sets of facts. Thus, it is questionable whether the SUA Convention actually alters the definition of piracy.

The SUA Convention, however, does solidify the link between piracy and terrorism, by treating piracy as a form of maritime terrorism and by equating the jurisdictional basis for the capture and prosecution of pirates with those that already exist in other anti-terrorist conventions for the capture and prosecution of terrorists. In fact, in response to recent acts of terrorism, the maritime industry attempted to strengthen SUA through amendments, known as the 2005 Protocols, which were adopted on Oct. 14, 2005, but haven't as of today entered into force for lack of necessary state ratifications.³⁹ Thus, this study observes that piracy-fighting countries need to rely more heavily on conventions like SUA, and other anti-terrorism treaties, in order to justify their capture and prosecution of pirates, because pirates should be fought like terrorists. The SUA Convention constitutes a single instance where in the international community is struggling to address crimes of a similar nature but with no absolutely defined grounds to their legal address. The International Convention against the Taking of Hostages 1979 is another example. The offence of hostage-taking covered by this treaty clearly covers holding crews for ransom in the typical acts of piracy being committed off Somalia. The aim of this Convention like the SUA Convention is to require states to create offences under their law and to provide for a seamless international criminal law framework that reduces the existence of safe havens for those who commit the acts covered by them. This aim finds expression in the obligation on states

³⁹ See IMO, <http://www.imo.org> (last visited May 9, 2009); see also Jane Andrewartha, English Maritime Law Update: 2005, 37 MAR. L. & COM. 359, 369 (2006).

either to extradite or prosecute those accused of committing the acts (*aut dedere aut judicare*). Although these treaties are commonly characterized as counter-terrorism conventions, the word ‘terrorism’ appears only in the preamble of each. A terrorist motive does not form any express element of the crime set out in the treaty. The treaties can be useful tools against piracy in many circumstances, but they do not themselves classify acts of piracy as ‘terrorism’.

Therefore, the question: “*Should piracy be considered in the context of counter-terrorism under national or international law, or should it be regarded as ordinary crime?*” still remains debatable. It sometimes appears that there is a drive to establish a nexus between piracy and terrorism and to view piracy through the context of terrorism; to find a link, for example, between acts of piracy and Al Qaeda or, in the case of Somali piracy, *Al Shabaab*. A UN monitoring group report on the arms trade shows that money from piracy is being used to purchase arms used in the conflict in Somalia.^[40] The example of the Niger Delta may be seen as relevant. It is one of the regions where the regimes governing acts of marine armed robbery (which would be piracy if committed on the high seas) and counter-terrorism converge. Rather than attempting a rigid distinction between acts of terrorism and piracy, the ‘four circles’ model may be useful, which views terrorism, piracy, insurgency and organized crime as sometimes overlapping activities.

In conclusion, one may also ask the question: *Are there any benefits to be derived from labeling piracy as terrorism?* It is sometimes thought that, politically, a counter-terrorism label might encourage greater pro-activity in international co-operation regarding prevention and enforcement. Some countries seek to galvanize states in the West to act against piracy by using counter-terrorism legislation that may be defective in terms of human rights protections. But, given the serious nature of piracy it is unlikely to provide more incentive to states to provide for effective and dissuasive penalties. Piracy is already an offence with universal jurisdiction.

Piratical acts and acts akin to piracy do not need the ‘terrorism’ label to be seen as grave crimes worthy of an international response. Some actions of the pirates will be caught by the international counter-terrorism instruments but piracy is not terrorism as such and does not necessarily need to be treated as such. The typical acts of piracy committed off the coast of

⁴⁰ Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1811 (2008), United Nations, 10 December 2008, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N08/604/73/PDF/N0860473.pdf?OpenElement>

Somalia seem to be piracy indeed, rather than terrorist offences. But particular acts may amount to a number of offences and they must be dealt with on a case by case basis.

3.4.2 The Duty to Cooperate to suppress piracy: Public International Law relating to the Powers of Governments and their Navies over Acts of Piracy

Under Article 100 of the UNCLOS, all states ‘shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.’ The International Law Commission in its commentary on the equivalent provision in the HSC noted that: “Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case.” Doubt has been expressed historically as to whether this duty extends to requiring that States have an adequate national criminal law addressing piracy.⁴¹ While the wording of Article 100 may be open to the interpretation that all states should have such a law, the Security Council has noted that it remains the case that many states do not.⁴²

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

Customary international law provides basic principles governing the appropriate amount of force to be used where it is lawful to stop and arrest a ship at sea.⁴³ Piracy is an ordinary crime and navies are undertaking law enforcement duties, not engaging in conflict. Navies have the right to use reasonable force in pursuit of their law-enforcement mission; the amount of force

⁴¹ As many States have not had historically, and still do not have laws adequately criminalising piracy. See: Joseph W. Bingham (reporter), ‘Harvard Research in International Law: Draft Convention on Piracy’, *AJIL Sup* 26 (1932), 755–756, 760. This work remains relevant as it influenced the International Law Commission’s drafting of relevant treaty provisions, which largely endorsed the Harvard findings: [1956] II *YbILC*, 282. On the modern position see Laurent Lucchini and Michel Voelckel, *Droit de la mer*, Tome 2, vol. 2 (Pedone, 1996), 158-9.

⁴² Preamble to United Nations Security Council Resolution (UNSCR) 1851 (2008).

⁴³ The principles were considered in another context by the International Tribunal for the Law of the Sea in the case of *Saiga 2* (http://www.itlos.org/start2_en.html). See also the case of *S.S. ‘I’m Alone’* (Canada/United States, 1935), *U.N.R.I.A.A.*, Vol. III, p. 1609 and *The Red Crusader* case (Commission of Enquiry, Denmark–United Kingdom, 1962), *I.L.R.*, Vol. 35, p. 485.

used must not exceed what is reasonably required in the circumstances. In the event of death or serious injury, human rights and the requirement of humane treatment necessitate the holding of an enquiry.

However, UNCLOS does not lay down rules as to the prosecution of pirates. But if a ship is attacked, there may be an offence under the SUA Convention. This is so whether the attack also comprises the offence of piracy or does not (for example because it is within territorial waters rather than the high seas). Unlike UNCLOS, which imposes a duty on states to cooperate in the suppression of piracy, but no explicit duty to prosecute,^[44] the SUA Convention places obligations upon states to have adequate national laws implementing the Convention offences and either to extradite or prosecute suspects found within their territory, irrespective of where the offence was committed. UNCLOS says nothing about transferring suspects to another jurisdiction, but the SUA Convention provides that a master may disembark a suspected person in port (Article 8 (1)) and includes a procedure for such action. The primary obligation is therefore on the port state to receive the suspect unless they have very strong grounds for refusing to do so. In such circumstances, the port state may try the suspect either as a pirate or for a SUA Convention offence, depending upon their own national law.

3.5.0 Jurisdiction: Issues Relating to Capture, Detention and Prosecution of Pirates

3.5.1 Jurisdiction to Capture Pirates

Under international treaty law, as well as under customary law, any state has jurisdiction on the high seas to capture pirates.⁴⁵ Article 19 of the Geneva Convention, as well as Article 105 of UNCLOS, provide that: “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 taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”⁴⁶ In fact, under the law of the seas, the high seas are viewed as no man’s land and jurisdiction to apprehend belongs to

⁴⁴ However the obligation in UNCLOS to cooperate in the repression of piracy can be interpreted as meaning that any state having an opportunity of taking measures against piracy and failing to do so is in breach of its duty under international law. This interpretation is supported by the Commentary of the International Law Commission on the provision of the 1958 High Seas Convention on which the UNCLOS provision was based.

⁴⁵ Geneva Convention, Niclas Dahlvang, *supra* note 24, at 22 (noting that on the high seas, every state may seize a pirate ship and arrest the pirates).

⁴⁶ Geneva Convention, *supra* note 10, art. 19; UNCLOS, *supra* note 9, art. 105

all nations.⁴⁷ However, no nation has the right to enter a state's territorial waters, where only the territorial state has exclusive jurisdiction to apprehend.⁴⁸ The Somali pirates quickly took advantage of this situation in 2007, when they would attack ships in the Gulf of Aden and then quickly return to the Somali territorial waters, where they were immune from persecution by nations patrolling the Gulf of Aden and trying to combat piracy.⁴⁹ In order to address this unfortunate situation, the United Nations Security Council passed five different resolutions in 2008, authorizing any nation patrolling the Gulf of Aden to enter the Somali territorial waters and to use force against pirates.⁵⁰ One of the five resolutions even authorizes nations to enter the Somali territorial waters if in "hot pursuit" of the pirates.⁵¹ Moreover, the December 16, 2008 Resolution extends the authorization to use military force against Somali pirates to land-based operations on the Somali mainland. Under this Resolution, nations can "undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea."⁵² However, because the above Resolutions permit military action in Somali territory beyond that already authorized by customary law, many states with a history of piracy problems were apprehensive about the scope of such Resolutions, and feared that they would undermine national territorial sovereignty.⁵³ Thus, the text accompanying the Resolutions emphasized that they applied purely to Somalia and that they would not establish any kind of a new precedent under international law. Moreover, all of the Resolutions require consent from the Somali transitional government before any of the patrolling nations attempts to enter the Somali

⁴⁷ It was Hugo Grotius who developed the concept of "mare liberum" in the early 17th century and established the doctrine of freedom of the seas. Peppetti, *supra* note 31, at 106. Today, major international treaties codify the principle that anyone can apprehend pirates on the high seas, as the high seas do not belong to any particular nation. See e.g., Art.19 of the Geneva Convention as well as in Art.105 of UNCLOS.

⁴⁸ UNCLOS (*supra* note 9), limits the territorial sea to 12 nautical miles off shore. Note however that some nations, including China, have taken a nonconformist approach and have claimed that their exclusive economic zones, which typically extend out to 200 nautical miles, constitute territorial waters. Dahlvang, *supra* note 24, at 24. This approach significantly hinders the piracy fight under customary law, although arguably the 2008 U.N. Security Council Resolutions trump customary law and allow any nation to fight piracy in Somali territorial waters, whether such waters extend to 12 or 200 nautical miles.

⁴⁹ Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL Insight, Vol. 13, Issue 2, Feb. 6, 2009, available at <http://www.asil.org/insights090206.cfm> (last visited May 13, 2009) [hereinafter Kontorovich].

⁵⁰ S.C. Res. 1816 (June 2, 2008), S.C. Res. 1838 (Oct. 7, 2008), S.C. Res. 1844 (Nov. 20, 2008), S.C. Res. 1846 (Dec. 2, 2008), and S.C. Res. 1851 (Dec. 16, 2008)

⁵¹ S.C. Res. 1851

⁵² S.C. Res. 1816, Art. 6. The United States, the main proponent and drafter of Resolution 1816, had proposed language that would authorize operations in the Somali air space when combating piracy; this draft language was withdrawn when other Security Council nations objected. The United States however maintains that Resolution 1816 as is authorizes operations in the Somali air space. Agence France Press, *US says piracy resolution allows for air strikes in Somalia*, Dec. 17, 2008, available at <http://www.google.com/hostednews/afp/article/ALeqM5gD5FXcnxXGFclrUHm3xXpenReDxQ> (last visited on May 31, 2009).

⁵³ Kontorovich, *supra* note 49.

territorial waters.⁵⁴ Similarly, all of the resolutions require the patrolling nations to respect international humanitarian law when chasing pirates and entering the Somali territorial waters.⁵⁵ The latter restriction as shall be observed later in this chapter is problematic: under international humanitarian law, pirates are considered civilians, which significantly limits the nature and type of force that can be used against them.⁵⁶

Under the SUA Convention, states have jurisdiction to apprehend and capture pirates anywhere, not just on the high seas.⁵⁷ Thus, the SUA Convention gives states more freedom in their fight against piracy, like anti-terrorist conventions do for any state's fight against terrorism. However, under SUA, a vessel must nonetheless be in international transit, coming from a foreign territory or the high seas, at the time of the illegal act. Thus, a vessel navigating through purely territorial waters of a state could not be apprehended through SUA, and nations do not have a right of entry into another nation's territorial waters to capture pirates under this convention.⁵⁸

As described in this section, international treaty and customary law provides for narrow basis under which pirates can be apprehended on the high seas or elsewhere. Recent United Nations Security Council Resolutions have further expanded such basis for the capture of Somali pirates, but unfortunately these resolutions only apply to Somalia and will not be useful in fighting piracy anywhere else in the world. Moreover, as will be described in the section succeeding below, jurisdiction to capture pirates under international law does not necessarily correspond to jurisdiction to prosecute them, which may pose additional hurdles in the global fight against piracy, and which may support the argument that piracy-fighting nations will need to treat pirates more as terrorists with reliance on anti-terrorist laws.

3.5.2 Jurisdiction to Prosecute Pirates

It is an unfortunate fact that 50-60% of captured pirates have been released by the navies which captured them. This illustrates the challenges of providing a feasible system of prosecution of the pirates. Issues related to jurisdiction authority to prosecute make it difficult for pirates to be

⁵⁴ *Id.*

⁵⁵ See *supra* note 43.

⁵⁶ Kontorovich, *supra* note 49 (noting that because pirates are treated like civilians under IHL, they may only be specifically targeted in immediate self-defense).

⁵⁷ SUA Convention, Art. 4.

⁵⁸ Peppetti, *supra* note 31, at 97.

successfully reprimanded. And the question then is: Is there a lack of political will to ensure that pirates or suspected pirates are brought to justice? There is certainly going to be a reluctance to capture pirates without a firm possibility of successfully dealing with them and their ships. Once pirates have been captured, there is the problem of where they should be transferred by the capturing ships for the investigation and prosecution of their crimes

UNCLOS Article 105 refers only to the power of the seizing State to try a seized pirate. However, as a matter of customary international law, every State has jurisdiction to prosecute a pirate subsequently present within their territory irrespective of any connection between the pirate, their victims or the vessel attacked and the prosecuting State (universal jurisdiction).⁵⁹ Piracy is the original universal jurisdiction crime,⁶⁰ viewed as a heinous crime against all nations and any state, acting as a global agent on behalf of all nations, can choose to prosecute the offending pirate.⁶¹ Treaty law and domestic laws, however, curtail the customary law conception of piracy⁶² as States may also have jurisdiction over suspected pirates on other bases as a matter of national law. Undoubtedly, there are frequently multiple jurisdictions involved in a single act of piracy. Ships are referred to as floating multi-nationals due to the varying nationalities of the pirates, crew, passengers, vessel owner, cargo owners, regional ports and flag of the vessel etc. Following ordinary principles of criminal jurisdiction therefore, the State of the suspected pirate's nationality, the State of nationality of the suspected pirate's victim and the flag State of any involved vessels may all also have valid claims of jurisdiction over a suspected pirate. Hence, an act of piracy, like any number of other offences, may provide a number of States with equally valid claims to exercise jurisdiction over an offence.⁶³ But in the case of piracy, there is no legal need for a nexus between any of these interests and the country which mounts the prosecution.

⁵⁹ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002, p.3, President Guillaume (Separate Opinion), para. 5 and Judges Higgins, Kooijmans and Buergenthal (Joint Separate Opinion), para. 61; Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford University Press, 2008), 229; Bingham, 'Harvard Research' (n.4 above), 852-6; Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 182

⁶⁰ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. J. INT'L L. 183 (2004) [hereinafter *Piracy Analogy*].

⁶¹ Peppetti, *supra* note 31, at 106.

⁶² *Id.* at 107 (noting that although the exercise of universal jurisdiction over pirates is permitted under treaty and customary law, any domestic prosecution on this basis must still be authorized under the prosecuting state's national legal system, which is often not the case).

⁶³ A pirate vessel does not necessarily lose its nationality (Article 104, UNCLOS), and may still be subject to its flag State's jurisdiction in addition to the jurisdiction of the State of the seizing warship.

Article 19 of the Geneva Convention states that: “the courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”⁶⁴ Article 105 of UNCLOS repeats this provision, but does not place any express responsibility upon a seizing State to try an arrested pirate. It simply provides that the seizing State “may” decide upon the penalties to be imposed, i.e., including prosecution (Article 105). On its face, this is a discretionary power not an obligation.⁶⁵ However, in exercising this discretion a State should bear in mind its duty to “cooperate to the fullest possible extent in the repression of piracy” (Article 100). Other states, however, are not entitled to prosecute pirates under the Geneva Convention or under UNCLOS. This is problematic for states like the United Kingdom that have chosen to transfer captured pirates to so-called regional partner states, like Kenya, for prosecution. Under UNCLOS, the legality of this type of transfer is dubious, as only the capturing state has jurisdiction over caught pirates while receiving states like Kenya do not. Moreover, domestic statutes implementing UNCLOS do not always allow for universal jurisdiction. The U.S. statute that implemented UNCLOS allows the U.S. to prosecute pirates, although the U.S. is the capturing nation and has jurisdiction to prosecute under UNCLOS, only if pirates somehow acted against American interests.⁶⁶ Thus, if the United States captures pirates on the high seas, it may only prosecute them in the United States if the pirates directed their activities against American ships or victims, or if the pirates are somehow later found on American soil.⁶⁷ Thus, questions of “extradite or prosecute” obligations are likely to arise where pirates have been captured and these hamper the effectiveness of the justice implementation system.

Under the SUA Convention, states again have more freedom in terms of their jurisdiction to prosecute pirates.

⁶⁴ Geneva Convention, Art. 19.

⁶⁵ Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 176.

⁶⁶ In fact, the U.S. statute implementing SUA limits jurisdiction to the following cases: if the activity was on or against American ships; if the activity was by or against American nationals; if the offenders are later found in the U.S.; and if the activities committed somehow compelled American action or inaction. 18 U.S.C. 2280 (2005).

⁶⁷ *Id.*

Under this treaty, member states have an obligation to extradite or prosecute persons accused of behavior that qualifies as piracy.⁶⁸ Unlike the law of piracy, the SUA Convention creates an express obligation upon parties to create appropriate domestic offences. Under Article 6, States parties must make the offences in Article 3(of the SUA Convention) a crime under national law when committed:

- (a) against or on board their flag vessels;
- (b) within their territory, including their territorial sea; or
- (c) by one of their nationals.

In addition States parties may establish criminal jurisdiction where a relevant offence is committed, *inter alia*, against one of their nationals or in an effort to compel their government to do or abstain from doing any given act.

Moreover, SUA authorizes the capturing state to prosecute pirates, but it also condones transfers of pirates to third states, even indicating that the third state “shall” accept such transferred pirates.⁶⁹ . The most important jurisdictional provisions are those dealing with the obligation to either extradite or submit the case for consideration by prosecutorial authorities (commonly, if misleadingly, called an obligation to “extradite or prosecute”). Where a State subsequently finds a suspect or offender within its territory (the territorial State) and another State party or parties have jurisdiction under Article 6, then the territorial State:

shall ... if it does not extradite him, be obliged ... to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.⁷⁰

To this end each party must establish jurisdiction “over the offences set forth in Article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with” the obligations described in above.⁷¹

Thus parties must establish jurisdiction, for example, over offences committed by other State parties’ nationals or on other State parties’ vessels where the offender is present within

⁶⁸ See SUA Convention, Art. 10. However, scholars have argued that the obligation to prosecute “only imposes the requirement to hold a preliminary hearing, and not to actually prosecute the alleged offender before an independent court of criminal justice.” Peppetti, *supra* note 31, at 96.

⁶⁹ See SUA Convention, Art. 6(4)

⁷⁰ Article 10(1), SUA Convention.

⁷¹ Article 6(4), SUA Convention.

their territory and not extradited to another State party having jurisdiction. Put simply, the test for State Party A is:

- (1) is the suspect within the territory of State A?
- (2) has another State party established jurisdiction in accordance with Article 6 over the offence committed by the suspect?
- (3) has State A extradited the suspect to one of these States?

If not, State A prima facie appears obliged to submit the suspect to its authorities for the purpose of prosecution and is also under an obligation to have taken measures to establish its jurisdiction in such cases. This may be described as a limited form of universal jurisdiction (“quasi-universal jurisdiction”), as it allows the prosecution of individuals lacking relevant “links” to the prosecuting State. Once a piracy suspect is within the territory of a State, therefore, the State may have jurisdiction over that person:

- (a) as a matter of universal jurisdiction over piracy; and/or
- (b) as a matter of jurisdiction under the SUA Convention.

Article 7 provides that a State finding a suspect on its territory is required to commence a preliminary investigation and, if it considers the circumstances so warrant, take the suspect into custody while a decision is made about extradition or prosecution. That investigating State is required to communicate with States having jurisdiction under Article 6, but it is not required to defer to their jurisdiction. Instead Article 7(5) provides that an investigating State Party “shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction” (emphasis added). These last words in particular appear consistent with the view that a State has a free choice whether to extradite or prosecute. Article 7 thus supports the view that, absent an extradition request, a State could validly prosecute a person suspected of a SUA Convention offence found within its territory.

Any view that a State Party could never commence a criminal prosecution until it had received and declined an extradition request would not only be contrary to the object and purpose of the treaty but would contradict the plain words of Article 7. One should also note that the SUA Convention does not contain the wording found in some other Conventions only

obliging a State that does not extradite a suspect to submit the case to its prosecuting authorities “at the request of the requesting Party”.⁷²

In effect, the SUA Convention conceptualizes piracy similarly to how anti-terrorist conventions construe acts of terrorism, by allowing virtually any state to prosecute captured pirates, like any state can prosecute captured terrorists. Thus, states like the U.K. may rely on SUA to justify the legality of pirate transfers to regional partners like Kenya.⁷³ Moreover, piracy-fighting states should continue to justify the legality of their anti-piracy measures, such as the prosecution of captured pirates, by emphasizing the similarity between piracy and terrorism and by relying on other anti-terrorist conventions.

However, the first requirement before a person may be transferred to a state for prosecution is that that state has the necessary domestic legislation. Both UNCLOS and the SUA Convention need to be incorporated into the domestic law of states parties; the enactment of proper legislation can be facilitated by combining UNCLOS with IMO Assembly resolutions which contain precise guidelines and recommendations on how to implement UNCLOS provisions on the prevention and punishment of pirates.⁷⁴ Although the Security Council resolutions give powers in relation to ‘piracy’ in Somali territorial waters, the national legislation of most states will not allow prosecution for acts committed in those waters (since this is not piracy as internationally defined) unless the act also amounts to a SUA offence.

The next issue is one of willingness to prosecute. There is a perception that many countries in the West are not prepared themselves to mount prosecutions and are even divesting themselves of the power. This may be from fear that pirates, after finishing a prison sentence, would apply for asylum, or otherwise. In some countries there may not be jurisdiction as wide as is provided by UNCLOS; for example jurisdiction may be limited to flagged vessels. Other states will not prosecute inchoate offences, but only if the pirates have actually attacked and are caught in the act. A number of pirates have been arrested during or after unsuccessful attacks on ships. While there has been the rare occasion of trial in Europe or the US (for example those involved in the attack on the *Samanyolu* who are now in Holland), there is a strong feeling in some

⁷² See: Article 6(2), European Convention on Extradition 1957; Article 16(10), United Nations Convention against Transnational Organized Crime 2000.

⁷³ Reliance on the SUA Convention is problematic, however, as most nations where pirate attacks typically occur, including Indonesia, Malaysia, and Somalia, are not members of this convention. See also Kontorovich, *supra* note 49.

⁷⁴ For instance, Recommendations to Governments For Preventing And Suppressing Piracy And Armed Robbery Against Ships MSC/Circ.622/Rev.2.

quarters that it is unreasonable to expect the regional countries such as Kenya, Tanzania, and Seychelles to bear almost all the burden of prosecution.

But whether or not some states lack political will, others are hampered by the difficulties of mounting a successful prosecution, due to difficulties of evidence-collection and of investigation and trial more generally. Although there are parallels with other trans-border operations, such as counter-terrorism, and it may be thought that the challenges are therefore not unique, the characteristics of capture and transfer of pirates do present particular problems. Decisions on whether to prosecute may take weeks. Meanwhile, the suspects must be held on board their vessel or the naval or commercial ship (neither of which are designed to hold persons in secure but humane conditions). In such circumstances, delays awaiting decisions on whether to instigate domestic investigation, transfer to a third party state or release may give the opportunity to destroy evidence. Pirates are sophisticated, they use the internet, they know about the requirement for evidence and they are increasingly destroying the evidence. There are challenges inherent in arresting in one place for prosecution in another; those responsible for the initial capture may not know for weeks what constitutes the detention and custody regime in the state where prosecutions are going to take place and whether the police, prosecutors and judiciary have the necessary capacity. For the capturing authority, it will be difficult to apply the correct standards of investigation since they are unaware which country's jurisdiction they are working to. While some countries have officers on board naval vessels trained to police standards (e.g. UK), this will not always be the case. In 2008 the British Foreign Office advised the Royal Navy not to detain pirates of certain nationalities as they might be able to claim asylum in Britain under British human rights legislation, if their national laws included execution, or mutilation as a judicial punishment for crimes committed as pirates.⁷⁵ Taking an example, a recent case in Finland saw pirates captured, their boat sank, but no prosecution carried out due to the pirates having attacked a Singapore vessel, yet these are not EU nor Finnish citizens. A further complication is that Singapore law allows the death penalty for piracy and Finland does not. Some countries have been reluctant to utilize the death penalty to stop pirates.⁷⁶

⁷⁵ Woolf, Marie (April 13, 2008). "Pirates can claim UK asylum *The Sunday Times*, April 13, 2008. *The Times* (London). Retrieved April 22, 2009.

⁷⁶ <http://online.wsj.com/article/SB122757123487054681.html>

3.6 The Effect on the Successful Address of Piracy Globally

The very definition and interpretation of piracy have constituted a fundamental obstacle to the effective address of piracy globally. Piracy remains an area of great legal debate as evident from case law. Defining the term has been difficult and elusive,⁷⁷ and the definition of piracy *jure gentium* is also to be distinguished from that under national or municipal law.⁷⁸

Given the diverging definitions of piracy in international and municipal legal systems, some authors argue that greater uniformity in the law is required in order to strengthen anti-piracy legal instruments.⁷⁹ There is a substantial difference between the tactics and kinds of organizations that commit sea robbery and the tactics and weapons used by pirates that board ships while the vessel is underway. Additionally, corrupt port officials and terrorists represent criminal activities with their own objectives and tactics. The problem is more than semantics. The definition of the crime affects, and in some cases determines, the agency or government that is responsible for dealing with it. Whereas real pirates, those that attack ships while underway, appear to be better organized, equipped and trained, and they have specific economic motives for acts of piracy. The maritime terrorists, on the other hand, may also have economic motives for robbing ships, but their ultimate goals are political.

Current definitions of piracy are hence inadequate as a tool for policymakers and need to change. According to Malaysia's Deputy Prime Minister, Datuk Seri Mohd Najib Tun Razak, "... the International Chamber of Commerce's International Maritime Bureau (IMB) groups all forms of piracy under one category of piracy. Malaysia, Indonesia and Singapore feel that acts of piracy should be separated according to the crime committed."⁸⁰ To meet his challenge to provide a useful definition for maritime crimes, the U.N. International Maritime Organization (IMO) and the IMB should revise existing definitions of piracy to include four categories of maritime crimes: corruption, sea robbery, piracy, and maritime terrorism.

According to the IMB, incidents of maritime piracy more than quadrupled in the last ten years, increasing from 90 reported attacks in 1994 to 445 attacks in 2003. But these numbers are

⁷⁷ See Noyes, J. E., An Introduction to the International Law of Piracy, California Western International Law Journal, Vol. 21, pp. 106-121.

⁷⁸ Shaw, M. N., International Law, 6th Edition, Cambridge University Press, p. 398

⁷⁹ Velozo de Melo Bento, Lucas, 'Along Liquid Paths': The Dualistic Nature of International Maritime Piracy Law (September 25, 2010)". ssrn.com.

⁸⁰ "New Definition sought for acts of piracy, isolated from terrorism," Utusan Online, Kuala Lumpur, Oct. 8, 2004, front page, <http://www.utusan.com.my/utusan/content.asp?pub=Utusan_Express&sec=Front_Page>

misleading due to loose definitions of the problem. Most of acts cited in the annual IMB reports on maritime piracy were not the classic boarding and hijacking of a merchant vessel on the high seas. Instead, nearly two-thirds of the attacks in 2003 occurred while the ships were stationary in port and are better classified as sea robbery. Current definitions also overlook corruption among port authorities and classify maritime terrorism together with reports of dockworkers stealing cans of paint.

UNCLOS, while not ratified by all countries, including the United States, nonetheless represents “the best evidence of international law relating to the maritime regime, and is therefore binding on all nations.”⁸¹ Under UNCLOS, an act must satisfy four criteria in order to constitute piracy: 1) it must be committed on the high seas; 2) it must be of a violent nature; 3) it must include at least two vessels; and 4) it must be committed for solely private aims. This definition, widely accepted as a reflection of customary law and recognized as the most authoritative codification of piracy law, significantly narrows the definition of piracy.⁸²

⁸¹ Peppetti, *supra* note 31.

⁸² Peppetti, *supra* note 31, at 91.

CHAPTER FOUR

OTHER ISSUES AFFECTING THE LEGAL ADDRESS OF PIRACY GLOBALLY

Apart from the difficulties encountered in the definition and legal address of piracy globally, there exist other aspects which affect the litigation process to a great extent. These may not be directly arising from the definition but share the same proximity towards achieving an effective litigation process. The degree of cooperation amongst and between states, the international application of Human Rights Law as well as reconciling public and private interests fall within this category of issues affecting the legal address of piracy globally.

4.1 International Cooperation to Suppress Piracy

The aspect of international cooperation is quite fundamental towards achieving an effective legal regime in fighting piracy. This is certainly why it constitutes a duty required of states by the LOSC to guarantee a successful legal address of the crime both globally and at national levels. Covered thus within the ambit of the UNCLOS, it plays a universal role in ensuring that pirates are properly and justly reprimanded, and that the global legal regime against piracy is effective.

As stated above, the High Seas Convention 1958 (HSC) and the United Nations Convention on the Law of the Sea 1982 (UNCLOS) define piracy in almost identical terms and the provisions of these treaties, in particular Articles 100 to 107 of UNCLOS, provide the legal framework for the repression of piracy under international law.⁸³ That much-quoted provision, Article 100 of UNCLOS, requires states to cooperate to the fullest possible extent in the repression of piracy. It provides: “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” The International Law Commission in its commentary on the equivalent provision in the HSC noted that: “Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed certain latitude as to the measures it should take to this end in any individual case.”⁸⁴ Doubt has been expressed historically as to whether this duty extends to requiring that States

⁸³ The preambles to UNSCR 1848 and 1851 (2008) reaffirm ‘that international law, as reflected in [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities’; see also operative paragraph 3, UNSCR 1838 (2008)

⁸⁴ [1956] II YbILC, 282.

have an adequate national criminal law addressing piracy.⁸⁵ While the wording of Article 100 may be open to the interpretation that all states should have such a law, the Security Council has noted that it remains the case that many states do not.⁸⁶

A number of UN bodies deal with piracy and promote international cooperation. The International Maritime Organization (IMO) primarily deals with the prevention of piracy, working very closely with UNODC (United Nations Organization on Drugs and Crime) which has primacy on transnational organized crime and legislative approaches, as well as procedures to assist naval vessels in investigations. The United Nations Office for Somalia in particular, coordinates activities of different organizations dealing with Somalia, bearing in mind that piracy is only a symptom of the wider problem.

There are a large number of other cooperation initiatives. An example can be found in the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)⁸⁷. This initiative, in collaboration with the IMO, aims at capacity building, the sharing of information, and the suppression of piracy in the area. With regard to piracy off the coast of Somalia, cooperation has been made possible by and is facilitated through the Djibouti Code of Conduct,⁸⁸ which with the guidance of the IMO came into force in January 2009. The agreement has a similar strategy of cooperation as ReCAAP, although rather more complex. The Code of Conduct provides an impetus for countries in the region to adopt legislation for prosecuting pirates and for developing coastguard capability, so that when the navies depart, the countries in the region can take over the problem and handle it themselves. The Contact Group on Piracy off the Coast of Somalia, set up with the encouragement of the Security Council, is an ad hoc group of states with interests in the issue; the Group has four different working groups with substantive work being done in different areas, the second having responsibility for legal issues. This working group is considering issues of the kind dealt with at the conference. There are moves for more sharing of intelligence among states; EUROPOL, for example, has decided to facilitate the exchange of information.

⁸⁵ As many States have not had historically, and still do not have laws adequately criminalizing piracy.

⁸⁶ Preamble to UNSCR 1851 (2008).

⁸⁷ <http://www.recaap.org/about/pdf/ReCAAP%20Agreement.pdf>

⁸⁸ "...the signatories declare their intention to co operate to the fullest possible extent, and in a manner consistent with international law, in the repression of piracy and armed robbery against ships, with a view towards...is being established in Sana'a." http://www.imo.org/about/mainframe.asp?topic_id=1773&doc_id=10933

As well as these multilateral means of cooperation, there are bilateral agreements and memoranda of understanding between states which wish to transfer captured pirates for prosecution and the prosecuting states. Even where such MOUS exist, there is no obligation on the prosecuting state to accept a detained person.

Finally, from a purely opportunistic standpoint, countries like the United States or the United Kingdom may not have enough strategic incentive to go after pirates, as long as American or British ships are not often attacked, and as long as American or British interests are not more directly threatened. For example, were it firmly proven that pirates harbored dangerous terrorists or directly aided groups like Al Qaeda, the United States and the United Kingdom would surely rethink their strategy and their efforts against pirates. Until such times, naval powers may continue to employ meager efforts in the fight against piracy, and consequently, piracy may continue to thrive, uninterrupted and unhindered.

4.2 Application of Human Rights Law

The treatment of captured pirates is subject to certain safeguards in international law. Humane treatment, the absence of arbitrary detention, the right to be brought promptly before a judge, the right to a fair trial, the avoidance of transfer to a country which will apply the death penalty and conflict with fundamental human rights, and other such obligations are required, for states parties to the relevant treaty, by such treaties as the Convention Against Torture, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights. Most states off the Horn of Africa for instance, are party to the Covenant.

European states which have naval vessels off the coast of Somalia are parties to the European Convention on Human Rights (ECHR). Although these states are acting under the authority of Security Council resolutions, those resolutions make clear that they do not displace the operation of human rights; indeed they expressly affirm them⁸⁹. The Convention imposes a number of requirements regarding the treatment of pirates, their capture, detention and transfer.

The issue which is considered here relates to the requirement not to detain persons except subject to certain criteria, including the need to bring them promptly before a judge (Article 5). Questions raised by this requirement include: Does the Convention have extraterritorial effect,

⁸⁹ For example, paragraph 14 of 1846(2008) calls upon states to co-operate in investigating and prosecuting persons suspected of piracy and armed robbery consistent with international human rights law.

does it require states to accord judicial oversight of pirates detained on the high seas, and if so how can this requirement be implemented in practice?

The ECHR applies to persons within a state's jurisdiction (Article 1); in extra-territorial situations this is now agreed to depend upon whether a person is within a state's effective control. Most of the relevant case law of the European Court of Human Rights and of national courts relates to the operation of forces in other countries, for example as part of the multi-national force in Iraq and Afghanistan. In the *Al Skeini* case in the UK courts, it was conceded by the government that UK military-run detention facilities in other countries were within its jurisdiction for the purposes of the ECHR. The questions which come up therefore include: Do the conclusions of the courts in these cases read across to operations on the high seas? At what stage are pirates under the control of the military?

The detention of pirates can thus be divided into three categories. First, there is the situation where pirates are captured and detained with a view to bringing them to the capturing state for prosecution. Here it is relatively clear that the ECHR applies. This situation underlay a recent ECHR case, *Medvedyev*,⁹⁰ involving a French naval vessel that had captured a Cambodian-flagged vessel suspected of drug-running and escorted it to Brest where proceedings were instigated. The Court ruled against France for failure to properly inform judicial authorities of the navy's actions and on the grounds that it did not have a secure basis in both international and national law for their arrest. France has appealed to the Grand Chamber in Strasbourg. The court dismissed the claim on the grounds that the applicants in *Medvedyev* had not been brought promptly before judicial authorities, as there was no reasonable alternative to holding them up for the 13 days required to take them to port.

Secondly, there is the situation where pirates are captured and detained, possibly for some weeks, with a view of bringing them to a third state for prosecution. Here a whole range of factors would probably be considered by a court. The court may rule in these circumstances in favour of extra-territorial application for the ECHR, as was conceded in *Medvedyev*.

The third situation is where it is not known, at the moment pirates are detained, who will prosecute them if at all. If the pirates are detained in this situation on the capturing state's vessel, that ship would probably be regarded as being under the state's jurisdiction for the purposes of the ECHR, akin to a consulate or embassy. If pirates are detained in their own ship, however,

⁹⁰ <http://www.echr.coe.int/echr/>, No. 3394/03

pending decision as to their disposition, there is uncertainty as to the application of the law. A parallel situation would be where a state rescued persons in distress in accordance with obligations under the SOLAS Convention (on Safety of Life at Sea). The aim there is to preserve life, quite different from a scenario when they are detained with a view to prosecution.

In conclusion therefore, if there is an obligation to provide judicial oversight of detention of pirates on the high seas, there will be questions as to how the obligation is to be put in effect. The detailed application of the ECHR to the treatment of pirates is not clear in every respect, but the Court in Strasbourg is likely to make further pronouncements on the matter.

4.3 Other concerns: Reconciling Public and Private Interests

As mentioned in chapter three, the interests involved as a consequence of acts of piracy are very numerous and different. Several objects, properties as well as people from different backgrounds are likely occurrences in any piracy case. In this light, shipping lines, insurers, seafarers all face commercial realities – the need for speed and reliability in delivering cargo. That commercial reality expresses itself most commonly via the payment of ransom. Ransom payments have increasingly been regarded as a business cost and the expectation of the pirates is therefore that ransoms will be paid. On the other hand, public interests are configured to disrupt, detect and prosecute piracy. In the event of a piracy case, these interests spring up and must be addressed. But how they are tackled and reconciled or compromised will determine whether the outcome of the legal regime is effective and successful or not. Coupled with the other obstacles seen in the previous chapter, reconciling interests equally affects the global address of piracy.

There are other tensions to be considered: Private interests are not yet being reconciled amongst themselves. Those who support the placement of armed security guards on ships for example, are opposed by those who seek to minimize the risk of the escalation of violence in the region. As regards public interests, those states which seek trial and prosecution of the pirates by the countries in the Gulf of Aden region for instance, have placed huge pressure on Kenya's shoulders and on other jurisdictions which attempt to prosecute pirates, and have raised concerns about the unwillingness of other members of the international community to commence prosecutions against piracy.

On one view, there appear to be few attempts to reconcile or compromise between the public and private interests, in stark contrast to the international community's approach to

counter-terrorism. On another view, private and public interests overlap: Commercial interests are shared by governments who gain tax revenue from a healthy industry; humanitarian concerns should be shared by all; it is in the interests of all (even lawyers) that piracy be stopped; what is needed is more work on coordination and recognition of long term interests on both sides. Though there is work in progress towards the reconciliation of public and private interests, they need to be intensified to render a smooth legal regime in resolving piracy cases and an effective fighting against piracy globally.

CHAPTER FIVE

CONCLUSION: THE WAY FORWARD

A global overview of modern day piracy paints nothing short of a grim picture. One is tempted at one point to ask if the fight against piracy is purely not illusionary. Despite the possible responses to the piracy threat in Somalia and elsewhere, and the more aggressive measures that may be needed in the same fight, so much is still left to be achieved. But it still remains to be emphasized that pirates are dangerous and world powers especially the developed nations should use more aggressive means in combating sea terrorists.

A straight forward, round-up conclusion to the issues in question is hard to come by given the complex and problematic nature of some of the issues examined in the previous chapters. However, it must be understood that the existing approaches and solutions regarding the fight against piracy constitute aspects that need to be understood within the particular context of the area or region affected by the crime in question; thus the possibility of acquiring a blueprint proposal remains doubtful as the problem also lies in the factors stimulating the emergence and growth of piracy in an area as much as the laws governing such crimes and their implementation.

In a bid to make final comments and proposals on the issues at stake and hence conclude on this study, one might want to consider the following questions: Are the current legal frameworks adequate? If not, what then is the way forward as regards fighting piracy globally? These questions have served as guidelines in this round up of the study.

5.1 Are The Current Legal Frameworks Adequate?

After looking at the issues raised and examined above, if one was writing a modern code for piracy, one would not start from here. But the existing multinational agreements and customary international law do provide sufficient legal powers for government vessels to seize pirate vessels, using appropriate levels of force, as well as an adequate international legal regime providing powers to arrest, transfer, prosecute or extradite persons responsible for piracy. The relevant international provisions are scattered and include provisions of soft law such as IMO guidelines. What then is the way forward?

It must be understood that modern-day piracy, currently thriving mostly in Somalia with the possibility of spreading to other regions of the world, is a serious threat to all naval nations, to their ships and crew members, as well as to their cargo. Pirates today operate like terrorists: they go after any prey that they estimate easy to capture, regardless of the nationality of the ship or its crew members. Thus, they function in a supra-state sphere, as a global threat to all nations and a lingering menace on all seas. Moreover, a serious danger looms that pirates may become linked to other terrorist groups, or that their activities will fund such other terrorist groups. All countries, and especially those with a significant naval presence, should undertake serious efforts to fight piracy in Somalia for example, and to ensure that piracy does not re-emerge in another lawless region. Pirates need to be fought in a serious manner: by being routinely captured and routinely prosecuted and punished in the courts of piracy-fighting states. In order to accomplish these goals, piracy-fighting countries should categorize maritime criminal acts, should rely on anti-terrorist conventions as a legal basis for the battle against piracy.

Thus, in order to quantify the threat to the maritime industry and to maritime security, the relevant authorities should categorize sea-based crimes that world leaders can use to create policies that will resolve the actual problem. Crimes against ships could be placed into the following four categories: Corruption which covers acts of extortion or collusion against marine vessels by government officials and/or port authorities; Sea robbery which relates more to attacks that take place in port while the ship is berthed or anchored; Piracy which covers actions against ships underway and outside the protection of port authorities in territorial waters, straits and the high seas; Maritime terrorism which covers crimes against ships by terrorist organizations.

Secondly, the relevant provisions of the various international instruments should be further publicized. International conventions are not adequately implemented in domestic law. Each state, whether or not with navies in the region of concern, should ensure that piracy and armed robbery are offences under its domestic law; that provision is made for appropriate law enforcement officers, with appropriate powers; that it has courts competent to hear piracy offences with provision for fair trial; that there is suitable provision for disposing of property seized by pirates subject to the rights of innocent third parties.

Piracy is only a symptom of much wider problems. The international community should deal with the root cause of piracy to be able to diminish and erase it successfully. With particular

reference to Somali piracy in the Gulf of Aden, political instability and lack of a proper governmental authority in Somalia, coupled with ongoing economic woes, and social unrest must be appropriately addressed and resolved in order to properly address piracy. Piracy exists in Somalia because there is no stable central government that could fight pirates: the country has had no government, no organized army or police force, and no functioning judiciary for almost two decades. As such piracy will thrive in Somalia as long as lawlessness and poverty prevail in this war-torn country. These have been catalysts, fueling the rapid growth of piracy in the region. Piracy thus exists in Somalia because many people are poor and cannot find adequate employment to support their families.⁹¹ In such appalling conditions, pirates are able to freely dock their ships in Somali ports, and to escort their hostages onto Somali land, without any fear of arrest or other repercussions by the Somali government.⁹² Thus, fighting piracy off the coast of Somalia may require the rebuilding of Somalia prior to addressing the crime.⁹³ Countries that have felt threatened by piracy may need to lobby the U.N. for funds and support in rebuilding the political institutions and infrastructure of Somalia, and may need to invest their own time and effort and recreating a stable and peaceful Somali society. Otherwise, pirates will continue to thrive.⁹⁴ And this is just the case for Somalia or the Gulf of Aden. The emergence of piracy in other parts of the world will also require that a contextual analysis be adopted in addressing the crime. No two regions have the same reasons for the emergence and growth of piracy, fulfill the same conditions necessary for its demise and hence require the same approach in finding solutions. Already, piracy is developing off the coast of Nigeria in the Gulf of Guinea, another relatively unstable country.⁹⁵ Piracy may similarly spread to other unstable regions, and we may face a return of the 17th century paradigm: wherever there is water, pirates thrive.

There is however, no doubt that ensuring peace and stability in Somalia, and possibly in other regions, may be the most significant and comprehensive step in fighting piracy but this piracy eradicating solution (the rebuilding of stable societies) may not be the only feasible goal.

⁹¹ Todd Pitman, Ending Somali piracy: few options for US forces, Apr. 14, 2009, available at: <http://www.ktar.com/?nid=46&sid=1122768> (last visited on May 13, 2009) [hereinafter Pitman].

⁹² Pitman, Ending Somali Piracy, *supra* note 63 (arguing that pirates operate openly in towns along the coast of Somalia).

⁹³ Many analysts have already argued that piracy cannot be fought off the coast of Somalia by security alone, and the deputy commander of the U.S. Africa Command in Germany has recently stated that the only long-term solution would be to resolve the political instability in Somalia. Similarly, Mary Yates, a senior U.S. diplomat serving as Africom deputy for civil-military activities, has recently stated that “we have to get at the root causes, and the root causes are on the land.” *Id.*

⁹⁴ Pitman, *supra* note 63 (arguing that because the developed countries, including the U.S., have not undertaken significant efforts to help Somalia rebuild itself, now its “anarchy... has come back to haunt.”).

⁹⁵ See, e.g., Piracy in Nigeria, available at http://en.wikipedia.org/wiki/Piracy_in_Nigeria (last visited on May 31, 2009).

Thus, the best long-term solution against piracy may be the developed world's commitment to reestablish functioning order in the developing and failed states, like Somalia.

5.2 Conclusion

It has been observed above that the definition and scope of piracy as prescribed by international law, gives rise to numerous issues of dispute and global concern. These issues which qualify as limitations towards the successful and effective implementation of a legal regime against piracy globally also demonstrate the inadequacies in the application of international laws at national and international levels. Several international instruments now exist that have been construed to handle these limitations and add value to already existing legislation. Nevertheless, as examined above, these issues are sometimes very complex and will require more than just constitutional modifications and improvements. When placed alongside the national legislations of states, then there is the obvious enigma of interests. It then becomes a question of limitations or rules of priority and how these are balanced or compromised determines the success of the global anti-piracy regime.

The key solution however, towards achieving global success and an effective legal address to piracy lies in the willingness of states to cooperate without restrictions towards the eradication of this crime globally. As such, there is bound to be compromise and sacrifice of national interests for the satisfaction of the general good (i.e. global interest) and the developed nations must lead in this regard, supporting the underdeveloped nations as much as possible wherever such assistance is necessary and required. Otherwise, when is there ever going to be a unanimously rallying point for all states signatories or not at the international level? Such required cooperation must go beyond institutionalizing piracy to world standards. It must also entail more concrete assistance as examined below.

For investigations and prosecutions, further international co-operation is needed to bring successful prosecutions. Information-sharing is important. There are problems regarding the collection of evidence by the capturing authority for prosecution in another country. Once a case comes to trial, to secure oral statements from witnesses involves huge costs and the time for crew to attend trial. The shipping industry can provide support to make the process of prosecutions work by encouraging the attendance of witnesses, who may be masters or crew. Detailed

information should continue to be made available regarding the evidentiary and procedural requirements of the law of the differing prosecuting authorities, such as the handover guidance prepared in relation to Kenya and naval and police forces must act in strict compliance with them. There should be further efforts to facilitate liaison between the different personnel involved in transfer of suspects and investigation and prosecution. There should be identification of appropriately qualified and empowered national leads for collaboration in investigations and prosecutions.

UNODC and other agencies should continue their efforts to collate standard investigative practices and should consider whether it is possible to introduce common rules or guidelines which would facilitate the collection of evidence by one authority for prosecution in another.

Is it possible to develop a blueprint or common standards, internationally agreed, for the fighting piracy? An attempt should be made. Prosecutions cannot be continued in countries of the region such as Kenya without full international support. There needs to be a long term commitment by the international community to give support for trials and capacity building in relevant regional states. There needs to be intelligent assistance given to these national criminal justice systems. Moreso, western states cannot absolve themselves of their responsibility to mount prosecutions themselves. They have legal responsibilities under the SUA Convention, for example, to prosecute where they do not extradite persons within their jurisdiction. But trial by new or existing international courts is not the way forward. For the conduct of trials, the shipping industry should be ready to cooperate with providing information, evidence and witnesses. There needs to be greater coordination among the different international organizations and forums which are geared towards promoting cooperation on counter-piracy and greater promulgation of the guidelines, codes and other instruments of each. There should be full transparency.

Nevertheless, efforts are constantly being and should be intensified to redress this situation and counteract the upsurge of piracy globally. The tides may be turning on piracy, and we may sooner than later witness a more unified and potent battle to eradicate Somali piracy, through a joint effort of naval powers.⁹⁶ However, the fight against piracy on the whole will not

⁹⁶ In the recent months, more nations have expressed their willingness to apprehend pirates. On April 15, 2009, the French navy captured 11 pirates, after launching an attack on the pirate ship, which the French navy had spotted with a surveillance helicopter and had observed over night. Elizabeth A. Kennedy, Somali pirates vow to kill American sailors, Apr. 15, 2009,

be complete without a full re-examination, and possible elaboration, of international law, to define and sharpen the legal tools needed to capture and prosecute both pirates themselves and the masterminds of piracy operations. Without such reliance on international law, piracy may surge in other areas of the world, where poverty and unstable governments persist and continue to pose a problem to the world at large.

In brief:

- Piracy is a much more serious problem than most states and international institutions will want to believe. It is a possibility that some piracy gangs are linked to terrorist groups which have in some cases either posed as pirates or used the strategy of pirates to advance their courses.
- The already serious problem of piracy is compounded by the pursuit of individualistic interests and the lack of unity in the global effort to deal with it. There exists no unanimously united front for dealing with global piracy.
- The limitations inherent in the definition of piracy and its scope make the application of international legislation in particular difficult especially in line with national legislations and hence piracy cannot be effectively tackled.
- The efforts made at dealing with the problem of piracy have often missed the mark by failing to carefully consider and deal with the most fundamental and underlying causes of piracy in the context of the areas or regions where the crime is rampant. These will include such issues as socio-political and economic issues evident in the case of Somalia (which neither has a truly centralized government nor a working judicial system with over 80% of the population living under the poverty line). Thus, any efforts at addressing the problem of piracy in any region that disregard these factors are bound to fail.

available at <http://news.yahoo.com/s/ap/piracy> (last visited May 9, 2009). Similarly, Yemen's coast guard rescued 13 Yemeni hostages in a shootout with the Pirates on April 13, 2009. Id. The German navy captured seven pirates on April 15, 2009, after pursuing the pirates by warships in the Gulf of Aden. CNN, Pirates captured after attacking German tanker, Apr. 15, 2009, available at <http://www.cnn.com/2009/WORLD/africa/03/31/german.pirates> (last visited May 9, 2009). Last but not least, the United States navy successfully liberated an American skipper, Richard Phillips, who had been hijacked by Somali pirates after the pirates had attempted to hijack Phillips' ship and were warded off by the ship's crew; Phillips had apparently surrendered himself to the pirates. Elizabeth A. Kennedy, Somali pirates on hijack spree since weekend, Apr. 14, 2009, available at http://news.yahoo.com/s/ap/20090414/ap_on_re-af/piracy (last visited on May 9, 2009) [hereinafter Kennedy, Hijack Spree]. Finally, many nations have recently pledged \$213 million to boost security in Somalia and halt piracy. CNN, More than \$200M pledged to beat Somali pirates, Apr. 24, 2008, available at <http://www.cnn.com/2009/WORLD/africa/04/24/pirates.security.meeting.money/index.html> (last visited on May 12, 2009).

By means of recommendations, in summary of the points advanced as regards the way forward:

- Any effective tools and/or strategies for tackling the problem of piracy should be practically truly international and all-inclusive. Only a concerted effort occasioned by the appropriate standardization of existing legislations stand a proper chance of tackling modern day piracy head on;
- The enormity of the threat of piracy should be appropriately quantified. Without a good knowledge of the quantitative estimation of the cost and implications of piracy, no state or international institution could come out with the right measure of policy and legal instruments for dealing with the menace of piracy;
- A full public disclosure of all internationally adopted legislations and adaptation to national legislation must be ensured and as many states as possible pressured to rectify them.
- Where applicable, the more fundamental issues that lend to piracy such as poverty, socio-political instabilities and plain lack of the rule of law, as exemplified in the case of Somalia must be prioritized in any effort at combating piracy;
- For the most part, as has been made clear in the preceding chapters, the worse hit areas of piracy have been in and around under developing countries. It is therefore tempting for developed nations to stay aloof and assume that lukewarm wait-and-see attitude. However, most of the under-developed countries that are worst hit usually lack the financial, intelligence and pro-active strength to act without the support of the more developed nations.
- A key element to the way forward for dealing with piracy is the willingness of states parties to internationally adopted legal instruments for prosecuting and punishing offenders to maintain and enforce these statutes. How to instill this willingness though quite beyond the scope of this dissertation is a crucial element in bringing modern day piracy under control.