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**WALK THE PLANK:  
SOMALI PIRATES AND INTERNATIONAL LAW**

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## ABBREVIATIONS

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|          |  |
|----------|--|
| ECHR     | European Convention on Human Rights  |
| EEZ      | Exclusive Economic Zone  |
| EU       | European Union   |
| EUNAVFOR | European Union Naval Mission in Somalia  |
| ICC      | International Criminal Court   |
| ICTR     | International Criminal Tribunal for Rwanda   |
| ICTY     | International Criminal Tribunal for Former Yugoslavia  |
| IMB      | International Maritime Bureau  |
| IMO      | International Maritime Organisation  |
| ITLOS    | International Tribunal for the Law of the Sea  |
| nm       | nautical miles   |
| NATO     | North Atlantic Treaty Organisation   |
| PLO      | Palestinian Liberation Organisation  |
| PRC      | Piracy Reporting Centre  |
| ReCAAP   | Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia               |
| SUA      | Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation                |
| TFG      | Somali Transitional Federal Government   |
| UK       | United Kingdom   |
| UN       | United Nations   |
| UNCAT    | United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment |
| UNCHS    | United Nations Convention on the High Seas   |
| UNCLOS   | United Nations Convention on the Law of the Sea  |
| UNSC     | United Nations Security Council  |
| USA/US   | United States of America/United States   |
| WFP      | World Food Programme   |

# INTRODUCTION

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The perception of pirates as loveable rogues and swashbuckling sailors is a fanciful one. In reality, the piratical acts currently occurring off the coast of Somalia and in the Gulf of Aden present a major economic, humanitarian and security challenge to the global community. This is evidenced in the unprecedented international naval response. Currently, a naval coalition led by the United States of America (USA) and comprised of vessels and air support supplied by the European Union (EU), North Atlantic Treaty Organisation (NATO), India, China, Japan and Russia, amongst others, is patrolling affected sea tracts in the Horn of Africa.<sup>1</sup>

The upsurge in piracy and overwhelming naval response has thrown into stark relief the current international law framework governing piracy. Customary international law of the sea was codified in the 1982 United Nations (UN) Convention on the Law of the Sea (UNCLOS) referred to as “a constitution for the oceans.”<sup>2</sup> With regard to a comprehensive definition of piracy, UNCLOS adopted the existing definition found in the 1958 UN Convention on the High Seas (UNCHS).<sup>3</sup> That definition applies to both private ships and aircraft. While the inclusion of aircraft in the definition of piracy amounts to a progressive expansion of international law in this area,<sup>4</sup> for the purposes of this dissertation, discussion shall solely focus on ships. The most distinctive aspect of the definition of piracy is that it is an offence confined to the high seas and thus outside the jurisdiction of any state.<sup>5</sup> As well as defining piracy at international law, UNCLOS establishes enforcement and interdiction powers for the suppression of piracy and accordingly is the single most important international legal document in this area.

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<sup>1</sup> Xan Rice, *US launches anti-piracy naval force to combat hijackings off Somalia* (9 January 2009) Guardian.co.uk <<http://www.guardian.co.uk/world/2009/jan/09/piracy-somalia-us-navy>> accessed

<sup>2</sup> Martin Murphy, ‘Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?’ in Peter Lehr (ed), *Violence at Sea: piracy in the age of global terrorism* (2007) 155,155.

<sup>3</sup> Article 15 of United Nations Convention on the High Seas (29 April 1958, entered into force 30 September 1962) 450 *UNTS* 82 [hereinafter ‘UNCHS’] was replicated in Art 101 of United Nations Convention on the Law of the Sea (10 December 1982, entered into force 16 November 1994) 1833 *UNTS* 3 [hereinafter ‘UNCLOS’]. See Appendix One.

<sup>4</sup> Ivan Shearer, *Piracy* (2008) Max Planck Encyclopedia of Public International Law <[http://www.mpepil.com/subscriber\\_article?id=/epil/entries/law-9780199231690-e1206](http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e1206)> accessed 15/07/09, [15].

<sup>5</sup> UNCLOS, above n 3, Art 101(a)(i).

Piracy was the first offence criminalised at international law and thus “inaugurates international criminal law.”<sup>6</sup> It must be considered as distinct from any offence of piracy occurring in territorial waters recognised by domestic law. Part one of chapter one explores the historical development of the international crime of piracy and in particular the political interests which have determined its enforcement. Part two of chapter one establishes the extent of the Somali piracy epidemic. The serious economic, humanitarian and security threat piracy poses justifies current naval efforts and the need to support these efforts through the progressive development of international law which has occurred over the last 18 months.

Chapter two traverses the key elements of the definition of piracy found in Art 101 of UNCLOS. It highlights controversy over the limited nature of that definition and justifies those limitations by reference to the historical antecedents of the offence of piracy. Importantly, this chapter highlights the fact that piracy should not be used as a vehicle to counter deficiencies in other areas of international law, namely terrorism.

In chapter three, novel international and regional responses to piracy are assessed. In terms of international responses, in 2008 the UN Security Council (UNSC) began to respond to the challenges naval vessels were experiencing in suppressing piracy due to the limited nature of enforcement powers under UNCLOS. In particular, the UNSC has extended the ability of naval vessels to pursue pirates into territorial waters. The other notable international response is the use of bilateral prosecution agreements under which detained pirates are handed to Kenya for the purposes of prosecution. Finally, chapter three evaluates the Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden established in January 2009 to coordinate regional responses to piracy.

Having considered the origins of piracy, definitional issues and novel modern responses, chapter four proposes the establishment of an international piracy court. While UNCLOS defines piracy at international law, it is the responsibility of states to implement appropriate domestic laws which provide for the prosecution and sentencing of pirates. Empirically, states can be said to have failed in this respect. The inability and unwillingness of states to prosecute piracy, coupled with the highly questionable practice of handing states to Kenya for prosecution, justifies the creation of a specialised court.

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<sup>6</sup> Gerry Simpson, *Law, War and Crime* (Polity Press, 2007)159.

## CHAPTER ONE:

### *From Roman bandits to Somali pirates*

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#### **1.1 Historical development of the international crime of piracy**

Sea piracy is not a new phenomenon, nor is its history confined to piratical acts in the seas off Eastern Africa or South East Asia as today we may perceive. Instead, the history of piracy is both long and varied. Legal developments throughout that time are sporadic and mostly tied to variations in political opinion on piracy and the threat it posed to commercial interests. For the purposes of tracing the development of modern piracy three main periods will be briefly considered. The first is that of ancient times when piracy terminology first developed. The second period to be considered in more depth is the sixteenth to eighteenth centuries when scholars began to explore the principles of *hostis humani generis* and domestic statutory laws developed. Finally, the period 1830-1950s will be considered as the era in which piracy in the Mediterranean and Atlantic seas was mostly eradicated and international treaties appeared.

Piracy, despite not always having been termed as such, has existed for as long as trade ships have navigated the oceans. Some trace piracy as far back as 1190 B.C. when ship battles in the Mediterranean Sea were common.<sup>7</sup> The term *peirates* (pirates) was likely only first coined by the Greeks much later, around 500-300 B.C.<sup>8</sup> To the Romans pirates were not just ship-robbers but also undesirable groups on land who essentially practised banditry.<sup>9</sup> This is a far broader conception of the term pirate than we currently endorse.

Piracy flourished in Elizabethan England. In this grand era of piracy, privateering inevitably hindered law enforcement. Unlike pirates, privateers worked on a “private ship commissioned by the government to attack and loot the shipping of enemy countries.”<sup>10</sup> Essentially, the actions undertaken were the same but the motivations and authority very different. At times of war a ‘pirate’ could operate very legitimately as a privateer, and after periods of war, historians note that piracy typically spiked as privateers were

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<sup>7</sup> For an overview of piracy and maritime activity during the Bronze Age see: Philip de Souza, *Piracy in the Graeco-Roman World* (Cambridge University Press, 1999) 15.

<sup>8</sup> *Ibid*, 3.

<sup>9</sup> *Ibid*, 79.

<sup>10</sup> Peter Earle, *The Pirate Wars* (Methuen, 2003) 12.

relinquished from service and many navy sailors lacked employment.<sup>11</sup> Both privateering and piracy flourished in Europe in the late sixteenth century and increased with the expansion of merchant shipping after 1550 around Morocco, West Africa, the Canaries, Brazil, the Caribbean and the Mediterranean.<sup>12</sup> Piracy and politics collided, with many nations using pirates and privateers to increase wealth and strategic advantage. This is reflected in the fact that token attempts were made by most European nations to punish pirate nationals but really no attempts were made to police the high seas.<sup>13</sup> England, which was the main endorser of piracy and privateering, only really began to condemn piracy in the 1620s and stopped using pirates to pursue political and financial interests from the 1670s onwards.<sup>14</sup> This was likely a consequence of rising naval power, a more centralised state government and increased trade relations. Only in 1856, however, was privateering formally abolished by European powers pursuant to the Paris Declaration.<sup>15</sup>

In terms of how the law was used to respond to piracy, since Roman times and the work of Cicero (died 43 B.C.E) pirates have essentially been known as *hostes humani generis* (enemies of the human race).<sup>16</sup> On the basis of Cicero's work, Grotius (1583-1645) used the classification of *hostes humani generis* to advance the notion of universal jurisdiction.<sup>17</sup> Grotius discussed punishment as a fundamental right of the sovereign state but noted piracy as a special exception.<sup>18</sup> The status of *hostes humani generis* meant pirates were stripped of any national affiliation and were thus beyond the

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<sup>11</sup> Ibid, 11.

<sup>12</sup> Ibid, 23.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid, 24.

<sup>15</sup> Article 1 of the Declaration of Paris stated "privateering is and remains abolished.": Declaration of Paris (30 March 1856) The Online Library of Liberty <[http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=1053&chapter=141128&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1053&chapter=141128&layout=html&Itemid=27)> accessed 6/10/09.

<sup>16</sup> For example, Cicero explained that no fidelity was owed to an oath sworn to a pirate because "... a pirate is not included in the number of lawful enemies, but is the common foe of all the world; and with him there ought not to be any pledged word nor any oath mutually binding.": M. Tullius Cicero, *De Officiis* (Walter Miller trans, Heinemann, 1913 ed) Book III, [107] at 385. The contribution of Cicero to the development of piracy laws is noted in: M. Cherif Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law' in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004) 39, 47.

<sup>17</sup> Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations* (A.C. Campbell trans, Boethroyd, 1814 ed) [trans of: *De Jure Belli ac Pacis*], Book II, c 20, [XL]. The first treaty to recognise piracy as an offence subject to universal jurisdiction was the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty; and the United States of America (19 November 1794) The Library of Congress <<http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=008/llsl008.db&recNum=140>> accessed 8/10/09, Arts 20-21.

<sup>18</sup> Grotius, *ibid*.



protection of any state.<sup>19</sup> This granted states universal jurisdiction over pirates. Pirates captured on the high seas could be tried and punished by any state, regardless of whether they were a national of that state or had attacked a flag ship of that state.<sup>20</sup> The creation of universal jurisdiction was revolutionary and marks piracy's most significant contribution to international law.

English common law is the major source of later international and overseas domestic law developments. Common law in the fifteenth and sixteenth centuries made piracy an offence against the law of nations (international law) and punishable as a civil law offence in the courts of admiralty.<sup>21</sup> Piracy only became a criminal offence with the introduction of statutory law governing piracy under King Henry VIII.<sup>22</sup> The Act, and its immediate successor,<sup>23</sup> did not define piracy but it certainly appears to have covered a broader range of acts and had a greater jurisdiction than now. For example, piracy covered attacks against ships in any "Haven, Rover or Creek" which nowadays is no longer considered piratical.<sup>24</sup> Importantly, the Act recognised that "Traytors, Pirates, Thieves, Robbers, Murderers and Confederates upon the Sea" had previously escaped punishment and sought to redress this.<sup>25</sup> A convicted pirate was from then on to "suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attained and convicted of any Treasons, Felonies, Robberies or other the said Offences upon the Lands."<sup>26</sup> While death by hanging was permitted, during the Elizabethan era (1558-1603) it was not always ordered. King James I (1603-1625), being committed to the eradication of piracy, hung more pirates during his reign than in the entire previous century.<sup>27</sup>

In the USA, piracy committed on the high seas was an offence against the law of nations, and was first recognised as a federal crime in Article 1, Section 8 of the United States (US) Constitution 1787. Then in 1790 the US Congress enacted statutory law granting jurisdiction over murder and robbery committed on the high seas.<sup>28</sup> As with

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> *In re Piracy Gentium* [1934] AC 586 (PC) 589.

<sup>22</sup> An Act for the Punishment of Pirates and Robbers of the Sea 1536, 28 Hen 8, c 15.

<sup>23</sup> An Act for the More Effectual Suppression of Piracy 1700, 12 Wm 3, c 7.

<sup>24</sup> An Act for the Punishment of Pirates and Robbers of the Sea 1536, above n 22, c 15, s 2. Article 101(a) of UNCLOS, above n 3, confines piracy to an offence committed on the high seas or outside the jurisdiction of any State.

<sup>25</sup> Ibid, s 1.

<sup>26</sup> Ibid, s 2.

<sup>27</sup> Earle, above n 10, 58.

<sup>28</sup> Act of April 30, 1790, ch 9, 1 Stat. 112 (1790).

English law, punishment for convicted pirates under US law was extreme with the typical sentence for a convicted pirate being death by hanging. Capital punishment for piracy was abolished in the USA in 1897 and replaced with life imprisonment.<sup>29</sup> This was largely the result of juries being unwilling to convict because of the presence of the death penalty.<sup>30</sup> It would be almost one hundred years before the UK abolished piracy with violence (along with treason) as a capital offence.<sup>31</sup>

Piracy was eradicated as a serious problem in the Atlantic and Mediterranean Seas in the 1830s.<sup>32</sup> Not only had Britain reached the pinnacle of her navy might but nearly every other navy of significance was cracking down on piracy also.<sup>33</sup> Accordingly, it would be some time before piracy featured on the international agenda again. The first multilateral organisation to consider piracy was the League of Nations. Essentially, at this time both English and US law deferred to the law of nations for a definition of piracy.<sup>34</sup> Varying conceptions of piracy at international law existed. In 1926 the League appointed a sub-committee of experts to prepare a report on the codification of the international law of piracy. According to that report, released one year later, under international law “piracy consists in sailing the seas for private ends without authorization from the government of any State with the object of committing depredations upon property or acts of violence against persons.”<sup>35</sup> As a result of this report many countries desired the establishment of an international convention. Inevitably, upon the failure of the League those countries had to wait for the establishment of the UN and then the adoption in 1958 of UNCHS for the developments in international law they desired. UNCHS was in part based on the work of the Harvard *Draft Convention on Piracy and Commentary* released in 1932.<sup>36</sup> Piracy was defined under Art 15 of UNCHS as consisting of the following:

- (1) Any illegal acts of violence, 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:

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<sup>29</sup>Act of Jan. 15, 1897, ch. 29, 29 Stat. 487 (1898).

<sup>30</sup> Joshua Michael Goodwin, ‘Universal Jurisdiction and the Pirate: Time for the Old Couple to Part’ (2006) 39 *VAND. J. TRANSNAT’L L.* 973, 998 referring to 28 Cong. Rec. 3098-99 (1896).

<sup>31</sup> Crime and Disorder Act 1998 (UK), s 37.

<sup>32</sup> Peter Earle, above n 10, 253.

<sup>33</sup> *Ibid*, 231.

<sup>34</sup> Phillip A. Buhler, ‘New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy’ (1999) 8-*WTR Currents: Int’l Trade L J.* 61, 63-64.

<sup>35</sup> League of Nations Committee of Experts for the Progressive Codification of International Law, *Draft Provisions for the Suppression of Piracy* (1927) League of Nations Doc. C.196. M.70.1927. V. 116.

<sup>36</sup> Harvard Research into International Law, ‘Draft Convention on Piracy and Commentary’ (1932) 26 *Sup AJIL* 739.

- (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a private ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

UNCLOS also codified existing customary international law with respect to universal jurisdiction. Under Art 19, on the high seas:

every State may seize a pirate ship... or a ship taken by piracy and under control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed...

However, UNCLOS varied the conceptual basis of universal jurisdiction in one important respect. A pirate ship was no longer stripped of its nationality merely because it had engaged in piratical acts. Instead, the flag state had the right to determine retention or loss of nationality.<sup>37</sup> For academics such as Grotius, universal jurisdiction was derived from the fact pirates had no nationality as *hostes humani generis*.<sup>38</sup> In UNCLOS no mention is made of the status of *hostes humani generis* and universal jurisdiction takes on a more practical, as opposed to a conceptual, role. Still, universal jurisdiction with respect to pirates is regarded as the only pure case of universal jurisdiction in international law as it originates from customary international law rather than international conventions.<sup>39</sup> The piracy articles in UNCLOS were eventually adopted verbatim into the 1982 UNCLOS which remains the leading convention with respect to international maritime law.<sup>40</sup> Consequently, piracy is now largely governed by multilateral treaty law as opposed to customary international law. The majority of naval coalition members, Somalia and Kenya are party to UNCLOS.<sup>41</sup>

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<sup>37</sup> Article 18 of UNCLOS, above n 3, provided that “a ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.” Article 18 of UNCLOS is replicated in Art 104 of UNCLOS, above n 3.

<sup>38</sup> Grotius, above n 17.

<sup>39</sup> See the separate opinion of President Guillaume: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3, 38 & 40.

<sup>40</sup> UNCLOS, above n 3, Art 100-107. See Appendix One.

<sup>41</sup> United Nations Division for Ocean Affairs and the Law of the Sea, *Chronological lists of ratifications, accessions and successions to the Convention and the related Agreements as at 20 July 2009*

It is important to note that UNCLOS does not prescribe a penalty regime for piracy. Instead, it merely creates a binding definition of piracy, establishes various enforcement powers and leaves the question of sanction to the domestic law of the state parties to UNCLOS.<sup>42</sup> That UNCLOS is silent as to a universal punishment for pirates has been subject to criticism.<sup>43</sup> However, such criticism does not take into consideration the proper role of international law and its relationship with domestic law. It is standard practice for international law to define an offence and then rely on domestic law to criminalise the conduct accordingly.<sup>44</sup> Exceptions to the general separation of functions between international and domestic law are contained in the statutes constituting international criminal courts or tribunals which not only define offences but also establish sentencing regimes.<sup>45</sup>

Along with developments in international law, the international community established various agencies to facilitate anti-piracy cooperation and support maritime commerce. In 1981 the International Chamber of Commerce established the International Maritime Bureau (IMB) to coordinate efforts against maritime crime.<sup>46</sup> IMB established the Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia in October 1992.<sup>47</sup> PRC receives, collates and provides reports on piracy and armed robbery against ships. Distinct from the International Chamber of Commerce's organisations is the International Maritime Organisation (IMO) which is a specialised UN agency concentrating on maritime safety and dealing with pollution from shipping.<sup>48</sup> IMO was established by convention in 1948 but only met for the first time in 1959.<sup>49</sup> It is the major maritime regulatory body and provides a forum for cooperation and discussion for its 169 members.<sup>50</sup>

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<[http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The United Nations Convention on the Law of the Sea](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea)> accessed 23/09/09.

<sup>42</sup> UNCLOS, above n 3, Art 105.

<sup>43</sup> See, for example: Goodwin, above n 30, 997.

<sup>44</sup> *In re Piracy Jure Gentium*, above n 21, 589. See also: Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 17.

<sup>45</sup> For example, penalties are provided for in Part VII of the Rome Statute of the International Criminal Court (17 July 1988, entered into force 1 July 2002) 2187 UNTS 90.

<sup>46</sup> International Chamber of Commerce, *International Maritime Bureau*

< [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=27&Itemid=16](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=27&Itemid=16)> accessed 08/07/09.

<sup>47</sup> International Chamber of Commerce, *International Maritime Bureau Piracy Reporting Centre*

< [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=30&Itemid=12](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12)> accessed 08/07/09.

<sup>48</sup> International Maritime Organisation, *Introduction to the IMO* < <http://www.imo.org/home.asp>> accessed 08/07/09.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

## 1.2 The situation in Somalia

Having traversed the history of piracy, it is necessary to give an overview of the current situation in Somalia. The Somali piracy epidemic presents a major economic, humanitarian and security challenge to the international community. Somalia is inhabited by an estimated 9,832,017 people.<sup>51</sup> The following map outlines the various regions of Somalia which hugs the East African coast line.<sup>52</sup>



Map No. 3690 Rev. 7 UNITED NATIONS January 2007

Department of Peacekeeping Operations Cartographic Section

<sup>51</sup> Central Intelligence Agency, *Somalia* (26 June 2009) The World Factbook

< <https://www.cia.gov/library/publications/the-world-factbook/geos/SO.html> accessed 08/07/09.

<sup>52</sup> United Nations Department of Peacekeeping Operations, *Somalia Map*, No 3690, Rev 7 January 2007.

2008 was a significant year for piracy. Somali pirates expanded operations into the Gulf of Aden which led to dramatic increases in the number of attacks.<sup>53</sup> During 2008 44 ships were hijacked and approximately 600 crew taken hostage.<sup>54</sup> Africa has now outstripped South East Asia as the global piracy ‘hotspot’ with the Malacca Straits and South China Sea experiencing marked declines in the number of pirate attacks since 2005.<sup>55</sup> In September 2009 IMB declared that reported piracy attacks to date surpassed the total number of attacks in 2008.<sup>56</sup>

The states which comprise the Gulf of Aden and Red Sea area are some of the largest oil and gas producers in the world. Accordingly, the Gulf of Aden is a navigational route of considerable significance to commercial shipping. Approximately 12 percent of the world’s required daily oil is transported through this area and 50,000 vessels traverse the route per annum.<sup>57</sup> It offers a much more direct route to Europe and North America from the Far East and Asia, linking with the Suez Canal, than the alternative of travelling around the Cape of Good Hope.<sup>58</sup> Because of the route’s strategic importance, shipping companies run the risk of pirate attacks, but the price is high. Large ransoms are demanded of shipping companies for the release of captured ships and crew.<sup>59</sup> Consequently, insurance premiums increased ten-fold in 2008, and marine insurance leader Allianz has this year called for the piracy risk to be accommodated under war insurance policies.<sup>60</sup> If the risk piracy poses to international shipping in this area is not curbed then the costs involved in shipping will only increase and ultimately the consumer will carry that burden.

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<sup>53</sup> ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships - Annual Report 2008* (ICC International Maritime Bureau, January 2009) 5.

<sup>54</sup> International Maritime Organisation, *Piracy in Waters off the Coast of Somalia* <[http://www.imo.org/home.asp?topic\\_id=1178](http://www.imo.org/home.asp?topic_id=1178)> accessed 27/09/09.

<sup>55</sup> ICC International Maritime Bureau, above n 53, 5.

<sup>56</sup> ICC Commercial Crime Services, *Piracy figures for 2009 surpass those for previous year* (23 September 2009) <[http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=374:piracy-figures-for-2009-surpass-those-for-previous-year&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=374:piracy-figures-for-2009-surpass-those-for-previous-year&catid=60:news&Itemid=51)> accessed 27/09/09.

<sup>57</sup> James Kraska and Brian Wilson, ‘Piracy Repression, Partnering and the Law’ (2009) 40 *J. Mar. L & Com.* 43, 43.

<sup>58</sup> Roger Middleton, *Piracy in Somalia: threatening global trade, feeding local wars* (Chatham House, October 2008) AFP BP 08/02, 9.

<sup>59</sup> It is estimated that the “Eyl Group” alone earned US\$30m in ransom payments from international shipping companies in 2008: United Nations Security Council, above n 1, [5].

<sup>60</sup> Times Online, *Shipping insurance cost soars with piracy surge off Somalia* (11 September 2008) <<http://www.timesonline.co.uk/tol/news/world/article4727372.ece>> accessed 25/06/09; Lloyd’s List, *Piracy risk must be put where it best fits – in war policies, urges Allianz* (23 June 2009) <<http://www.lloydlist.com/ll/news/piracy-risk-must-be-put-where-it-best-fits-in-war-policies-urges-allianz/1245680091722.htm>> accessed 24/06/09.

Piracy does not just pose a threat to commercial interests; delivery of humanitarian aid to Somalia is also suffering. The UN claims that 3.1 million people in Somalia face “an acute food, nutrition and livelihood crisis.”<sup>61</sup> Ninety-five percent of the supplies provided by the World Food Programme (WFP) must be delivered to Somalia by sea.<sup>62</sup> Since the attack on a WFP-contracted ship in late 2007 and again in early 2008, the international community has provided navy protection to WFP ships.<sup>63</sup> Such protective measures have generally proved successful in ensuring safe delivery of aid throughout 2008 and 2009.<sup>64</sup> If states cannot provide such protection long term and piracy continues, WFP may struggle to contract ships to deliver supplies to Somalia. This would inevitably harm the Somali population.

Pirates have developed their own set of modern piracy tactics to allow for attacks further off shore and thus outside territorial waters. While small skiffs with powerful outboards are used to approach the ships, ‘mother-ships’ (typically fishing trawlers) increase the range of attacks by towing the skiffs into the high seas.<sup>65</sup> Pirates target ships with low sides, speed and crew numbers.<sup>66</sup> Container ships and bulk carriers are the most common pirate targets.<sup>67</sup> In 2008 the largest tanker ever was hijacked and released in early 2009, illustrating an increase in the boldness and ambitions of Somali pirates.<sup>68</sup> There is very little time to prevent hijacking or undertake evasive measures as “from sighting pirates to being boarded takes approximately fifteen minutes.”<sup>69</sup> Somali pirates fire automatic weapons and rocket propelled grenades to force entry and, once onboard, they sail the ship towards the Somali coast to begin ransom demands.<sup>70</sup> Ships hijacked in the Gulf of Aden are taken to the major pirate home bases in Eyl, Hobyo and Xarardheere.<sup>71</sup> Pirates are dependent on support on land to undertake their activities and Puntland, a semi-autonomous region in the northeast of Somalia, provides the

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<sup>61</sup> United Nations Security Council, above n 1, [34].

<sup>62</sup> *Ibid*, [35].

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*, [36].

<sup>65</sup> Middleton, above n 58, 4.

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

<sup>67</sup> ICC International Maritime Bureau, above n 53, 17.

<sup>68</sup> Guardian.co.uk, *Hijacked Saudi oil tanker released after ransom dropped by parachute* (9 January 2009)

< <http://www.guardian.co.uk/world/2009/jan/09/sirius-star-released-somali-pirates-ransom> > accessed 21/06/09.

<sup>69</sup> Middleton, above n 58, 4.

<sup>70</sup> ICC International Maritime Bureau, above n 53, 23.

<sup>71</sup> United Nations Security Council, above n 1, [6]. See United Nations Department of Peacekeeping Operations map of Somalia on page 9.

national base for pirate activities.<sup>72</sup> Networks based on shore handle ransom negotiations, supplies, guard ships and hostages and organise intelligence gathering and acquisition of finance.<sup>73</sup>

Many pirates die or are injured during attacks. For example, some of the pirates escaping from the *Sirius Star* after receiving their ransom were reported as having drowned.<sup>74</sup> Three pirates were also shot dead by the US Navy during the recovery of Captain Phillips in the high profile hijacking of the *Maersk Alabama*.<sup>75</sup> Nonetheless, despite the risk to life, many young Somalis are eager to join pirate militias, thereby showing the desperation of their situation. Somalia is a country ravished by wide-spread poverty and unemployment is in excess of 90 percent of the population.<sup>76</sup> Piracy therefore offers a very real source of income and opportunities not available through legal vocations. In this respect, the problem of piracy is inextricably linked to the political and economic situation in Somalia:

With little functioning government, long, isolated, sandy beaches and a population that is both desperate and used to war, Somalia is a perfect environment for piracy to thrive.<sup>77</sup>

No government has controlled the entire state since 1991 and the Somali Transitional Federal Government (TFG), recognised internationally since 2000, currently has limited control over the state.<sup>78</sup> Lack of strong internal governance means pirates operate with near impunity as the state does not have the capacity or resources to curb piracy. Some pirate militias are now considered to rival local authorities in terms of resources and capabilities, further hampering law enforcement.<sup>79</sup> Corruption is also rife. The UN Secretary-General acknowledged in his March 2009 report to the UNSC that reports of complicity by officials in the Puntland region in piracy activities were increasing.<sup>80</sup> If local authorities are complicit in the operations of pirates then concerted international efforts in the high seas will never be truly effective in discouraging piracy. Domestic support is

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<sup>72</sup> Middleton, above n 58, 4-5.

<sup>73</sup> Dr J Peter Pham in Harvard Humanitarian Law and Policy Forum, *Somalia: Responding to the Legal Challenges of Offshore Piracy* (Live seminar, 16 April 2009) <<http://tinyurl.com/d2w77x>> accessed 25/06/09.

<sup>74</sup> Guardian.co.uk, above n 68.

<sup>75</sup> CNN, *Shipmates recount battle with pirates, call captain brave* (16 April 2009) <<http://edition.cnn.com/2009/US/04/16/maersk.crew/index.html?iref=newssearch>> accessed 25/06/09.

<sup>76</sup> Pham, above n 73.

<sup>77</sup> Middleton, above n 58, 3.

<sup>78</sup> Douglas Guilfoyle, 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' (2008) 57 *ICLQ* 690, 691.

<sup>79</sup> United Nations Security Council, above n 1, [5].

<sup>80</sup> *Ibid*, [7].



required, at the very least, to undermine and disband land-based piracy support networks. A more competent Somali state, in terms of institutional capacity and territorial control, could provide effective law enforcement and thus deter piratical acts.

While this examination focuses on international law's response to piracy, it is naïve to think international law alone can solve Somali piracy. Given the fact that piracy stems from the internal problems of poverty and poor governance, a comprehensive solution must address these problems in the long term. However, looking at short term measures, the global community seriously began to respond to the threat piracy posed in the area in 2007,<sup>81</sup> with increasing involvement since then. As noted in the introduction, an international naval coalition now patrols the Gulf of Aden and Somali coastline. The coalition has attracted some unlikely support: India, China, Japan and the EU have deployed naval forces outside their regions for the first time.<sup>82</sup> Special measures undertaken by the coalition include establishing a Maritime Security Patrol Area which allows ships to follow a standard route through the Gulf of Aden, well protected by naval ships.<sup>83</sup>

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<sup>81</sup> In October 2007 naval escorts for ships contracted by the World Food Programme began: Peter Goosens in Harvard Humanitarian Law and Policy Forum, *Somalia: Responding to the Legal Challenges of Offshore Piracy* (Live seminar, 16 April 2009) <<http://tinyurl.com/d2w77x>> accessed 25/06/09.

<sup>82</sup> Brian Wilson, *An enduring legacy of Somali piracy could be new navies on the high seas* (13 January 2009) Yale Global < <http://yaleglobal.yale.edu/content/anti-piracy-patrols-presage-rising-naval-powers>> accessed 27/09/09.

<sup>83</sup> Middleton, above n 58,10.

## CHAPTER TWO:

### ***To call a pirate by any other name... the issue of definition***

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Under Art 101 of UNCLOS the crime of piracy at international law consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship..., and directed:
  - (i) on the high seas, against another ship..., or against persons or property on board such ship...;
  - (ii) against a ship..., persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship... with knowledge of facts making it a pirate ship...;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>84</sup>

The definition of piracy found in Art 101 has been subject to much criticism, particularly for being overly restrictive and thus requiring amendment or at least a liberal interpretation. This chapter will critically assess the key elements of the definition of piracy as contained in Art 101.

Prior to beginning a detailed discussion of Art 101, it is important to acknowledge that difficulties over definition are not solely attributable to the drafting of UNCLOS. Instead, broader factors contribute to the confusion over what exactly piracy under international law is, or at least what piracy should be. 'Piracy' is now used by academics and the general public to describe a variety of activities outside the conduct regulated by Art 101. A prominent example of this is the prolific use of the phrase 'copyright piracy' in intellectual property law to describe the illegal infringement of copyright.<sup>85</sup> Confusion is also created by the major private international maritime organisation, IMB, not

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<sup>84</sup> References to "aircraft" omitted.

<sup>85</sup> See for example: Rudi Moffitt, 'Resistance is futile (resistance by artists against online piracy as a response to pirates using downloading as a means of resisting global corporate domination of culture)' (2009) 12 *Journal of World Intellectual Property* 75; Kal Raustiala and Christopher Sprigman, 'The piracy paradox revisited (response to article by C. Scott Hemphill and Jeannie Suk in this issue, p. 1147)' (2009) 61 *Stanford Law Review* 1201; Tanushree Sangal, 'Piracy in the media and entertainment industry in India: stemming the menace' (2009) 20 *Entertainment Law Review* 82.

discriminating between the high seas and territorial waters in its definition of piracy for the purposes of data collection.<sup>86</sup> The most comprehensive collection of piracy statistics being based on a fundamentally different definition is problematic. Finally, it is difficult to ensure a uniform understanding of piracy at international law when varying definitions of piracy are found in domestic law. In New Zealand, for example, we somewhat confusingly extend piracy, as defined by the law of nations, to acts done both outside and inside New Zealand territory.<sup>87</sup> A similar definition is used by Canada.<sup>88</sup> The Philippines extends piracy under domestic criminal law to cover acts of highway robbery and brigandage.<sup>89</sup> While states may outlaw and define 'piratical' acts occurring in their territorial waters as they please, it is confusing if they refer to the law of nations and even 'piracy' in doing so.

### **2.1 Acts of violence, detention or depredation**

The first limb of the definition of piracy contained in Art 101(a) of UNCLOS requires an illegal act of violence, detention or depredation (plundering or robbery). Therefore, piracy is not confined to acts of plunder as may have traditionally been perceived.<sup>90</sup> Instead, it encompasses a broader range of acts. Many pirate attacks involve threatened rather than actual violence. While threatened violence is not expressly included in the illegal acts listed it is likely covered by violence.<sup>91</sup> Alternatively, threatened violence may come within the ambit of depredation. Depredation requires an act committed with an element of force and threatened violence can be regarded as a forceful act thereby satisfying that element.<sup>92</sup> In addition, Art 101 does not require an intent to commit the listed illegal acts (*animus furandi*) as was traditionally required.<sup>93</sup> The exclusion of intent reflects the earlier position of the Privy Council in *In re Piracy Jure Gentium* [1934] AC 586 where it was held that while intent to plunder will be evidence of the offence of piracy, it is not a necessary element.

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<sup>86</sup> The ICC International Maritime Bureau defines piracy as "an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.": ICC International Maritime Bureau, above n 53, 3.

<sup>87</sup> Crimes Act 1961, s 93(1).

<sup>88</sup> Criminal Code RS C 1985, c 34, s 74.

<sup>89</sup> Pres. Dec. No. 532, 8 August 1974 (Phil).

<sup>90</sup> Robert C.F. Reuland, 'Interference with Non-national Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction' (1989) 22 *VNJTL* 1161, 1181.

<sup>91</sup> Rosemary Collins and Daud Hassan, 'Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asia Perspective' (2009) 40 *J. Mar. L & Com.* 89, 96.

<sup>92</sup> *Ibid.*

<sup>93</sup> Reuland, above n 90, 1181-1182.

## 2.2 Private ends

The more significant requirement under Art 101(a) of UNCLOS is that the illegal acts of violence, detention or depredation be committed for “private ends.” What “private ends” means is hotly contested in modern piracy discourse. If we look to the origins of piracy law for instruction, we find two different alleged sources for this requirement. First, “private ends” was included to acknowledge an historic exception under piracy law for civil-war insurgents or unrecognised organisations who attacked government vessels for a political purpose.<sup>94</sup> In *Bolivia v Indemnity Mutual* [1909] 1 KB 785 Bolivian government goods were seized by Brazilian rebels. The Bolivian government was unable to claim under its insurance policy as the attack was not piratical. Instead, it amounted to an attack against a particular state for a public political end (that end being a dispute over territory with Bolivia). The *Bolivia* case reflects this first source and confirms that rebellions are motivated by public ends. The alternative, but not dissimilar, originating source for this requirement is the distinction between privateering and piracy.<sup>95</sup> This distinction was discussed in chapter one and essentially related to privateering being authorised or licensed by the state whereas piracy was not. Accordingly, private ends could be said to be acts undertaken “without due authority.”<sup>96</sup> The concept of an act being without due authority differs from the exception concerning attacks on government ships by civil-war insurgents or unrecognised organisations. The latter cannot be said to be duly authorised but instead are acts undertaken as part of a broader political agenda pursued by a particular group. As a result, these alternative sources for the exception lead to different classifications of acts as private or public. For example, the exception based on the lack of due authority logically means acts of rebellion or insurgency may be piratical as those acts would not necessarily be authorised by a sovereign power. Yet those same acts are not considered to amount to piracy under the exception for civil-war insurgents.

Variance in opinion over the origins of the private ends exception is reflected in the more recent lack of general consensus as to how generously private ends should be interpreted. Twenty-two years ago the Court in *Castle John v NV Mabeco* (Belgium, Court of Cassation, 1986) 77 *ILR* 537 interpreted private ends so broadly as to make it an almost redundant requirement. In that case Greenpeace protestors boarded, occupied and damaged two ships on the high seas. Their aim in undertaking such actions, as

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<sup>94</sup> Harvard Research into International Law, above n 36, 798 & 857.

<sup>95</sup> Murphy, above n 2, 159. During the United States civil war courts did not regard Confederate privateers as pirates, see for example: *Dole v New England Mutual Marine Ins. Co* 7 F. Cas. 837.

<sup>96</sup> Murphy, above n 2, 160.

accepted by the Court, was to alert public opinion to the environmental harm caused by discharging waste into the sea. Despite this appearing on face value to be a political protest and thus committed for public ends, the Court held it was in fact committed for personal (private) ends. It was an act furthering a personal view on a certain subject, albeit with a political perspective. To be non-private the Court implied the act would have to relate to the interests or detriment of the state or state system. This decision is in conflict with academic opinion during the 1980s.<sup>97</sup> Furthermore, it cannot be reconciled with the earlier authoritative work of the Harvard *Draft Convention on Piracy and Commentary*.<sup>98</sup> It also requires a highly subjective determination of what amounts to being in the interests or detriment of the state or state system.

The decision in *Castle John* is considered a sensible one by leading interdiction academic Douglas Guilfoyle who goes on to propose that “all acts of violence lacking State sanction are acts undertaken ‘for private ends.’”<sup>99</sup> While it is certainly important to define private ends in a manner which does not overly restrict the application of piracy laws, if private ends encompass political activity then piracy is extended beyond its traditional realm of application. This leads us to consider whether the offence of piracy should be used in modern times to supplement international terrorism laws given their limited usefulness and the increasing threat of violence at sea. Whether an operational nexus exists between pirates and terrorists is disputed.<sup>100</sup> If there is such a nexus and pirate networks become listed terrorist organisations then paying ransoms will become difficult.<sup>101</sup> Certainly, under Guilfoyle’s definition, terrorist acts, which would involve non-state sanctioned violence, could be piratical so long as the other requirements in Art 101 were

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<sup>97</sup> See for example: Reuland, above n 90.

<sup>98</sup> There it was noted that acts publicly motivated should not be piracy but instead subject to ordinary international law and punished accordingly: Harvard Research into International Law, above n 36, 857.

<sup>99</sup> Guilfoyle, above n 78, 693.

<sup>100</sup> The Transport Committee of the House of Commons felt an operational nexus between pirates and terrorists was likely: House of Commons Transport Committee, *Piracy: eighth report of Session 2005-06*, (6 July 2006), HC 1026, 27. Compared with: Robert Snoddon, ‘Piracy and Maritime Terrorism: Naval Responses to Existing and Emerging Threats to the Global Seaborne Economy’ in Peter Lehr (ed) *Violence at Sea: Piracy in the Age of Global Terrorism* (Routledge, 2007) 225, 239; Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism: the threat to international security - Adelphi Paper 338* (International Institute for Strategic Studies, 2007) 8.

<sup>101</sup> Making funds available to people who commit, facilitate or participate in terrorist acts is prohibited pursuant to United Nations Security Council Resolution 1373 (2001), UN Doc. S/Res/1373 (28 September 2001).

satisfied. Typically, though, private ends has been interpreted as excluding terrorist and insurgent activities.<sup>102</sup>

A major problem in expanding the definition of piracy to include terrorist and other acts is that, in consequence, the offence may lose its symbolic importance. Piracy being a particular offence, as opposed to one able to be relied on generally, is indicative of the very serious nature of the offence itself and its historical origins. The law of piracy emerged to counter threats to commercial maritime interests and piracy remains a considerable threat to such interests given the sustained attacks in the Gulf of Aden. Classical piracy was undertaken in pursuit of wealth and motivated by greed.<sup>103</sup> In addition, it reflects the right of all states to enjoy the freedom of the high seas through reliance on universal jurisdiction. These historical origins and interests are reflected in the UNCLOS definition. Acts falling short of piracy (politically motivated, internal hijackings or within territorial waters) should still be comprehensively dealt with but through alternative regimes. In this sense, parallels can be drawn with deliberate attempts made to confine the offence of genocide at international law to the most serious acts intended to destroy, in whole or in part, a national, ethnic, racial or religious group.<sup>104</sup> Like piracy, the offence of genocide has a very particular history and was created to punish acts like no other. The offence of genocide was first mooted by Polish scholar and lawyer Raphael Lemkin in response to Nazi atrocities during World War II and found support in the Nuremberg trials.<sup>105</sup> Because certain Nazi acts could not easily be covered by existing legal offences such as mass murder, genocide was to incorporate these acts and be distinguished by the important requirement of intent.<sup>106</sup> Human rights violations which fall short of genocide do not go unpunished but are instead treated as war crimes or crimes against humanity and are governed by other treaties and legal regimes such as the 1949 Geneva Conventions or the 1998 Rome Statute of the International Criminal Court (ICC).<sup>107</sup> Often,

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<sup>102</sup> See for example: Adam J. Yound, *Contemporary Maritime Piracy in Southeast Asia* (ISEAS Publishing, 2007) 11-12; Ethan C. Stiles, 'Reforming Current International Law to Combat Modern Sea Piracy' (2004) 27 *Suffolk Transnat'l L. Rev.* 299, 324.

<sup>103</sup> Earle, above n 10. See also: de Souza, above n 7.

<sup>104</sup> Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948, entered into force 12 January 1951) 78 *UNTS* 277, Art 2.

<sup>105</sup> Raphael Lemkin, 'Genocide as a Crime Under International Law' (1947) 41 *American Journal of International Law* 145.

<sup>106</sup> *Ibid*, 147.

<sup>107</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (12 August 1949, entered into force 12 August 1949) 75 *UNTS* 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (12 August 1949, entered into force 21 October 1950) 75 *UNTS* 85; Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949, entered into force 21 October 1950) 75 *UNTS* 135; Convention relative to the Protection of

however, 'genocide' is inappropriately used to refer to a range of acts outside its traditional scope.<sup>108</sup> The symbolic importance of the prohibition against genocide is therefore assured through the rigorous application of the rules governing genocide. Likewise, rigorous adherence to the rules governing piracy should ensure the offence retains its symbolic importance as a particular offence with great historical significance.

Rather than mould piracy to respond to the threat of terrorism and violence at sea, the creation of alternative legal frameworks ought to be considered. It has been suggested that an offence of maritime terrorism should be developed to plug the gap between piracy and terrorism laws. One proposed definition for maritime terrorism is that it equates to:

...the systematic use of or threat to use acts of violence against international shipping and maritime services by an individual group to induce fear and intimidation on a civilian population in order to achieve political ambitions or objectives.<sup>109</sup>

The largest maritime terrorist attack to date is the destruction of the Philippine tanker *SuperFerry 14* in 2004 which killed 116 people.<sup>110</sup> Pragmatically, the strategies to combat piracy and terrorist acts such as the *SuperFerry* attack are quite different and accordingly it is appropriate that they be governed by different permissive legal regimes. Developing a convention governing maritime terrorism is the better way to respond to the threat of terrorist activity at sea rather than unduly expanding piracy. It should not be the responsibility of piracy law to remedy the various limitations found in international treaties governing terrorism and acts of violence and aggression at sea. This is especially so when one considers the philosophical differences in the acts of maritime violence perpetrated by pirates and terrorists.<sup>111</sup> While terrorists have broader political goals, pirates are personally motivated by pecuniary interests.<sup>112</sup> Accordingly, "private ends" is best limited to actions which are privately motivated. Acts which are privately motivated do not concern a state's political structure, issues of public importance or current and desired state policy. Any act which is motivated by these types of concerns should be

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Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949, entered into force 21 October 1949) 75 *UNTS* 287; Rome Statute of the International Criminal Court, above n 45.

<sup>108</sup> For examples of the tendency of politicians to refer to mass killings as genocide see: Antonio Cassese, 'Genocide' in Antonio Cassese (ed) *The Oxford Companion to International Justice* (Oxford University Press, 2009) 332, 332.

<sup>109</sup> Carlo Tribelli, 'Time to Update the 1998 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' (2006) 8 *OR. REV. INT'L L.* 133, 145.

<sup>110</sup> Murphy, above n 100, 46.

<sup>111</sup> Adam J. Yound, above n 102, 11.

<sup>112</sup> *Ibid.*

strictly considered as political and thus covered by the “private ends” exception and not piratical in nature.

### **2.3 Two-ship requirement**

For an act to be piratical, under Art 101(a)(i) of UNCLOS it must be undertaken by one ship against another. This is commonly referred to as the ‘two-ship requirement’ and marked a significant change to existing customary law. Of relevance to the two-ship requirement is that the attacking ship must be a private ship.<sup>113</sup> It is irrelevant whether the victim ship is private or non-private (a government vessel). The requirement that the attacking ship be a private vessel means that a government ship cannot commit piracy. The exception to this general proposition is that of a mutinous crew on board a government ship who use the ship to commit piracy.<sup>114</sup> In that instance, UNCLOS creates a legal fiction and deems any mutinous government ship which engages in piratical acts to be a private ship and thus subject to the international law of piracy.<sup>115</sup> When the mutiny has been suppressed and the ship is not being used to commit piratical acts then the deeming provision would also cease to operate and the ship would no longer be private in nature.<sup>116</sup> Interestingly, while mutiny is an offence under domestic and not international law a mutinous crew who engage in piracy would of course be committing an offence against international law. Conceivably, they could be convicted of both piracy by a third state exercising universal jurisdiction under international law and mutiny under the domestic law of the flag-state. The material requirement in relation to government ships is whether the crew has actually “mutinied” as required by Art 102 of UNCLOS. Mutiny requires more than simple disobedience to orders or resort to criminality.<sup>117</sup>

The major limitation of the two-ship requirement is that it is impossible to claim that internal hijacking or seizure of a ship amounts to piracy. For example, a cruise ship passenger on the high seas who robbed another passenger could not be considered as having committed a piratical act. Internal hijacking or robbery not amounting to piracy allegedly marks a departure from existing customary law.<sup>118</sup> Certainly, the authors of the *Harvard Draft Convention on Piracy* felt that internal robbery or hijacking could amount to

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<sup>113</sup> Article 101(a)(i) of UNCLOS, above n 3, requires a piratical act be committed by the crew or the passengers of a private ship “against another ship..., or against persons or property on board such ship.”

<sup>114</sup> *Ibid*, Art 102.

<sup>115</sup> *Ibid*.

<sup>116</sup> International Law Commission, *Yearbook of the International Law Commission 1956*, vol II (1956) A/CN.4/SER.A/1956/Add.1, 283.

<sup>117</sup> Shearer, above n 4, [17].

<sup>118</sup> *Ibid*, [15].



piracy in limited circumstances.<sup>119</sup> A notable contradictory view is contained in *In re Piracy Jure Gentium*. The Privy Council warned against defining piracy broadly as simply ‘sea robbery’ and illustrated the absurdities which could arise through the example of a cruise liner passenger robbing another. The Court went on to quote with approval the opinion of Wheaton:

If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority and the offender were secured and confined by the master of the vessel to be taken home for trial, this state of things would not authorise seizure and trial by any nation that chose to interfere or within whose limits the offender might otherwise be found.<sup>120</sup>

Considering that at that time piracy carried heavy penalties, it is understandable that the Privy Council held concerns about extending the definition of piracy to cover such robberies, and that UNCHS followed suit.<sup>121</sup> To be sentenced to death as a pirate for a robbery of a fellow crew member or another passenger would be extreme. Regardless of how customary international law defined piracy, at the time of drafting UNCHS China proposed the expansion of the draft definition beyond the two-ship requirement.<sup>122</sup> The proposed amendment was that piracy also covered a crew member or passenger who, with intent to plunder or rob, commits violence against or threatens another passenger or crew member and takes control of the ship.<sup>123</sup> Essentially, China sought to have internal hijacking covered by piracy. This proposal mirrored existing Chinese domestic law but was ultimately unsuccessful, the International Law Commission preferring a more restrictive definition.<sup>124</sup>

The exclusion of internal hijacking from the ambit of piracy at international law did not attract attention until the *Achille Lauro* hijacking in 1985. Members of the Palestinian Liberation Organisation (PLO) boarded the cruise liner posing as passengers and seized the ship on the high seas, taking both crew and passengers hostage.<sup>125</sup> During the two-

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<sup>119</sup> Draft Article 3(1) provided that an act could be piratical “[i]f the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.”: Harvard Research into International Law, above n 36.

<sup>120</sup> *In re Piracy Jure Gentium*, above n 21, referring at 592 to Wheaton in John Bassett Moore, *A Digest of International Law*, vol II (AMS Press, 1970 ed) 953.

<sup>121</sup> At the time of the Privy Council’s opinion piracy was punishable by death in the United Kingdom under the Piracy Act 1837.

<sup>122</sup> International Law Commission, above n 116, 43.

<sup>123</sup> *Ibid.*

<sup>124</sup> International Law Commission, above n 116, 18.

<sup>125</sup> BBC, *Achille Lauro Hijacker Released* (30 April 2009)

< <http://news.bbc.co.uk/2/hi/europe/8027448.stm> > accessed 23/07/09.

day standoff the PLO demanded the release of Palestinian prisoners from Israeli jails and killed one passenger. After docking the *Achille Lauro* in Egypt, the hijackers were intercepted by the USA while fleeing in an airplane and forced to land in Italy. They were successfully prosecuted in Italy under domestic terrorism laws. The mastermind behind the attack was only released this year having served 24 years of a 30-year sentence.<sup>126</sup>

The *Achille Lauro* incident highlighted the inability of international law to deal with internal hijacking at sea. Piracy was unhelpful due to the two-ship requirement and international maritime treaty law lacked a broader applicable offence. Consequently, at the urging of the UN General Assembly IMO sponsored the establishment of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) which entered into force in 1992.<sup>127</sup> SUA now forms part of the body of treaty law governing terrorism and deals specifically with the safety of ships. While SUA does not expand the definition of piracy to cover internal seizures, it supplements the international legal piracy regime by creating specific offences applicable to internal seizure and hijacking.<sup>128</sup> Of particular relevance is Art 3(1):

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

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship...<sup>129</sup>

Unlike Art 101 of UNCLOS, Art 3 of SUA is not dependent on an attack being launched from one ship against another. While the use of SUA in combating piracy is discussed in greater detail below, it is sufficient to note here that SUA was in part a consequence of the limitations of the two-ship requirement and the lack of a broader applicable offence.

## **2.4 High Seas**

Piracy is geographically limited under Art 101(a)(i) to being an offence committed on the high seas or outside the jurisdiction of any state. This is considered to be the most

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<sup>126</sup> Ibid.

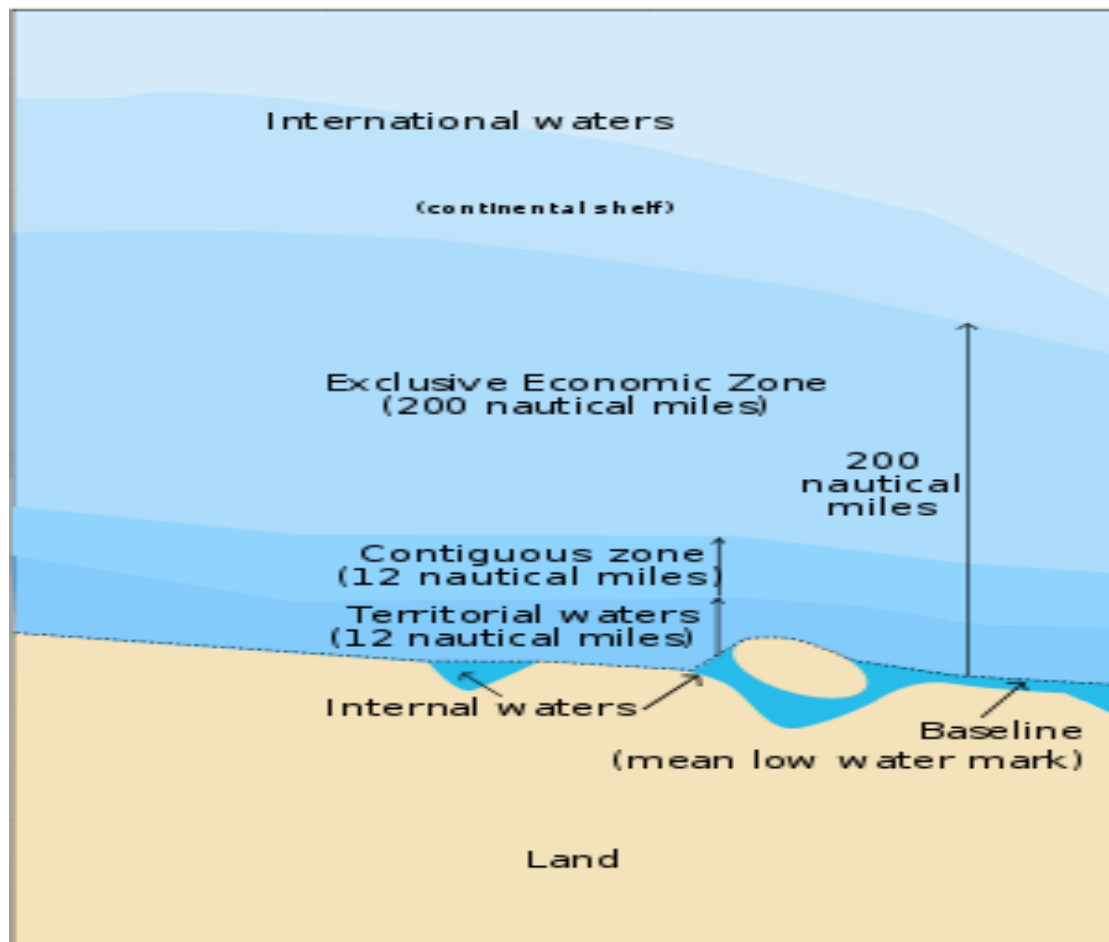
<sup>127</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988, entered into force 1 March 1992) 1678 *UNTS* 221 [hereinafter SUA].

<sup>128</sup> As explained by Adam J. Yound "SUA was not designed to address definitional or jurisdictional issues of piracy per se, but rather was meant to address international terrorism, although it is being promulgated as an anti-piracy document, partially in order to address some of the perceived deficiencies in UNCLOS...": Yound, above n 102, 9.

<sup>129</sup> SUA, above n 127, Art 3(1).

significant restriction in the current definition.<sup>130</sup> It limits not only the offence to the high seas but enforcement powers also.<sup>131</sup> As a preliminary point, the alternative location to the high seas found in Art 101(a)(i) is that of “a place outside the jurisdiction of any state” in Art 101(a)(ii). This was explained by the original drafters of UNCHS as a reference to acts which occur on “an island constituting *terra nullius* or on the shores of an unoccupied territory.”<sup>132</sup> Given the focus on the high seas in piracy discourse, discussion in this section shall focus solely on that maritime zone. Before considering the impact of limiting enforcement powers to the high seas, it is necessary first to define the various maritime zones and explain the corresponding relationship with jurisdiction.

The sea is divided into maritime zones which accord coastal states certain privileges and responsibilities. Each zone is measured from the low-water mark (baseline).<sup>133</sup> These zones are illustrated in the following diagram and will be explained in turn:<sup>134</sup>



<sup>130</sup> Guilfoyle, above n 78, 694.

<sup>131</sup> UNCLOS, above n 3, Art 105.

<sup>132</sup> International Law Commission, above n 116, 282.

<sup>133</sup> UNCLOS, above n 3, Art 5.

<sup>134</sup> Aswers.com, *Schematic Map of Maritime Zones* <<http://www.answers.com/topic/territorial-waters>> accessed 27/07/09.

The first main zone is the internal waters which covers all water, such as ports and rivers, on the landward side of the baseline.<sup>135</sup> Of greater significance is the territorial sea which extends to a maximum of 12 nautical miles (nm) from the baseline.<sup>136</sup> UNCLOS significantly expanded the territorial sea which had the corresponding effect of shrinking the high seas. Previously, the territorial sea stretched just 3nm from shore, originally on the basis of the 'cannon-shot rule'.<sup>137</sup> As the name of the zone indicates, the territorial sea forms part of the territory of the coastal state and therefore the coastal state has criminal jurisdiction over all offences committed within that zone. In addition, the coastal state has sovereignty over the seabed, subsoil and airspace above the territorial sea.<sup>138</sup> Sovereignty over the territorial sea is only limited by the exceptions contained in UNCLOS and international law.<sup>139</sup> One such exception is the right of innocent passage which accrues to foreign ships transiting through territorial waters.<sup>140</sup>

Beyond the territorial sea is the contiguous zone which extends to a maximum 24nm from the territorial baseline (or 12nm from the end of the territorial zone).<sup>141</sup> Within this zone the coastal state can enforce customs, fiscal, immigration and sanitary laws.<sup>142</sup> Finally, the Exclusive Economic Zone (EEZ), which extends to a maximum of 200nm from the baseline,<sup>143</sup> was first introduced in 1971 by the UN Sea-Bed Committee and accepted in the Third UN Conference on the Law of the Seas negotiations.<sup>144</sup> The EEZ includes the contiguous zone by way of spatial definition.<sup>145</sup> Within the EEZ the coastal state has sovereign rights for the purposes of exploring and exploiting, conserving and managing all natural resources in the superjacent waters, seabed and subsoil.<sup>146</sup> In addition, the coastal state has rights to build artificial islands, installations and undertake marine research.<sup>147</sup> The EEZ can be viewed as a compromise at the time of negotiation between

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<sup>135</sup> UNCLOS, above n 3, Art 8(1).

<sup>136</sup> Ibid, Art 3.

<sup>137</sup> Cornelius van Bynkershoek, *De Domino Maris Dissertatio* (Ralph Van Deman Magoffin trans, Oxford University Press, 1923 ed).

<sup>138</sup> UNCLOS, above n 3, Art 2(2).

<sup>139</sup> Ibid, Art 2(3).

<sup>140</sup> Ibid, Art 17.

<sup>141</sup> Ibid, Art 33(2).

<sup>142</sup> Ibid, Art 33(1).

<sup>143</sup> Ibid, Art 57.

<sup>144</sup> Christopher C. Joyner, *Antarctica and the Law of the Sea* (Martinus Nijhoff Publishers, 1992) 116.

<sup>145</sup> UNCLOS, above n 3, Art 55.

<sup>146</sup> Ibid, Art 56(1).

<sup>147</sup> Ibid.

states which wanted to extend the territorial sea and those which were hesitant about expanding jurisdiction over waters.<sup>148</sup>

Beyond the outer limit of the EEZ lie the high seas (or international waters). The high seas, in contrast to the zones discussed above, are open to all states for the purpose of exercising certain freedoms. These freedoms include the freedom of navigation, fishing, overflight, research and laying certain cables and structures.<sup>149</sup> As Art 101(a)(i) of UNCLOS makes clear, piracy can only occur in this maritime zone. However, under UNCLOS the high seas regime is in part extended to cover the seas in the EEZ (which includes the contiguous zone).<sup>150</sup> In the superjacent seas of the EEZ third states can exercise rights of navigation and lay cables as they can in the high seas.<sup>151</sup> Importantly, the articles governing piracy are extended to the EEZ.<sup>152</sup> Therefore, at international law piracy can be committed anywhere outside the 12nm territorial sea limit. It is interesting that the introduction of the EEZ has essentially shrunk the high seas as rights of coastal states have extended beyond the territorial sea in a limited fashion, yet international jurisdiction over piracy has endured. For example, in the contiguous zone the coastal state is granted jurisdiction to enforce immigration and customs laws yet not the offence of piracy.<sup>153</sup>

No state may exercise territorial sovereignty over the high seas,<sup>154</sup> reflecting the ancient principle of *mare liberum* (the high seas belong to no one).<sup>155</sup> Consequently, the exercise of universal jurisdiction becomes central to the enforcement of the international law of piracy. While universal jurisdiction, as discussed earlier, historically originates from the classification of pirates as *hostes humani generis*, it complements the UNCLOS high seas regime by allowing for the enforcement of piracy laws without major contravention of the *mare liberum* principle. It is a very practical response to the legal status of the high seas zone being outside the territorial jurisdiction of any individual state. Universal jurisdiction over piracy has been criticised as outdated and better replaced through state reliance on the flag-state principle or nationality.<sup>156</sup> Under the flag-state principle, a ship is essentially construed as a floating island for the purposes of jurisdiction. Piratical acts committed

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<sup>148</sup> Joyner, above n 144, 116.

<sup>149</sup> UNCLOS, above n 3, Art 87.

<sup>150</sup> Article 58(2) of UNCLOS, above n 3, extends the application of Arts 88-115 to the EEZ.

<sup>151</sup> Ibid, Arts 90 & 112.

<sup>152</sup> Ibid, Art 58(2).

<sup>153</sup> UNCLOS, above n 3, Art 33(1).

<sup>154</sup> Ibid, Art 89.

<sup>155</sup> Hugo Grotius, *The Free Sea* (Richard Hakluyt trans, Liberty Fund, 2004 ed) [trans of: *Mare Liberum*].

<sup>156</sup> Goodwin, above n 30, 1010.

while on board would come under the jurisdiction of the flag-state for the purposes of prosecution. Criticism of universal jurisdiction over piracy is largely specious. To reiterate, universal jurisdiction is a practical response to piracy. It avoids questions as to competing jurisdictions, recognises that some states of which pirates are nationals will be unable to prosecute, and reflects that all states have a legitimate interest in combating piracy.

There is a divergence of opinion as to whether or not confining piracy to the high seas under UNCLOS is representative of earlier customary law. Regardless of whether or not this is the case, the definition found in UNCLOS is now binding, both as a matter of treaty law and by force of customary international law. The practical impact of confining piracy to an offence committed only on the high seas is that international law is not interested in piratical acts within territorial waters. Such acts are instead a matter of exclusive domestic jurisdiction for the coastal state. International law presumes the coastal state has legislation applicable to such acts and is able to enforce those laws. Many international organisations and academics have expressed frustration with the delineation between territorial and international waters with respect to piracy. This is understandable when one considers that most 'pirate' attacks occur in territorial waters.<sup>157</sup> In 2001 IMO responded to this problem by adopting a definition which classifies piratical acts which occur within territorial waters as 'armed robbery against ships.' The definition reads:

**"Armed robbery against ships"** means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of "piracy", directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over such offences.<sup>158</sup>

This definition is non-binding and was promulgated as a recommended standard to be implemented under domestic law.<sup>159</sup> The first international treaty to adopt the definition in legally binding terms was the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia in 2004.<sup>160</sup> Interestingly, the UNSC resolutions implemented throughout 2008, and discussed in the next chapter, refer to armed robbery against ships without defining the term.<sup>161</sup> Obviously, the UNSC is relying on the IMO

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<sup>157</sup> ICC International Maritime Bureau, above n 53, 3.

<sup>158</sup> International Maritime Organisation Assembly, 'Code of Practice For the Investigation of the Crimes of Piracy and Armed Robbery Against Ships' annexed to *Resolution A.922(22)* (29 November 2001) IMO Doc. A 22/Res.922, Art 2.

<sup>159</sup> *Ibid*, preamble.

<sup>160</sup> Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (28 April 2005) 44 *ILM* 829 [hereinafter ReCAAP], see Appendix 4; Zou Keyuan, 'New Developments in the International Law of Piracy' (2009) 8 *Chinese J. Int'l L.* 323, [9].

<sup>161</sup> Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 *EJHL* 399, 403.

definition and this provides further support for the adoption of the definition by states for the purposes of delineating between piracy at international law and equivalent acts occurring within territorial waters. Furthermore, its inclusion in the UNSC resolutions allows the naval coalition to act consistently in dealing with the Somali pirates who seem not to discriminate between the territorial sea and high seas for the purposes of attacking ships.

Some commentators call for the expansion of the current geographical limitation in Art 101 to include at least a tract of the territorial waters.<sup>162</sup> While this recommendation is appealing, it would ultimately complicate state sovereignty over criminal matters, principally because within its territorial waters the state would lose its ability to enforce criminal law comprehensively. It is conceivable that disputes would arise over whether an act amounted to piracy or an offence punishable under domestic law. Moreover, it would permit warships to enter territorial waters (or at least part of those waters) without consent and this would likely be seen as an unacceptable erosion of territorial boundaries and a potential threat to state security.

SUA is not limited in application to the high seas.<sup>163</sup> This is yet another way in which the convention complements the restrictive piracy regime under UNCLOS. The Somali piracy epidemic has placed increased focus on SUA which up until now has been regarded as a “dormant” convention.<sup>164</sup> Specifically, SUA had only been relied on as a source of jurisdiction in one prosecution.<sup>165</sup> SUA is valuable in that it requires state parties to implement appropriate legislation to make punishable by appropriate penalties the offences defined in the convention.<sup>166</sup> It is this feature of SUA which has led the UNSC to recommend that states involved in anti-piracy measures become parties to SUA and that those which are already parties fully implement their SUA obligations.<sup>167</sup> Allegedly, it is now regularly invoked by Kenyan courts which are largely responsible for the prosecution

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<sup>162</sup> See, for example: Rosemary Collins and David Hassan, above n 91.

<sup>163</sup> Article 4(1) of SUA, above n 127, provides “[t]his convention applies 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.” Alternatively, Art 4(2) provides that the convention applies if the offender is found in the territory of a State party.

<sup>164</sup> Eugene Kontorovich, ‘International Legal Responses to Piracy off the Coast of Somalia’ (2009) 13 *ASIL Insights* <<http://www.asil.org/insights090206.cfm>> accessed 20/09/09.

<sup>165</sup> *United States v Shi* 525 F.3d 709.

<sup>166</sup> SUA, above n 127, Art 5.

<sup>167</sup> United Nations Security Council Resolution 1846 (2008), UN Doc. S/RES/1846 (2 December 2008) [15].

of Somali pirates apprehended by the naval coalition.<sup>168</sup> As Kenyan case reports are unavailable, this claim cannot be substantiated and the use to which SUA is put analysed. Certainly, Kenyan law, amended in 2009, incorporates SUA and accordingly extends Kenyan jurisdiction over offences against the safety of ships committed within territorial waters and elsewhere, regardless of nationality.<sup>169</sup>

## **2.5 Conclusion**

The constraints imposed by the current definition of piracy are manifold. However, those constraints reflect the historical nature of the offence and the particularity of state interests it advances. It is recognised that a far greater range of threats to maritime security exist than are contemplated by the current definition of piracy. Those threats should not be disregarded or ignored by international law. Instead, rather than unduly expanding the notion of piracy to achieve the multiple goals of preventing and prosecuting acts of terrorism or aggression on the high seas or piratical acts occurring within domestic waters, appropriate international treaty law ought to be established. Such laws would complement the specificity of the offence of piracy and ensure maritime security.

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<sup>168</sup> Charles Darr in Harvard Humanitarian Law and Policy Forum, *Somalia: Responding to the Legal Challenges of Offshore Piracy* (Live seminar, 16 April 2009) <<http://tinyurl.com/d2w77x>> accessed 25/06/09.

<sup>169</sup> Merchant Shipping Act 2009 (Kenya), c 4, s 370.



## CHAPTER THREE:

### ***Modern responses to an ancient crime***

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In a very short period international law has evolved to circumvent the constraints imposed on enforcement jurisdiction by UNCLOS. Specifically, measures undertaken at both the international and regional levels have responded to the geographical limitation of enforcement powers to the high seas under Art 101 of UNCLOS. In addition, states have clarified prosecution responsibilities and processes for pirates captured through reliance on universal jurisdiction. The response to the Somali piracy epidemic is largely based around common interests and cooperation, pragmatically identifying the limitations of Somali state capacity and building on measures undertaken in recent times to combat piracy in Southeast Asia. This chapter shall describe and analyse international initiatives in the form of UNSC resolutions and bilateral prosecution agreements. In terms of regional initiatives, the new Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct) will be considered. Given that this regional agreement was largely modelled on the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) the two will be compared and contrasted.

#### ***3.1 International initiatives***

##### *a. United Nations Security Council Resolutions*

As the UN Secretary-General noted in his March 2009 report, “the Gulf of Aden is currently being patrolled by one of the largest anti-piracy flotillas in modern history.”<sup>170</sup> Maximising this formidable naval capability has required significant expansion of international law. Under the existing legal framework of UNCLOS, enforcement powers are limited in two key ways:

- Article 105 permits any ship to seize a pirate ship, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board on the high seas or in any other place outside the jurisdiction of any state. This expansive power is not extended to the territorial seas.

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<sup>170</sup> United Nations Security Council, above n 1, [14].

- Article 111 permits the hot pursuit of a foreign ship by the authorities of a coastal state where there is “good reason to believe that the ship has violated the laws and regulations of that State.” The pursuit must begin in the internal waters, territorial waters or contiguous zone and Art 111(1) permits the pursuit to continue into the high seas (outside the jurisdiction of any state) only if it is uninterrupted. Article 111(3) provides that hot pursuit must cease when the ship pursued enters the territorial waters of its own or a third state. However, Art 111 does not permit ‘reverse hot pursuit’ which is the pursuit of a pirate vessel or suspects from the high seas into territorial waters. Combating Somali piracy was initially made difficult by this limitation. Somali pirates were attacking ships on the high seas and sailing them quickly into territorial waters where they were for all purposes untouchable.<sup>171</sup>

The only possible way UNCLOS could be said to provide for entrance into territorial waters without prior permission is through the notion of ‘assistance entry.’ Under Art 98(1) of UNCLOS, ships flying the flag of a state party to UNCLOS are under a duty to render assistance in three circumstances: when they find a person at sea in danger of being lost, when informed of the need for rescue by persons in distress, and after a collision with another ship. Importantly, this duty to assist is not limited to the high seas - Art 98(1) simply requires the duty be fulfilled “at sea” and this has been interpreted as a potential basis on which naval coalition members could enter Somali territorial waters.<sup>172</sup> However, while Art 98(1) stipulates that the duty applies at sea, this does not necessarily mean naval vessels may rely on it to enter territorial waters. Article 18(2) of UNCLOS concerning innocent passage through territorial waters provides that a foreign ship may stop and anchor in order to provide assistance. That UNCLOS has made special provision for foreign warships to assist while transiting through territorial waters suggests that, had the duty to render assistance been intended to permit reverse hot pursuit, this would have been expressly provided for as it was with regard to innocent passage. Even if Art 98(1) does permit entrance into territorial waters, it could only be in response to a request by another ship for help under paragraph (b). Therefore, a naval vessel could not invoke Art 98(1) in order to pursue a suspected pirate vessel into territorial waters when no request for help had been received in relation to the

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<sup>171</sup> The Security Council recognised that the Somali Transitional Federal Government lacked capacity to “interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters” in the preamble to United Nations Security Council Resolution 1816 (2008) UN Doc. S/RES/1816 (2 June 2008).

<sup>172</sup> Shearer, above n 4, [31].

suspected pirate vessel. There is no evidence that assistance entry had been relied on to enter Somali waters prior to the advent of the UNSC resolutions discussed below.

The UNSC has tailored responses to the particular issues posed by UNCLOS through reliance on its Chapter VII powers under the 1945 UN Charter.<sup>173</sup> Importantly, none of the UNSC measures are to be taken as creating new international law. All major permissive UNSC resolutions in this area confirm they are not to be interpreted as establishing customary law.<sup>174</sup> Each resolution shall be considered in turn.

Under paragraph seven of UNSC Res 1816 (2008), naval vessels were permitted, for a period of six months, to enter into Somali territorial waters to combat piracy and armed robbery against ships. Entrance was conditional upon receiving the prior written permission of the TFG, and while in Somali waters “all necessary means” could be used to repress piracy and armed robbery against ships. UNSC Res 1816 (2008) was extended by UNSC Res 1846 (2008) for a further year and will expire in December 2009. In the March 2009 report of the UN Secretary-General, 11 states and two regional organisations had entered into cooperation agreements with the TFG in respect of resolutions 1816 (2008) and 1846 (2008).<sup>175</sup> The UNSC has required the permission of the TFG, even though permission is not necessary for resolutions adopted under Chapter VII powers, largely to avoid having to define the width of Somali territorial waters which is currently contested.<sup>176</sup> Absent from both resolutions is any clear direction as to who has adjudicative jurisdiction and priority to prosecute pirates captured in Somali waters. The resolutions simply require the relevant states (apprehending, coastal and national states of victims and perpetrators) “to cooperate in determining jurisdiction.”<sup>177</sup> As to how any conflict should be resolved, it seems logical that expanding enforcement jurisdiction over piracy in Somali territorial waters to naval coalition members would also entail the expansion of adjudicative jurisdiction. However, considering that the extension of enforcement jurisdiction to Somali territorial waters is

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<sup>173</sup> United Nations Charter (26 June 1945, entered into force 24 October 1945).

<sup>174</sup> United Nations Security Council Resolution 1816 (2008), above n 171, [9]; United Nations Security Council Resolution 1846 (2008), above n 167, [11]; United Nations Security Council Resolution 1851 (2008) UN Doc. S/RES/1851 (16 December 2008) [10].

<sup>175</sup> United Nations Security Council, above n 1, [15].

<sup>176</sup> Treves, above n 161, 407-408.

<sup>177</sup> United Nations Security Council Resolution 1816 (2008), above n 171, [11]; United Nations Security Council Resolution 1846 (2008), above n 167, [14].

premised on the consent of the TFG, it can be said that the TFG ultimately decides who should exercise jurisdiction over pirates pursued and arrested in Somali waters.<sup>178</sup>

In addition to authorising reverse hot pursuit, the UNSC has authorised land-based military operations to combat piracy and armed robbery against ships. As outlined in chapter one, since sea pirates are supported by vast land-based networks, operations within Somalia may be essential to curbing piracy on the high seas. UNSC Res 1851 (2008) permits states and regional organisations to “undertake all necessary measures that are appropriate in Somalia” in order to suppress piracy and armed robbery against ships.<sup>179</sup> Once again, as with UNSC resolutions 1816 (2008) and 1846 (2008), the prior permission of the TFG is necessary.<sup>180</sup> Interestingly, any measures taken under this resolution must be “consistent with applicable international humanitarian and human rights law.”<sup>181</sup> This requirement has been described as “intriguing” and may seriously limit the operations able to be undertaken pursuant to the resolution.<sup>182</sup> The only known instance of the TFG authorising military action on Somali land is the French operation in April 2008 to release the captured crew members of the *Le Ponant*.<sup>183</sup> This occurred prior to the introduction of UNSC Res 1851 (2008) but illustrates how the resolution may be used. In addition to authorising land-based operations, the resolution provides for use of ‘ship-riders.’<sup>184</sup> Ship-riders originate from drug interdiction law, which allows a law enforcement official of state A to ride on a naval ship belonging to state B, and board vessels belonging to state A, in order to enforce state A’s laws.<sup>185</sup> In the context of UNSC Res 1851 (2008), they are to be used “to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution...”<sup>186</sup> It is not known whether ship-riders have yet been deployed. They may be useful for the purposes of gathering evidence consistent with the prosecuting state’s evidentiary laws.<sup>187</sup>

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<sup>178</sup> Guilfoyle, above n 78, 697.

<sup>179</sup> United Nations Security Council Resolution 1851 (2008), above n 174, [6].

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Douglas Guilfoyle in Harvard Humanitarian Law and Policy Forum, *Somalia: Responding to the Legal Challenges of Offshore Piracy* (Live seminar, 16 April 2009) <<http://tinyurl.com/d2w77x>> accessed 25/06/09; Eugene Kontorovich, above n 164.

<sup>183</sup> New York Times, *French Troops Seize Somali Pirates After Hostages are Freed* (11 April 2008) <[http://www.nytimes.com/2008/04/11/world/africa/11iht-yacht.4.11921315.html?\\_r=1](http://www.nytimes.com/2008/04/11/world/africa/11iht-yacht.4.11921315.html?_r=1)> accessed 21/09/09.

<sup>184</sup> United Nations Security Council Resolution 1851 (2008), above n 174, [3].

<sup>185</sup> Guilfoyle, above n 78, 698.

<sup>186</sup> United Nations Security Council Resolution 1851 (2008), above n 174, [3].

<sup>187</sup> Darr, above n 168.

Lastly, the UNSC is aware of the complications created by the current arms embargo on Somalia.<sup>188</sup> The matter has been addressed in UNSC Res 1816 (2008) which overrules the embargo with respect to the provision of technical assistance to Somalia for the purposes of ensuring Somali coastal and maritime security.<sup>189</sup>

*b. Prosecution agreements*

Bilateral prosecution agreements with Kenya have been entered into by the UK,<sup>190</sup> USA,<sup>191</sup> EU,<sup>192</sup> and Denmark.<sup>193</sup> Under these agreements pirates captured by EU, USA, Danish or UK naval vessels on the high seas will be handed to Kenyan authorities for prosecution. Essentially, the agreements delegate jurisdiction in a limited fashion. Whether UNCLOS permits the delegation of jurisdiction is open to question. Article 105 of UNCLOS, which confers the right to exercise universal jurisdiction, expressly states that prosecution is to be undertaken by “the courts of the state which *carried out the seizure*” (emphasis added). The plain wording of the text, along with the drafting history suggests that transferring pirates to third states for purposes of prosecution is outside the permitted use of universal jurisdiction under UNCLOS.<sup>194</sup> The effect of Art 105 has not yet been raised in a Kenyan piracy trial.<sup>195</sup> However, a precedent for delegating jurisdiction is the creation of the ICC. Given the accepted use of delegated jurisdiction, UNCLOS can reasonably be interpreted to permit delegation.

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<sup>188</sup> United Nations Security Council Resolution 733 (1992) UN Doc. S/RES/733 (23 January 1992); United Nations Security Council Resolution 1425 (2002) UN Doc. S/RES/1425 (22 July 2002).

<sup>189</sup> United Nations Security Council Resolution 1816 (2008), above n 171, [6].

<sup>190</sup> The United Kingdom entered into a bilateral agreement with Kenya, 11 December 2008: United Kingdom Foreign and Commonwealth Office, *Prisoner Transfer Agreements* <<http://www.fco.gov.uk/en/fco-in-action/conflict/piracy/prisoners>> accessed 20/09/09. The text of this agreement is not publicly available.

<sup>191</sup> The United States of America entered into a bilateral agreement with Kenya, 27 January 2009: Derek Kilner, *Kenya, US agree to deal on piracy* (27 January 2009) VOA News <<http://www.voanews.com/english/archive/2009-01/2009-01-27-voa16.cfm?CFID=289525164&CFTOKEN=50615770&jsessionid=88301ba97b9ffc25c8715741371a6546f201>> accessed 20/09/09. The text agreement is not publicly available.

<sup>192</sup> The European Union entered into a bilateral agreement with Kenya, 6 March 2009: CONSILIUM, *EU Prosecution Agreement with Kenya Signed* (6 March 2009) <[http://www.consilium.europa.eu/App/Article/Article.aspx?article\\_id=36&page\\_id=1518&type=1&lang=en&id=1567](http://www.consilium.europa.eu/App/Article/Article.aspx?article_id=36&page_id=1518&type=1&lang=en&id=1567)> accessed 20/09/09; Council of the European Union, ‘Provisions on the conditions of transfer of suspected pirates and seized property from the EU-led naval force to the Republic of Kenya’ annexed to *Council Decision concerning the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy* (23 February 2009) 5348/09 AF/DOS/jj, see Appendix 3.

<sup>193</sup> Denmark entered into a bilateral agreement with Kenya, 18 August 2009: Africa News Online, *The Gulf Pirate Crisis* (23 August 2009) <[http://africanewsonline.blogspot.com/2009\\_08\\_01\\_archive.html](http://africanewsonline.blogspot.com/2009_08_01_archive.html)> accessed 20/09/09. The text of this agreement is not publicly available.

<sup>194</sup> Kontorovich, above n 164.

<sup>195</sup> *Ibid.*

The agreements themselves establish a detailed regime for transfer and prosecution of suspected pirates. Under the EU/Kenya agreement, the EU Naval Mission (EUNAVFOR) is to provide all relevant evidence to the Kenyan authorities, hand over seized property and provide additional assistance and support upon request.<sup>196</sup> In exchange for organising the prosecution and incarceration of pirates, Kenya is to receive financial and technical aid in order to modernise its judicial system.<sup>197</sup> The major motivation in entering into such agreements has been the practical difficulties for states involved in the coalition naval effort undertaking trials themselves.<sup>198</sup> Such difficulties include arranging witnesses, gathering evidence and interpreters, and incarcerating convicted pirates. Moreover, given Kenya's location, captured pirates can be quickly taken into custody on shore as opposed to the delay in naval vessels returning to their flag states. Kenya has overhauled its piracy laws, including removing the death penalty, in order to utilise the prosecution agreements.<sup>199</sup> Obviously, some states will continue to prosecute pirates themselves, regardless of any bilateral agreement, when they perceive prosecution to be in their interests. The most high profile example is the US initiating proceedings in the New York District Court against Muse, the only pirate to survive the hijacking of the *Maersk Alabama* in April 2009.<sup>200</sup>

The establishment of such bilateral agreements is encouraged by various UNSC resolutions. In particular, UNSC resolutions 1816 (2008) and 1846 (2008) call upon flag, port and coastal states to cooperate in "determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia."<sup>201</sup> Both resolutions go on to state that any cooperative measures must be undertaken in accordance with all applicable international law and especially international human rights law.<sup>202</sup> Accordingly, it is necessary to determine whether these bilateral prosecution agreements satisfy obligations imposed on detaining states under international human rights law.

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<sup>196</sup> Council of European Union, above n 192, Arts 6 & 9(b)(6). See Appendix 3.

<sup>197</sup> Jeffrey Gettleman, *The West Turns to Kenya as Piracy Criminal Court* (23 April 2009) New York Times <[www.nytimes.com/2009/04/24/world/africa/24kenya.html](http://www.nytimes.com/2009/04/24/world/africa/24kenya.html)> accessed 03/09/09.

<sup>198</sup> Ibid.

<sup>199</sup> Section 371 of Merchant Shipping Act 2009 (Kenya), c 4 now provides that the punishment for piracy is life imprisonment.

<sup>200</sup> United States Attorney for Southern District of New York, *Somali Pirate Indicted for Hijacking the Maersk Alabama and Holding the Ship's Captain Hostage* (19 May 2009) NEFA Foundation <[http://www.nefafoundation.org/miscellaneous/FeaturedDocs/US\\_v\\_Muse\\_dojprindictment.pdf](http://www.nefafoundation.org/miscellaneous/FeaturedDocs/US_v_Muse_dojprindictment.pdf)> accessed 20/07/09.

<sup>201</sup> United Nations Security Council Resolution 1816 (2008), above n 171, [11]; United Nations Security Council Resolution 1846 (2008), above n 167, [14].

<sup>202</sup> Ibid.

Because there is no state of armed conflict, it cannot be argued that pirates qualify as prisoners of war and are thus protected by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, or that they are civilians under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>203</sup> While captured pirates are not afforded prisoner of war or civilian status, they are protected by the 1984 UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT).<sup>204</sup> All of the bilateral partners, including Kenya, are parties to UNCAT.<sup>205</sup> Under UNCAT, torture is prohibited and cannot be justified in times of war or peace nor by reference to internal instability or public emergency.<sup>206</sup> In addition to requiring state parties to introduce appropriate domestic legislation to prevent torture, UNCAT creates a refouler ban under Art 3:

- (1) No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
- (2) For the purposes of determining whether there are such grounds, the competent authorities shall take into all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The threshold requirement that there be “substantial grounds for believing that [a person] would be in danger of being subjected to torture” in Art 3(1) has been interpreted by the USA to mean “if it is more likely than not that he would be tortured.”<sup>207</sup> The refouler ban has certainly complicated anti-piracy measures. 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 under British human rights legislation.<sup>208</sup> Although the direction lead to an uproar in the House of Commons, Hon Jack Straw assured the

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<sup>203</sup> Convention relative to the Treatment of Prisoners of War, above n 107; Convention Relative to the Protection of Civilian Persons in Time of War, above n 107; Michael H. Passman, ‘Protections Afforded to Captured Pirates Under the Law of War and International Law’ (2008) 33 *Tul. Mar. L. J.* 1.

<sup>204</sup> United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (10 December 1984, entered into force 26 June 1987) 1465 *UNTS* 85 [hereinafter UNCAT].

<sup>205</sup> United Nations, *Status of Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en)> accessed 03/09/09.

<sup>206</sup> UNCAT, above n 204, Art 2(2).

<sup>207</sup> United States Senate, *Reservations Upon Ratification* (21 October 1994) United Nations Treaty Collection.

< [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en#12](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#12)> accessed 20/09/09.

<sup>208</sup> Marie Woolf, *Pirates can claim UK asylum* (13 April 2009) *The Sunday Times* <[www.timesonline.co.uk/tol/news/uk/article3736239.ece](http://www.timesonline.co.uk/tol/news/uk/article3736239.ece)> accessed 30/04/09.

House that applications for asylum by pirates could not conceivably be entertained.<sup>209</sup> This is primarily because Art 1F(b) of the 1951 Convention relating to the Status of Refugees provides that the Convention will not apply to persons who have committed a “serious non-political crime.”<sup>210</sup> Again in 2008, the Danish government ordered the release of captured pirates rather than transferring them to the Somali authorities and risk breaching their obligations under UNCAT.<sup>211</sup>

The refouler ban in UNCAT directly challenges the propriety of handing captured pirates to Kenya for the purposes of prosecution. Kenya has a seriously deficient human rights record, a relevant consideration under Art 3(2) of UNCAT. In 2000 the UN Special Rapporteur on Torture released a damning report on the use of torture and corporal punishment by Kenyan police.<sup>212</sup> The May 2009 report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions details the systemic failings of the Kenyan police and justice system.<sup>213</sup> The report mostly concerns the use of summary execution and torture by Kenyan police but is heavily critical of the complicity of justice officials. In particular, the report notes that “the criminal justice system as a whole was widely described as ‘terrible.’ Investigation, prosecution, and judicial processes are slow and corrupt.”<sup>214</sup> As well, the report details the poor treatment of prisoners. Concerns about the use of torture and cruel and degrading treatment in Kenya are well documented elsewhere by various human rights watchdogs.<sup>215</sup> Cumulatively, these reports lead to the reasonable conclusion that there are substantial grounds for believing that a captured pirate may be in danger of being subjected to torture.

Deliberate attempts have been made to avoid breaching the refouler ban in the prosecution agreements brokered so far. As only the text of the EU/Kenya agreement is

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<sup>209</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 4 December 2008, 223-224 (Jack Straw, Lord Chancellor and Secretary of State for Justice) <<http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm081204/debtext/81204-0017.htm>> accessed 02/09/09.

<sup>210</sup> *Ibid*; Convention relating to the Status of Refugees (28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

<sup>211</sup> Paulo Prada and Alex Roth, *On the Lawless Seas, It's Not Easy Putting Somali Pirates in the Dock* (12 December 2008) *The Wall Street Journal* <<http://online.wsj.com/article/SB122903542171799663.html>> accessed 10/09/09.

<sup>212</sup> Sir Nigel Rodley, *Report of the Special Rapporteur on Torture, Sir Nigel Rodley – visit to Kenya* (9 March 2000) UN Doc. E/CN.4/2000/9/Add.4.

<sup>213</sup> Prof Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions – mission to Kenya* (26 May 2009) UN Doc. A/HRC/11/2/Add.6.

<sup>214</sup> *Ibid*, 13.

<sup>215</sup> See, for example: International Rehabilitation Council for Torture Victims, *Kenya* <<http://www.irct.org/our-project/target-countries/kenya.aspx>> accessed 20/09/09; World Organisation Against Torture, *Addressing the economic, social and cultural root causes of torture in Kenya* (November 2008) <[http://www2.ohchr.org/english/bodies/cat/docs/ngos/OMCT\\_Kenya41.pdf](http://www2.ohchr.org/english/bodies/cat/docs/ngos/OMCT_Kenya41.pdf)> accessed 20/09/09.



publicly available, analysis shall be confined to that particular document. The EU/Kenya prosecution agreement expressly states that the agreement does not affect the parties' rights and obligations under UNCAT. In particular:

signatories confirm that they will treat persons transferred... both prior to and after transfer, humanely and in accordance with international human rights obligations, including the prohibition of torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial.<sup>216</sup>

The heavy focus in the agreement on compliance by Kenya with international human rights standards in its treatment of pirates is probably sufficient to side-step the refouler ban, largely because Kenya's undertaking to comply with UNCAT means there are no substantial grounds for believing a pirate would be tortured. However, the EU is likely to monitor the transfer of suspected pirates closely in order to comply with the 1950 European Convention on Human Rights (ECHR) as well as UNCAT. Under ECHR, all contracting parties must provide the rights and freedoms contained within the Convention to everyone within their jurisdiction.<sup>217</sup> Captured pirates would certainly come within the jurisdiction of a party to ECHR if they are detained or arrested by a EUNAVFOR vessel. Recently, the European Court of Human Rights, in a drug interdiction case, held that drug smugglers detained by the French navy on the high seas were within the jurisdiction of France.<sup>218</sup> Accordingly, ECHR is not limited in application by territorial borders. Thus in addition to UNCAT, transfer of pirates must comply with the rights and obligations detailed by ECHR. Many of the rights found in Art 5 of ECHR are reflected in the EU/Kenya agreement.<sup>219</sup>

Aside from the complications presented by UNCAT, one legal commentator has noted that successful prosecution of pirates is made difficult by Kenyan evidentiary laws.<sup>220</sup> In particular, evidence must be given in person because a sworn statement is not sufficient.<sup>221</sup> Making witnesses and victims available to Kenyan courts is a further practical challenge created by relying on bilateral prosecution agreements. It has been suggested that ship-riders could be used in order to collect evidence in accordance with

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<sup>216</sup> Council of European Union, above n 192, Art 2(c).

<sup>217</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI. 1950 (European Convention on Human Rights) <<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>> accessed 10/09/09, Art 1.

<sup>218</sup> *Medvedyev and Others v France*, no. 3394/03 (Sect. 5), ECHR 2008-..(extracts) - (10.7.08).

<sup>219</sup> Council of European Union, above n 192, Art 3.

<sup>220</sup> Guilfoyle, above n 182.

<sup>221</sup> *Ibid.*

the prosecuting state's evidentiary rules.<sup>222</sup> The use of ship-riders is provided for in UNSC Res 1851 (2008) and the Djibouti Code of Conduct discussed below.

### **3.2 Regional initiatives**

On 29 January 2009, various African states at an IMO sponsored meeting in Djibouti adopted the Djibouti Code of Conduct.<sup>223</sup> This agreement marks the first major regional effort to cooperate in the repression of piracy off the coast of Africa and in the Gulf of Aden. It was immediately signed by Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen.<sup>224</sup> The Djibouti Code of Conduct was inspired by ReCAAP and various commonalities exist between the two.<sup>225</sup> ReCAAP, which was a Japanese initiative spear-headed by the then Prime Minister, Junichiro Koizumi, was adopted on 11 November 2004 and entered into force on 4 September 2006.<sup>226</sup> As an agreement ReCAAP is quite remarkable. Firstly, a divergent array of states signed the agreement which amounted to a considerable political feat given the various political sensitivities in the area. Secondly, it has been largely credited with the decline in pirate attacks and incidents of armed robbery against ships in the Malacca Straits and broader Southeast Asian waters.<sup>227</sup> However, the global community, and in particular the maritime industry, should not expect a similar level of success in curbing piracy under the Djibouti Code of Conduct as occurred with the advent of ReCAAP. The reality is that contracting parties to ReCAAP, including Japan, China and India, have resources and well established navies far beyond the capability of states in the African region. Even so, like ReCAAP the Djibouti Code of Conduct provides for information sharing and data collection.<sup>228</sup> This is likely to be of considerable aid in coordinating strategic responses to piracy in the region.

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<sup>222</sup> Darr, above n 168.

<sup>223</sup> Sub-regional meeting on maritime security and armed robbery against ships for Western Indian Ocean, Gulf of Aden and Red Sea States, 'Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden' (29 January 2009), annexed to International Maritime Organisation Council, *Protection of Vital Shipping Lanes* (3 April 2009) IMO Doc. C 102/14 [hereinafter the Djibouti Code of Conduct]; International Maritime Organisation, *High-level meeting in Djibouti adopts a Code of Conduct to repress acts of piracy and armed robbery against ships* (30 January 2009) <[http://www.imo.org/About/mainframe.asp?topic\\_id=1773&doc\\_id=10933](http://www.imo.org/About/mainframe.asp?topic_id=1773&doc_id=10933)> accessed 01/09/09.

<sup>224</sup> International Maritime Organisation, *Ibid.*

<sup>225</sup> For the full text of both agreements see Appendix 4.

<sup>226</sup> Keyuan, above n 160, [28].

<sup>227</sup> Guilfoyle, above n 78, 698. The ICC International Maritime Bureau statistics show a decrease from 28 recorded attacks in the Malacca straits in 2003 to just 2 attacks in 2008: ICC International Maritime Bureau, above n 53, 5.

<sup>228</sup> ReCAAP, above n 160, Part III; Djibouti Code of Conduct, above n 223, Art 8.

ReCAAP was the first international treaty to adopt, in legally binding form, the IMO's definition of 'armed robbery against ships.'<sup>229</sup> While the Djibouti Code of Conduct has also adopted this definition in Art 2, it then proceeds to distinguish responses to piracy as opposed to armed robbery against ships in a way that ReCAAP does not. Article 4 of the Djibouti Code of Conduct governs measures to repress piracy and broadly correlates to Article 3 of ReCAAP which is applicable to both piracy and armed robbery against ships. Article 5 of the Djibouti Code of Conduct specifically deals with armed robbery against ships and limits the participants' obligations to information sharing and confirms that the coastal state has authority over entrance into its territorial waters in accordance with Art 111 of UNCLOS. That the Djibouti Code of Conduct delineates between these two geographically defined crimes reflects the fact that, unlike ReCAAP, it envisages participants authorising reverse hot pursuit which is the pursuit of pirate ships from the high seas into territorial waters. While ReCAAP obligates contracting parties to suppress piracy and armed robbery against ships, it strongly confirms that territorial sovereignty and jurisdiction is to be respected:

Nothing in this Agreement entitles a Contracting Party to undertake in the territory of another Contracting Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Contracting Party by its national law.<sup>230</sup>

Accordingly, the contracting parties to ReCAAP were not prepared to permit reverse hot pursuit or any erosion of state sovereignty over territorial waters in respect of piracy. It was therefore appropriate to deal with the offences together. In contrast, the participants to the Djibouti Code of Conduct were prepared to permit limited reverse and cross border hot pursuit for piracy and armed robbery against ships. This reflects the reality that many participants lack the naval capacity to patrol their own waters effectively. However, pursuit for the purposes of enforcing piracy laws is subject to a different and more permissive regime under Art 4 than pursuit for the purposes of armed robbery against ships under Art 5. This is why the Djibouti Code of Conduct deals with the two offences under separate provisions. Effective enforcement of both offences requires hot pursuit, but because armed robbery against ships can only occur within territorial waters it is not appropriate that participant states have *carte blanche* rights to enter and arrest such perpetrators in another participant's waters. Reflecting the trend begun in UNSC Resolution 1816 (2008), participants may enter the territorial sea of any coastal state

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<sup>229</sup> Keyuan, above n 160, [9].

<sup>230</sup> ReCAAP, above n 160, Art 2(5).

with permission.<sup>231</sup> Unlike UNSC Resolutions 1816 (2008) and 1846 (2008), “permission” is not specified as entailing the prior written consent of the coastal state and therefore on-the-spot permission would suffice. As the Djibouti Code of Conduct provides for one single point of contact, making requests for entry should be relatively straight-forward.<sup>232</sup> In addition, the Djibouti Code of Conduct provides for the use of “embarked officers” or ship-riders which ReCAAP does not. Under Art 7(4), embarked officers may be used to “assist the host Participant and conduct operations from the host Participant ship or aircraft.” Although it is not known how Art 7 will be used, it has been suggested that embarked officers could be used to grant effective permission in instances of hot pursuit.<sup>233</sup>

As well as guarding their territory jealously in terms of enforcement, contracting parties to ReCAAP prioritised extradition of captured pirates over the exercise of universal jurisdiction. The bias in favour of exercising jurisdiction on the basis of nationality as opposed to universality features in two ways in ReCAAP. Firstly, Art 3(1), which establishes the general obligations of the contracting parties with respect to the suppression of piracy and armed robbery against ships, requires contracting parties to make every effort to arrest pirates but, unlike Art 4(3)(a) of the Djibouti Code of Conduct, does not include taking actions to investigate and prosecute pirates. Secondly, under Art 12 of ReCAAP, on receipt of a request for extradition the contracting party which has captured pirates or persons committing armed robbery against ships must endeavour to fulfill that request. In contrast, the Djibouti Code of Conduct confirms the right to exercise universal jurisdiction under Art 4(4),(6) but does permit participants to waive their right to exercise jurisdiction under Art 4(7). There is no similar priority given to extradition. Furthermore, the Djibouti Code of Conduct is more nuanced in its recognition of the variety of actors involved in anti-piracy missions and appropriately encourages participants to liaise and cooperate with these stakeholders as to interdiction and prosecution.<sup>234</sup> Such stakeholders would include the apprehending state, the flag state of victim ship and the national state of the perpetrators.

In terms of technicalities, ReCAAP is a binding agreement whereas the Djibouti Code of Conduct is not.<sup>235</sup> Instead, the African participants have undertaken to consult within

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<sup>231</sup> Djibouti Code of Conduct, above n 223, Art 4(5).

<sup>232</sup> Ibid, Art 8.

<sup>233</sup> Darr, above n 168.

<sup>234</sup> Djibouti Code of Conduct, above n 223, Art 6(2).

<sup>235</sup> Ibid, Art 15(a).

two years in order to establish a binding agreement.<sup>236</sup> Neither agreement is intended to supplant the rights or obligations of the signatories under international agreements or applicable rules of customary international law.<sup>237</sup> The Djibouti Code of Conduct also expressly recognises the inadequacies of local domestic laws. Participants are required under Art 11 to review national legislation so as to ensure “there are national laws in place to criminalize piracy and armed robbery against ships, and adequate guidelines for the exercise of jurisdiction... and prosecutions of alleged offenders.” Article 11, if adhered to, may be the most important contribution the Djibouti Code of Conduct makes to anti-piracy measures. In particular, it would remedy any tension between international law, which defines and outlaws piracy, and domestic law, which requires that offenders must be prosecuted and sentenced, even if it is generally unable to do so.

### **3.3 Conclusion**

While piracy is the oldest crime at international law, the legal responses to piracy developed over the last year are both innovative and distinctly modern. They effectively fill gaps not recognised as being at all problematic by the original drafters of UNCHS in 1958. While they are not to be taken as declaratory of customary international law, it is likely these responses will expand the ideas and options available to other states which experience piracy now and in the future. However, these responses are not perfect. UNSC resolutions will not indefinitely apply to the situation in Somalia and the Djibouti Code of Conduct depends on there being sufficient political capital to ensure that the agreement becomes binding in time and is well implemented. Out of all the novel international law responses to Somali piracy, the use of bilateral prosecution agreements is of the most concern. International law seems to have a good grasp on enforcement measures but adjudicative responses require further consideration. While handing pirates to Kenya may very well be an expedient option, the ability of the Kenyan state to deliver sound judgments and comply with international human rights obligations is dubious. For all of that, the effort and resources expended in patrolling and combating piracy on the high seas may reach a disappointing conclusion if the question of adjudication is not resolved.

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<sup>236</sup> Ibid, Art 13.

<sup>237</sup> Ibid, Art 15(b),(g),(i),(l); ReCAAP, above n 160, Art 2(2).

## CHAPTER FOUR:

### *A specialised international piracy tribunal*

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As one piracy commentator has explained, “what to do with pirates has become the central legal question of the current anti-piracy campaign.”<sup>238</sup> While UNCLOS permits any state to prosecute pirates captured on the high seas, and UNSC resolutions expect states to cooperate in determining jurisdiction over pirates captured in domestic waters, many states have proved unwilling to prosecute. This general unwillingness amongst naval coalition members can be attributed to a lack of political capital and outdated and ineffective domestic piracy laws. As discussed in chapter three, the practice of handing pirates to Kenya raises serious issues over compliance with human rights standards. Accordingly, it is necessary to assess alternative ways in which adjudicative jurisdiction could be exercised. In particular, this chapter shall explore the establishment of a specialised piracy tribunal or court as an alternative to handing pirates to Kenya for prosecution.

#### **4.1 The deficiencies of domestic law**

Trial in the courts of the apprehending state is preferred under UNCLOS.<sup>239</sup> However, in practice this approach has not been utilised. First, as explained in chapter three, prosecution of pirates by an apprehending state is not always practicable. Collecting evidence is difficult, transfer of pirates to the courts of the apprehending state may be complicated due to distance, and bearing the responsibility for incarcerating pirates is expensive. This is particularly so when the majority of states punish piracy by life imprisonment. Furthermore, on a political level naval coalition members may take the position that they have sufficiently contributed to anti-piracy measures by policing the high seas. In December 2008, US Secretary of State Rice observed that anti-piracy efforts were being handicapped by a lack of political will and coordination in prosecuting pirates.<sup>240</sup> This problem has continued in 2009. For example, many states have premised their prosecution of pirates on political interest. Relying on a threshold of ‘interest’ is evident in Germany’s approach. The German Public Prosecutor’s office notes that it has discretion to prosecute non-German pirates and will only exercise that

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<sup>238</sup> Kontorovich, above n 164.

<sup>239</sup> Ibid.

<sup>240</sup> United Nations Security Council, *Security Council Report of the 6046<sup>th</sup> meeting* (16 December 2008) UN Doc. S/PV.6046, 10.

discretion “if the German State has a particular, well-defined interest in prosecution”.<sup>241</sup> Such an interest would be met if German nationals had been killed or injured, a German ship attacked, a German shipping company had been blackmailed by pirates, or the German navy had detained the pirates.<sup>242</sup>

Lack of political will is compounded by inadequate domestic legal structures to implement the right of universal jurisdiction conferred by UNCLOS. In May 2009, Dutch marines under NATO command released nine captured pirates because no legal framework existed to carry out their arrest and subsequent prosecution.<sup>243</sup> NATO continues to operate without a uniform arrest, detention and prosecution policy.<sup>244</sup> Many coalition members are currently operating under archaic piracy laws relatively unchanged since the nineteenth century.<sup>245</sup> In addition, there is a lack of uniformity as to sentence.<sup>246</sup> Other coalition members, like India and Denmark, do not recognise a specific offence of piracy at domestic law.<sup>247</sup> Japan only enacted anti-piracy legislation on 19 June 2009.<sup>248</sup> Prior to this, despite being committed to anti-piracy measures in South East Asia, Japan had no domestic law governing and defining piracy. The need to modernise domestic piracy laws in line with UNCLOS has been recognised by the UNSC:

the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia and in some case led to pirates being released without facing justice.<sup>249</sup>

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<sup>241</sup> Hamburg Public Prosecutor, *Prosecution of acts of piracy off Somalia by German prosecution authorities* (6 March 2009) <[www.iflos.org/.../brandt%20statement%20piracy%20maritime%20talks%202009.pdf](http://www.iflos.org/.../brandt%20statement%20piracy%20maritime%20talks%202009.pdf)> accessed 02/09/09.

<sup>242</sup> Ibid.

<sup>243</sup> Radio Nederland Wereldroep, *High time for piracy tribunal, experts say* (20 May 2009) <<http://www.rnw.nl/int-justice/article/high-time-piracy-tribunal-experts-say>> accessed 02/09/09.

<sup>244</sup> North Atlantic Treaty Organisation, *The Standing NATO Maritime Group 1* <[http://www.snmg1.nato.int/SNMG1\\_ficheiros/Page4065.htm](http://www.snmg1.nato.int/SNMG1_ficheiros/Page4065.htm)> accessed 22/09/09.

<sup>245</sup> Capt. Patrick Neher in Harvard Humanitarian Law and Policy Forum, *Somalia: Responding to the Legal Challenges of Offshore Piracy* (Live seminar, 16 April 2009) <<http://tinyurl.com/d2w77x>> accessed 25/06/09.

<sup>246</sup> For example, piracy is punishable by life imprisonment in the United States of America under 18 U.S.C § 1651 and in Canada under the Canadian Criminal Code RS C 1985, c 34, s 74(2). In contrast, Russia imposes 10-15 years imprisonment if piracy is committed by an organised group or death results under the Criminal Code of the Russian Federation 1996, Art 227. China has executed pirates in the past, including 13 pirates in 2000, see: BBC, *China Executes Pirates* (28 January 2000) <<http://news.bbc.co.uk/2/hi/asia-pacific/622435.stm>> accessed 23/09/09.

<sup>247</sup> Neher, above n 245.

<sup>248</sup> Prime Minister of Japan and his Cabinet, *Statement by Prime Minister Taro Aso on the Enactment of the Law on the Penalization of Acts of Piracy and Measures against Acts of Piracy* (19 June 2009) <[http://www.kantei.go.jp/foreign/asospeech/2009/06/19danwa\\_e.html](http://www.kantei.go.jp/foreign/asospeech/2009/06/19danwa_e.html)> accessed 31/08/09.

<sup>249</sup> United Nations Security Council Resolution 1851 (2008), above n 174, preamble.

The deficiencies of domestic law in this area are too systemic to be addressed in any meaningful timeframe. It is understandable, then, that the naval coalition is looking for alternatives. However, the current reliance on Kenya as the court of choice for piracy prosecutions is seriously undermined by Kenya's human rights record. Even if the UNCAT refouler ban can be appropriately side-stepped through Kenya's written undertaking to comply with the Convention, the quality of the Kenyan justice system leaves much to be desired.

#### **4.2 Justifying the establishment of a specialised court**

One option currently being considered by the Contact Group on Piracy off the Coast of Somalia is the establishment of an international piracy court.<sup>250</sup> This option is expressly supported by the Netherlands and Russia but has not been subjected to rigorous academic consideration.<sup>251</sup> The court could be based in Kenya or another East African state near Somalia. Much of the attractiveness in handing pirates to Kenya for prosecution is due to Kenya's close proximity to the area of offending and the decision as to where the court would be located should also take this into consideration.

First, it is necessary to consider whether it is legally permissible under UNCLOS to delegate jurisdiction to such a court. As discussed in chapter three, bilateral prosecution agreements have been challenged on grounds they are outside the permitted use of universal jurisdiction under Art 105 of UNCLOS.<sup>252</sup> The reasoning used in chapter three to refute that claim is equally applicable here. Delegating jurisdiction over individuals at international law is an accepted practice as evidenced by the establishment of the ICC. The precedential value of the ICC means that it is likely Art 105 could be interpreted as permitting such delegation. Furthermore, the establishment of such a court would not involve the collective delegation of jurisdiction but instead the coordinated individual delegation of jurisdiction. Members of the naval coalition would individually delegate jurisdiction to the court for the purposes of prosecution. This delegation could occur by creating a treaty-based statute for the court, as occurred with the ICC, to which states

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<sup>250</sup> Working Group Two of the Contact Group on Piracy off the Coast of Somalia has prepared a discussion paper (the contents of which are not publicly available) exploring the option of an international prosecution mechanism, see: United States Department of State, *Fourth Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia* (11 September 2009)

<<http://www.state.gov/r/pa/prs/ps/2009/sept/129143.htm>> accessed 22/09/09.

<sup>251</sup> Radio Nederland Wereldroep, above n 243; Fairplay International Shipping Weekly, *Putting Somali pirates ashore for trial in Kenya is no longer an option, unless the Kenyan courts are replaced by an international tribunal* (2 July 2009) <<http://www.state.gov/r/pa/prs/ps/2009/sept/129143.htm>> accessed 22/09/09.

<sup>252</sup> Kontorovich, above n 164.



then become party. Alternatively, the court could be established through the exercise of the Chapter VII powers of UNSC as occurred with the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Former Yugoslavia (ICTY).<sup>253</sup> The piracy epidemic has already been classified as a threat to international peace and security and UNSC Res 1846 (2008) provides a possible mandate by calling on states to “cooperate in determining jurisdiction” over captured pirates.

In terms of subject matter, a specialised international court should deal exclusively with piracy. Armed robbery against ships should remain the sole concern of the coastal state and be subject to domestic law. Pirates apprehended in the territorial waters of Somalia pursuant to UNSC Res 1846 (2008) and any successive resolutions would also be dealt with by the court, provided the acts for which they would be prosecuted occurred on the high seas. Limiting the court’s jurisdiction to piracy may be subject to criticism on the grounds that it ignores the reality of the problem that the majority of “pirate” attacks occur in domestic waters.<sup>254</sup> However, it is highly unlikely that states would delegate jurisdiction over armed robbery against ships to any international piracy court. Given the concerns of states such as Indonesia that measures to combat piracy in Somalia would create new customary law,<sup>255</sup> it is also most improbable that states would agree that any new court should have jurisdiction over *all* acts of piracy. Instead, the court’s jurisdiction may be limited to trying African pirates only. As to the temporal jurisdiction of the court, this may not be as controversial an issue as it was with the establishment of, for example, the ICTR.<sup>256</sup> However, in order to avoid double jeopardy and comply with the doctrine of *non bis in idem*, the court’s jurisdiction should not include past piratical incidents which have already been tried in a domestic court.<sup>257</sup> The expiration of temporal jurisdiction should not be predetermined. Instead, an appropriate completion strategy should be adopted to coincide with the decrease of pirate attacks off the coast of Somalia.

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<sup>253</sup> The International Criminal Tribunal for Former Yugoslavia was established pursuant to United Nations Security Council Resolution 827 (1993) UN Doc. S/RES/827 (25 May 1993). The International Criminal Tribunal for Rwanda was established pursuant to United Nations Security Council Resolution 955 (1994) UN Doc. S/RES/955 (8 November 1994).

<sup>254</sup> ICC International Maritime Bureau, above n 53, 3.

<sup>255</sup> Indonesia was a major proponent of paragraph 9 being included in United Nations Security Council Resolution 1816 (2008), see: Guilfoyle, above n 78, 697.

<sup>256</sup> See the opposition of Rwanda to the limited temporal jurisdiction of the International Criminal Tribunal for Rwanda: United Nations Security Council, *Security Council Report of the 3453<sup>rd</sup> meeting* (8 November 1994) UN Doc. S/PV.3453, 14.

<sup>257</sup> The potential misuse of universal jurisdiction in this way is recognised by Principle 9 of the *Princeton Principles on Universal Jurisdiction* which provides states must recognise a claim of *non bis in idem*: Princeton Program in Law and Public Affairs, *The Principles on Universal Jurisdiction* (Princeton University, 2001).

A major justification for the establishment of various international criminal tribunals over the years has been the inability or unwillingness of domestic courts to prosecute certain offences.<sup>258</sup> This has been particularly so with offences committed with the support of or by state officials.<sup>259</sup> While piracy does not have a comparable dimension of state criminality, states have showed similar levels of unwillingness or inability to prosecute piracy. This unwillingness and/or inability to prosecute has already been discussed above. The establishment of tribunals such as the ICTY, ICTR and Special Court for Sierra Leone was also justified on social and political grounds. In particular, they were to aid the restoration of peace, redress violations and fulfil a deterrent function.<sup>260</sup> Similarly, a piracy court can be justified on social and political grounds, albeit with no comparable focus on restoration of peace and post-conflict unification. A specialised court may increase the seriousness with which piracy is regarded and thus fulfil a deterrent function. Moreover, it would redress the violations committed and recognise the interests of victims in prosecution and sentencing. In addition to social, political and pragmatic justifications, a specialised piracy court would ensure consistency in the application of international law in this area. The court would apply a uniform sentencing regime as set out in the governing statute. Moreover, it would further aid the development of piracy law and, in particular, may clarify its association with universal jurisdiction and interdiction law, human rights standards and armed robbery against ships.

#### **4.3 Ruling out existing international judicial bodies**

The creation of a specialised African-based piracy court is preferable to having the International Tribunal for the Law of the Sea (ITLOS) handle prosecutions. ITLOS is the judicial body established by UNCLOS to settle disputes regarding the law of the sea.<sup>261</sup> Accordingly, ITLOS has a very specialised competence in the law of the sea and this might favour ITLOS handling the application of international piracy law. However, while ITLOS has contentious and advisory jurisdiction, it does not have criminal jurisdiction.<sup>262</sup>

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<sup>258</sup> Paola Gaeta, 'International Criminalization of Prohibited Conduct' in Antonio Cassese (ed) *The Oxford Companion to International Justice* (Oxford University Press, 2009) 63, 64.

<sup>259</sup> Ibid.

<sup>260</sup> United Nations Security Council Resolution 827 (1993), above n 253, preamble; United Nations Security Council Resolution 955 (1994), above n 253, preamble. See also the preamble to United Nations Security Council Resolution 1315 (2000) UN Doc. S/RES/1315 (14 August 2000) which authorised United Nations negotiations with Sierra Leone in order to establish a special court.

<sup>261</sup> 'Statute of the International Tribunal for the Law of the Sea' in Annex VI to UNCLOS, above n 3.

<sup>262</sup> Under Art 21 of the Statute of the International Tribunal for the Law of Sea "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and

In addition, ITLOS deals with disputes between state parties and certain entities but not individuals.<sup>263</sup> Expanding its jurisdiction to cover not only criminal acts but individuals as well would mark a serious departure from the status quo. It would be necessary to amend UNCLOS so as to allow ITLOS to establish an ad hoc criminal tribunal for the purposes of trying pirates. The process for amending UNCLOS is time consuming and an international piracy tribunal is urgently required. Under Art 312 a state party must propose specific amendments to the UN Secretary-General; these proposals are circulated; and if within 12 months at least one half of the states party to UNCLOS reply favourably a conference will be called. A simplified procedure for amendment is contained in Art 313 but should any one state party reject the amendment the simplified procedure has no effect. In terms of practicality, ITLOS is based in Hamburg, Germany, and accordingly the same concerns apply to the transporting of captured pirates and difficulties in collecting evidence. While ITLOS should not be directly responsible for an international piracy court, with its expertise in the area the contribution of ITLOS to the drafting of a statute for the court would be invaluable.

The only other seemingly plausible contender for the responsibility of prosecuting pirates is the ICC. The major advantages offered by the ICC is its permanency, avoiding costs and delay in the establishment of a piracy tribunal, and its obvious expertise in the application of international criminal law. Currently, the ICC has jurisdiction to try individuals charged with “the most serious crimes of international concern.”<sup>264</sup> While piracy, on the basis of its history and the current Somali piracy epidemic, could be considered a serious crime of international concern, the ICC’s substantive jurisdiction under Art 5 pertains to prosecuting individuals for genocide, crimes against humanity, war crimes and, in the future perhaps, aggression. Accordingly, as with ITLOS, the governing statute of the ICC would require amendment to allow for the prosecution of pirates. The first review conference of the Rome Statute is to be held in May-June 2010 in Kampala, Uganda, pursuant to Art 123(1).<sup>265</sup> However, it is doubtful the state parties to the Rome Statute, many of whom are involved in the naval coalition, would see

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all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”

The principal jurisdiction of the Tribunal to settle disputes is provided for in Part XV of UNCLOS and the ability of the Tribunal to give advisory opinions is guided by the process in Art 138 of the *Rules of the Tribunal* (Adopted 28 October 1997, last amended 17 March 2009) ITLOS/8 E 17 03 09.

<sup>263</sup> ‘Statute of the International Tribunal for the Law of the Sea’ in Annex VI to UNCLOS, above n 3, Art 20.

<sup>264</sup> Rome Statute of the International Criminal Court, above n 45, Art 1.

<sup>265</sup> International Criminal Court, *Review Conference of the Rome Statute* <<http://www.icc-cpi.int/Menu/ASP/Special+Events/Review+Conference+2010/Review+Conference+2010.htm>> accessed 01/10/09.

amendment of the Statute as a more preferable option to the establishment of a stand-alone piracy court. Firstly, the ICC was designed to handle prosecution of the perpetrators of the worst crimes rather than any offence of an international nature.<sup>266</sup> This is evidenced by the obvious exclusion of offences such as drug trafficking which the drafters of the Rome Statute felt were sufficiently dealt with by pre-existing international treaty law.<sup>267</sup> Secondly, the USA, the major power in the current naval coalition, is not a party to the Rome Statute and thus does not recognise the jurisdiction of the Court. The rationale of using a specialised court to ensure consistency of application of piracy laws and uniform prosecution processes would be fundamentally undermined if major coalition members did not convey detained pirates to that court. In sum, the ICC is not the appropriate judicial body to handle piracy prosecutions under any new international scheme.

#### **4.4 Conclusion**

While universal jurisdiction over piracy permits any state to prosecute a pirate detained on the high seas, political and practical concerns have led to very limited use of this power. Some states require there be a sufficient interest in the prosecution before taking action. Other states, potentially willing to act, are unable to do so due to limited or non-existent domestic laws governing piracy and the exercise of universal jurisdiction. In turn, the inability and/or unwillingness of states to prosecute pirates has frustrated the efforts of the naval coalition in the Horn of Africa in suppressing piracy. Accordingly, the proposal that an international criminal court for piracy be established is a meritorious one. Such a court would ensure the uniform application of international law. Importantly, the transfer of pirates by apprehending states to the court could in no way be said to breach the refouler ban under UNCAT. Thus a specialised international piracy court is a superior option to the current practice of handing pirates to Kenya for prosecution pursuant to various bilateral agreements.

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<sup>266</sup> Patrick Robinson, 'The Missing Crimes' in Antonio Cassese, Paola Gaeta and John R.W.D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press, 2002) 497.

<sup>267</sup> William A. Schabas, *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed (Cambridge University Press, 2007) 88-89.

## FINAL CONCLUSION

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Piracy is an ancient but still relevant crime. Throughout history pirates have threatened commercial interests and state security. This is recognised in the development of customary international law governing piracy and its later codification in UNCHS and UNCLOS as described in chapter one. As a treaty based offence, piracy is subject to typical difficulties of interpretation and application. However, the lawlessness at sea currently perpetuated by Somali pirates has prompted a major rejuvenation of international piracy laws. Specifically, the promulgation of various UNSC resolutions throughout 2008 and the creation of the Djibouti Code of Conduct has circumvented restraints imposed by UNCLOS on enforcement capability. These novel responses to piracy are to be commended as preferable to the amendment of UNCLOS so as to expand the definition of piracy and enforcement powers contained in Articles 100-107. As discussed in chapter two, amending UNCLOS is neither practical nor consistent with the specific historical nature of the offence.

While the international naval coalition is now better able to apprehend pirates in the high seas and territorial waters, the subsequent action of handing pirates to Kenya for prosecution is unsatisfactory. Given the documented human rights abuses and ill treatment of criminal suspects and prisoners, handing pirates to Kenya for prosecution may be in breach of UNCAT. Even if Kenya's express undertaking to comply with applicable human rights standards in its treatment of pirates can be said to satisfy UNCAT, the deficiencies in the Kenyan justice system undermine the credibility of the naval coalition in handing pirates to Kenya to face trial. This, coupled with the lack of uniformity in prosecution of pirates amongst naval coalition members not party to bilateral agreements with Kenya, justifies the establishment of a specialised international piracy court. The creation of such a court is the most logical next step in the development of international law in this area. Although what amounts to 'piracy' at international law is the product of history, how the world responds to piracy in the modern age need not be similarly confined. Innovative measures ought to be further encouraged.

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## APPENDIX 1

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### 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, ARTICLES 100-107:

#### **Article 100**

##### *Duty to cooperate in the repression of piracy*

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

#### **Article 101**

##### *Definition of piracy*

Piracy consists of any of the following acts:

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

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

(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).

#### **Article 102**

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

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

#### **Article 103**

##### *Definition of a pirate ship or aircraft*

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.



#### **Article104**

##### *Retention or loss of the nationality of a pirate ship or aircraft*

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

#### **Article105**

##### *Seizure of a pirate ship or aircraft*

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

#### **Article106**

##### *Liability for seizure without adequate grounds*

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

#### **Article107**

##### *Ships and aircraft which are entitled to seize on account of piracy*

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

## APPENDIX 2

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### EXTRACTS FROM UNITED NATIONS SECURITY COUNCIL RESOLUTIONS:

#### **United Nations Security Council Resolution 1816 (2008)**

7. *Decides* that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

(a) Enter the territorial water of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;

11. *Calls upon* all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution;

#### **United Nations Security Council Resolution 1846 (2008)**

10. *Decides* that for a period of twelve months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

(a) Enter the territorial water of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;

14. *Calls upon* all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution;

### **United Nations Security Council Resolution 1851 (2008)**

3. *Invites* all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“shipriders”) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA convention;

6. In response to the letter from the TFG of 9 December 2008, *encourages* Member States to continue to cooperate with the TFG in the fight against piracy and armed robbery at sea, *notes* the primary role of the TFG in rooting out piracy and armed robbery at sea, and *decides* that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law;

## APPENDIX 3

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### PROVISIONS ON THE CONDITIONS OF TRANSFER OF SUSPECTED PIRATES AND SEIZED PROPERTY FROM THE EU-LED NAVAL FORCE TO THE REPUBLIC OF KENYA (2009):

#### 1. Definitions

For the purposes of this Exchange of Letters:

- (a) "European Union-led Naval Force (EUNAVFOR)" means EU military headquarters and national contingents contributing to the EU operation "Atalanta", their ships, aircrafts and assets;
- (b) "Operation" means the preparation, establishment, execution and support of the military mission established by EU Council Joint Action 2008/851/CFSP and/or its successors;
- (c) "EU Operation Commander" means the Commander of the Operation;
- (d) "EU Force Commander" means the EU Commander in the area of operations as defined within Article 1(2) of EU Council Joint Action 2008/851/CFSP;
- (e) "national contingents" means units and ships belonging to the Member States of the European Union and to other States participating in the operation;
- (f) "Sending State" means a State providing a national contingent for EUNAVFOR.
- (g) "Piracy" means piracy as defined in Article 101 of UNCLOS;
- (h) "Transferred person" means any person suspected of intending to commit, committing, or having committed, acts of piracy transferred by EUNAVFOR to Kenya under this Exchange of Letters.

#### 2. General principles

- (a) Kenya will accept, upon the request of EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy and associated seized property by EUNAVFOR and will submit such persons and property to its competent authorities for the purpose of investigation and prosecution.
- (b) EUNAVFOR will, when acting under this Exchange of Letters, transfer persons or property only to competent Kenyan law enforcement authorities.
- (c) The Signatories confirm that they will treat persons transferred under this Exchange of Letters, both prior to and following transfer, humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial.

#### 3. Treatment, prosecution and trial of transferred persons

- (a) Any transferred person will be treated humanely and will not be subjected to torture or cruel, inhuman or degrading treatment or punishment, will receive adequate accommodation and nourishment, access to medical treatment and will be able to carry out religious observance.

- (b) Any transferred person will be brought promptly before a judge or other officer authorised by law to exercise judicial power, who will decide without delay on the lawfulness of his detention and will order his release if the detention is not lawful.
- (c) Any transferred person will be entitled to trial within a reasonable time or to release.
- (d) In the determination of any criminal charge against him, any transferred person will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- (e) Any transferred person charged with a criminal offence will be presumed innocent until proved guilty according to law.
- (f) In the determination of any criminal charge against him, every transferred person will be entitled to the following minimum guarantees, in full equality:
  - (1) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (2) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choice;
  - (3) to be tried without undue delay;
  - (4) to be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (5) to examine, or have examined, all evidence against him, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (6) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (7) not to be compelled to testify against himself or to confess guilt.
- (g) Any transferred person convicted of a crime will be permitted to have the right to his conviction and sentence reviewed by or appealed to a higher tribunal in accordance with the law of Kenya.
- (h) Kenya will not transfer any transferred person to any other State for the purposes of investigation or prosecution without prior written consent from EUNAVFOR.

#### **4. Death penalty**

No transferred person will be liable to suffer the death sentence. Kenya will, in accordance with the applicable laws, take steps to ensure that any death sentence is commuted to a sentence of imprisonment.

#### **5. Records and notifications**

- (a) Any transfer will be the subject of an appropriate document signed by a representative of EUNAVFOR and a representative of the competent Kenyan law enforcement authorities.
- (b) EUNAVFOR will provide detention records to Kenya with regard to any transferred person. These records will include, so far as possible, the physical

condition of the transferred person while in detention, the time of transfer to Kenyan authorities, the reason for his detention, the time and place of the commencement of his detention, and any decisions taken with regard to his detention.

- (c) Kenya will be responsible for keeping an accurate account of all transferred persons, including, but not limited to, keeping records of any seized property, the persons physical condition, the location of their places of detention, any charges against him and any significant decisions taken in the course of his prosecution and trial.
- (d) These records will be available to representatives of the EU and EUNAVFOR upon request in writing to the Kenyan Ministry of Foreign Affairs.
- (e) In addition, Kenya will notify EUNAVFOR of the place of detention of any person transferred under this Exchange of Letters, any deterioration of his physical condition and of any allegations of alleged improper treatment. Representatives of the EU and EUNAVFOR will have access to any persons transferred under this Exchange of Letters as long as such persons are in custody and will be entitled to question them.
- (f) National and international humanitarian agencies will, at their request, be allowed to visit persons transferred under this Exchange of Letters.
- (g) For the purposes of ensuring that EUNAVFOR is able to provide timely assistance to Kenya with attendance of witnesses from EUNAVFOR and the provision of relevant evidence, Kenya will notify EUNAVFOR of its intention to initiate criminal trial proceedings against any transferred person and the timetable for provision of evidence, and the hearing of evidence.

## **6. EUNAVFOR Assistance**

- (a) EUNAVFOR, within its means and capabilities, will provide all assistance to Kenya with a view to the investigation and prosecution of transferred persons.
- (b) In particular, EUNAVFOR will:
  - (1) hand over detention records drawn up pursuant to Paragraph 5(b) of this Exchange of Letters;
  - (2) process any evidence in accordance with the requirements of the Kenyan competent authorities as agreed in the implementing arrangements described in Paragraph 9;
  - (3) endeavour to produce statements of witness or affidavits by EUNAVFOR personnel involved in any incident in relation to which persons have been transferred under this Exchange of Letters;
  - (4) hand over all relevant seized property in the possession of EUNAVFOR.

## **7. Relationship to other rights of transferred persons.**

Nothing in this Exchange of Letters is intended to derogate, or may be construed as derogating, from any rights that a transferred person may have under applicable domestic or international law.

## **8. Liaison and disputes**

- (a) All issues arising in connection with the application of these provisions will be

examined jointly by Kenyan and EU competent authorities.

- (b) Failing any prior settlement, disputes concerning the interpretation or application of these provisions will be settled exclusively by diplomatic means between Kenyan and EU representatives.

## **9. Implementing arrangements**

- (a) For the purposes of the application of these provisions, operational, administrative and technical matters may be the subject of implementing arrangements to be approved between competent Kenyan authorities on the one hand and the competent EU authorities, as well as the competent authorities of the Sending States on the other hand.
- (b) Implementing arrangements may cover, inter alia:
  - (1) the identification of competent law enforcement authorities of Kenya to whom EUNAVFOR may transfer persons;
  - (2) the detention facilities where transferred persons will be held;
  - (3) the handling of documents, including those related to the gathering of evidence, which will be handed over to the competent law enforcement authorities of Kenya upon transfer of a person;
  - (4) points of contact for notifications;
  - (5) forms to be used for transfers;
  - (6) provision of technical support, expertise, training and other assistance upon request of Kenya in order to achieve the objectives of this Exchange of Letters.

## APPENDIX 4

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### OVERLEAF IN PDF FORMAT:

- **2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)**
- **2009 Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct)**