

## What Piracy did for Good Order at Sea: A Perspective on Lessons Learned

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### Abstract

The re-emergence of piracy in the late 20<sup>th</sup> century, especially off the coast of Somalia, highlighted a number of threats to good order at sea all of which can be traced back to the perceived inability of states to exercise jurisdiction. Most states follow the permissive approach to jurisdiction, limiting the exercise of jurisdiction to specific principles such as territoriality, nationality, passive personality, protection of the state and universality. Consequently the exercise of state jurisdiction beyond territorial limits will only take place in accordance with the rules of international law as contained in the United Nations Law of the Sea Convention (UNCLOS). Starting with the legal framework provided by UNCLOS as supplemented by the United Nations Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and United Nations Security Council Resolution 2077 (2012), an investigation into the challenges surrounding piracy can serve to extrapolate the challenges facing states in general in the facilitation of good order at sea. Although this paper argues the existence of adequate international laws and jurisdiction, remaining challenges for the effective control of piracy include inadequate domestic legislation together with a lack of capacity to facilitate custody and speedy prosecution after capture, the perceived reluctance of states to prosecute suspects, creating a 'catch and release' policy, as well as the fear of asylum. These challenges are exacerbated by the application of international human rights law possibly influencing the effectiveness of multi-force operations. Possible solutions may include the use of ship-riders to overcome evidential problems, co-operation agreements with countries in the affected regions to prosecute offenders, the institution of anti-piracy courts and increasing regional co-operation. With all the focus placed on anti-piracy operations the question remains: What is the operational reality *viz-a-viz* the legal reality? How can we use the lessons learned in regards to piracy in other maritime crimes? Using piracy as a test case this paper contends that a unitary solution should be pursued for all crimes committed at sea.

### Introduction

Good order at sea not only relates to safe and secure shipping, but also the ecologically sustainable development of marine resources in accordance with international law.<sup>1</sup> Bad order as highlighted by the re-emergence of piracy in the late 20<sup>th</sup> century, especially off the coast of Somalia, highlighted a number of threats to good order at sea whether related to the sea as a resource, medium of transportation, an area of sovereignty or as natural environment subject to overuse and pollution.<sup>2</sup> It appears that all these threats relate back to one common denominator: the inability or perceived inability of states to exercise jurisdiction.

Jurisdiction can be defined as "the competence of a state to exercise its governmental functions by legislation, executive and enforcement action, and judicial decrees over persons and property."<sup>3</sup> While civil jurisdiction being controlled by the rules of private international law seldom leads to protest, the exercising of criminal jurisdiction often results in public

<sup>1</sup> Bateman, S., Ho, J. & Chan, J. 2009. 'Good Order at Sea in South Asia', *RSIS Policy paper*, Singapore: S. Rajatman School of International Studies, at 6.

<sup>2</sup> Till, G. 2013. *Seapower A guide for the twenty-first century*, 3<sup>rd</sup> edition, London: Routledge, at 284.

<sup>3</sup> Dugard, J. 2011. *International Law A South African Perspective*, 4<sup>th</sup> edition, Landsdowne: Juta, at 146.

debate and protest by states claiming to have jurisdiction. Consequently most of the international law rules on jurisdiction relate to criminal offences.<sup>4</sup>

There are two approaches with regard to the question of jurisdiction.<sup>5</sup> In terms of the first approach States cannot exercise their jurisdiction in another State's territory unless there is a permissive rule of international custom or convention.<sup>6</sup> In terms of the second approach, States have a wide discretion to extend their jurisdiction to persons, property and acts outside their territory unless if there is a prohibitive rule.<sup>7</sup> Most states, seeking to limit the exercise of extraterritorial jurisdiction in criminal matters, follow the first approach relying on permissive principles such as territoriality, nationality, passive personality, protection of the state and universality.<sup>8</sup>

From these principles it is concluded that the exercise of state power beyond territorial limits is exceptional. Therefore the extraterritorial exercise of state jurisdiction over maritime areas and vessels at sea requires explanation.

### International law framework

Except where expressly provided for in international treaties, good order on the high seas<sup>9</sup> depends exclusively on the laws of the flag state.<sup>10</sup> Warships and ships owned or operated by governments only for governmental or non-commercial service, enjoy "complete immunity from the jurisdiction of any state other than the flag state".<sup>11</sup> Other vessels are limited by a number of exceptions in their freedom of the high seas including war ships' right of visitation and inspection when there is a reasonable suspicion of piracy, slave trading or unauthorised broadcasting.<sup>12</sup>

According to Shaw "the most formidable of the exceptions to the exclusive jurisdiction of the flag state and to the principle of the freedom of the high seas is the concept of piracy."<sup>13</sup>

UNCLOS defines piracy as:

- (a) any illegal acts of violence or detention, or any act of depredation committed for private ends by the crew or 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;

<sup>4</sup> Dugard at 147; Malanczuk, P. 1997. *Akehurst's Modern Introduction to International Law*, 6<sup>th</sup> edition, London: Routledge, at 110.

<sup>5</sup> The case of *S.S. Lotus, France v Turkey*, 1927 PCIJ Reports, Series A no 10.

<sup>6</sup> The case of *S.S. Lotus, France v Turkey*, 1927 PCIJ Reports, Series A no 10, at 18 para 45. Also see *Kaunda and Others v President of the Republic of South Africa 2005 (4) SA 235 (CC)* at para 38.

<sup>7</sup> The case of *S.S. Lotus, France v Turkey*, 1927 PCIJ Reports, Series A no 10, at 18 para 46.

<sup>8</sup> Dugard at 150 states that there should be "a direct and substantial connection between the state exercising jurisdiction and the matter in question." Ryngaert, C. 2008. *Jurisdiction in International Law*, Oxford: Oxford University Press, at 21 agrees with Dugard that in practice states use the restrictive approach.

<sup>9</sup> UNCLOS, Article 89 describes the high seas as those parts of the sea not included in the exclusive economic zone or in the territorial sea or in the internal waters of a state.

<sup>10</sup> UNCLOS, Article 92; *High Seas Convention*, Article 6; Shaw, M. 2003. *International Law*, 5<sup>th</sup> edition, Cambridge: Cambridge University Press, at 545 and Malanczuk at 272.

<sup>11</sup> UNCLOS, Articles 95 and 96; *High Seas Convention*, Articles 8 and 9.

<sup>12</sup> UNCLOS, Article 110.

<sup>13</sup> Shaw at 548.

- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>14</sup>

An act must thus satisfy five criteria to constitute piracy: it must be committed on the high seas, be of a violent nature, include at least two vessels, the aggressor ship must be a private ship<sup>15</sup> and the act must be committed solely for private aims.<sup>16</sup> The UNCLOS definition has been generally accepted as a reflection of pre-existing customary international law and it is recognized as the most authoritative codification of piracy law.<sup>17</sup>

UNCLOS determines that all States have an obligation to cooperate to the fullest possible extent in the repression of piracy<sup>18</sup> and have universal jurisdiction<sup>19</sup> on the high seas to seize pirate ships and 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.<sup>20</sup> However there are constraints on the exercising of these enforcement rights.

A seizure on account of piracy may only be carried out by a warship or if another vessel is used it must be clearly marked and identifiable as being on authorised government service.<sup>21</sup> These seizures must comply with certain minimum safeguards. Guilfoyle identified at least three sets of duties that the boarding state should comply with from state practice as demonstrated by various regional and international agreements.<sup>22</sup> Firstly account should be taken of the need not to endanger the safety of life at sea, the safety and security of the ship and its cargo, and not to prejudice any commercial or legal interests of the flag state. The second set of duties that relates closely to the commercial interests of the flag state provides for reasonable steps to avoid undue detainment or delay. The third set of duties requires boarding states to conduct boarding and search in accordance with international law, to treat all persons aboard in accordance with their basic human dignity and international human rights law, within available means afford fair treatment to anyone against whom proceedings

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<sup>14</sup> UNCLOS, Article 101.

<sup>15</sup> Piracy cannot be committed by a state's warship or government ship except where the crew mutinied and took control of the ship so that it no longer falls under the effective control of the state that owns it.

<sup>16</sup> Sterio, M. 2009. 'Fighting Piracy in Somalia (and elsewhere): Why more is needed', *Fordham International Law Journal*, Vol 33, at 385. For a further discussion of the criteria also see Guilfoyle, D. 2009. *Shipping Interdiction and the Law of the Sea*, New York: Cambridge University Press, at 27 as well as Middelburg, A. 2011. *Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast*, Nijmegen: Wolf Legal Publishers, at 6 - 7.

<sup>17</sup> Middelburg at 6. Note the concern raised by Geiss, R. & Petrig, A. 2011 *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, Oxford: Oxford University Press, at 140-142 stating that article 101 UNCLOS is merely a definition of piracy and does not create a criminal norm since it does not describe an offence. It states what acts constitute piracy but does not determine that an individual is actually prohibited from engaging in piracy, not does it attach a punishment to the act. The same argument is raised in terms of the definition of piracy in terms of article 15 of the SUA Convention. They argue that there is no basis for prosecuting piracy as an international crime due to the *nulla poena sine lege* principle and therefore the requirement of domestic prosecution is required.

<sup>18</sup> UNCLOS, Article 100.

<sup>19</sup> Universal jurisdiction may be exercised by any State to prosecute individuals who have committed certain core crimes against international law, even if the State has no link to the crime in question. See Rynjaert at 106.

<sup>20</sup> UNCLOS, Article 105. According to UNCLOS, Article 58(2) these provisions and other pertinent rules of international law also apply to the EEZ in so far as they are not incompatible with the provisions of UNCLOS relating to the EEZ.

<sup>21</sup> UNCLOS, Article 107.

<sup>22</sup> Guilfoyle 2009 at 266 - 267.

are commenced, ensure that any measures taken are environmentally sound and to ensure that the ship's master is advised of the intention to board and afforded the earliest opportunity to contact the ship's owner and the flag state.<sup>23</sup>

Since UNCLOS provides the basis for jurisdiction as well as the necessary enforcement mechanisms<sup>24</sup> one would expect that there should not be any serious challenges in this regard. However reality reflects the opposite. Starting with the definition, an investigation into the challenges surrounding piracy also provides the opportunity to extrapolate the challenges facing states in general in the facilitation of good order at sea.

It seems that the definition of piracy is rather narrow. Although states have universal jurisdiction over piracy, the offence is limited to the high seas and it must be committed by one ship on another ship.<sup>25</sup> In reality a large number of ships are also captured and their crews held for ransom in territorial waters, amounting at most to armed robbery subject to the jurisdiction of the territorial state.<sup>26</sup> In the case of Somalia the Security Council broadened the scope of the definition by continuous reference to "piracy and armed robbery at sea".<sup>27</sup> Although the concept of armed robbery is not defined in the Security Council Resolutions it seems to carry the meaning routinely used by the International Maritime Organisation (IMO) being all acts of violence, excluding piracy, committed for private ends against a ship or persons or property on board such ship within territorial waters.<sup>28</sup> It is thus similar to piracy with the exception of the place and the exclusion of the two ships requirement. The Security Council however reiterated that the resolution only applies to Somalia and shall not be considered as establishing customary international law.<sup>29</sup>

Piracy must be committed for private ends. Attacks on ships and their crew for political motives are not piracy under international law. However these attacks are still unlawful under the United Nations Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation. (SUA Convention)<sup>30</sup> De Bont declares that to the best of his knowledge Somali pirates never attempted to use the private ends provision in argument

<sup>23</sup> Klein, N. 2007, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation', *Denver Journal of International Law and Policy*, Vol 35, at 287 discusses the constraints on the right of visit.

<sup>24</sup> Bateman, S. 2011. 'Solving the "Wicked Problems" of Maritime Security: Are Regional Forums up to the Task?', *Contemporary South East Asia*, Vol 33(1), at p.4.

<sup>25</sup> The so-called two ships requirement.

<sup>26</sup> IMO, 2012 'Reports on Acts of Piracy and Armed Robbery against Ships', *Annual Report*, MSC.4/Circ., at 180, para 7 of 1 March 2012 reports that "more than 60 per cent of the attacks worldwide were reported to have occurred or to have been attempted in international waters, which is largely due to the continuous activity of Somali pirates off the coast of Somalia and in the Indian Ocean and the Arabian Sea. However, for other regions the majority of incidents occurred in the territorial waters of the coastal States concerned while the ships were at anchor or berthed."

<sup>27</sup> Resolution 2077 of 21 November 2012, preamble as well as paras 1, 10.

<sup>28</sup> Treves, T. 2009. 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', *The European Journal of International Law*, Vol 20(2), at 403. See *IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against ships*, Resolution A 1025(26), annex para 2.2 adopted on 2 December 2009. <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/A.1025.pdf> accessed on 31 May 2013.

<sup>29</sup> United Nations Security Council Resolution 2077 adopted on 21 November 2012, preamble as well as para 13. Accessed at <http://www.securitycouncilreport.org/un-document/somalia> on 29 May 2013.

<sup>30</sup> Passman, M.H., 2008. 'Protections Afforded to Captured Pirates under the Law of War and International Law', *Tulane Maritime Law Journal*, Vol 33(1), at 12; *United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* of 10 March 1988, entered into force on 1 March 1992, signed by 150 parties at 30 April 2013. For the text of the Convention see [www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf](http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf) accessed on 3 June 2013. For a list of signatories see [www.imo.org/About/Conventions/StatusOfConventions/](http://www.imo.org/About/Conventions/StatusOfConventions/) accessed on 3 June 2013.

against a piracy charge.<sup>31</sup> Guilfoyle reports that Somali Pirates even declare that they operate for private ends, the reason being that some ransoms cannot be paid under anti-terrorism regulations.<sup>32</sup>

Another shortfall is the so called two ships requirement, which requires pirates to use a ship to attack another ship: thus an aggressor ship and a victim ship. An act committed by a crew member or passenger aboard a ship and not against another ship is not piracy.<sup>33</sup> When members of a Palestine Liberation Organization faction took control of the Italian cruise ship Achille Lauro in 1985, the act did not constitute piracy because the aggressors had boarded the ship in its last port, thus, no aggressor ship.<sup>34</sup>

The SUA Convention, that has still not been signed by Somalia, provides for a wide range of unlawful acts that might endanger the safety of ships as well as their crews, including the seizure and taking control of a ship by force or intimidation.<sup>35</sup> It fills the geographical gap left by the UNCLOS definition of piracy because it applies to all maritime areas including territorial waters. It also fills the gap left by the private ends requirement in that it applies to politically motivated attacks. By providing for internal seizure the SUA Convention also solves the two ships requirement. Nevertheless it should be kept in mind that the SUA Convention was rather meant to address international terrorism.<sup>36</sup> In fact the SUA Convention never uses the word piracy.<sup>37</sup> Being treaty law it does not have the same potential wide application than UNCLOS. It does not create universal jurisdiction and its application is limited to those States that signed the SUA Convention.

Except for the various maritime zones jurisdiction is exercised within a certain geographical area. Although more prevalent along the African West coast there are also conflicting sovereignty claims along the East African coast. In the case of Kenya and Somalia, Kenya claims that the maritime border should run directly east parallel to the line of latitude while Somalia claims that it should run perpendicular to the coastline.<sup>38</sup> These claims that primarily relate to natural resources may, if left unattended, impact negatively on co-operation and the exercise of jurisdiction to promote good order at sea.

Resolution 2077 (2012), recalls almost all previous resolutions on piracy and consolidates them into one document.<sup>39</sup> The Resolution reaffirms the international law as reflected in UNCLOS as the legal framework for the combating of piracy and armed robbery at sea, as well as other ocean activities.<sup>40</sup> The Security Council expresses its concerns about the

<sup>31</sup> De Bont, S. 2010. 'Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective', *One Earth Foundation Working Paper*, at 8-9.

<sup>32</sup> Guilfoyle, D., 2010. 'Counter-Piracy Law Enforcement and Human Rights', *International and Comparative Law Quarterly*, Vol. 59, at 143.

<sup>33</sup> Passman at 13.

<sup>34</sup> Sterio at 386-387. The Achille Lauro also serves as example of the private ends requirement.

<sup>35</sup> *SUA Convention*, Article 3.

<sup>36</sup> Middelburg at 9-11 discusses the SUA definition.

<sup>37</sup> The principles in UNCLOS form part of common law while the SUA Convention is only enforceable if adopted by a State party.

<sup>38</sup> Mutambo, A., Mungai, C. & Gisesa, N. *et al*, 2012. Simmering border disputes in battle to control oil, gas. *The East African*, accessed online at <http://www.theeastafrikan.co.ke/news/Oil-discoveries-fuel-fresh-border-disputes/-/2558/1487086/-/view/printVersion/-/sau98nz/-/index.html> on 6 May 2013. Even with regard to the baselines used for measurement of the breadth of territorial seas there are sometimes disputes about whether to use the low water line along the coast or straight baselines – see in this regards Bateman at 4.

<sup>39</sup> United Nations Security Council Resolution 2077 adopted on 21 November 2012 recalls previous UN Security Council Resolutions 1814(2008), 1816 (2008), 1844 (2008), 1846 (2008), 1851 (2008), 1897 (2008), 1918 (2010), 1950 (2010), 1976(2011), 2015 (2011) and 2020 (2011).

<sup>40</sup> Resolution 2077 (2012) preamble. The inclusion of a call to investigate other offences such as illegal fishing and toxic waste dumping might indicate a positive shift towards a post-piracy situation in

reported involvement of children in piracy off the coast of Somalia, the release of suspects without facing justice, the continuing limited capacity of states and domestic legislation to facilitate custody and prosecution of suspected pirates after capture, the inhumane conditions hostages face in captivity and the effect of escalating ransom payments and the lack of enforcement of the arms embargo<sup>41</sup> on the growth of piracy off the coast of Somalia.<sup>42</sup> Recognizing instability in Somalia as one of the underlying causes of piracy and armed robbery off the coast of Somalia,<sup>43</sup> the Security Council acknowledges the contribution of various non-governmental organisations, urges further co-operation among both state and non-state actors and adopts a number of decisions regarding the prosecution of suspected pirates. It would seem throughout this resolution that there is in fact a marked increase in emphasis on the prosecution of suspected pirates, not only their apprehension. However, reaffirming UNCLOS as the basis of the applicable international law the resolution does not do enough to facilitate a pro-prosecution environment. UNCLOS still only provides a right to prosecute, not a duty to do so.<sup>44</sup>

The Resolution reiterates the need to bring to justice not only suspected pirates but also key figures of criminal networks involved in the planning, organising, facilitation and financing or profiting from attacks highlighting that there are more role players involved than only the ones operating at sea.<sup>45</sup>

The international law framework created by both UNCLOS and the SUA Convention may suggest a sufficient address of jurisdiction over piracy as an international crime, but the challenge lies on a practical level in the execution of substantive international criminal law.<sup>46</sup> The manner in which piracy should be suppressed is not addressed. UNCLOS makes no specific provision for co-operation between States on criminal matters. It does however lay a foundation for allowing such co-operation since it sets out the jurisdictional rights and duties of states within their respective maritime zones and require states to take action against a number of specific offences.<sup>47</sup>

To solve the gaps left by UNCLOS, Cheuh proposes the effective application of the number of international treaties in existence that addresses crimes relating to piracy.<sup>48</sup> She also favours a wide interpretation of those treaties that could be classified as anti-terrorism treaties to include other maritime crimes, since they were ultimately adopted to address specific crimes, albeit crimes often committed by terrorists.<sup>49</sup> In certain instances a wide interpretation also carries the advantage of mandatory rather than discretionary interstate

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addressing other issues negatively influencing good order at sea. Although these offences mentioned in the resolution remain piracy-related it may be argued that it possibly opens the door in the Security Council addressing other good order at sea concerns.

<sup>41</sup> Established by Resolution 733 (1002).

<sup>42</sup> Resolution 2077 (2012) preamble, as well as para 8.

<sup>43</sup> Resolution 2077(2012).

<sup>44</sup> Guilfoyle 2010 at 144. UNCLOS only requires co-operation but do not have any mechanisms to compel such co-operation.

<sup>45</sup> Resolution 2077 (2012) preamble, paras 5, 9, 16, 24

<sup>46</sup> Guilfoyle 2009 at 23.

<sup>47</sup> Cheuh W. L. 2013. 'Extradition and Mutual Legal Assistance in the Prosecution of Serious Maritime Crimes: A Comparative and Critical Analysis of Applicable Legal Framework', *Working Paper*, Hague Centre for Studies and Research at 3 and 21.

<sup>48</sup> Cheuh at 8-9, see also Geiss & Petrig at 187 referring to these treaties as the "extradite or prosecute" treaties. In terms of these treaties a State has a free choice to extradite an offender or submit the case without delay to the relevant authorities for prosecution.

<sup>49</sup> Cheuh at 9. Reference is made *inter alia*, to the SUA Convention and the 1979 International Convention against the Taking of Hostages.

co-operation.<sup>50</sup> On a second level Geiss and Petrig emphasize the need for regional agreements to meet region specific needs.<sup>51</sup> On a third level the lacunas created by international law must be filled by domestic law. The existence of universal jurisdiction alone is not enough since it is limited to those instances where the crime of piracy is committed in the high seas.<sup>52</sup> It does not provide for acts of piracy committed in territorial waters and even where it was committed on the high seas, there is still a need for domestic prosecution of apprehended pirates making it clear that even those countries that signed the SUA Convention require adequate domestic legislation as well as the capacity to facilitate custody and prosecution of suspected pirates after capture.<sup>53</sup>

## Human rights

The successful domestic prosecution of piracy depends on the effective application of international human rights law, including concerns regarding the use of force when conducting these operations including the arrest, detention and subsequent fair trial rights of the pirates as well as their actual prosecution and punishment.<sup>54</sup>

## Use of force

Although the vessels deployed in combating piracy mostly constitute of the armed forces of the various countries, it must be kept in mind that anti-piracy co-operation and operations are essentially law enforcement operations. Therefore it is not a mandate for the armed forces to use targeted lethal force as would be the case in military operations governed by International Humanitarian Law.<sup>55</sup> The use of reasonable force requires an alignment of domestic law with international human rights law.<sup>56</sup> The rules as it apply to anti-piracy operations, or all maritime operations for that matter, has not been adequately developed. Guilfoyle<sup>57</sup> suggests that the use of force must be limited to what is “necessary and proportionate” under the circumstances and where a ship is stopped to be boarded warning

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<sup>50</sup> Cheuh at 10 refers, as an example, in terms of certain agreements states are obliged to either extradite suspect or prosecute them within their own domestic legal system, thereby compelling states to ensure that the required domestic legislation is in place in order to comply with their treaty obligations.

<sup>51</sup> Geiss & Petrig at 53. Guilfoyle 2010 at 145 argues that regional co-operation is a political issue and not a legal issue. The preamble to United Nations Security Council Resolution 2077 refers to regional co-operation no less than six times. It is further referred to in paras 4,10,12,14,16,19 and 33.

<sup>52</sup> Guilfoyle 2009 at 42; *UNCLOS*, Article 101(a). Piracy as a universal crime is therefore more limited than other international crimes over which universal jurisdiction exist such as war crimes and genocide.

<sup>53</sup> Resolution 2077 (2012) preamble. Andersen, E., Brockman-Hawe, B. & Goff, P. ‘Suppressing Piracy: Exploring the Options in International Law’, *One Earth Foundation Workshop Report*; in De Bont at 11; Guilfoyle 2010 at 142.

<sup>54</sup> Keles B. 2010. ‘Piracy – a crime and a challenge for democracies’, *Report: Parliamentary Assembly Document no 12193* at 3. Due to limited space this paper focuses only on those rights critical to a successful prosecution. Papastravides, E. *Human rights law to interdiction and arrest at sea*, Unpublished Conference Proceedings, UNISA Maritime to wit the right to life, prohibition of torture, degrading and inhuman treatment, prohibition of non-refoulement, the right to liberty and security, promptness, the right to a fair trial, the right to effective remedy, the right to property (effective distribution of evidence).

<sup>54</sup> Guilfoyle 2010 at 148.

Piracy Conference on 4 September 2013 listed a full spectrum of human rights to wit the right to life, prohibition of torture, degrading and inhuman treatment, prohibition of non-refoulement, the right to liberty and security, promptness, the right to a fair trial, the right to effective remedy, the right to property (effective distribution of evidence).

<sup>55</sup> Guilfoyle 2010 at 148.

<sup>56</sup> Guilfoyle 2010 at 148.

<sup>57</sup> Guilfoyle 2009 at 66.

shots may be used where required.<sup>58</sup> The use of force will only be regarded a justified when used as a last resort.<sup>59</sup> The use of military vessels to render a ship unseaworthy by immobilization is therefore only acceptable as a last resort in terms of UNCLOS.<sup>60</sup> SUA limits the use of force to the minimum that is necessary and reasonable under the circumstances.<sup>61</sup> The principle of minimum force applies throughout, from the moment of stopping a vessel for boarding, during the boarding itself as well as during the period spent on board.<sup>62</sup>

### Arrest and fair trial rights

Piracy, unlike other maritime crimes such as human trafficking and drug prevention, allows a state to unilaterally search a ship if it is suspected of piracy and then subsequently arrest the perpetrators and seize the vessel. Other maritime crimes generally require consent from the flag state before its vessels may be boarded and seized.<sup>63</sup> Ships on the high seas are generally only subject to the jurisdiction of their own flag's state. Law enforcement is therefore subject to consent by the flag state, or strictly governed by treaty law.<sup>64</sup> Piracy is the exception – it is the only crime, apart from slavery and unauthorised broadcasting to a limited extent, which grants UNCLOS parties general enforcement jurisdiction, allowing for the arrest and detention of suspected pirates, irrespective of the flag state status of the boarded vessel.<sup>65</sup>

In the event of a reasonable suspicion of piracy, a warship may verify the flag of the suspected ship, which verification may include visiting the suspect ship to inspect its documentation and if necessary to conduct further examination on board.<sup>66</sup> In the Somali region the determination of when a ship is reasonably suspected of piracy is problematic due to the practice of using fishing vessels for piracy and *vice versa*. This may be exacerbated by the use of merchant vessels as mother ships to launch piracy attacks. The prevalent nature of piracy in this region renders a large number of ships suspect.<sup>67</sup> Once the suspicion is confirmed the enforcement measures which include arrest of the suspects and seizure of the ship and the property on board come into operation.<sup>68</sup>

### Prosecution and punishment

There are a number of challenges in the successful prosecution of pirates.<sup>69</sup> Although the treaties mentioned all indicate a positive duty to suppress piracy, none of these conventions

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<sup>58</sup> See also Geiss & Petrig at 69 and 97 for a short discussion on a number of cases brought before the International Tribunal for the Law of the Sea where the use of force to stop and seize a vessel was authorised.

<sup>59</sup> Geiss & Petrig at 69.

<sup>60</sup> Geiss & Petrig at 69.

<sup>61</sup> SUA Convention, Article 8*bis*; Geiss & Petrig at 97. Guilfoyle 2009 also refers to various drug trafficking agreements limiting the use of force to the minimum reasonable necessary under the circumstances.

<sup>62</sup> Geiss & Petrig at 98.

<sup>63</sup> Guilfoyle 2009 at 5.

<sup>64</sup> Guilfoyle 2009 at 19.

<sup>65</sup> UNCLOS, Article 105.

<sup>66</sup> UNCLOS, Article 110(2).

<sup>67</sup> Geiss & Petrig at 56.

<sup>68</sup> UNCLOS, Article 105; Geiss & Petrig at 56. Where the suspicion is not verified UNCLOS, Article 110(3) provides that the boarded ship is entitled to compensation for any damages or losses incurred due to the boarding.

<sup>69</sup> Keles Document no 12193; Dutton, Y. 2010. Bringing Pirates to Justice: A case for including piracy within the jurisdiction of the International Criminal Court, *Chicago Journal of International Law*, 11(1) at 203.



actually compel States to in fact prosecute and punish suspected pirates.<sup>70</sup> The release of pirates without trial has been a matter of concern and it is estimated that in a six-month period in 2010 as many as 700 pirates were released after capture without trial.<sup>71</sup> International law determines that the responsibility for the prosecution of offenders within their territorial waters falls to the coastal state. In the case of piracy Somalia remains the exception. With the permission of the Somali government the Security Council has authorised the international community to pursue and prosecute pirates within Somali territorial waters. Together with the mentioned lack of domestic legislation, the multiple number of countries that co-participate in anti-piracy operations can make it difficult to determine which country's rules are to be applied in the prosecution of the pirates, stressing the need for inter-State agreements regarding the transfer and prosecution of suspected pirates.<sup>72</sup>

To date the international community mainly concentrated on the development of co-operation in interdiction and seizure of ships leaving the handing over and prosecution of suspected pirates in the background.<sup>73</sup> Therefore there are currently no clear guidelines in the prosecution of piracy suspects. While no particular approach can be singled out, Middelburg identifies a number of options for prosecution<sup>74</sup> further indicating the indecisiveness within the international community in this regard. The possibilities include:

1. Prosecution on the basis of jurisdiction.
2. Prosecution in the International Criminal Court.
3. Prosecution in the flag state.
4. Prosecution in third countries.
5. Prosecution in an International Piracy Tribunal.

### **Prosecution on the basis of jurisdiction<sup>75</sup>**

According to this approach the appropriate prosecuting authority will be either the country in whose territory the suspect is captured or the country of his/her nationality.<sup>76</sup> This is not always the best solution. Somalia, as an example, has no effective government and judiciary, making the successful prosecution of pirates within its territory difficult. Even in regions where more formal governmental structures are in place, such as Puntland and Somaliland, the application of the law remains problematic.<sup>77</sup> Domestic legislation may be non-existent (as is the case in Somaliland), or it may be outdated or non-compliant with the

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<sup>70</sup> Guilfoyle 2009 at 30. Although international law generally does not obligate States to exercise their powers in terms of jurisdiction, specific treaties entered into by the States may require them to do so – see Cheuh at 2. A distinction should be made here between piracy and other maritime crimes. In terms of Articles 99, 100, 108 and 109 the duties of states to co-operate is expressed in a mandatory nature, which is not the case for piracy which only requires that states perform their duties “to the fullest possible extent.” *UNCLOS*, Article 99 also calls expressly for the punishment of those individuals involved in the slave trade but the provisions relating to piracy, drug-trafficking and illegal broadcasting do not carry the obligation to either criminalise or prosecute the offence.

<sup>71</sup> Geiss & Petrig at 30. The Security Council has also raised its concern regarding the “catch and release” policy followed in anti-piracy operations – see Resolution 1918 of April 2010 as an example.

<sup>72</sup> Keles at 3. These agreements should comply with international human rights documents.

<sup>73</sup> Cheuh at 2.

<sup>74</sup> Middelburg at 45.

<sup>75</sup> Although Middelburg refers to prosecution on the basis of “territorial” jurisdiction, she uses examples that refer both to territoriality and nationality.

<sup>76</sup> Middelburg at 47.

<sup>77</sup> Security Council 2012. *Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the Region*, 20 January 2012, S/2012/50.

provisions of UNCLOS.<sup>78</sup> Following a model of jurisdictional prosecution would also be impossible where the pirate's country of origin does not provide for the crime of piracy – one cannot be prosecuted for something that is not a crime in that jurisdiction.

Of greater concern is the risk of unfair trial and other human rights abuses that may occur in a lawless state. In terms of the various international treaties, such as the United Nations Convention against Torture (UNCAT), a person cannot be returned to a place where there are "substantial grounds for believing that he would be in danger of being subject to torture"<sup>79</sup> or in fact any other serious human rights violation. In spite of a lack of express legislation criminalising piracy, Puntland did prosecute a number of pirates. The United Nations (UN) have however pointed out that these prosecutions were faced with a number of concerns such as delays in trial, a lack of defence council, bribery and poor prison conditions,<sup>80</sup> all impacting negatively on the human rights of the suspects. Similar concerns have been raised regarding prosecutions in Somaliland. Although the UN is of the opinion that countries such as the Seychelles, Kenya and Mauritius conduct their trials in accordance with international standards, the standards within their prisons are of grave concern.<sup>81</sup>

Apart from these concerns many African countries are also involved in conflicts which in turn may prevent or hamper regional cooperation in the combating and prosecution of pirates.<sup>82</sup> Disputes about maritime boundaries as well as an inability of some states to delineate maritime zones, makes it difficult to determine jurisdiction over the suspects since it is not clear in whose territory the pirate was in fact captured.<sup>83</sup>

### **Prosecution in the International Criminal Court.**

The International Criminal Court (ICC) only has jurisdiction over the international crimes: war crimes, crimes against humanity and genocide.<sup>84</sup> War crimes and crimes against humanity are arguably the most serious international crimes. The Rome Statute only applies to the most serious crimes, recognising that "grave crimes threaten the peace, security and well-being of the World".<sup>85</sup> Piracy, although described as a threat to international peace, cannot be regarded in the same light as war crimes and crimes against humanity.<sup>86</sup> It does not threaten the well-being of the world.<sup>87</sup> It also does not fall within in the ICC's jurisdiction. To claim jurisdiction an amendment of the Rome Statute or an additional protocol to the Rome

<sup>78</sup> The subsequent amendment of the Puntland Piracy Law No. 6 of 2010 does not comply with *UNCLOS* – see in this regard the 2012 Report of the Secretary General at 7.

<sup>79</sup> Guilfoyle 2010 at 153; Middelburg at 49.

<sup>80</sup> Report by the Secretary General at 7. In spite of the report's concern regarding poor prison conditions the first successful post-trial transfers of convicted pirates have been made to UN prisons built in Puntland and Somaliland – see [www.thecgpcs.org/work.do?action=workSub2](http://www.thecgpcs.org/work.do?action=workSub2) accessed on 11 August 2013.

<sup>81</sup> Report by the Secretary General at 9 - 23.

<sup>82</sup> Wambua, P.M. 2009. 'Enhancing regional maritime cooperation in Africa: The planned end state.' *African Security Review*, Vol 18(3) at 48.

<sup>83</sup> Wambua at 52.

<sup>84</sup> The fourth crime of 'crimes of aggression' has not been defined and is currently not available as a crime within the ICC jurisdiction.

<sup>85</sup> Rome Statute preamble.

<sup>86</sup> See Geiss & Petrig at 145-146 where it is argued that piracy generally do not come close to the severity of genocide and crimes against humanity.

<sup>87</sup> Middelburg at 52, as well as Geiss & Petrig at 139. Dutton at 205-206 however holds a contrary view and sees piracy as equally serious as the rest of the ICC crimes, arguing that it often involve the same violent acts used to commit the traditional ICC crimes. She further argues that piracy have universal jurisdiction in common with the rest of the ICC crimes. However, as mentioned earlier, piracy does not have true universal jurisdiction. Unlike the ICC crimes, piracy's universal jurisdiction is limited to the area where the crimes are committed, i.e. in the high seas.

Statute would be required. Considering the opposition to the inclusion of crimes covered by the SUA Convention in the Rome Statute<sup>88</sup>, it is highly unlikely that signatory countries will agree to the addition of piracy as a crime under jurisdiction of the ICC.

Even if piracy could be included within the jurisdiction of the ICC, it may not be the best solution to the challenge of prosecution. The ICC does not seem to have the capacity to handle a large number of piracy cases.<sup>89</sup> To date it has only been able to complete one trial up to sentencing stage, taking approximately nine years to complete.<sup>90</sup>

It should also be remembered that only those States who have signed the Rome Statute are subject to the jurisdiction of the ICC. African countries most affected by piracy around the Horn of Africa<sup>91</sup> are not signatories to the Rome Statute, effectively excluding its jurisdiction.

### **Prosecution in the flag state**

The general position in international law, adopted by UNCLOS, is that the flag state (in this instance the arresting state) has primary jurisdiction and should therefore conduct the domestic prosecution of arrested pirates.<sup>92</sup> This does not however seem to have gained acceptance by those states involved in combating piracy.<sup>93</sup> Although the legal framework may exist there seems to be lack of political will with flag states to claim jurisdiction.<sup>94</sup>

States only seem interested in the prosecution of pirates where their own interests have been affected, for example the killing of one of their citizens or the high-jacking one of their vessels.<sup>95</sup> Trials may prove to be expensive and time consuming. With domestic courts usually overburdened with domestic crimes it is not inconceivable that states may shy away from prosecuting pirates where they have no interests to protect.

As in the case of prosecution on the basis of jurisdiction, flag states may also have inadequate domestic legislation to prosecute pirates. Without the legal framework created by their domestic laws flag states are unable to prosecute arrested pirates.<sup>96</sup>

South Africa, also involved in anti-piracy operations off the Somali coast, can prosecute arrested pirates in terms of the Defence Act 42 of 2002. However to date they did not prosecute one suspect, choosing to hand over captured pirates to a third party in terms of a Memorandum of Understanding with Mozambique.

States may also be hesitant to prosecute pirates due to concerns relating to asylum claims.<sup>97</sup> Especially in the case of Somalia as a failed state and the appalling conditions in the country, this may be a real concern for flag states. Various examples are cited in the literature where suspected pirates have indicated their intent to apply for asylum in the prosecuting country.<sup>98</sup> Apart from the pirates then qualifying for residency, their families, depending on the applicable immigration legislation may consequently apply for residency,

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<sup>88</sup> Middelburg at 51.

<sup>89</sup> Middelburg at 52.

<sup>90</sup> ICC (International Criminal Court). (2012, March 14). *The Prosecutor v Thomas Lubango Dyilo, No: ICC-01/04-01/06*. Judgement pursuant to Article 74 of the Statute. Retrieved March 14, 2012, from <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>

<sup>91</sup> Somalia, Ethiopia, Eritrea and Sudan, see Middelburg at 53.

<sup>92</sup> UNCLOS, Article 105; Cheuh at 5.

<sup>93</sup> Middelburg at 55, Geiss & Petrig at 168.

<sup>94</sup> Middelburg at 55.

<sup>95</sup> Middelburg at 55-56, Geiss & Petrig at 30-31.

<sup>96</sup> Middelburg at 56.

<sup>97</sup> Middelburg at 57.

<sup>98</sup> Middelburg at 57.

opening the door to countless more asylum seekers. Where these individuals face a real threat of persecution or torture on their return to their home countries, the prosecuting country would be obliged to grant asylum or risk contravening an assortment of treaties.

The difference in crimes and sentencing in various domestic jurisdictions raises a fair trial concern affecting the individual's right to equal treatment by the law. Middelburg<sup>99</sup> for example refers to pirates sentenced by a Dutch court to five years' imprisonment and those sentenced by a Yemen court to death.

### **Prosecution in third countries**

Due to the various reasons mentioned countries may prefer pirates not to be tried in their domestic courts and serving lengthy prison sentences in their prisons.<sup>100</sup> Consequently these countries conclude memorandums of understanding with third countries willing to prosecute and incarcerate pirates. The negative aspect of third country agreements lies in their temporary nature. They have been entered into with the aim of eventually returning to the "normal" state of affairs. In order to facilitate the return to the normal state of affairs the Security Council has passed a number of resolutions aimed at the strengthening of regional co-operation in law enforcement operations. These agreements grant the third countries more law enforcement power than UNCLOS and accordingly allow law enforcement operations within the territorial waters of Somalia.<sup>101</sup> The general practice seems to be that patrolling naval states hand over piracy suspects to African States.<sup>102</sup> These transfers are not done in terms of formal extradition treaties<sup>103</sup> but on request of the State or international organisation having the suspect in custody. Although there is also no general prescribed handing over procedure, parties abide by specific transfer agreements and the application of human rights law.<sup>104</sup> Two such agreements are the prosecution agreement entered into with Kenya as well as the Djibouti code of conduct.

### **The Kenya agreement**

The United Kingdom, the US, the European Union, Canada, Denmark and China have entered into an agreement with Kenya to conduct the prosecution of suspected pirates captured by these countries.<sup>105</sup> Kenya's proximity to the Somali coastline ensures swift handing over after arrest, negating concerns around an individual's right to a prompt trial. Although the suspected pirates are likely not of Kenyan nationality, Kenya may exercise jurisdiction in terms of the principles of universal jurisdiction where the pirates have been captured in the high seas.<sup>106</sup> Where the suspects are captured in the territorial waters of Somalia universal jurisdiction would arguably not apply but Kenya could still claim jurisdiction in terms of the Security Council's resolutions. Their domestic legislation defines piracy in a manner that reflects UNCLOS and has also incorporated the SUA Convention, allowing Kenya to prosecute crimes against the safety of ships in their domestic courts.<sup>107</sup> A problem with this transfer agreement is that it does not adequately cover the criteria and proceedings to be followed during transfer. Suspects are not given the same procedural safeguards

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<sup>99</sup> Middelburg at 64.

<sup>100</sup> Middelburg at 65.

<sup>101</sup> Cheuh at 19. These operations do not however allow participating states carte blanche in operations – they still require the permission of Somalia before undertaking the law enforcement operations.

<sup>102</sup> Gess & Petrig at 33.

<sup>103</sup> Geiss & Petrig at 192.

<sup>104</sup> Geiss & Petrig at 193-194.

<sup>105</sup> Middelburg at 65; Geiss & Petrig at 21 and 33.

<sup>106</sup> Report by the Secretary-General at 19.

<sup>107</sup> Middelburg at 66; section 371, read with section 369 of the Kenyan Merchant Shipping Act 2009, Report by the Secretary-General (2012) at 18.

rendered to extradited individuals, for example leaving them without the right to make representations against their transfer or allow them access to their files. All that is required is that they be treated humanely and in accordance with international human rights law. The transferring party is also not required to assess any individual case prior to transfer.<sup>108</sup>

Although Kenya withdrew from this agreement in 2010 due to the burden placed on its judicial system, they continue to accept suspected pirates for prosecution on a case-to-case basis by applying the terms of the previous agreements.<sup>109</sup> Even though the Kenyan human rights track record is not above reproach, the death penalty was removed from the statutes as a sentence for piracy, instituting life imprisonment as an alternative.<sup>110</sup> Kenyan prisons are however severely overcrowded, in some instances as much as 300 percent.<sup>111</sup> Concern about human rights abuses remains,<sup>112</sup> raising the question whether the handing over of suspected pirates to the Kenyan authorities could be seen as a violation of the UNCAT obligations of these European countries. To date, however, the handing over of suspects to the Kenya police and the gathering and transfer of evidence for prosecution in the Kenyan courts have not yet resulted in any legal difficulties.<sup>113</sup>

### **The Djibouti Code of Conduct**

The code of conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden (the Djibouti Code) was signed on 29 January 2009 by Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, Tanzania and Yemen. Subsequently 20 out of the possible 21 countries have signed this code of conduct.<sup>114</sup> The five main areas for co-operation are (1) the investigating, arrest and prosecution of suspected pirates and armed robbery at sea, (2) the interdiction<sup>115</sup> of suspect ships and property on board ships, (3) the rescue of ships, persons or property subjected to piracy and robbery at sea, (4) regional co-operation in terms of shared operations between the signatory states and states not signatory to the Code<sup>116</sup> as well as (5) the sharing of information facilitating the prosecution of suspected pirates.<sup>117</sup> Unfortunately the Djibouti Code is not a legally binding agreement.<sup>118</sup> It also does not give any signatory any more rights than that provided for on international law.<sup>119</sup>

In an area plagued by piracy regional co-operation between the various African states is extremely important. Many of these countries lack navies and are therefore dependent on their neighbours to assist in maritime security. Even where countries do have a navy there

<sup>108</sup> Geiss & Petrig at 202-203.

<sup>109</sup> Report by the Secretary-General (2012) at 22.

<sup>110</sup> Middelburg at 66, para 371 of the Kenyan Merchant Shipping Act 2009.

<sup>111</sup> Report by the Secretary-General (2012) at 20.

<sup>112</sup> Dutton at 220-221.

<sup>113</sup> Report by the Secretary-General (2012) at 23.

<sup>114</sup> IMO at [www.imo.org/OutWork/Security/PIU/Pages/DCoC.aspx](http://www.imo.org/OutWork/Security/PIU/Pages/DCoC.aspx) last accessed on 03/08/13. Countries who have subsequently signed include Comoros, Egypt, Eritrea, Jordan, Mauritius, Mozambique (on 6 July 2012), Oman, Saudi Arabia, South Africa (on 15 May 2012) Sudan and the United Arab Emirates. Many of these countries have dubious human rights track records. See also Geiss & Petrig at 48-51.

<sup>115</sup> Guilfoyle 2009 at 4 describes interdiction as a two-step process "first, the boarding, inspection and search of a ship at sea suspected of prohibited conduct; second, where such suspicions prove justified, taking measures including any combination the vessel, arresting persons aboard or seizing cargo."

<sup>116</sup> This would include the exchanging of law enforcement officials.

<sup>117</sup> Ocean Beyond Piracy Project at [www.oceansbeyondpiracy.org/matrix/activity/djibouti-code-conduct](http://www.oceansbeyondpiracy.org/matrix/activity/djibouti-code-conduct) last accessed on 03 August 2013.

<sup>118</sup> Article 15(a) of the Djibouti Code; Geiss & Petrig at 49.

<sup>119</sup> See Article 15 of the Djibouti Code for the relevant safeguard clauses, also Geiss & Petrig at 50 - 51.

is often a lack of funding, making patrolling the African coastline nearly impossible for any single African state.<sup>120</sup> It is in this context that within the South African Development Community (SADC), South Africa, Mozambique and Tanzania, in an effort to promote regional co-operation in the combating of piracy, concluded a Memorandum of Understanding on maritime security co-operation.<sup>121</sup>

### Ship-riders

The difficulties created by the number of role players in the policing, arrest, investigation and trial of suspected pirates resulted in the use of ship-rider agreements to facilitate the investigation and prosecution of piracy suspects.<sup>122</sup> Ship-riders are neither something new nor exclusive to the combating of piracy having traditionally been used in the combating of illegal fishing and drug trafficking.<sup>123</sup> The difference between ship-rider agreements combating piracy and other law enforcement agreements lies in the fact that anti-piracy operations generally do not take place within the territorial waters of one of the parties to the agreement. The value of these agreements is in the removal of jurisdictional limits for the successful investigation and prosecution of the suspected pirates.<sup>124</sup> Ship-riders can be described as “law enforcement officers from a coastal state...who are embarked on a foreign naval ship.”<sup>125</sup> The agreement allows a law enforcement officer from a country willing to prosecute pirates to arrest and transfer suspects to the ship-rider’s domestic court.<sup>126</sup> The ship-rider will typically collect the evidence and testify at the trial. Considering that armed forces are equipped for combat and not traditional police work like the gathering of evidence, the use of ship-riders has the positive effect of increasing policing skills aboard military ships and may lead to more successful prosecutions of pirates.<sup>127</sup> The agreement between South Africa, Mozambique and Tanzania for example allows a Mozambican ship-rider to be present on the South African vessel and to carry out any arrests that may become necessary.

The idea behind the use of ship-riders is that the law enforcement officer, as representative of the prosecuting country, will exercise effective control over the suspect on behalf of the prosecuting country. It is therefore not designed to widen the enforcement powers of the signatory to the agreement but rather to establish “adjudicative jurisdiction” over the suspected pirate.<sup>128</sup> This leaves the country whose vessel is used free from any responsibility towards the human rights of the suspect creating a questionable legal fiction that they do not have effective control over the suspect. Ship-rider agreements are however

<sup>120</sup> Wambua at 45-59.

<sup>121</sup> See [www.defenceweb.co.za/index.php?option=com\\_content&task=view&id=3000&Itemid=233](http://www.defenceweb.co.za/index.php?option=com_content&task=view&id=3000&Itemid=233) last accessed 05 August 2013. For further information on South Africa’s role see [http://www.defenceweb.co.za/index.php?option=com\\_content&view=article&id=31768:exercise-oxide-underway-off-mozambique&catid=108:maritime-security&Itemid=233](http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=31768:exercise-oxide-underway-off-mozambique&catid=108:maritime-security&Itemid=233) accessed on 07 September 2013.

<sup>122</sup> Cheuh at 20. The use of ship-riders were authorised in the combating of piracy by Resolution 1851 and 1897 of the UN Security Council. See also article 7 of the Djibouti Code as an example where the use of ship-riders are authorised referring to them as “embarked officers”, see Geiss & Petrig at 50 and 85.

<sup>123</sup> Middelburg at 72; UNODC, 2009. *‘Ship-riders’: tackling Somali pirates at sea* at [www.unodc.org/unodc/en/frontpage/ship-riders-tackling-somali-pirates-at-sea.html](http://www.unodc.org/unodc/en/frontpage/ship-riders-tackling-somali-pirates-at-sea.html) accessed on 11 August 2013, Geiss & Petrig at 88. Geiss & Petrig at 93 argues that while ship-rider agreements could be seen as a valuable law enforcement mechanism in anti drug trafficking operations, it could in fact result in a lowering of human rights protection in the context of piracy, circumventing the non-refoulement principle and undermining legal certainty.

<sup>124</sup> Middelburg at 72; Geiss & Petrig at 86.

<sup>125</sup> Middelburg at 72.

<sup>126</sup> UNODC *Ship-riders’: tackling Somali pirates at sea*.

<sup>127</sup> Gess & Petrig at 89.

<sup>128</sup> Gess & Petrig at 88.

only seen as a temporary solution and a long term solution lies in strengthening the courts ability to conduct piracy trials.

Since Somalia does not have the capacity to prosecute pirates the option of prosecution by third countries currently seems to be the most effective. This model is also the one most often followed. UN assistance in building the domestic criminal justice system and prison facilities are much more cost effective than establishing a new international court.<sup>129</sup> However, handing over suspects to countries with a suspect human rights track record is effectively violating the human rights of the suspects and may open the door to claims against the countries handing over the suspected pirates. Where countries enter into such agreements it is imperative that these concerns must be addressed. Kenya, Seychelles and Mauritius have established regional prosecution centres pursuant to third party transfer agreements.<sup>130</sup>

### **Prosecution in an international piracy tribunal.**

Currently the ICC is the only court with jurisdiction to prosecute international crimes. As already seen the ICC does not have blanket jurisdiction to prosecute all international criminal offences.<sup>131</sup> A possible solution proposed is the creation of a special international tribunal for the prosecution of pirates,<sup>132</sup> which can either be an ad hoc tribunal, similar to the International Criminal Tribunal for Rwanda, or a “hybrid” tribunal where the piracy tribunal operates as an international chamber within the domestic courts of the State.<sup>133</sup> According to a report by the UN Secretary General the Security Council is in fact considering the establishment of a specialised anti-piracy court.<sup>134</sup> Countries in the East-African region including Puntland and Somaliland, Kenya, Seychelles, Mauritius and Tanzania are considered the most likely seat for such a court.<sup>135</sup> However the report expresses concern regarding the long term sustainability of such a court. In spite of the apparent threat posed by piracy very few instances have been recorded where naval coalitions have in fact handed over suspects to regional countries for prosecution. In 2011 for example, of the 286 pirate attacks reported, only four cases were transferred to regional States for prosecution,<sup>136</sup>

Middelburg sees the creation of a special regional tribunal as an opportunity to strengthen the regional judicial capacity to bring pirates to justice.<sup>137</sup> A further advantage would be the proximity of the courts to the region of the offence, thereby ensuring that the offence can be dealt with in the area where it occurred and sentences executed close to the convicted person’s home State. The courts can comply with the accused’s right to a speedy trial since the offence would be committed relatively closely to the courts, resulting in a shorter period between arrest and handing over for trial.<sup>138</sup>

### **Conclusion**

The definition of what constitutes maritime security is not clear. A specific country’s definition of maritime security largely depends on its own geographical circumstances and

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<sup>129</sup> Geiss Petrig at 170.

<sup>130</sup> Cheuh at 19.

<sup>131</sup> See the discussion above regarding the crimes within the jurisdiction of the ICC.

<sup>132</sup> Middelburg at 75. This suggestion was made by the Netherlands and have been supported by Russia and Germany. See also Geiss & Petrig at 172-173.

<sup>133</sup> Middelburg at 75-83.

<sup>134</sup> Report of the Secretary-General

<sup>135</sup> Report of the Secretary-General at 2.

<sup>136</sup> Report of the Secretary-General at 3.

<sup>137</sup> Middelburg at 81.

<sup>138</sup> Geiss & Petrig at 178.



maritime interests.<sup>139</sup> Where countries have a vast coastline they are more likely to include concerns such as maritime environmental issues in their maritime security environment than those countries with small maritime zones.<sup>140</sup> Maritime security creates a complex set of challenges such as conflicting maritime claims, foreign naval activity in territorial waters and other challenges facing good order at sea.<sup>141</sup> All countries, irrespective of the size of their coastline, even landlocked countries, do have one maritime concern in common – the “security and safety of shipping and seaborne trade.”<sup>142</sup> Consequently combating piracy has arguably received the most attention from the international community.

In spite of the attention afforded to piracy it highjacking at sea and the seriousness attached to these crimes, they are by no means the only maritime crimes.<sup>143</sup> Maritime crimes in turn should be seen against the wider background of other transnational crimes. Many of the crimes committed at sea like drug trafficking and illicit arms trade are merely extensions of the crimes committed on land, across the borders of various jurisdictions. These transnational crimes have been described as a greater threat to human security than terrorism.<sup>144</sup> International concerns elicited a response from the UN General Assembly in the form of the UN Convention against Transnational Organised Crimes.<sup>145</sup> Yet crimes at sea have not received the same level of treatment than those committed on land.

Since maritime crimes are not limited to the borders of any specific country there is a need for both inter-state and regional co-operation. These operations are however very expensive.<sup>146</sup> Since all countries are potentially affected by maritime crime due the percentage of trade done at sea, all countries should contribute to maritime security enforcement. In spite of this it does not seem as if the land locked states are in no hurry to become involved in the combating of piracy or other maritime crimes. Memorandums of understanding such as those referred to are generally only reached between coastal states, specifically those most heavily affected by piracy. Only a small number of states have the financial resources and training to conduct such operations on their own.<sup>147</sup> This is further exacerbated by the fact that not all countries have navies. It has been shown that co-operation between states can be effective in the management of piracy. The reality however is unequal regional and inter-state co-operation due to lack of resources.

Inter-state co-operation creates jurisdictional concerns, especially in the prosecution of piracy and other maritime crimes. The traditional flag-state jurisdiction is insufficient. The status of piracy as a crime subject to universal jurisdiction opens it up to wider jurisdiction than mere flag-state jurisdiction, which is necessary in order to facilitate successful prosecution. More jurisdictional restrictions are placed on other crimes such as drug trafficking where only the flag state would have jurisdiction to board and search a ship. Wider jurisdiction is created by means of treaties which allow for other ships to board and search ships on the high seas, although retaining the need for permission from the flag state.<sup>148</sup> The effective combating of other maritime crimes would require wider rights regarding searches, seizures and arrests – such as in the case of piracy - than that currently

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<sup>139</sup> Bateman 2011 at 2-3.

<sup>140</sup> Bateman 2011 at 3.

<sup>141</sup> Bateman 2011 at 2.

<sup>142</sup> Bateman 2011 at 3.

<sup>143</sup> Other maritime crimes include illegal immigration, human trafficking, smuggling of contraband and drug trafficking – see in this regard Wambua at 45-59.

<sup>144</sup> Gastrow, P. 2006. ‘Tackling Security Threats: International Organised Crime’ in Adebajo, A. & Scanlon, H. (eds), *A Dialogue of the Deaf: Essays on Africa and the United Nations*, Centre for Conflict Management, Sunnyside: Jacana Media (Pty) Ltd at 208.

<sup>145</sup> Gastrow at 207.

<sup>146</sup> Guilefoyle 2009 at 94.

<sup>147</sup> Guilefoyle 2009 at 94.

<sup>148</sup> Guilefoyle 2009 at 95.



provided for in international law. Slavery, for example, only provides for boarding and searching rights but no enforcement jurisdiction while a crime such as human trafficking does not create any boarding and searching rights at all. The policing of these crimes at sea would have to be exclusively regulated by treaties. In the context of maritime crimes the UN Organized Crime Convention, which deals with human trafficking and migrant smuggling provides for maritime interdiction in the case of migrant smuggling but not in the case of human trafficking. Search and seizure for human trafficking can only take place in those instances where it can also be classified as migrant smuggling or slavery.<sup>149</sup>

It can be argued that the seriousness attached to the various crimes should mainly depend on the financial impact of the particular crime on the state. Piracy potentially affects all countries and can have a severe impact on trade at sea, hence the seriousness with which it is considered by the international community. Other maritime crimes such as migrant smuggling,<sup>150</sup> although highly profitable,<sup>151</sup> are regarded as a lower risk without the same economic impact on the international community as piracy. In turn smuggling migrants are more prevalent than human trafficking and is consequently regarded as the more serious offence of the two,<sup>152</sup> since bypassing of a country's immigration laws is also seen as a threat to the sovereignty of that country.

Another aspect identified in the combating of piracy concerns the application of human rights. Although this research has not elaborated on this aspect to great extent it is a matter that should receive urgent attention. As indicated above UNCLOS and the different memorandums of understanding do not address the actual processes that should be followed during the arrest, prosecution and punishment of the pirates. This creates the opportunity for the potential abuse of suspected pirates' human rights. The treaties and agreements regarding other maritime crimes such as drug trafficking seem to address these aspects more clearly than piracy.

While it is clear that all maritime crimes are not treated equally and the bulk of resources are currently directed towards combating piracy the time may have arrived to do away with the fragmented approach towards the various maritime crimes and work towards a unitary solution for all crimes committed at sea.

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<sup>149</sup> Guilefoyle 2009 at 183.

<sup>150</sup> Defined by Guilefoyle 2009 at 180 as "procuring a person's entry into a state' of which the person is not a national or permanent resident' by crossing borders without complying with national migration law *and* doing so for financial benefit."

<sup>151</sup> Guilefoyle 2009 at 182.

<sup>152</sup> Guilefoyle 2009 at 181.

## Bibliography

BATEMAN, S. 2011. Solving the “Wicked Problems” of Maritime Security: Are Regional Forums up to the Task? *Contemporary South East Asia*, 33 (1), 1-28.

BATEMAN, S., HO, J., & CHAN, J. 2009. Good Order at Sea in South Asia, *RSIS Policy paper*, Singapore: S. Rajatman School of International Studies.

CHEUH, W.L.. 2013. Extradition and Mutual Legal Assistance in the Prosecution of Serious Maritime Crimes: A Comparative and Critical Analysis of Applicable Legal Framework, *Working Paper*, Hague Centre for Studies and Research, 1-22.

Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden, 2009. Available at [www.oceansbeyondpiracy.org/matrix/activity/djibouti-code-conduct](http://www.oceansbeyondpiracy.org/matrix/activity/djibouti-code-conduct) [accessed on 11 September 2013].

Convention for the suppression of unlawful acts against the safety of maritime navigation, 10 March 1988. Available at [www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf](http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf) [accessed on 11 September 2013].

Convention on the High Seas, 29 April 1958. Available at [www.untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_high\\_seas.pdf](http://www.untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf) [accessed on 11 September 2013].

DE BONT. S. 2010. *Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective*. One Earth Foundation Working Paper.

DUGARD, J. 2011. *International Law: A South African Perspective*, 4th ed, Landsdown:Juta.

Dutton, Y. 2010. Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court, *Chicago Journal of International Law*, 11(1), 201-245.

GASTROW, P. Tackling Security Threats: International Organised Crime. In: ADEBAJO, A. & SCANLON, H. eds. 2006. *A Dialogue of the Deaf: Essays on Africa and the United Nations*, Centre for Copnflct Management, Sunnyside: Jacana Media (Pty) Ltd, 207-222.

GEISS, R., & PETRIG, A. 2011. *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, Oxford: Oxford University Press.

GUILFOYLE, D. 2009. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press.

GUILFOYLE, D. 2010. Counter-Piracy Law Enforcement and Human Rights, *International and Comparative Law Quarterly*, 59(1), 141-169.

IMO, 2012. Annual reports on Acts of piracy and armed robbery against ships. Available at [www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx](http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx) [accessed 31 May 2013].

OMI. 2009. Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships. Available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/A.1025.pdf> [accessed 31 May 2013].

KELES, B. 2010. Piracy: a crime and a challenge for democracies, *Report: Parliamentary Assembly Document no 12193*.

KLEIN, N. 2007. The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *Denver Journal of International Law and Policy*, 35, 287.

MALANCZUK, P. 1997. *Akehurst's Modern Introduction to International Law*. 6<sup>th</sup> ed. London and New York: Routledge.

MIDDELBURG, A. 2011. *Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast*. Nijmegen: Wolf Legal Publishers.

MUTAMBO, A., MUNGAI, C. & GISESA, N. *et al.* 2012. Simmering Border Disputes in Battle to Control Oil, Gas. *The East African*. Available at <http://www.theeastafrikan.co.ke/news/Oil-discoveries-fuel-fresh-border-diputes-/-/2558/1487086/-/view/printVersion/-/sau98nz/-/index.html> [accessed on 6 May 2013].

PAPASTRAVIDES, E. 2013. *Human Rights Law to Interdiction and Arrest at Sea*, Unpublished conference proceedings, UNISA Maritime Piracy Conference held on 4 September 2013.

PASSMAN, M.H. 2008. Protections afforded to Captured Pirates under the Law of War and International Law, *Tulane Maritime Law Journal*, 33(1), 1-40.

RYNGAERT, C. 2008. *Jurisdiction in International Law*, Oxford: Oxford University Press.

SECURITY COUNCIL. 2012. *Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the Region*, 20 January 2012, S/2012/50. Available at <http://www.refworld.org/docid/4f2a604f2.html> [accessed 11 September 2013].

SHAW, M. 2003. *International Law*. 5<sup>th</sup> ed. Cambridge: Cambridge University Press.

STERIO, M. 2009. Fighting piracy in Somalia (and elsewhere): Why more is needed. *Fordham International Law Journal*, 33, 385-387.

TILL, G. 2013. *Seapower: A guide for the twenty-first century*, 3<sup>rd</sup> ed. London and New York: Routledge.

TREVES, T. 2009. Piracy, law of the sea, and use of force: developments off the coast of Somalia. *The European Journal of International Law*, 20(2), 399-414.

United Nations Convention on the Law of the Sea, 10 Decembe 1982. Available at [www.un.org/dept/los/convention\\_agreements/texts/unclos/UNCLOS-TO.htm](http://www.un.org/dept/los/convention_agreements/texts/unclos/UNCLOS-TO.htm) [accessed on 11 September 2013].

United Nations Office on Drugs and Crime. 2009. *Ship-riders: tackling Somali pirates at sea*. Available at [www.unodc.org/unodc/en/frontpage/ship-riders-tackling-somali-pirates-at-sea.html](http://www.unodc.org/unodc/en/frontpage/ship-riders-tackling-somali-pirates-at-sea.html) [accessed on 11 August 2013].

UNITED NATIONS SECURITY COUNCIL RESOLUTION 2077 adopted on 21 November 2012. from: <http://www.securitycouncilreport.org/un-document/somalia> [accessed on 29 May 2013].

WAMBUA, P.M. 2009. Enhancing regional maritime cooperation in Africa: The planned end state. *African Security Review*, 18(3), 45-59.

### **Case law**

Kaunda and Others v President of the Republic of South Africa 2005(4) SA 235 (CC)

S.S. Lotus, France v Turkey. 1927, PCIJ Reports, Series A, no 10.

The Prosecution v Thomas Lubango Dyilo No: ICC=01/04-01/06.