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UNIVERSITY OF CAPE TOWN
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FACULTY OF LAW – SCHOOL FOR ADVANCED LEGAL STUDIES

**Combating piracy today – a comprehensive analysis of how to
counter the menace of piracy using the example of attacks by
Somali pirates around the Horn of Africa**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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LIST OF ABBREVIATIONS

AU	African Union
BIMCO	Baltic and International Maritime Council
CMI	Comité Maritime International
CTF	Combined Task Force
ICC	International Criminal Court
ICS	International Chamber of Shipping
IGP&I	International Group of P&I Clubs
IMB	International Maritime Bureau
IMO	International Maritime Organization
IRTC	Internationally Recommended Transit Corridor
ISC	Information Sharing Centre
ITF	International Transport Workers Federation
INTERPOL	International Criminal Police Organisation
ISPS	International Ship and Port Facility Security
IUMI	International Union of Marine Insurance
JIWG	Joint International Working Group
PRC	Piracy Reporting Centre
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
SOLAS	International Convention for the Safety of Life at Sea
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
TFG	Transnational Federal Government
UNCLOS	United Nations Convention on the Law of the Sea
UNDOALOS	Division for Oceans Affairs and the Law of the Sea
UNOLA	United Nations Office of Legal Affairs
UNTS	United Nations Treaty Series
UTC	Universal Time Coordinated

INTRODUCTION

The increased number of Somali pirates' attacks against ships off the coast of Somalia and in the Gulf of Aden in recent years has attracted special attention of the international community. Although the menace of piracy was believed to have largely disappeared in modern times, piracy remains a considerable threat to international maritime trade. On an almost daily basis the maritime community is confronted with new reports of piratical attacks, most frequently off the Somali coast.

On 16 November 2009, for instance, the Piracy Reporting Centre of the International Maritime Bureau (IMB) reported:

16.11.2009, 10:53 UTC, Position: 08:0.11S – 045:58E, around 600 nm southeast of Mogadishu, Somalia:

Pirates armed with machine guns attacked, boarded and hijacked a chemical tanker underway. They took hostage 28 crew members. The pirates are in control of the tanker and are sailing her to an unknown destination.¹

Despite such frequently occurring piratical attacks against commercial vessels, maritime trade still passes through the narrow strait between the Horn of Africa and the Arabian peninsula, as alternative routes, for instance around the Cape of Good Hope, would cause excessive costs.

This paper will focus on how to combat piracy in these days, both from a general perspective and, whenever appropriate, specifically with regard to the serious situation off the coast of Somalia.

Chapter 1 will deal with the development of piracy, outlining its historical origins as well as pointing out current incidents of piracy in various regions, different types of piracy, general explanation attempts for the increase in piratical acts and the specific situation off the coast of Somalia and in the Gulf of Aden. In Chapter 2 the relationship between piracy and maritime terrorism will be clarified as both of these terms are more and more frequently used interchangeably without sticking to basic features of either piracy or terrorism anymore. Chapter 3 will form the centrepiece of the paper examining the existing international legal framework against piracy. Beginning with piracy's origins in customary

¹ See incident details at the International Maritime Bureau Piracy Reporting Centre website: http://www.icc-ccs.org/index.php?option=com_fabrik&c=form&view=details&Itemid=82&fabrik=48&rowid=365&tableid=70&fabrik_cursor=0&fabrik_total=0 [Accessed 17.11.2009].

international law, the major international conventions to prevent and combat piracy will be analysed, always especially focusing on the definitions of offences as well as rights and obligations under the respective convention. Moreover, the United Nations Security Council Resolutions on Somalia will be outlined. In Chapter 4 the focus will be on international cooperation to combat piracy, distinguishing cooperation carried out by private companies and organisations as opposed to cooperation under the umbrella of countries and government-based international organisations. Respecting the latter type of international cooperation a further distinction will be made between cooperation on an international level and cooperation on a regional level. Chapter 5 will deal with matters of self-defence on board in the case of an incident as well as the employment of private armed guards on board merchant vessels and private armed escort vessels. In Chapter 6 the author will conclude with a summary and give some final remarks with regard to prospective developments.

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CHAPTER 1: The Development of Piracy

I. Historical Origins of Piracy

The origins of piracy date back hundreds if not thousands of years when seafaring became a common practice of states and in particular when maritime commerce between states began to develop.² An inscription on an Egyptian clay tablet from the 14th century B.C. probably provides one of the earliest indications of ancient piracy, describing in detail how attacks of pirates occurred off the coast of Egypt.³

Although piracy is universally condemned in modern times, to come to the conclusion that piracy was always disdained would be wrong. In the early first century B.C. for instance, pirates in the Mediterranean Sea were at least temporarily condoned to a large extent because they supplied the Roman Empire with numerous slaves for its luxury markets.⁴ But it is not necessary to look back that far into the past: in the 17th century the rival European powers of the time such as the British Empire or the Spanish Empire commissioned pirates by issuing letters of marque and used these so-called privateers for harassing and attacking their enemies' merchant vessels.⁵ Pirates were regarded 'as a weapon in the arsenal of states'⁶ and piracy proved as an ideal way to strike one's enemy without bringing about a state of war between states.⁷

However, the status of pirates fluctuated considerably as piracy was ostracised in times of relative peace although it was supported by states when they were at war with enemy states. Therefore decommissioned privateers became frustrated and started attacking any vessel without distinction of different states.⁸ It is argued that this was the starting point from which pirates became *hostes humani generis*, i.e. enemies of mankind and of civilisation itself.⁹

Notwithstanding this development quite a long time passed until the European

² DR Burgess 'Hostis Humani Generis: Piracy, Terrorism and a New International Law' (2006) 13 *U. Miami Int'l & Comp. L. Rev.* 293 at 301.

³ R Fowler 'Pirates of the Mediterranean – Pillaging and Plundering in Ancient Times' (21.05.2007), available at http://ancient-culture.suite101.com/article.cfm/pirates_of_the_mediterranean [Accessed 26.11.2009].

⁴ JD Peppetti 'Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats' (2008) 55 *Naval L. Rev.* 73 at 87.

⁵ M Bahar 'Attaining Optima Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations' (2007) 40 *Vand. J. Transnat'l L.* 1 at 12.

⁶ L Azubuike 'International Law Regime against Piracy' (2009) 15 *Ann. Surv. Int'l & Comp. L.* 43 at 45.

⁷ AP Rubin *The Law of Piracy* 2nd (1998) at 31.

⁸ Burgess (note 2) at 307-8.

⁹ Azubuike (note 6) at 46.

maritime states abolished all forms of piracy, the practice of privateering and government sponsorship with the Declaration of Paris in 1856.¹⁰ However, the first basis for a legal framework in order to define and combat piracy was not established before the middle of the 20th century, as will be outlined below (see p. 16).

II. Modern-day Piracy

1. Overview of Current Incidents

Even nowadays piracy at sea remains a serious threat to maritime commerce. From a global point of view the hot spots of piracy are in Southeast Asia, in parts of South and Central America and in the Caribbean waters, along some African coast lines and in the Gulf of Aden.¹¹ The developments of these various regions during the last few years show considerable differences.

In Southeast Asia, particularly in the Strait of Malacca between the Malaysian peninsula and the Indonesian island of Sumatra, which had been the most endangered area in a global comparison for a significant period of time, the number of attacks per year has halved between 2005 and 2008 from 82 to 41 attacks, and it is estimated that this number will decrease even more in 2009.

In the same timeframe the frequency of attacks in South and Central America as well as in the Caribbean waters remained on a relatively low level counting not more than 21 annual attacks in total although currently a slight increase to already 28 attacks within the first three quarters of 2009 is worth to be mentioned.

With regard to the African coasts, the situations in endangered areas are significantly different. In the hot spot of Nigeria the number of incidents has stabilised between 14 and 26 within the period of 2005 and 2008 whereas in the region off the coast of Somalia together with the Gulf of Aden a tremendous increase from 27 attacks in total in 2005 to 63 attacks in 2008 was recorded. For 2009 the figures are even worse: from a worldwide total of 306 attacks reported in the period January to September 147 attacks took place off the coast of Somalia and in the Gulf of Aden respectively, i.e. almost every

¹⁰ See the text of the Declaration of Paris (1856) at http://avalon.law.yale.edu/19th_century/decparis.asp [Accessed 26.11.2009].

¹¹ With regard to these areas the IMB Piracy Reporting Centre issues specific warnings to mariners to be extra cautious and to take necessary precautionary measures when transiting; see http://www.icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58 [Accessed 26.11.2009].

second attack was conducted in that region.¹²

Looking at these figures of the latest quarterly Piracy Report of the IMB one has to bear in mind though that the actual number of attacks is very likely to be even higher as many shipowners and masters are very reluctant to report such incidents (e.g. in order to avoid a rise of insurance premiums).¹³

2. Different Types of Piracy

Concerning piratical acts, various types of attacks in terms of different levels of sophistication in planning and violence in execution as well as the frequency in which they occur have to be distinguished. For a better understanding four different types of piracy are to be pointed out.¹⁴

The most frequently occurring but also least violent and less sophisticated types of attacks can be characterised as so-called subsistence piracy, i.e. theft of comparatively low cost items while the vessel is at anchor or berthed in the pier. The perpetrators are often unemployed fishermen searching for portable ship supplies which can quickly be converted into cash without any problems.

A different type of incident takes place while the vessel is underway. The pirates either board the vessel clandestinely looking for any portable and readily accessible goods, equipment and valuables or they make a violent attack not hesitating to use force against the ship's crew in order to obtain all cash on board as well as other valuables which are more difficult to access. In particular the latter type obviously entails a much higher risk of getting hurt for the ship's crew but also requires a higher level of sophistication if the perpetrators want to be successful.

Another type of piracy which has probably attracted the most attention of the international maritime community in recent years is the kidnapping for ransom of a ship's

¹² All figures refer to the IMB Piracy Report for the period 1 January - 30 September 2009, available at http://www.icc-ccs.org/index.php?option=com_fabrik&view=form&fabrik=18&random=0&Itemid=92 [Accessed 24.11.2009].

¹³ EC Stiles 'Reforming Current International Law to Combat Modern Sea Piracy' (2004) 27 *Suffolk Transnat'l L. Rev.* 299 at 300.

¹⁴ In the following the author basically refers to the distinction made by M Mejia & PK Mukherjee 'The SUA Convention 2005: A Critical Evaluation of its Effectiveness in Suppressing Maritime Criminal Acts' (2006) 12(3) *JIML* 170 at 171-2.

crew. Although these incidents occur less frequently than the above-mentioned ones, the risks for life and limb of the ship's crew are potentially high in view of the fact that these perpetrators are usually heavily armed (e.g. with AK-47s) and well prepared when they attack a vessel. As will be shown below this type of piracy is also the prevalent one off the coast of Somalia and in the Gulf of Aden.

Finally, a less frequently occurring but highly sophisticated and violent type of piracy is the hijacking of vessels. Pirates are not interested in cash or easily transportable items but rather in the vessel and all of its cargo itself. While the cargo is sold on the black market the vessel itself is repainted, renamed and equipped with fake registration papers and serves as a so-called 'phantom ship' for the pirates' own purposes such as committing cargo frauds. The effort it takes to plan and execute such an attack gives rise to assume that these highly sophisticated attacks are conducted by organised international crime syndicates.¹⁵

These remarks show that piratical attacks can be subject to totally different intentions of their perpetrators, ranging from subsistence piracy to well-organised crime syndicates with entirely different expectations of 'incomes'.¹⁶

The interest of the international community in improving cooperation to prevent and combat piracy incidents in the above-mentioned hot spots depends essentially on their level of seriousness. Relevant parameters in this regard are the types of weapons employed in these incidents, the treatment of the ship's crew, the value of property stolen and the level of threat to safety of maritime navigation.¹⁷

3. General Explanation Attempts for the Increase in Acts of Piracy

On the one hand the different regions in which piracy occurs quite often share a number of similar problems but on the other hand each region also suffers from specific individual circumstances. In the following the author outlines conceivable reasons which may account for the surge of piratical attacks in these days.

¹⁵ GD Gabel 'Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-day Piracy' (2007) 81 *Tul. L. Rev.* 1433 at 1436.

¹⁶ See J Xu 'Piracy as a Maritime Offence: Some Public Policy Considerations' (2007) *J.B.L.* 639 at 647.

¹⁷ RC Beckman 'Combatting [sic] Piracy and Armed Robbery against Ships in Southeast Asia: The Way Forward' (2002) 33 *Ocean Dev. & Int'l L.* 317 at 320-1.

In view of the fact that nowadays maritime commerce constitutes about ninety per cent of world trade,¹⁸ which, however, can only be conducted through a restricted number of maritime channels, it becomes apparent that this situation provides many potential targets for piratical attacks.¹⁹ Many shipowners and masters have no choice but to send their vessels through narrow straits such as between the Horn of Africa and the Arabian peninsula or the Strait of Malacca where unarmed cargo vessels become ‘easy prey’ for pirates.²⁰ Additionally, it is not only impossible to protect the vast oceans completely from piracy,²¹ but also are many littoral states in endangered regions simply not able to police their own waters.²²

Apart from the inability of some states one has to keep in mind that some governments may not have sufficient incentives to enforce the law. As long as the social costs of piracy which a coastal state faces are comparatively low it may be very reluctant to take usually quite costly anti-piracy measures, not to mention the fact that in some regions ‘piracy may even be thought of as a way to bring prosperity to local coastal societies’.²³ Moreover, the problem of corruption should not be forgotten. It is argued that ‘it would be naive to believe that there is not collusion between criminals and law enforcers in most jurisdictions’ which are affected.²⁴

Even if affected states are willing to take anti-piracy measures because their national economies may rely on sea shipping to a large extent, they face the problem that the long-term damage caused by piracy is ‘not as easily identifiable as the immediate financial burden placed upon the public if an expensive piracy control system is established’.²⁵ In addition, such expenditures are often hard to justify by a government against a frequently predominantly poor population which may only see the immediate benefit for mostly foreign shipowners but not the long-term benefit for the society of that country.²⁶

Another explanation attempt is related to the circumstance that maritime commerce

¹⁸ BH Dubner ‘Recent Developments in the International Law of the Sea’ (1999) 33 *Int’l Law*. 627 at 632.

¹⁹ Gabel (note 15) at 1439.

²⁰ E Kontorovich ‘International Legal Responses to Piracy off the Coast of Somalia’ (2009) 13(2) *ASIL Insights*, available at <http://www.asil.org/insights090206.cfm> [Accessed 28.11.2009].

²¹ W Langewiesche *The Outlaw Sea: A World of Freedom, Chaos, and Crime* (2004) at 7.

²² Stiles (note 13) at 301.

²³ Xu (note 16) at 651.

²⁴ *Ibid* at 651-2.

²⁵ J Mo ‘Options to Combat Maritime Piracy in Southeast Asia’ (2002) 33 *Ocean Dev. & Int’l L.* 343 at 351.

²⁶ *Ibid*.

frequently ‘passes through a global geography of poverty, envy and desperation’, thus valuable goods transported by cargo vessels offer a welcome opportunity for pirates as they are ‘all easily black-marketed into quick money’.²⁷ Furthermore, it is argued that these vessels loaded with precious cargo are ‘crewed from pools of poor’ who will never be able to have access to the wealth that they see and transport every single day.²⁸

Lastly, two rather practical issues are worth to be mentioned. Firstly, concerning piratical attacks with kidnapping for ransom of a ship’s crew it was firmly criticised that the payment of ransom could be regarded as an encouragement to further hostage-taking in the future.²⁹ Secondly, the increase of flag of convenience states has contributed to the surge of phantom ships.³⁰ The problem is not only that open registers have enabled vessels to claim nationality of a state with which the vessel has few or no connections, but also that the procedure of how vessels can be registered in flag of convenience states often without any inspections of the vessels is too easy.³¹ This facilitates the reregistration of hijacked vessels.

4. The Specific Situation of Piracy around the Horn of Africa

(a) Historical Background: Somalia’s Development to a ‘Failed State’

In 1960 a former British and an Italian protectorate, namely British and Italian Somaliland, became independent and joined in a united Somali Republic, more commonly known as Somalia.³² In October 1969 the Somali President was assassinated and a few days later, the army under Major General Mohamed Siad Barre took power. By the end of December 1990 however, the capital Mogadishu was shaken by severe fighting and many parts of the country were not under control of any authority anymore. In January 1991 Siad Barre was ousted by combined northern and southern clan-based forces, which were backed and armed by Ethiopia, and the Somali state collapsed. It was the beginning of a long-lasting

²⁷ J Hitt ‘Bandits in the Global Shipping Lanes’ (20.08.2000) *The New York Times*, available at <http://www.nytimes.com/2000/08/20/magazine/bandits-in-the-global-shipping-lanes.html?pagewanted=all> [Accessed 28.11.2009].

²⁸ Langewiesche (note 21) at 3-4.

²⁹ UK Foreign Secretary cited at <http://www.incelaw.com/publications/index.asp?id=1055,1006,43,1012> [Accessed 19.08.2009].

³⁰ Gabel (note 15) at 1439.

³¹ T Garmon ‘International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th’ (2002) 27 *Tul. Mar. L. J.* 257 at 267-8.

³² All the following remarks refer to the Final Report of the International Expert Group on Piracy off the Somali Coast (p. 10-12), workshop commissioned by the Special Representative of the Secretary General the United Nations to Somalia, Ambassador Ahmedou Ould-Abdallah, Nairobi, 10 - 21 November 2008; available at http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf [Accessed 28.11.2009].

civil war in Somalia as no armed fraction was in the position to offer a national solution. Thus, fighting continued in many parts of the country for several years.

However, already in May 1991 the north-western region of Somalia declared its independence as Somaliland. Later in 1998 local authorities established the semi-autonomous region of Puntland in the north-eastern region of the country and in April 2002 local leaders based in Baidoa proclaimed the formation of a State of Somalia in the south-western region.

Although the so-called Transnational Federal Government (TFG) was established in 2004 there is still no effective central national government which controls the whole country. Currently three different administrations have to be distinguished: (1) the TFG which intends to be the national government although it still has not managed to establish itself entirely in Mogadishu, (2) the government of Somaliland which aims to be the government of an independent Somaliland, and (3) the government of Puntland which seeks to be the government of the semi-autonomous region of Puntland. The basic shortcomings all the administrations struggle with are inadequacies with regard to governance systems, human resources, delivery of public services and physical infrastructure.

(b) Incidents Attributed to Somali Pirates in These Days

The number of incidents carried out by suspected Somali pirates has to be taken very seriously. In the period between January and September 2009 a total of 168 piratical attacks attributed to Somali pirates occurred in various geographical locations off the coast of Somalia, including parts of the Indian Ocean, the Gulf of Aden, southern parts of the Red Sea, waters off the east coast of Oman and parts of the Arabian Sea. A total of 32 vessels were reported hijacked and 533 crew members were taken hostage. Furthermore, eight crew members were injured, four killed and one reported missing. It is striking that 100 of these incidents took place in the Gulf of Aden and 47 off the Somali east and south coast. The attacks were conducted against bulk carriers, containers, fishing vessels, RoRos, tankers, tugs and yachts.

In its latest quarterly Piracy Report, the IMB Piracy Reporting Centre states that most likely due to 'the increased number of warships patrolling the Gulf of Aden and with

ship's masters adhering to the recommended advice and deploying effective anti-piracy precautionary measures, the number of successful hijackings in the Gulf of Aden has dropped dramatically. However, the attacks are continuing with serious concerns ... [and as] the monsoon recedes in September 2009, pirates are expected to start attacking vessels once again at full force ... [because with] the end of the monsoon period, the wind and weather conditions are favourable to the pirates'.³³ According to these concerns it was reported that major shippers such as Mærsk, one of the world's largest, have seriously considered 'forgoing the Suez Canal and routing ships around the Cape of Good Hope in order to avoid piracy-prone Somalia'.³⁴

Furthermore, the Somali pirates' *modus operandi* has changed from the beginning in the mid 1990s to now. Initially pirates did not use very large skiffs powered by outboard motors because on the one hand they were quite dependent on favourable weather conditions and on the other hand not able to attack vessels far off the coast. Nowadays, pirates usually use considerably more powerful speedboats and in several cases they are believed to use additional 'mother ships' which can move inconspicuously into the ocean carrying pirates, weapons and skiffs. When having targeted and almost reached a particular vessel the mother ship launches smaller skiffs to attack and hijack the passing vessels at very far distance from the coast. Therefore, the IMB Piracy Reporting Centre advises that vessels should keep as far away as possible from the coastline, preferably more than 600 nautical miles.³⁵ The skiffs often attack from a number of directions simultaneously in order to allow at least one of the skiffs to approach a vessel unnoticed and enable a number of pirates to board the vessel. The pirates themselves are usually heavily armed with AK-47s for instance and rocket-propelled grenades.³⁶

Lastly, it is noteworthy that in comparison to piracy hot spots in other parts of the world, such as the Strait of Malacca, Somalia does not have the natural coastal terrain required by pirates in order to hide attacked ships from aerial and maritime surveillance. However, there is simply no need for this type of terrain because Somali pirates are usually not interested in the cargo or the vessel itself but they only pursue one particular goal,

³³ All figures in this paragraph in respect of attacks by Somali pirates refer to the IMB Piracy Report for the period 1 January - 30 September 2009 (note 12), see in particular p. 23.

³⁴ J Kraska & B Wilson 'Piracy Repression, Partnering and the Law' (2009) 40 *J. Mar. L. & Com.* 43 at 46.

³⁵ See the IMB Piracy Reporting Centre's warning for piracy prone areas, available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58 [Accessed 30.11.2009].

³⁶ See the Final Report of the International Expert Group on Piracy off the Somali Coast (note 32), p. 14-19.

namely ransom for hostages. In 2008 the average ransom was estimated between US\$ 500,000 to US\$ 2 million and the estimated income from piracy for 2008 in total was projected to be between US\$ 18 to 30 million.³⁷

(c) Specific Problems in Somalia

The current situation of flourishing piracy off the coast of Somalia and the increasing number of piratical attacks since the mid 1990s is due to different factors which can be distinguished as internal and external ones.

With regard to internal factors the already above-mentioned long-lasting civil war has left its marks significantly. Despite the formation of the TFG in 2004 political instability persists as the TFG is not able to control the country to a sufficient extent. Large parts of the country and in particular the coastal areas constitute a legal vacuum.³⁸ The coastal population suffers from poverty, hunger and civil insecurity. In view of depressed economic conditions, unemployment and desperation there is no shortage of willing recruits for pirate operations. To join groups involved in piracy often seems to be the only possibility to improve the personal desolate situation for many young, uneducated and unemployed Somalis. Piracy is regarded as a quick way for all participating pirates to earn much larger amounts of money than by any other means of income generation.³⁹

But also external factors have contributed to the current situation. Lacking a national government which is able to enforce the law in its own territorial waters, foreign vessels exploited these circumstances for illegal fishing and dumping of hazardous waste into the sea off the coast of Somalia since the mid 1990s.⁴⁰ Consequently, the reduction of maritime resources due to the illegal operations served as a justification for Somalis to attack the foreign vessels, claiming they were authorised coast guards commissioned to protect Somalia's fishing resources and environment.⁴¹ Although it might be unjustifiable to hold the foreign vessels for ransom, one should not underestimate the additional effect of these illegal operations in providing further incentives for piratical attacks, first against illegal operating vessels, later against any vessels sailing close to the Somali coast.

³⁷ Ibid.

³⁸ EA Ceska & M Ashkenazi 'Piraterie vor den afrikanischen Kuesten und ihre Ursachen' (2009) 34-35 *APuZ* 33 at 33.

³⁹ See the Final Report of the International Expert Group on Piracy off the Somali Coast (note 32), p. 14-19).

⁴⁰ Ceska & Ashkenazi (note 38) at 34.

⁴¹ HR Heitman 'Dealing with Piracy in African Waters', handout on p. 3, speech at the Combating and Preventing Sea Piracy in Africa Summit 2009, Cape Town, 26 - 28 August 2009.

CHAPTER 2: Piracy *versus* Maritime Terrorism

Before examining the existing legal framework against piracy, it makes sense to clarify the relationship between piracy and maritime terrorism as both of these terms are more and more frequently used interchangeably by many authors trying to cover all forms of maritime violence without sticking to basic features of either piracy or terrorism anymore.

I. Distinction of Piracy and Maritime Terrorism

It is not surprising that owed to the political atmosphere, the mass media and governments the line between piracy and acts of maritime terrorism is increasingly blurred. In the wake of the 9/11 attacks officials stated their concern of how easily large vessels such as oil tankers could be hijacked in order to use them as weapons to block commercial waterways or to attack busy harbours.⁴² The most recent examples of maritime terrorism include the suicide attack against the American warship *USS Cole* in the port of Aden in 2000, the bombing of the oil tanker *Limburg* in the Gulf of Aden off Yemen in 2002⁴³ and the *Superferry 14* bombing off the port of Manila, Philippines, the world's deadliest terrorist attack at sea.⁴⁴

Although the United Nations General Assembly passed resolutions condemning terrorism and adopted several conventions on terrorism, by now there is no internationally agreed definition on terrorism.⁴⁵ With regard to piracy, however, it is argued that 'terrorism on the high seas can equal piracy under international law'⁴⁶ and that '[just] as terrorists learned to be pilots for 9/11, terrorists may now be learning to be pirates'.⁴⁷ Both piracy and maritime terrorism are 'forms of violent interference with shipping' and constitute 'a threat to all states' so that similar theories may be applied.⁴⁸

⁴² E Barrios 'Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia' (2005) 28 *B. C. Int'l & Comp. L. Rev.* 149 at 151.

⁴³ R Collins & D Hassan 'Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective' (2009) 40 *J. Mar. L. & Com.* 89 at 99; M Mejia & PK Mukherjee 'Selected Issues of Law and Ergonomics in Maritime Security' (2004) 10(4) *JIML* 316 at 321.

⁴⁴ S Das 'Mean Acts of Islamic Terrorism on Mighty Oceans' (13.01.2008), available at <http://www.news.faithfreedom.org/index.php?name=News&file=article&sid=1695> [Accessed 01.12.2009].

⁴⁵ T Deen 'POLITICS: U.N. Member States Struggle to Define Terrorism' (25.07.2005), available at <http://ipsnews.net/news.asp?idnews=29633> [Accessed 01.12.2009].

⁴⁶ Bahar (note 5) at 6.

⁴⁷ JS Burnett 'The Next 9/11 Could Happen at Sea' (22.02.2005) *The New York Times*, available at <http://www.nytimes.com/2005/02/22/opinion/22burnett.html> [Accessed 01.12.2009].

⁴⁸ H Tuerk 'Combating Terrorism at Sea – The Suppression of Unlawful Act against the Safety of Maritime Navigation' (2008) 15 *U. Miami Int'l & Comp. L. Rev.* 337 at 342-3.

Despite some similarities such as tactics of how to seize and hijack vessels, there are prevailing differences between piracy and maritime terrorism particularly in terms of their causes, objectives and the way of execution of their acts. Probably the most significant difference is that piracy is a crime motivated by greed and committed for immediate financial and private gain, while terrorism is motivated by political or ideological goals beyond the immediate act of attacking and hijacking a maritime target.⁴⁹ Therefore terrorists seek publicity, they frequently cause as much harm as possible in order to draw attention to their acts and to induce fear and terror, whereas pirates act with stealth seeking to avoid attention and inflict only necessary harm to accomplish their objectives.⁵⁰ Moreover, with regard to potential targets of pirates or terrorists, the ‘victims of piracy have to be “materially satisfying”’ to the perpetrators who may attach importance to geographically sensitive locations but not to nationality, religion or political beliefs, whereas terrorists choose targets of symbolic significance.⁵¹ Altogether there are decisive differences between piratical acts and acts of terrorism.⁵²

II. Grey Area between Piracy and Maritime Terrorism

Considering these decisive differences, however, it is easily conceivable that some incidents may fall within a grey area combining features of piracy and (maritime) terrorism, for instance if the piratical act is conducted in order to finance terrorism and thus it is very likely that the pirates belong to a terrorist group.⁵³ In principle though there is still much uncertainty about possible connections between piracy and maritime terrorism and at present no link between them has been proven yet.⁵⁴

The situation is similar in Somalia where a linkage of Somali pirates and the militant Somali Islamist group *Al Shabab* is in question. Although both groups have the same objective of uncontrolled access to the sea, their reasons differ from each other as the Somali pirates want to continue plundering passing maritime trade while *Al Shabab* is dependent on secure movement of illegal weapons, manpower and other material support.

⁴⁹ H Fouché ‘Piracy, Armed Robbery and Terrorism at Sea: Synonyms or Separate Crimes’, handout on p. 29, workshop at the Combating and Preventing Sea Piracy in Africa Summit 2009, Cape Town, 26 - 28 August 2009; see also LM Diaz & BH Dubner ‘An Examination of the Evolution of Crimes at Sea and the Emergence of the Many Legal Regimes in Their Wake’ (2009) 34 *N.C. J. Int’l L. & Com. Reg.* 521 at 540.

⁵⁰ TM Sittnick ‘State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait’ (2005) 14 *Pac. Rim L. & Pol’y J.* 743 at 751.

⁵¹ Xu (note 16) at 646.

⁵² Collins & Hassan (note 43) at 100.

⁵³ Xu (note 16) at 646.

⁵⁴ Corresponding remarks by Captain F van Rooyen in his speech (‘Securing Trade Conducted by Sea’) at the Combating and Preventing Sea Piracy in Africa Summit 2009, Cape Town, 26 - 28 August 2009.

Another aspect militating against a link between piracy and terrorism is that the number of piratical attacks decreased when the Union of Islamic Courts which is closely related to *Al Shabab* took control of several land bases of the pirates during the second half of 2006.⁵⁵ The reason for that development though may also have been caused by the fact that the monsoon prevented the Somali pirates from making more attacks in that period. In any case, a definite connection between Somali pirates and *Al Shabab* has not been proven yet.⁵⁶

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⁵⁵ See the Final Report of the International Expert Group on Piracy off the Somali Coast (note 32), p. 20.

⁵⁶ S Askins, INCE & Co, Shipping E-Brief October 2009 at 6, available at <http://www.incelaw.com/documents/pdf/Strands/Shipping/Shipping-e-Brief/Shipping-e-Brief-October-2009> [Accessed 02.12.2009].

CHAPTER 3: Existing International Legal Framework against Piracy

Due to the fact that maritime traffic constitutes ninety per cent of the world trade, states have a keen interest in preventing and combating piracy.⁵⁷ In the following chapter the scope of the existing international legal framework will be examined by having a look at the application of customary international law, the development of international conventions and the resolutions adopted by the United Nations Security Council. During that examination the special focus will be on the issues of defining the term of piracy and identifying the still existing gaps of the current legal framework against piracy. Whenever appropriate the specific situation off the coast of Somalia will be considered.

I. Piracy's Origins in Customary International Law

The crime of piracy, being admittedly the earliest international crime,⁵⁸ was originally governed by customary international law before it was largely regulated by several international conventions as will be outlined below.⁵⁹ As not all states are signatories to any of these international conventions dealing with piracy the application of customary international law and its treatment with the matter of piracy is still of significant importance.⁶⁰ Basically two elements are considered necessary to constitute a rule of customary international law, namely a settled state practice (*usus*) and the belief that such behaviour is 'law' (*opinion iuris*).⁶¹ International law generally applies only among states being the typical subjects of law as entities with capacity to exercise legal rights and duties.⁶² Accordingly, the question arises as to how pirates can be convicted of the crime of piracy being non-state actors.

The answer to this concept of state *versus* non-state conflict lies in universal jurisdiction of states.⁶³ 'True universal jurisdiction applies only in the case of crimes under customary international law, in respect of which all states have the right to prosecute', such as in the case of piracy.⁶⁴ The establishment of piracy as an *ius cogens* crime and the international recognition of such extensive jurisdiction, which, however, may still be limited by extradition agreements, principles of comity and the acknowledgement of state

⁵⁷ Dubner (note 18) at 632.

⁵⁸ J Dugard *International Law – A South African Perspective* 3rd (2008) at 159.

⁵⁹ Collins & Hassan (note 43) at 93.

⁶⁰ Garmon (note 31) at 259.

⁶¹ MN Shaw *International Law* 6th (2008) at 74.

⁶² I Brownlie *Principles of Public International Law* 7th (2008) at 57.

⁶³ Bahar (note 5) at 11.

⁶⁴ Dugard (note 58) at 157.

sovereignty, is owed to the severe threat of piracy to maritime commerce.⁶⁵ States realised that piracy was too uncontrollable and cruel in order to legitimate it as a ‘tool of political persuasion’,⁶⁶ and thus, pirates became *hostes humani generis*. As ‘pirates were not subject to the authority of any state [anymore] ... no state could be held responsible’ for their acts of violence under international law.⁶⁷ Nonetheless, it has to be stressed that exercising universal jurisdiction over international crimes like piracy is permitted by international law, but states are not obligated by it ‘to do so in the absence of a treaty obligation.’⁶⁸

Although customary international law commonly recognises universal jurisdiction over crimes of piracy it does not provide a clear definition of piracy. Therefore, several ambiguities exist such as whether piracy requires intent to rob (*animus furandi*), whether acts of insurgents fighting against their government should be excluded from piracy (like acts by state vessels or recognised belligerents) or whether acts have to involve at least two vessels.⁶⁹ Brierly noted: ‘There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority.’⁷⁰ Finally it took until 1958 for the first international convention, namely the Convention on the High Seas also referred to as the Geneva Convention, to be established in order to codify the customary regime on piracy in an attempt to clarify its definition.

II. United Nations Convention on the Law of the Sea

1. Historical Background

The currently existing international law on piracy is set out in Articles 100 to 107, 110 and 111 of the United Nations Convention on the Law of the Sea (UNCLOS). The convention resulted from the third United Nations Conference on the Law of the Sea and was concluded in 1982. UNCLOS replaced the already above-mentioned Convention on the High Seas from 1958, adopting its provisions relating to piracy with minor changes and particularly restating the wording of its Article 15 verbatim stipulating the definition of

⁶⁵ Garmon (note 31) at 260.

⁶⁶ Burgess (note 2) at 299.

⁶⁷ Tuerk (note 48) at 342.

⁶⁸ Dugard (note 58) at 157.

⁶⁹ M Halberstam ‘Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety’ (1988) 82 *Am. J. Int’l L.* 269 at 272-3.

⁷⁰ J Brierly *The Law of Nations* (1928) at 154, cited in ‘Part IV – Piracy’, Harvard Research in International Law, Draft Convention on Piracy with Comments, (1932) 26 *Am. J. Int’l L. Supplement* 739 at 750 [hereinafter Harvard Draft Convention].

piracy.⁷¹ Despite the fact that UNCLOS as a treaty is normally only binding to signatory states, it is generally accepted that its provisions are regarded as a codification of customary international law and thus are also binding to states not party to the convention such as the United States of America, Venezuela and Israel.⁷²

The conventions under the United Nations regime were not the first attempts to establish provisions on piracy. Already in 1924 the League of Nations made efforts to provide a multilateral agreement on the law of piracy.⁷³ At that time, however, piracy no longer appeared to be ‘a pressing issue to the international community’ and moreover, as it was unlikely that an agreement would be reached, the subject was finally not included in the agenda of a proposed conference.⁷⁴ Later in 1932, the Harvard Research Group drafted piracy provisions taking into account various domestic laws of piracy as well as customary international law of piracy.⁷⁵ This so-called Harvard Draft Convention subsequently formed the basis for the Convention on the High Seas in 1958.⁷⁶ When examining the UNCLOS provisions in more detail there will be more extensive remarks to the Harvard Draft Convention where required and useful.

2. Different Juridical Categories of Waters

Before taking a critical look at the piracy provisions of UNCLOS it is necessary to introduce the approach of UNCLOS which is to ‘stratify the waters of the earth into different juridical categories’.⁷⁷ More precisely, UNCLOS distinguishes between the

⁷¹ T Treves ‘Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia’ (2009) 20 *Eur. J. Int’l L.* 399 at 401; Articles 100 to 107 UNCLOS repeat almost literally Articles 14 to 22 of the Convention on the High Seas.

⁷² RR Churchill & AV Lowe *The Law of the Sea* 3rd (1999); Barrios (note 42) at 153; Bahar (note 5) at 10; Treves (note 71) at 401; regardless of customary international law, the United States of America, Venezuela and Israel are also still bound by the Convention on the High Seas; for further information on ratifications, accessions and successions to UNCLOS see

http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm [Accessed 04.12.2005]; some scholars argue though that ‘customary international law on piracy encompassed a broader scope of activity than the restrictive definition found in UNCLOS’, see Barrios (note 42) at 161, also providing further references.

⁷³ Azubuike (note 6) at 48.

⁷⁴ Rubin (note 7) at 331-5; also quoting the Polish Representative (M. Zaleski) approved by the Council of the League of Nations on 13 June 1927: “It is perhaps doubtful whether the question of Piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the [proposed] conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interests for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement.”

⁷⁵ Collins & Hassan (note 43) at 95.

⁷⁶ The Harvard Draft Convention consists of 18 articles directly related to piracy, see the whole draft with comments in ‘Part IV – Piracy’ (1932) 26 *Am. J. Int’l L. Supplement* 739 *et seq.*

⁷⁷ Azubuike (note 6) at 49.

territorial sea (Articles 2 to 32), the contiguous zone (Article 33), the exclusive economic zone (Articles 55 to 75) and the high seas (Articles 86 to 120). Pointing out the distinction between the different zones is essential in order to analyse the occasionally limited scope of UNCLOS with regard to piratical acts as will be shown below.

Article 3 UNCLOS provides that a littoral state's territorial sea may extend up to twelve nautical miles from its coastline, within which the state has the same sovereignty as it has with regard to its land territory, Article 2 UNCLOS. The state exercises exclusive jurisdiction over these territorial waters subject to the right of innocent passage which in terms of Articles 17 to 19 UNCLOS allows vessels of coastal and land-locked states to navigate through the territorial sea of a littoral state for peaceful purposes.

Article 33 UNCLOS stipulates that the contiguous zone extends for further twelve nautical miles beyond the territorial sea. The jurisdiction of the littoral state is limited within the contiguous zone as the state may only exercise the control necessary to prevent infringements of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and where appropriate to punish suchlike infringements.

Subject to Article 57 UNCLOS a littoral state can claim up to 200 nautical miles from its coastline as part of its exclusive economic zone. According to Article 56 UNCLOS a state is granted the sovereign rights to exclusively explore and exploit the marine resources within the exclusive economic zone.

The high seas, as stipulated in Article 86 UNCLOS, are all those parts of the seas which are not included in the exclusive economic zone, the contiguous zone or the territorial sea. In terms of Article 87 UNCLOS the high seas are open to all coastal and land-locked states and the freedom of the high seas is to be exercised under the conditions laid down by UNCLOS.

Lastly, for the sake of completeness, it is noteworthy that internal waters, which, according to Article 8 UNCLOS, are waters on the landward side of the baseline, and ports are under the sovereignty of the littoral state and this sovereignty is not restricted by the right of passage of vessels of other states.⁷⁸

⁷⁸ Beckman (note 17) at 327.

3. Piracy Provisions under UNCLOS

The UNCLOS piracy provisions are embodied in Articles 100 to 107, 110 and 111. They determine the requirements to constitute an offence under UNCLOS and define the rights and obligations of all states party to the convention such as *inter alia* the issue of universal jurisdiction for the prosecution of pirates, the right of hot pursuit and the matter of international cooperation. In the following the UNCLOS definition of piracy will serve as a starting point in order to examine the often criticised ambiguities and shortcomings of the UNCLOS piracy regime.

(a) The Definition of Piracy

Article 101 UNCLOS provides the 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 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).*

Accordingly the definition consists of four essential elements, namely (i) an illegal act of violence, (ii) the commitment for private ends, (iii) the occurrence on the high seas, and (iv) the requirement of two ships being involved.

(i) Illegal Act of Violence

As already mentioned above there are several different types of piracy, from clandestine thefts when the vessel is at anchor or berthed in the pier to the capture of vessels while being underway, from taking ship's crews hostage for ransom to hijacking the vessels in order to use them as phantom ships. In the latter case an act of violence may frequently be

answered in the affirmative as these more sophisticated pirates usually do not hesitate to use force against ship's crews. On the contrary, in the former case a clandestine attack may not be covered by the UNCLOS definition of piracy in absence of a violent conduct, 'unless the act of trespassing is considered depredation' in terms of Article 101(a) UNCLOS.⁷⁹

However, certain incidents would be conceivable where the perpetrators are visibly armed but only threaten violence which is sufficient to induce the ship's crew to cooperate. If construed broadly, threatening violence could still meet the requirements of an 'act of violence' in terms of Article 101(a) UNCLOS. Otherwise the threatened violence may be characterised as an 'act of depredation' which is usually comprised of an element of force.⁸⁰

Regarding the situation around the Horn of Africa, Somali pirates almost exclusively take ship's crews hostage for ransom which in most instances will not lead to any problems of whether falling within the definition of violence under UNCLOS or not. Nonetheless, the lack of a clear and unambiguous provision should not be underestimated as in other hot spots of piracy, where more various types of piratical attacks occur, the deficiency of the element of an 'act of violence' may cause much more confusion and consequently may hinder a successful prosecution of the perpetrators.

(ii) Commitment for Private Ends

Subject to Article 101(a) UNCLOS an act has to be committed 'for private ends' to be regarded as a piratical attack. The denotation of 'private ends' is interpreted differently. On the one hand it is argued that an act 'for political or other ends is generally excluded' from the UNCLOS definition.⁸¹ On the other hand the element of 'private ends' is understood more broadly, that is to say that 'the violence involved is not public' and thus that not 'all politically motivated violence' is necessarily excluded because the perpetrators are not pirates due to 'their subjective motives but because their acts impinge upon States' monopoly on legitimate violence and their interests in freedom of navigation'.⁸²

⁷⁹ Collins & Hassan (note 43) at 97.

⁸⁰ Collins & Hassan (note 43) at 96-7.

⁸¹ Z Keyuan 'New Developments in the International Law of Piracy' (2009) 8 *Chinese J. Int'l L.* 323 at 325.

⁸² D Guilfoyle 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' (2008) 57(3) *ICLQ* 690 at 693.

Accordingly, the scope of Article 101 UNCLOS is vague in cases in which vessels and their passengers are attacked for political ends like in the *Achille Lauro* incident in 1985. In that case Palestinian terrorists, who were disguised as passengers, hijacked the cruise ship in the Mediterranean Sea and an American Jewish passenger was killed when demands for the release of Palestinian prisoners held by Israel were not met.⁸³ At that time, the prevalent opinion on that issue was that acts committed for a public purpose were not covered by the UNCLOS definition and in consequence efforts were made to close this gap by adopting the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) in 1988, which will be outlined below in more detail (see p. 31).

In order to determine the correct denotation of the term ‘for private ends’, a further look at its origins in the Harvard Draft Convention is useful, which stipulates piracy in Article 3(1) as

Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air.

Although the element ‘for private ends’ is likewise not defined in the in the Harvard Draft Convention, two further aspects deduced from its *travaux préparatoires* can be pointed out.

Firstly, the ‘private ends’ requirement was used to exclude acts by unrecognised insurgents who attacked vessels of the government which they attempted to overthrow.⁸⁴ Excluding such political activities in the era when the Harvard Draft Convention emerged made sense because the process of decolonisation had begun and the colonial powers had an interest in narrowing the scope of consideration for piratical acts as otherwise signatory states would have been obliged to enforce the law of the sea.⁸⁵

Secondly, the term ‘for private ends’ was not used to restrict the scope of piracy to

⁸³ For more details see DJ Harris *Cases and Materials on International Law* 6th (2004) at 459.

⁸⁴ Halberstam (note 69) at 277.

⁸⁵ Garmon (note 31) at 263.

acts committed with an intent to rob as Bingham commented to the Harvard Draft Convention: ‘Acts done with other purposes than robbery also are put under the common jurisdiction, although the typical piracy is usually defined as robbery on the high seas; for there is no good reason why one who does an act with intent to kill, wound, rape, enslave or imprison, or to steal or maliciously destroy property, which would be piracy if done to rob, should not be subjected to more probable retribution through the common jurisdiction of all states’.⁸⁶

Against the backdrop of all these different aspects it appears to be more appropriate that the ‘private ends’ requirement excludes acts of maritime terrorism motivated by political and public aims respectively, as such acts of maritime terrorists are most likely comparable to the acts of unrecognised insurgents which are not regarded as pirates.⁸⁷

Concerning acts by Somali pirates the element of ‘private ends’ basically does not restrict the scope of UNCLOS of combating piracy off the Somali coast and in the Gulf of Aden. As previously mentioned, no concrete link between Somali pirates and terrorist groups has been proven yet and thus it cannot be assumed that the pirates commit their acts for political ends. A still quite vague issue but potentially more critical one could result from the assumption that at least some operating Somali pirates may be commissioned by Somali local politicians.⁸⁸

(iii) Occurrence on the High Seas

Article 101(a) UNCLOS provides that the offence has to occur on the high seas, alternatively in a place outside the jurisdiction of any State. As the latter variant is extremely unlikely these days, the scope of the UNCLOS piracy definition is basically limited to acts on the high seas which in terms of Article 86 UNCLOS cover all those parts of the seas not included in the exclusive economic zone, the contiguous zone or the territorial sea. This geographical limitation means a significant restriction of acts which can be regarded as piracy under UNCLOS.

However, subject to Article 58(2) UNCLOS the piracy provisions also apply to the exclusive economic zone in so far as they are not incompatible with Part V of UNCLOS

⁸⁶ Harvard Draft Convention (note 70) at 786.

⁸⁷ Z Keyuan ‘Seeking Effectiveness for the Crackdown of Piracy at Sea’ (2005) 59(1) *J. Int’l Aff.* 117 at 119.

⁸⁸ See Keyuan (note 81) at 328, referring to a Chinese information source.

dealing with rights and duties of littoral states and other users of the exclusive economic zone, especially with regard to marine resources. Although the littoral state enjoys several sovereign rights within the exclusive economic zone, ‘some high seas freedoms are preserved there, such as the freedom of navigation’.⁸⁹ Piracy has remarkable effects on the exercise of navigational freedom and the enforcement of the UNCLOS piracy provisions may not be regarded as a violation of the littoral state’s sovereign rights. Therefore, it is well-recognised that the piracy provisions are not incompatible with Part V and consequently, their application within the exclusive economic zone is possible.⁹⁰

Nonetheless, the limitation of the scope of UNCLOS by not including the territorial sea remains considerable. Apart from the fact that states are inherently reluctant to surrender parts of their sovereignty when conventions are adopted, one of the main reasons for the current restriction under UNCLOS is associated with the historical development and implementation of the piracy provisions.

As regards the Harvard Draft Convention, Article 1 distinguishes between jurisdiction over the ‘territorial sea’ and the ‘high sea’, but does not stipulate any effective demarcation between the two seas. Accordingly, Article 1(3) of the Harvard Draft Convention only says that the ‘term “high sea” means that part of the sea which is not included in the territorial waters of any state’. At the time when the piracy provisions were developed most littoral states only claimed up to three nautical miles from its coastline as part of its territorial sea.⁹¹ That three nautical miles limit was also recognised under the Convention on the High Seas.⁹² With the adoption of UNCLOS the extent of the territorial seas was quadrupled from three to twelve nautical miles and additionally the exclusive economic zone was implemented. These changes took place without adjusting the piracy provisions to the new framework of modified juridical categories of waters in order to maintain an effective anti-piracy regime under UNCLOS.⁹³ During the negotiation and adoption of UNCLOS between 1973 and 1982, the subject of ‘piracy was not an issue on the agenda’.⁹⁴ The narrowness of the UNCLOS piracy definition with respect to the ‘high seas’ requirement is therefore essentially owed to the failure of evolving the piracy

⁸⁹ Keyuan (note 81) at 325.

⁹⁰ Dubner (note 18) at 633; Sittnick (note 50) at 758; Stiles (note 13) at 308.

⁹¹ Beckman (note 17) at 328.

⁹² Collins & Hassan (note 43) at 95.

⁹³ Ibid.

⁹⁴ Keyuan (note 81) at 326.

provisions in accordance with other UNCLOS provisions.

However, the effects of the geographical limitation of the definition may vary considerably. While attacks against vessels in the narrow Strait of Malacca predominantly cannot be regarded as piracy under UNCLOS because most of them occur in the territorial seas of the littoral states and only few in the exclusive economic zone or on the high seas, the situation is different around the Horn of Africa.⁹⁵ The development off the coast of Somalia shows that pirates are nowadays capable of attacking vessels far beyond the exclusive economic zone, that is to say on the high seas up to almost 500 nautical miles from the coast.⁹⁶ Basically the problem of capturing these Somali pirates remains, however, as according to UNCLOS, hot pursuits must cease when the pirates enter into territorial waters as will be shown below (see p. 27).

(iv) Two Ship Requirement

Article 101(a) UNCLOS defines that an act of piracy only exists if the action is taken by one ship against another one. The element reflects the traditional definition of piratical acts conducted by a group of perpetrators on a ship who attack and plunder other ships.⁹⁷ Contrary to some earlier conceptions of piracy, after which piratical acts could also be ‘committed by persons who were already on board the victim vessel as passengers or crew’, the UNCLOS definition basically excludes suchlike ‘internal seizures’.⁹⁸ Correspondingly, the *Achille Lauro* incident was not considered piracy because besides the failure of the ‘private ends’ requirement as mentioned above the ‘two ship’ requirement was not met either.

However, two aspects indicate that the involvement of two vessels should not be construed too strictly. Firstly, Article 101(b) UNCLOS provides that piracy can also consist of participating ‘in the operation of a ship ... with knowledge of facts making it a pirate ship’ and consequently the ‘provision seems to open the concept of modern piracy to

⁹⁵ For detailed remarks to incidents and different types of piracy in Southeast Asia see Beckman (note 17) at 322 *et seq.*

⁹⁶ See Piracy Prone Areas announced by the IMB Piracy Reporting Centre, available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58 [Accessed 08.12.2009].

⁹⁷ Gabel (note 15) at 1443.

⁹⁸ I Shearer ‘Piracy’ in *Max Planck Encyclopedia of Public International Law* at 15, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1206&recno=30&letter=P [Accessed 08.12.2009].

either a hostile takeover of a vessel by insiders or by outside renegades'.⁹⁹ Secondly, it is also stated in the comments to the Harvard Draft Convention that the intent was merely to exclude criminal acts by one passenger or crew member against another.¹⁰⁰

Particularly with regard to Somali pirates the question arises of which kind of pirate vessel meets the requirements of Article 101(a) UNCLOS. As Somali pirates usually use very fast skiffs or rubber boats operating from land bases or from mother ships it is doubtful whether these boats can be regarded as a 'ship' in terms of UNCLOS.¹⁰¹ Other than that the incidents around the Horn of Africa generally fulfil the element of two vessels involved.

(b) Rights and Obligations under UNCLOS

After having determined that a committed act of violence is covered by the UNCLOS piracy definition, the states party to the convention have several rights but also obligations as to how to take any anti-piracy measures.

(i) Universal Jurisdictional

According to states' universal jurisdiction for the apprehension and prosecution of pirates under customary international law, Article 105 UNCLOS allows every state, on the high seas or in any other place outside the jurisdiction of any state, to seize a pirate ship and to arrest the persons involved. The provision further provides that subsequently the courts of the state which carried out the seizure may decide upon the penalties imposed, and may also determine the action to be taken with regard to the ships. Insofar Article 105 UNCLOS constitutes an exception to the general rule of exclusive jurisdiction of the flag state on the high seas.¹⁰²

Article 107 UNCLOS clarifies that such seizures are only to be conducted by warships, military vessels or other explicitly marked governmental vessels, as for instance states' coast guards. Subject to Article 106 UNCLOS states can be held liable if the seizure

⁹⁹ Gabel (note 15) at 1443.

¹⁰⁰ Harvard Draft Convention (note 70) at 815 with reference to L Oppenheim *International Law* 4th (1928) at sec. 274: '[A] simple act of violence on the part of crew or passengers does not constitute in itself the crime of piracy, not at least as far as International Law is concerned. If, for instance, the crew were to murder the master on account of his cruelty, and afterwards carried on the voyage, they would be murderers, but not pirates. They are pirates only when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.'

¹⁰¹ Treves (note 71) at 402; Mejia & Mukherjee (note 14) at 182.

¹⁰² Beckman (note 17) at 328.

of a vessel has been conducted without adequate grounds. Moreover, although Article 105 UNCLOS entitles states to exercise universal jurisdiction over piratical acts, the wording ‘may’ indicates that states are not obliged to do so, for example if they are not directly affected by the incident.¹⁰³

Despite granting states wide-ranging rights to apprehend suspects of piratical acts the problem of prosecuting the perpetrators remains, since the prosecution is subject to the apprehending state’s domestic law which may vary tremendously from state to state.¹⁰⁴ There is a lack of uniformity with regard to penalties imposed on pirates by different apprehending states, the applied legal proceedings and the treatment of seized ships including recovered goods.¹⁰⁵ Also conceivable and even more critical is the situation in which the apprehending state does not have any domestic legislation dealing specifically with piracy and thus, the pirates may escape punishment.¹⁰⁶

The application of universal jurisdiction under UNCLOS can therefore generally be described as a ‘double edged sword’ as on the one hand it enables states to apprehend and prosecute pirates on the high seas but on the other hand ‘it provides too much freedom in the manner in which [states] may penalise the pirates, which is dependent on each state’s domestic legislation’.¹⁰⁷

Looking at the situation in Somalia, two specific problems become apparent. Firstly, due to the persisting political instability the TFG is not able to control the country sufficiently. Thus, no serious prosecution of pirates by Somali authorities takes place and deficiencies in terms of domestic legislation dealing with piracy appear irrelevant.

Secondly, the states whose warships are patrolling the waters off the coast of Somalia are frequently very reluctant to do more than capturing the pirates in order to avert further damage from maritime traffic and international trade. Several incidents have been reported when pirates went unpunished because navies released pirates shortly after having captured them on account of insufficient interests of the apprehending state in their

¹⁰³ Bahar (note 5) at 13.

¹⁰⁴ See J Kavanagh ‘The Law of Contemporary Sea Piracy’ (1999) *Austl. Int’l L. J.* 127 at 139.

¹⁰⁵ Collins & Hassan (note 43) at 102.

¹⁰⁶ Cf. BH Dubner *The Law of International Sea Piracy* (1980) at 151; however, the lack of having specific legislation dealing with the punishment of piracy did not prevent China from bringing pirates into its courts and trying them under the charge of crimes such as murder or robbery, corresponding to the relevant Chinese criminal law, see in more detail Keyuan (note 81) at 342.

¹⁰⁷ Collins & Hassan (note 43) at 103.

prosecution.¹⁰⁸ In other cases officials expressed concerns that captured pirates might either claim asylum in the apprehending state or that the transfer of the pirates to Somalia or other states in the region applying Islamic law could breach their human rights as they might face beheading for murder or having a hand chopped off for theft.¹⁰⁹ In recent times, whenever an apprehending state opted for the prosecution of pirates, the perpetrators were mostly sent to Kenya to grant a fair trial.¹¹⁰ Contrary to this ‘common’ practice however, it is argued that Article 105 UNCLOS ‘was intended to preclude transfers to third-party states’ such as Kenya referring to the drafting history.¹¹¹ However, no court or tribunal has yet dealt with that issue.

(ii) Right of Hot Pursuit

Article 111 UNCLOS provides the right of hot pursuit. A vessel which is suspected to have committed a piratical act within the territorial sea of a state and thereby violated the laws and regulations of that state can be pursued into the high seas. This right is limited subject to Article 111(3) UNCLOS stating that the right of hot pursuit ceases as soon as the vessel pursued enters the territorial sea of its own or a third state. By way of comparison, the right of hot pursuit stipulated in Article 7(1) of the Harvard Draft Convention is less restrictive because, if the pursuit of a pirate ship is commenced by a state within its own territorial sea or on the high seas, the pursuit of such a ship may be continued into or over the territorial sea of another state, unless prohibited by the other state. Hence, the Harvard Draft Convention does not attach as much importance to the sovereign rights within territorial seas as UNCLOS.¹¹²

In order to strengthen the right of hot pursuit it has been argued that the enforcement of piracy provisions within the territorial sea of states is not expressly prohibited by UNCLOS.¹¹³ This approach appears to be precarious. Although it may be admitted that the coastal state is in a way morally obliged under UNCLOS to permit the

¹⁰⁸ See *Spiegel Online* (15.09.2009), available at <http://www.spiegel.de/politik/ausland/0,1518,649004,00.html> [Accessed 09.12.2009].

¹⁰⁹ M Woolf ‘Pirates Can Claim UK Asylum’ (13.04.2009) *Times Online*, available at <http://www.timesonline.co.uk/tol/news/uk/article3736239.ece> [Accessed 09.12.2009].

¹¹⁰ Askins (note 56) at 6.

¹¹¹ Kontorovich (note 20) referring to the Report of the International Law Commission at 283, Commentary of Art. 43: “This article gives any State the right to seize pirate ships ... and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another State.”.

¹¹² Stiles (note 13) at 309.

¹¹³ See BH Dubner ‘Human Rights and Environmental Disaster – Two Problems That Defy the “Norms” of the International Law of Sea Piracy’ (1997) *Syracuse J. Int’l L. & Com.* 1 at 38, referring to comments by TA Clingan ‘The Law of Piracy’ in E Ellen *Piracy at Sea* (1989) at 170.

continuous pursuit of pirate ship by another state into its territorial sea in order to enforce the UNCLOS piracy provisions, it has to be emphasised that due to the territorial sovereignty of the coastal state some sort of its consent of the coastal state to the continuous pursuit is indispensable.¹¹⁴ Therefore the issue of continuing a pursuit into the territorial sea of another state is rather a matter of courtesy of the state whose sovereignty is concerned.

The limitation of the right of hot pursuit is a substantial problem especially in areas with closely neighbouring territorial waters, such as in the Strait of Malacca in Southeast Asia. In addition, the problem is sometimes exacerbated by still unsettled territorial claims between neighbouring states which cause even more suspiciousness and reluctance of states to permit other states' navies to enter into their territorial waters.¹¹⁵

But also around the Horn of Africa Somali pirates who attack vessels on the high seas are frequently able 'to evade pursuit by crossing into territorial waters'.¹¹⁶ As they apparently found out that foreign navy vessels are basically not allowed to pursue them into the Somali territorial sea they started to take advantage of this loophole of the international piracy regime. To counter this trend some scholars argue that a so-called 'failed state' like Somalia which is unable to properly police and maintain the security of its own territorial sea and thus is unable to attend to its duty to the international community forfeits its UNCLOS right of inviolability of its territorial sea at least temporarily.¹¹⁷ Furthermore, Somalia's territorial sea could be regarded as 'any other place outside the jurisdiction of any state' in terms of Article 105 UNCLOS.¹¹⁸ Following this point of view, foreign navy vessels could continue the pursuit of Somali pirates from the high seas into the territorial sea of Somalia.

However, even if in the case of Somalia the issue of statehood may legitimately be scrutinised according to international law, the just mentioned approach is in contrast to political reasons as it is of utmost importance that Somalia is reintegrated in the international community. Therefore, in cooperation with the TFG and under the auspices of the United Nations Security Council, the international community acted wisely to entitle

¹¹⁴ Mo (note 25) at 357-8.

¹¹⁵ Collins & Hassan (note 43) at 103.

¹¹⁶ Guilfoyle (note 82) at 694.

¹¹⁷ Azubuike (note 6) at 52 and 54; Bahar (note 5) at 67-8.

¹¹⁸ Bahar (note 5) at 69.

international naval forces to take anti-piracy measures also within the Somali territorial sea (see p. 41). Not only off the coast of Somalia but similarly in almost all hot spots of piracy the elimination of safe havens for pirates can basically serve as an effective remedy.

(iii) International Cooperation

Article 100 UNCLOS requires all states to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state. The provision provides the opportunity for organising collective actions of all states party to the convention with the objective to combat piracy effectively.¹¹⁹ With regard to the title of the provision every state has not only the right to take measures against piracy but also the ‘duty’ to cooperate in doing so.¹²⁰ In absence of a more precise definition of what is meant by ‘to the fullest possible extent’, there is uncertainty of which level of cooperation is required in respect of combating piracy on the high seas.¹²¹

Referring to the drafting debates at the United Nations Conference on the Law of the Sea in 1982 it becomes apparent that the provision of Article 100 UNCLOS should only demonstrate the intent to cooperate, that is to say that ‘non-compliance with the provision would not constitute a breach of international law’.¹²² Thus, a state would *de facto* not be obliged to cooperate if the state intended to avoid the prosecution of a pirate within its jurisdiction.

Nonetheless, Article 100 UNCLOS can basically be construed from two different perspectives. Assumed the level of effort is to be assessed as very high objectively and consequently, it may include a system of well-coordinated coast guards and joint patrols, entire information sharing, extradition of perpetrators and even allowing foreign vessels to enter one’s own territorial sea. If assessed from the subjective perspective of each state, the level of effort will very likely differ significantly between states subject to their wealth and resources and additionally to regional relations between them in the past.¹²³

Moreover, it is noteworthy that the possible cooperation of states concerning

¹¹⁹ Mo (note 25) at 347.

¹²⁰ Tuerk (note 48) at 342.

¹²¹ Collins & Hassan (note 43) at 104.

¹²² See Kavanagh (note 104) at 140-1.

¹²³ Collins & Hassan (note 43) at 104.

territorial waters is not even mentioned.¹²⁴

So far, Article 100 UNCLOS has not contributed very much to combat piracy. The main reason for the limited effectiveness of Article 100 UNCLOS is based on the fact that there is neither any ‘neutral body determining some minimum level of cooperation ... that states must satisfy’ nor any international agency which provides for the enforcement of signatory states’ duties.¹²⁵

(c) Interim Result

It is incontestable that the UNCLOS piracy provisions constitute the main legal framework which generally serves as a useful tool to combat piracy. Nonetheless, the usefulness of UNCLOS is limited due to inconsistencies which affect the practical scope of the convention and the enforcement of its goals.

On the one hand some provisions especially with regard to the piracy definition are overly stringent. Particularly the narrow and probably most frequent criticised high seas requirement is often not fulfilled and consequently many attacks are not covered by UNCLOS. It is also uncertain which piratical acts meet the condition of the violence component. The limiting effect of the private ends requirement as well as the two ship requirement though can basically be regarded as a useful means to separate the UNCLOS piracy provisions from maritime terrorism.

On the other hand some provisions are discretionary to an inadequate extent. Although international cooperation is explicitly mentioned as a fundamental principle in order to combat piracy there is no anti-piracy body which could coordinate cooperation among states. In the absence of more organisational structure actual and effective cooperation only takes place very rarely because states can not be forced to fulfil their duties under UNCLOS. Moreover, the UNCLOS provisions are too indefinite in determining how to capture and prosecute pirates resulting in inconsistent practices of states dealing with pirates.

With regard to the situation off the coast of Somalia the high seas requirement represents the most important shortcoming of UNCLOS (although the piracy provisions

¹²⁴ Stiles (note 13) at 310.

¹²⁵ Collins & Hassan (note 43) at 104.

apply to the exclusive economic zone) along with the limitations of the right of hot pursuit. Somali pirates are frequently able to evade pursuit by crossing into territorial waters after having attacked vessels on the high seas or within the exclusive economic zone.

Besides, there is uncertainty whether skiffs or rubber boats operating from land bases or from mother ships can be considered as a ‘ship’ in terms of UNCLOS.

III. SUA Convention

1. Historical Background

In response to the *Achille Lauro* incident when the limited scope of the UNCLOS piracy provisions became apparent, the international community made efforts to establish a legal basis for prosecuting maritime violence that was not covered by the UNCLOS framework.¹²⁶ In 1988 under the auspices of the United Nations and the International Maritime Organisation (IMO) respectively, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention), also referred to as the Rome Convention, was adopted.

The models used in drafting the 1988 SUA Convention were the first two United Nations terrorism conventions, namely the Hague Convention for the Suppression of Unlawful Seizure of Aircraft from 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation from 1971.¹²⁷ The 1988 SUA Convention is essentially based on these previously existing anti-terrorism conventions and bears close linguistic resemblance to them because many provisions were directly adapted to the maritime field.¹²⁸

Despite the convention’s usefulness in several incidents, the number of ratifications of or accessions to the convention increased only slowly until the 9/11 attacks when the international community became aware of possible threats to maritime safety which could develop in the future.¹²⁹ Furthermore, the attack on the World Trade Center in New York gave reason to review the 1988 SUA Convention since it did not cover all acts of violence

¹²⁶ AS Skaridov ‘*Hostis Humani Generis*’ in MH Nordquist *et al. Legal Challenges in Maritime Security* (2008) 479 at 481.

¹²⁷ RC Beckman ‘The 1988 SUA Convention and 2005 Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism’ in R Herbert-Burns *et al. Lloyd’s MIU Handbook of Maritime Security* (2009) 187 at 188-9.

¹²⁸ Sittnick (note 50) at 759; Tuerk (note 48) at 347.

¹²⁹ Beckman (note 127) at 190.

endangering maritime safety.¹³⁰ Finally after long negotiations the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Protocol) was formally adopted. The 1988 SUA Convention and the 2005 SUA Protocol constitute the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention) which so far has only been ratified by ten states.¹³¹ For the purpose of clarification the author will always refer to the amended 2005 SUA Convention if not indicated otherwise.

Although the major aim of the SUA Convention is admittedly the suppression of maritime terrorism, its main features make it likewise a potentially appropriate tool to combat piracy.¹³² Below, the main elements of the SUA Convention will be examined, always focusing on the relevant aspects with regard to piracy and drawing comparisons to UNCLOS whenever appropriate.

2. Relevant Provisions in Terms of Piracy

The SUA Convention provisions which are of importance for combating piracy refer to both the definition of offences under the convention and the basic rights and obligations of all signatory states concerning *inter alia* matters of jurisdiction and international cooperation. It has to be emphasised that unlike UNCLOS, which is regarded as a reflection of customary international law, the SUA Convention is only binding on states party to it.¹³³

(a) Offences under the SUA Convention

(i) Defining the Offences

The 1988 SUA Convention contains the main provisions concerning unlawful acts against the safety of maritime navigation which establish offences under the convention. Article 3(1) of the 1988 SUA Convention defines that a person commits an offence by unlawfully and intentionally (a) seizing or exercising control over a vessel by force or threat thereof; or (b) by performing an act of violence against a person on board a vessel if that act is likely to endanger the safe navigation of that vessel; or (c) by destroying a vessel or causing damage to a vessel or to its cargo which is likely to endanger the safe navigation

¹³⁰ Keyuan (note 81) at 330.

¹³¹ Status of the 2005 SUA Convention as at 30 November 2009, see http://www.imo.org/Conventions/mainframe.asp?topic_id=247 [Accessed 12.12.2009].

¹³² Mejia & Mukherjee (note 14) at 181.

¹³³ Azubuike (note 6) at 56.

of that vessel. Moreover, according to Article 3(2) of the 1988 SUA Convention also attempting to commit or abetting the commission of any of the just mentioned offences amount to an offence, as well as even threatening to commit offences in terms of Article 3(1)(b) or (c) constitutes an offence if the threat is likely to endanger the safe navigation of the vessel in question.

When the 2005 SUA Protocol was adopted the list of offences was broadened by adding three categories of new offences.¹³⁴ Firstly, Article 3*bis* (1)(a) of the 2005 SUA Protocol covers further unlawful acts within the scope of the 1988 SUA Convention with regard to using a vessel as a weapon or as a means to conduct a terrorist attack. Secondly, Article 3*bis* (1)(b) of the 2005 SUA Protocol contains non-proliferation offences, that is to say that the transport of weapons of mass destruction, their delivery systems and related materials is to be hampered and prosecuted. Thirdly, subject to Article 3*ter* of the 2005 SUA Protocol the transport of any person by sea who has committed an offence in terms of the 1988 SUA Convention, the 2005 SUA Protocol or any of the other United Nations terrorism conventions constitutes an offence if the transport was intentionally offered to assist that person to evade criminal prosecution.

Even though these added provisions are only of limited relevance to the above-mentioned different types of piracy, the expansion of the definition of offences is noteworthy in order to understand the development and the approach of the convention in general.

(ii) Remaining Shortcomings

In contrast to the piracy definition of Article 101 UNCLOS, the SUA Convention provisions do not mention restrictive elements such as the commitment for private ends or the two ship requirement.¹³⁵ Moreover, the geographical limits under the SUA Convention are not as narrow as under UNCLOS with its high seas requirement, as subject to Article 4 the SUA Convention is applicable if the attacked vessel 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, without regard to where the actual attack took place. Unlike UNCLOS the SUA Convention is not restricted to offences committed on the high seas or in an exclusive economic zone. Therefore, the coverage of unlawful acts under the SUA Convention is basically larger than under

¹³⁴ Cf. categorisation of new offences in Beckman (note 127) at 192.

¹³⁵ Treves (note 71) at 410.

UNCLOS.

But the SUA Convention also has its own limitations. As previously mentioned Article 3 of the SUA Convention requires the perpetrator either to have seized or exercised ‘control over the ship’ or to have performed an act of violence which has been ‘likely to endanger the safe navigation of that ship’. Accordingly, only the most violent but less frequent piratical acts such as kidnapping for ransom of a ship’s crew or hijacking of vessels are covered by the SUA Convention, whereas more frequent and slightly less violent piratical acts are not covered, as for instance simple acts of armed robbery by pirates in rubber boats who often only board the vessel for a very short moment.¹³⁶ Also if crew members were injured in the latter scenario it would not necessarily mean that such an act of violence was already likely to endanger the safe navigation of the attacked ship. Likewise, an attempted boarding of a vessel does not constitute an offence under the SUA Convention unless the act itself can be characterised as an ‘act of violence’ although an attempted boarding can be equally dangerous to the safe navigation of the attacked ship due to defensive measures taken by the vessel’s crew to prevent the successful boarding.¹³⁷

For these reasons it is argued that no distinction should be made between attempted and actual boardings and that neither seizing or exercising control over a ship nor an act of violence which is likely to endanger the safe navigation of the attacked ship should be necessary for the commitment of an offence under the SUA Convention.¹³⁸ Otherwise not all different types of piracy as outlined above (see p. 5) would be subject to the SUA Convention.

Altogether one has to bear in mind that the SUA Convention was adopted in order to remedy shortcomings of the UNCLOS piracy definition in respect of acts of maritime violence. Even though the defined offences under the SUA Convention may close some of these gaps, the convention does not serve as a universal remedy for combating piracy.

(b) Rights and Obligations under the SUA Convention

(i) Jurisdiction

Regarding the jurisdiction for prosecution there has to be some kind of link between the

¹³⁶ AJ Young & MJ Valencia ‘Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility’ (2003) 25(2) *Contemporary Southeast Asia* 269 at 277; Mejia & Mukherjee (note 14) at 184.

¹³⁷ Collins & Hassan (note 43) at 107.

¹³⁸ Beckman (note 17) at 322.

state willing to prosecute a person under the SUA Convention and the offence. Article 6(1) of the SUA Convention stipulates that a state is entitled to take measures and to establish jurisdiction over an offence when the offence is committed (a) against or on board a vessel flying its flag, or (b) in its territory including its territorial sea or (c) by a person who is its national. Thus, the number of states which can prosecute the offender is limited. The restrictions on states' jurisdiction under the SUA Convention become even more evident when compared with the respective provisions under UNCLOS: as opposed to Article 105 UNCLOS, according to which every state is entitled to prosecute pirates due to universal jurisdiction, the SUA Convention provides that only states which are party to the SUA Convention can prosecute offences under the treaty.¹³⁹

Provided that all states affected by an incident are party to the SUA Convention there are more detailed jurisdictional provisions which have to be mentioned. Subject to Article 7(1) of the SUA Convention, a signatory state shall take a person who allegedly committed an offence under the convention into custody as soon as the alleged offender enters its territory. Furthermore, after having taken the alleged offender into custody, Article 10 of the SUA Convention requires the signatory state to either extradite the person to another interested signatory state or to prosecute the person in its own courts. This obligation of the signatory state is referred to as the principle *aut dedere aut iudicare*.¹⁴⁰ Even in cases in which no extradition treaty between two signatory states exist the SUA Convention itself can serve as a legal basis for the extradition as stipulated in Article 11(2) of the SUA Convention.

At a first glance these provisions appear as a strong and useful tool to prosecute and penalise offenders in order to avoid situations in which perpetrators go unpunished. However, the prosecution or extradition of offenders and consequently the enforcement of the SUA Convention are ultimately left to the each signatory state's discretion.¹⁴¹ Owing to the lack of compulsion in the SUA Convention perpetrators will have impunity if for any reason the states concerned are unwilling to prosecute them because no other state will be able to step in and prosecute the perpetrators for their acts instead.¹⁴² In addition, the SUA Convention does not provide for any sanctions against signatory states which fail to

¹³⁹ Skaridov (note 126) at 482.

¹⁴⁰ R Wolfrum 'Fighting Terrorism at Sea: Options and Limitations under International Law' in MH Nordquist *et al. Legal Challenges in Maritime Security* (2008) 3 at 17.

¹⁴¹ Garmon (note 31) at 273.

¹⁴² *Ibid.*

comply with their treaty obligations.¹⁴³

Lastly, it has to be pointed out that the SUA Convention also lacks uniformity just as UNCLOS does with regard to prosecution methods, legal proceedings and penalties imposed on perpetrators. Article 5 of the SUA Convention, for example, states that each signatory state are supposed to make the defined offences punishable by appropriate penalties which take the grave nature of those offences into account. In view of the fact that domestic laws frequently vary tremendously between different states, the SUA Convention has been severely criticised as the '[u]niformity in treatment of offenders by each state is important to ensure certainty of punishment'.¹⁴⁴

(ii) International Cooperation

The SUA Convention contains several provisions which deal with the international cooperation among signatory states to prevent and suppress unlawful acts under the convention. In contrast to UNCLOS the obligations to cooperate are basically stipulated much more specifically. The wording indicates the importance of the provisions as the imperative was chosen, that is to say 'shall' is used as opposed to 'should'.¹⁴⁵

Article 13(1) of the SUA Convention determines that signatory states must cooperate in the prevention of offences by taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories. Additionally, signatory states are required to exchange information in accordance with their national law and to coordinate administrative and other measures considered as appropriate to prevent the commission of offences. Subject to Article 12 of the SUA Convention every state is also obliged to provide other states which are prosecuting an offender the greatest measure of assistance particularly in obtaining relevant evidence necessary for the criminal proceedings.

On the one hand these strong obligations for signatory states facilitate an effective system of international cooperation but, on the other hand, they may also deter countries from ratifying the SUA Convention. As the example of Southeast Asian nations shows, especially countries with a recent colonial history, a comparatively newly won

¹⁴³ Skaridov (note 126) at 483.

¹⁴⁴ Collins & Hassan (note 43) at 109.

¹⁴⁵ Meija & Mukherjee (note 14) at 180.

independence and often with still not entirely unchallenged maritime boundaries are very reluctant to ratify the treaty. These countries are afraid that the strong obligations under the SUA Convention could be a serious compromise to their national sovereignty and that in the course of extending the convention's scope the maritime forces of other signatory states could ultimately be allowed to pursue offenders in terms of the SUA Convention into their territorial waters in general.¹⁴⁶

Of further relevance to the cooperation between signatory states is the newly amended provision of Article 8*bis* of the 2005 SUA Protocol. The provision sets forth the conditions under which forces of a signatory state are allowed to board a vessel flying the flag of another signatory state when reasonable grounds exist that an offender in terms of the convention is on board. Thus, Article 8*bis* of the 2005 SUA Protocol establishes a new law enforcement mechanism as the provisions of the 1988 SUA Convention have not granted states powers to board vessels flying the flag of another signatory state and arrest offenders yet.¹⁴⁷

However, due to Article 8*bis* (5)(c) of the 2005 SUA Protocol the boarding of a vessel can only take place with the express authorisation of the flag state of the suspect vessel. The flag state may give its authorisation in general or *ad hoc* and may also impose specific conditions on the boarding state.¹⁴⁸ Moreover, Article 8*bis* of the 2005 SUA Protocol restricts the use of force and includes several important safeguards for innocent seafarers, carriers and flag states when a signatory state takes action against a vessel.¹⁴⁹

(c) Interim Result

In principle the SUA Convention can act as an additional useful tool to combat piracy. But in view of the fact that above all the SUA Convention was adopted to remedy shortcomings of the UNCLOS piracy provisions it has to be noted that this goal has only been achieved to a limited extent.

The most serious problem of the SUA Convention regime consists in the circumstance that its effectiveness depends on its widespread regional ratification which is still pending in

¹⁴⁶ Young & Valencia (note 136) at 277.

¹⁴⁷ Beckman (note 127) at 189 and 194.

¹⁴⁸ Tuerk (note 48) at 361.

¹⁴⁹ See Article 8*bis* (8) to (10) of the 2005 SUA Protocol for more detailed information with regard to safeguards.

most regions with hot spots of piracy.¹⁵⁰ Consequently, states which are obliged to cooperate in combating piracy outside their territorial waters under UNCLOS do not have such an obligation within their own territory unless they have become party to the SUA Convention. But even if a state has ratified the SUA Convention the prosecution or extradition of offenders are still subject to the state's discretion. In the absence of any enforcement and sanction mechanism the offenders may have impunity if signatory states fail to comply with their treaty obligations and in that case the basic idea of the SUA Convention to eliminate safe havens for offenders would dilute significantly.

Furthermore, the scope of the SUA Convention is restricted to the most serious piratical acts as mentioned above. Moreover, the newly amended boarding provisions which require that every suspect vessel can only be boarded with the express consent of the flag state show the reluctance of the international community 'to create new exceptions to the principle of flag state jurisdiction on the high seas'.¹⁵¹ Thus, effective cooperation under the SUA Convention will only take place among states with common interests.

Concerning the hot spot of piracy off the coast of Somalia and in the Gulf of Aden the current usefulness of the SUA Convention is very limited because Somalia has not become a party to the convention yet. Even if the TFG formally ratified the SUA Convention in the near future despite the political instability, the TFG would not be able to apply and enforce its provisions due to its inability to control the Somali coast. The frequently quite serious attacks of Somali pirates however regularly meet the requirements to constitute an offence in terms of the SUA Convention.

IV. Defining Piracy Beyond UNCLOS and the SUA Convention

It has become apparent that neither UNCLOS nor the SUA Convention provides a legal definition which covers all contemporary piratical attacks comprehensively. *Xu* comments that 'a particular kind of criminal conduct at sea may be considered as piracy according to its dictionary meaning, but may not squarely fall within a legal definition of piracy'.¹⁵² Nonetheless, several further attempts have been made to clarify that issue.

The IMO distinguishes according to the geographical occurrence of a piratical act.

¹⁵⁰ Further information on the current status of ratifications are available at the IMO website, see http://www.imo.org/conventions/mainframe.asp?topic_id=248 [Accessed 13.12.2009].

¹⁵¹ Beckman (note 127) at 197.

¹⁵² *Xu* (note 16) at 640.

If an incident takes place on the high seas (or in the exclusive economic zone) the IMO refers to the piracy definition of Article 101 UNCLOS whereas incidents occurring in the territorial waters of a littoral state are regarded as so-called ‘armed robbery against ships’. In its Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships the IMO defined ‘armed robbery against ships’ as 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 ship, within a state’s jurisdiction over such offences.¹⁵³ Thus, an offence in terms of the IMO can be described as the UNCLOS definition of piracy without the high seas limitation.¹⁵⁴ It is noteworthy though that so far this definition has only been used in non-treaty IMO documents.¹⁵⁵

Mejia & Mukherjee follow a very similar approach, also making a distinction between piracy in terms of UNCLOS occurring on the high seas on the one hand and the so-called ‘coastal zone piracy’ on the other hand which is almost identically defined as IMO’s term ‘armed robbery against ships’.¹⁵⁶

The probably most extensive definition is used by the IMB which determines 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.¹⁵⁷

Whichever of these approaches one may prefer it has to be emphasised that the theoretical determination of which unlawful acts can be regarded as piratical attacks may be useful for statistical purposes but that it does not automatically assist in combating piracy in practice. Only an amendment to the international legal framework against piracy with regard to the defined offences can extend the scope and increase the effectiveness of the international anti-piracy regime.

¹⁵³ IMO ‘Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships’ MSC/Circ.984 (20.12.2000) at 2.2 in Annex, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D1880/984.pdf [Accessed 27.01.2010].

¹⁵⁴ Cf. Collins & Hassan (note 43) at 110.

¹⁵⁵ H Fouché *Policing Piracy and Armed Robbery of Ships in South Africa’s Territorial Waters and Contiguous Zone* (2006) at 43, doctoral dissertation, available at http://libserv5.tut.ac.za:7780/pls/eres/wpg_docload.download_file?p_filename=F626643704/fouche.pdf [Accessed 27.01.2010].

¹⁵⁶ Mejia & Mukherjee (note 14) at 183.

¹⁵⁷ See IMB Piracy Report for the period 1 January - 30 September 2009 (note 12), p. 23.

V. International Ship and Port Facility Security Code

The International Ship and Port Facility Security (ISPS) Code is an amendment to the 1974 International Convention for the Safety of Life at Sea (SOLAS). In response to the perceived threats to ships and port facilities in the wake of the 9/11 attacks in the United States the ISPS Code was adopted in December 2002 under the auspices of the IMO, implemented through Chapter XI-2 ‘Special Measures to Enhance Maritime Security’ in SOLAS and entered into force in July 2004.¹⁵⁸ Similar to the SUA Convention, the ISPS Code is in the first place also regarded as a tool to combat maritime terrorism.¹⁵⁹

The priority objective of the ISPS Code is ‘to establish an international framework involving cooperation between contracting governments, government agencies, local administrations and the shipping and port industries to detect security threats and take preventive measures against security incidents affecting ship or port facilities used in international trade’.¹⁶⁰ The ISPS Code consists of two parts, one is mandatory (Part A) and the other one recommendatory (Part B). Part A contains detailed security-related requirements for governments, port authorities and shipping companies which have to be met, while Part B provides a series of guidelines about how to comply with these requirements.

The decisive question is whether the ISPS Code sustainably enhanced the international framework against piracy, particularly in the hot spot off the coast of Somalia. Accordingly, it has to be clarified when measures in terms of the ISPS Code can be taken. All preventive and procedural measures subject to the ISPS Code are designed to protect ship and port facilities against a ‘security incident’ which is defined in Regulation 1 of SOLAS XI-2 as ‘any suspicious act or circumstance threatening the security of a ship, including a mobile offshore drilling unit or a high-speed craft, or of a port facility or of any ship/port interface or any ship-to-ship activity’.¹⁶¹

Due to its broadness and vagueness this definition appears to be rather inadequate and not very useful concerning combating piracy in hot spots like off the coast of Somalia.

¹⁵⁸ With regard to the emergence of the ISPS Code see http://www.imo.org/Safety/mainframe.asp?topic_id=897#what [Accessed 07.02.2010].

¹⁵⁹ Mejia & Mukherjee (note 14) at 173.

¹⁶⁰ See IMO publication available at http://www.imo.org/newsroom/mainframe.asp?topic_id=583&doc_id=2435 [Accessed 07.02.2010].

¹⁶¹ The SOLAS/ISPS Code definition of ‘security incident’ is cited in M Mejia ‘The ISPS Code, Security Culture, and the Campaign against Piracy and Other Crimes at Sea’ (2009) 104(4) *BIMCO Bulletin* 42 at 43.

As regards the fight against terrorism, however, it has to be admitted that at least so far no incidents ‘of maritime attacks using ships as weapons or explosives, or of ships being taken over by terrorists embarking from shore-side’ have occurred since the ISPS Code’s entry into force.¹⁶²

But the ISPS Code also faces more precise criticism from maritime practitioners. Andrew Linington, spokesman of the UK officer’s union Nautilus UK, states: ‘The ISPS Code has done a lot for raising awareness of security but our members are still asking what good is it really doing. It is clearly not working when half-a-dozen men can gain access to a ship like the 318,000-dwt Sirius Star (built 2008) with knives and guns. It is high time we sat down and revised the code in the light of these attacks’.¹⁶³ The union Nautilus UK is of the opinion that the key failing of the ISPS Code consists in introducing additional responsibilities without requiring extra specialist on-board personnel.¹⁶⁴ Moreover, others criticise more generally that the ISPS Code did nothing to address the issue of piracy and other criminal actions aimed at ships that the industry had been complaining about for years, but that it is only another financial burden which shipoperators have to shoulder.¹⁶⁵

Currently, the ISPS Code’s effective contribution to combating piracy is still very limited in hot spots like off the Somali coast.¹⁶⁶ Many piratical attacks are not clearly addressed, different in nature and not covered by the ISPS Code.

VI. United Nations Security Council Resolutions on Somalia

The currently very serious and precarious situation of numerous pirate activities off the coast of Somalia is due to both the political instability facilitating piratical attacks which in turn exacerbate the situation in Somalia in general and the shortcomings of the international conventions in combating piracy. Aware of these problems, the international community made numerous efforts to improve the situation by passing several United

¹⁶² Mejia (note 161) at 43-4.

¹⁶³ Cited in ‘Nautilus UK says ISPS Code Fails to Protect Seafarers from Piracy’ *Tradewinds* (23.01.2009), available on request at www.tradewinds.no.

¹⁶⁴ *Ibid.*

¹⁶⁵ See ‘Good on Paper: The Spate of Somalian [sic] Piracy Attacks Has Highlighted the Flaws in ISPS and Justified the Initial Reaction of the Sceptics When the System Was Mooted’ Comment in *Fairplay Solutions* (04.12.2009), available on request at www.fairplay.co.uk.

¹⁶⁶ Similar assessments with regard to issues of piracy have also been stated by Captain B Watt in his speech (‘The ISPS Code as an Instrument against Piracy and Other Crimes at Sea’) at the Combating and Preventing Sea Piracy in Africa Summit 2009, Cape Town, 26 - 28 August 2009.

Nations Security Council resolutions as will be outlined below.¹⁶⁷

1. Practical Problems to Combat Piracy off the Somali coast

The legal situation under international law serves as a starting point. Accordingly, if a piratical attack occurs in the territorial waters of a littoral state, the only state which is entitled to seize the attacking vessel and to arrest the offenders is the littoral state unless the littoral state has expressly authorised another state to exercise police power in its territorial waters.¹⁶⁸ Somalia, however, is unable to properly police and maintain the security of its own territorial waters whereas international naval forces do not have the right to take anti-piracy measures within the Somali territorial waters. Consequently, Somali pirates often escape punishment because they regularly attack vessels either within the Somali territorial waters or if the attack occurs on the high seas they are frequently able to evade pursuit by crossing into Somalia's territorial waters.

2. Key elements of the Security Council Resolutions

In order to remedy the limitations and broaden the scope of the rules of international law on piracy the Security Council adopted Resolutions 1816, 1838, 1846 and 1851 in 2008 and Resolution 1897 in 2009. Collectively these resolutions are regarded as 'the most comprehensive piracy repression guidance promulgated by the UN in their history'.¹⁶⁹ All of them were decided under Chapter VII of the Charter of the United Nations.¹⁷⁰ Thus, the resolutions are legally binding for all states.¹⁷¹

First of all the Security Council passed Resolution 1816 in June 2008, stating that the Security Council was gravely concerned by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation.¹⁷² These concerns were especially deepened because of hijackings of vessels operated by the

¹⁶⁷ It can be distinguished between resolutions addressing generally the issues of peace, stability and security in Somalia such as SC Res. 1814 and 1844 and resolutions dealing with Somali piracy in detail such as SC Res. 1816, 1838, 1846, 1851 and 1897.

¹⁶⁸ Beckman (note 17) at 327.

¹⁶⁹ Kraska & Wilson (note 34) at 50.

¹⁷⁰ The full text of the Charter of the United Nations including Chapter VII is available at <http://www.un.org/en/documents/charter/index.shtml> [Accessed 06.02.2010].

¹⁷¹ Cf. M Herdegen *Völkerrecht* 8th (2009) at 286-7; Keyuan (note 81) further states to the legal status at 336: 'Unlike resolutions passed by the UN General Assembly, resolutions passed by the UNSC, particularly those under Chapter VII of the UN Charter, have legal effect and, when the term "decide" is used, they contain the highest degree of compelling binding force'.

¹⁷² See full text of the SC Res. 1816 at <http://www.un.org/News/Press/docs/2008/sc9344.doc.htm> [Accessed 06.02.2010].

United Nations World Food Programme and the inability of Somali authorities to act against the hijackers.¹⁷³ In this context it has to be pointed out that not piracy and armed robbery as such constitute a threat to international peace and security in terms of Chapter VII of the United Nations Charter. Exacerbated by pirate activities in the territorial waters of Somalia and on the high seas off the Somali coast it is rather the situation in Somalia as a whole which amounts to a case of Chapter VII.¹⁷⁴

The key provision of all resolutions is to be found in paragraph 7 of Resolution 1816 providing that states which cooperate with the TFG in the fight against piracy and armed robbery at sea off the Somali coast may (a) enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea and may for that reason (b) use ‘all necessary means’ within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy and under relevant international law. Also worth mentioning is the fact that Resolution 1816 and the subsequent resolutions of the Security Council were adopted on the basis of the TFG’s authorisation as stated in paragraph 9 of Resolution 1816. It is argued that the significance given to the TFG’s consent has the objective of respecting state sovereignty and strengthening the TFG in general.¹⁷⁵

Additionally, in Resolution 1846 the Security Council called upon all states, more precisely flag, port and coastal states, states of the nationality of victims and perpetrators of piratical acts and other states with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction and in investigating and prosecuting persons responsible for such piratical acts off the Somali coast and in assisting one another.¹⁷⁶ In this respect Resolution 1846 also urges states to fully implement their obligations under the SUA Convention provided that they are already party to the convention.¹⁷⁷

Resolution 1851 broadens the scope of action for international naval forces. Paragraph 6 stipulates that authorised states may undertake all necessary measures that are

¹⁷³ For more information on the United Nations World Food Programme in Somalia see <http://www.wfp.org/countries/Somalia> [06.02.2010].

¹⁷⁴ Guilfoyle (note 82) at 695.

¹⁷⁵ Treves (note 71) at 407.

¹⁷⁶ See paragraph 14 of the SC Res. 1846, available at <http://www.un.org/News/Press/docs/2008/sc9514.doc.htm> [Accessed 06.02.2010].

¹⁷⁷ Ibid at paragraph 15.

appropriate ‘in Somalia’ for the purpose of suppressing acts of piracy and armed robbery at sea, i.e. states are entitled to use land-based operations on Somali soil.¹⁷⁸ Arguably, this extension is owed to the *Le Ponant* incident in April 2008 when French forces pursued pirates who had taken crew members of a French luxury yacht hostage for ransom into the Somali mainland.¹⁷⁹

Furthermore, the Security Council argues in support of embarked law enforcement officials, also referred to as ‘shipriders’. In paragraph 3 of Resolution 1851 the Security Council invites all states combating piracy off the Somali coast to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark 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 the Resolution. However, this form of cooperation requires that the TFG has consented to the exercise of third state jurisdiction by shipriders in territorial waters of Somalia in advance and that suchlike special agreements or arrangements do not negatively affect the implementation of the SUA Convention.

Given the inability of the state of Somalia to prevent piratical activities and to patrol and secure its territorial waters the resolutions of the Security Council offer a new tool for international naval forces to effectively repress piracy off the Somali coast, particularly in cases of hot pursuit from the high seas into the territorial waters of Somalia. However, also the resolutions are restricted in some respect.

Firstly, the authorisation is temporarily limited. Resolution 1816 passed on 2 June 2008 was valid for six months. Accordingly, it was renewed on 2 December 2008 by Resolution 1846 for twelve further months which in turn was lastly prolonged on 30 November 2009 by Resolution 1897 for additional twelve months. The latter renewal also applies to land-based operations in terms of Resolution 1851.¹⁸⁰

Secondly, the scope of the resolutions is locally restricted. The authorisation provided only applies to the situation in Somalia, that is to say that international naval

¹⁷⁸ See full text of the SC Res. 1851 at <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm> [Accessed 07.02.2010].

¹⁷⁹ Cf. Treves (note 71) at 404.

¹⁸⁰ See particularly SC Res. 1897 at <http://www.un.org/News/Press/docs/2009/sc9799.doc.htm> [Accessed 07.02.2010].

forces taking anti-piracy measures are only allowed to enter the territorial waters of Somalia but not of other adjacent states such as Kenya or Yemen unless these states have expressly given their consent.¹⁸¹

Thirdly, it is stressed in paragraph 8 of Resolution 1897 that the renewed authorisations are not to be regarded as establishing customary international law. The authorisations shall not affect the rights, obligations or responsibility of states under international law, including any rights or obligations under UNCLOS with respect to any other situation.

Fourthly, the Security Council notes that activities undertaken by cooperating states pursuant to the authorisations shall not have practical effects of denying or impairing the right of innocent passage to the vessels of any third state.¹⁸²

3. EUNAVFOR Somalia (Operation Atalanta) and Combined Task Force 151

Related to the Security Council resolutions, certain military operations which have been launched to combat piracy off the coast of Somalia have to be mentioned, namely the EUNAVFOR Somalia – better known as Operation Atalanta – and the Combined Task Force 151 (CTF 151).

Operation Atalanta was established by the Council of the European Union in November 2008 and is a military operation in support of the United Nations Security Council Resolutions 1814, 1816, 1838, 1846 and 1897. Its objectives are to contribute to:

- the protection of vessels of the United Nations World Food Programme delivering food aid to displaced persons in Somalia;
- the protection of vulnerable vessels sailing in the Gulf of Aden and off the Somali coast;
- the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.

This first maritime operation of the European Union aims at effective cooperation with other naval forces and assets deployed in the region in order to improve the situation

¹⁸¹ Cf. wording of paragraph 9 of the SC Res. 1816 (note 172).

¹⁸² See paragraph 10 of the SC Res. 1897 (note 180).

off the coast of Somalia.¹⁸³

The CTF 151 is a multinational task force established in January 2009 to conduct anti-piracy operations to actively deter, disrupt and suppress piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations. After having previously been commanded by the U.S. Navy and the Turkish Navy, currently the command staff is comprised of personnel from a number coalition countries.¹⁸⁴

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¹⁸³ More information on Operation Atalanta is available at <http://www.consilium.europa.eu/showPage.aspx?id=1518&lang=en> [Accessed 07.02.2010].

¹⁸⁴ More information on CTF 151 is available at <http://www.cusnc.navy.mil/cm/151/index.html> [Accessed 07.02.2010].

CHAPTER 4: International Cooperation to Combat Piracy

International cooperation to combat piracy can be divided into two different types of cooperation which have to be distinguished. On the one hand international cooperation is carried out by private companies and non-governmental organisations, in particular by the IMB and the Comité Maritime International (CMI). On the other hand international cooperation is also to be found under the umbrella of countries and government-based international organisations, for instance in the form of agreements and collective acts performed by various countries or under the auspices of the IMO.¹⁸⁵ In the following these different types of international cooperation which have been undertaken so far to combat piracy will be outlined and examined.

I. Cooperation between Private Companies and Organisations

1. International Maritime Bureau – Piracy Reporting Centre

Piracy at sea remains a serious threat to maritime commerce. In response to an increasing level of piracy the IMB which is a specialised division of the International Chamber of Commerce decided to establish the 24 hour Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia, in October 1992.

The PRC's main objective is to be the first point of contact for the master of a ship to report an actual or attempted attack or even suspicious movements and thus initiating the process of response. Furthermore, the PRC aims at raising awareness within the shipping industry – including shipmasters, shipowners, insurance companies and traders – of the areas of high risk associated with piratical attacks. In an attempt to counter piratical attacks in an ideal way the PRC closely cooperates with the industry, various governments and law enforcement agencies and shares information in a transparent and open manner.¹⁸⁶

The key services of the PRC are:

- issuing daily status reports on piracy and armed robbery to ships via broadcasts on the Inmarsat-C SafetyNET service;
- reporting piracy and armed robbery at sea incidents to law enforcement and the IMO;
- helping local law enforcement apprehend pirates and assist in bringing them to

¹⁸⁵ Mo (note 25) at 347.

¹⁸⁶ Further information on the background of the PRC is available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12 [Accessed 08.02.2010].

justice;

- assisting and advising shipowners, shipmasters and crew members whose vessels have been attacked;
- providing updates on worldwide pirate activity via the Internet;
- publishing comprehensive quarterly and annual reports with detailed piracy statistics.¹⁸⁷

Apart from its reporting function the PRC has considerably contributed to the increased ‘public awareness of the real danger and risk of modern maritime piracy’.¹⁸⁸ Due to the status of the IMB as an independent non-governmental institution, it is widely accepted by the shipping industry, a fact which simplifies cooperation. Thus, shipowners and shipmasters rather report incidents to the PRC than to authorities of coastal states because otherwise they fear that for instance the authorities’ investigations may delay their voyage.¹⁸⁹

At present the PRC of the IMB can be regarded as the only international body which renders immediate, practical and unconditional assistance to seafarers who fall victim to maritime piracy anywhere in the world.

2. Comité Maritime International – Model Law

In addition to the work of the IMB, the major international cooperation of private companies and organisations is carried out by the Comité Maritime International (CMI). The CMI was formally established as a non-governmental organisation, located in Antwerp, Belgium, in 1897 and is regarded as the first international organisation in the maritime field which dealt exclusively with maritime law and related commercial practices.¹⁹⁰ Its main objective ‘is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects’.¹⁹¹

(a) Model National Law

Apart from the CMI’s contribution to combat piracy by organising studies and conferences

¹⁸⁷ More detailed information on all provided services by the PRC is available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=31&Itemid=37 [Accessed 08.02.2010].

¹⁸⁸ Mo (note 25) at 348.

¹⁸⁹ Beckman (note 17) at 332.

¹⁹⁰ For more detailed information on the historical background of the CMI see <http://www.comitemaritime.org/histo/his.html> [Accessed 13.02.2010].

¹⁹¹ See <http://www.comitemaritime.org> [Accessed 13.02.2010].

dealing with modern-day issues of shipping law to raise public awareness of the danger and risk of maritime piracy, the CMI's major efforts consist in drafting a model law responding to piracy.¹⁹² In 1997 the CMI invited several relevant international organisations to join together in examining the exacerbating situation of maritime piracy and ultimately the Joint International Working Group (JIWG) was formed. The JIWG consists of representatives from the following international organisations in addition to the CMI:

- the Baltic and International Maritime Council (BIMCO);
- the International Chamber of Shipping (ICS);
- the International Criminal Police Organisation (INTERPOL);
- the International Group of P&I Clubs (IGP&I);
- the IMB;
- the IMO;
- the International Transport Workers Federation (ITF);
- the International Union of Marine Insurance (IUMI);
- the United Nations Office of Legal Affairs, Division for Oceans Affairs and the Law of the Sea (UNOLA/DOALOS).

There was early agreement among the participants that the JIWG would focus on issues of jurisdiction and prosecution of the crimes of piracy and maritime violence. The JIWG noted that a fundamental difficulty in combating piracy with effective counter measures is due to the lack of uniformity in national laws concerning acts of piracy and maritime violence. As the legal inability to effectively prosecute pirates had become apparent in several cases in the past, for instance in the *Alondra Rainbow* incident in 1999, the JIWG stressed the need for a Model National Law which was to be drafted.¹⁹³ Finally, the Model National Law on Acts of Piracy and Maritime Violence (Model National Law) was completed in 2001.

The priority objective of the Model National Law was 'to ensure that no act of piracy or maritime violence falls outside the jurisdiction of affected states to prosecute and

¹⁹² Mo (note 25) at 348.

¹⁹³ See Keyuan (note 81) at 344 outlining the *Alondra Rainbow* incident in more detail: 'the Mumbai High Court overruled the lower court's decision and acquitted all the accused'.

punish these crimes or, alternatively, to extradite for prosecution in another state'.¹⁹⁴ Moreover, the draft was supposed to assist in giving full effect to the UNCLOS piracy provisions as well as the relevant provisions under the SUA Convention. Furthermore, it aimed at the uniform application of provisions of the SUA Convention as national law in those states which had not become parties to the convention by then. Additionally, the draft Model National Law sought to make sure that all incidents of piracy and maritime violence covered by its definitions would be reported to the proper national authorities and that the information would be passed on to the competent international organisations.¹⁹⁵

(b) Status of Adoption of the Model National Law by Governments

Although the proposed draft Model National Law was adopted by the CMI Assembly and subsequently distributed to the national member associations of the CMI, the ultimate goal of lobbying national governments for enactment of the text as national law was only reached to a very small extent.¹⁹⁶ Several different reasons for the missing support for the Model National Law have been adduced.

Firstly, the draft was criticised for not covering certain types of crimes. Particularly, questions arose in respect of the draft's 'application of jurisdiction over and its effectiveness at ensuring the prosecution of perpetrators of criminal offenses committed on board foreign-flagged ships', e.g. ships which are flagged under a state other than the state responding to the offense.¹⁹⁷

Secondly, despite the increasing number of piratical incidents there was still a general lack of awareness by many national governments in how far they had actually already been affected by these matters. Consequently, several governments did not realise that the Model National Law could serve as a useful remedy.¹⁹⁸

Thirdly, it is also argued that the problem of piracy and maritime violence was of

¹⁹⁴ See 'Report of the Joint International Working Group' in CMI Yearbook 2000, available at http://www.comitemaritime.org/singapore/piracy/piracy_report.html [Accessed 14.02.2010].

¹⁹⁵ Ibid.

¹⁹⁶ Fouché (note 155) at 39 notes that Canada and New Zealand are the only countries so far which have adopted measures in their national criminal codes criminalising piracy in accordance with the CMI Model National Law.

¹⁹⁷ Gabel (note 15) at 1448; at 1449 the cited author makes further remarks to the *Tajima* incident which was widely acknowledged as an example of such a situation to which the Model National Law could not provide a remedy.

¹⁹⁸ Cf. Hitt (note 27).

too little significance in financial terms to become a priority for the industry.¹⁹⁹

Fourthly, in retrospect the initial presentation of the draft in 2001 took place at quite an unfortunate time because ‘effective action was simply overtaken by events following 9/11 and the focus on producing the ISPS Code’.²⁰⁰

Against the backdrop of these circumstances and criticism the JIWG was engaged with the revision of the draft. Improvement suggestions for the draft were made by representatives of the participating organisations with regard to the range of the draft’s definitions, particularly addressing the increasing problem of violent kidnappings for ransom from ships at sea predominantly committed in waters of littoral states lacking effective governmental structures and law enforcement capabilities.²⁰¹ It was also proposed that any revised work should include criminal acts on foreign-flagged ships. Furthermore, the whole revision was to take the altered situation after the 9/11 attacks into account, considering an emerging linkage between piracy and terrorism. Apart from these substantive revisions in the text of the draft, it was also emphasised that a ‘revised Model National Law would need a better promotion’ in order to explain why such a model is necessary to actually be successful.²⁰²

(c) Draft Guidelines for National Legislation

Resulting from further deliberations of the JIWG with regard to the above-mentioned issues the Draft Guidelines for National Legislation (Draft Guidelines) were finally completed in 2007, replacing the initially drafted Model National Law in an attempt to diminish the limitations of the latter.

The Draft Guidelines are designed to apply to a broad range of maritime crimes including but not limited to homicide, bodily harm, piracy, armed robbery, extortion, serious fraud, kidnapping by deception, acts of terrorism and facilitation of proliferation of weapons of

¹⁹⁹ See Minutes of the Assembly held at the Automobile Club de France in Paris (16.04.2005), CMI News Letter No. 2 May/August 2005 at 9, available at <http://www.comitemaritime.org/news/pdfiles/2005-2.pdf> [Accessed 14.02.2010].

²⁰⁰ Ibid.

²⁰¹ Ibid at 8-9.

²⁰² Ibid at 9.

mass destruction.²⁰³ With regard to piratical acts the wide spectrum of criminal offences is intended to complement the non-exhaustive piracy provisions of UNCLOS and the offences under the SUA Convention.²⁰⁴ Thus, further ‘maritime criminal acts’ are defined in addition to already existing offences of piracy under international law.²⁰⁵

The JIWG admits that the majority of these criminal act fall under national admiralty and maritime jurisdiction of various states.²⁰⁶ Concerning the issue of jurisdiction and prosecution the Draft Guidelines provide an extensive right to prosecute ‘in the state apprehending or having custody of a person accused of committing an offence’, ‘when the person accused ... is a citizen or national of the enacting state, or is a resident or foreign national, or is a stateless person’, ‘when an offence ... is committed against a person who is a citizen or national of, or is a foreign national resident in the enacting state, or is a stateless person’ and ‘when an offence ... is committed on board a foreign-flag ship’ (and certain requirements are met).²⁰⁷

The JIWG is of the opinion that ‘the key to effective prosecution of these crimes ... is a high degree of uniformity in national legislation and the consequent elimination of conflicts of law which pose barriers to jurisdiction, apprehension, collection and admission of evidence, retention in custody, extradition and/or trial, and upon determination of guilt, sentencing to reasonably equivalent and proportionately severe penalties’.²⁰⁸ Although no specific penalties are proposed in the Draft Guidelines, states are to determine penalties severe enough to discourage the commitment of maritime criminal acts. Moreover, the JIWG acknowledges that national governments have the greatest knowledge of their own national circumstances of maritime crime and should therefore focus on individual needs when reviewing their national criminal law in the light of the Draft Guidelines.

Ultimately, not the provided form of the Draft Guidelines is decisive but the implementation of the Draft Guidelines’ contents into national legislation is of utmost

²⁰³ See all covered maritime criminal acts including acts of piracy in Article I of the Draft Guidelines for National Legislation, available at http://www.comitemaritime.org/cmidoocs/pdf/Crim_acts.pdf [Accessed 15.02.2010].

²⁰⁴ Cf. Meija & Mukherjee (note 43) at 322.

²⁰⁵ See Article I(3) of the Draft Guidelines (note 203) referring to the Convention on the High Seas and UNCLOS; Article I(4) refers to acts of piracy under national criminal codes and under applicable customary international law.

²⁰⁶ See Introduction to the Draft Guidelines for National Legislation (note 203).

²⁰⁷ Article II(3) - (6) of the Draft Guidelines.

²⁰⁸ See the Introduction to the Draft Guidelines (note 203).

importance.²⁰⁹

(d) Interim Result

The newly developed Draft Guidelines can generally serve as a useful tool which substantially improves the international maritime community's response to piracy.

Bearing in mind that pirates only operate at sea to commit their crimes but eventually have to come ashore to dispose of their gains, collective action by national law enforcement can be utilised to take advantage of this potential weakness of pirates.²¹⁰ However, the success of the Draft Guidelines will be highly dependent on the support of all member organisations of the JIWG and finally on the willingness of national governments to contribute and implement the Draft Guidelines into national legislation.

It is argued that the key feature of any developed model law consists in the 'lack of binding force'.²¹¹ On the one hand a model law brings along the advantage that states have some liberty in determining how to draft their own national anti-piracy laws. On the other hand the disadvantage is that no effective anti-piracy regime can be established if not all states concerned implement the model law as no legal obligation exists to adopt it.²¹²

II. Cooperation between Countries – Government-based Organisations

As regards cooperation and collective acts performed by countries and government-based international organisations the geographical scope of cooperation can be distinguished. While the IMO as a specialised organisation within the United Nations basically works on an international level, the cooperation can also take place on a regional level as for instance in Southeast Asia including a number of neighbouring countries. In the latter case the question arises in how far regional concepts of successful cooperation can be replicated in other areas in the world with similar problems with regard to piracy.

1. Cooperation on an International Level – Efforts of the IMO

The IMO is a specialised organisation within the United Nations with 169 member states.

²⁰⁹ Ibid.

²¹⁰ Gabel (note 15) at 1453.

²¹¹ Mo (note 25) at 353.

²¹² Ibid, also noting that if a model law was backed by an obligation to adopt it, it would be problematic how to make all states accept such an obligation because no state could be compelled to accept such an obligation if it did not wish to do so – similar to the conclusion of international treaties.

It has the mandate to develop and maintain a comprehensive regulatory framework for shipping, including safety, environmental concerns, legal matters, technical cooperation, maritime security and the efficiency of shipping.²¹³

With regard to piracy in general the IMO has made considerable efforts in many respects to address the problem and to raise public awareness of the danger and risk of maritime piracy these days. Besides issuing monthly piracy reports the IMO carries out research and studies on piracy control. Accordingly, already in December 2000 the IMO developed the Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.²¹⁴ Furthermore, the IMO issued *inter alia* two documents on the subject of preventing and suppressing piracy entitled ‘Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships’ and ‘Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships’.²¹⁵

In respect of piracy and armed robbery against ships in waters off the coast of Somalia the IMO published the ‘Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia Developed by the Industry’ at the request of the ICS.²¹⁶ Additionally, the IMO gave advice to mariners and disseminated the circular ‘Information on Internationally Recommended Transit Corridor (IRTC) for Ships Transiting the Gulf of Aden’.²¹⁷

Moreover, the IMO makes efforts to promote international action to stabilise the situation in Somalia through the United Nations, more precisely through the Security Council (see p. 41), the Political Office for Somalia, the Development Programme, the Contact Group on Piracy off Somalia and others.²¹⁸

²¹³ More detailed information on the general work of the IMO can be found at <http://www.imo.org/> [Accessed 15.02.2010].

²¹⁴ MSC/Circ.984 (20.12.2000), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D1880/984.pdf [Accessed 19.02.2010].

²¹⁵ MSC.1/Circ.1333 (26.06.2009), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25884/1333.pdf [Accessed 19.02.2010] and MSC.1/Circ.1334 (23.06.2009), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25885/1334.pdf [Accessed 19.02.2010].

²¹⁶ MSC.1/Circ.1335 (29.09.2009), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D26641/1335.pdf [Accessed 19.02.2010].

²¹⁷ SN.1/Circ.281 (03.08.2009), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D26208/281.pdf [Accessed 19.02.2010].

²¹⁸ See IMO website at http://www.imo.org/Facilitation/mainframe.asp?topic_id=1178 [Accessed 19.02.2010].

2. Cooperation on a Regional Level

The best-known example of cooperation on a regional level is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). Due to the decrease of piratical attacks in Southeast Asia and particularly in the Strait of Malacca ReCAAP is deemed to be the most successful regional cooperation among states.²¹⁹ Hence, ReCAAP's structure and approach will be outlined and examined. Subsequently, the question will be raised whether ReCAAP can be replicated in the hot spot of piracy off the coast of Somalia. Finally, the option of establishing regional piracy courts complementing other efforts of regional cooperation will be discussed.

(a) Regional Cooperation Using the Example of ReCAAP

In November 2004, after four years of negotiations ReCAAP was adopted by 16 states of Southeast Asia including Bangladesh, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, Sri Lanka, Singapore, South Korea, Thailand and Vietnam. The agreement which had been initiated by Japan entered into force in September 2006 when it received ten ratifications. Being the first government-to-government agreement that addresses the incidence of piracy and armed robbery in Asia, ReCAAP aims to enhance multilateral cooperation among the contracting parties.²²⁰

(i) Offences under ReCAAP

First of all, the extent of piratical activities which is targeted by ReCAAP has to be determined. According to the wording of the agreement and just like the IMO, ReCAAP uses the UNCLOS definition of piracy and additionally includes the offence of 'armed robbery against ships' as stated in the IMO's Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.²²¹ Thus, an offence in terms of ReCAAP can be described as the UNCLOS definition of piracy without the high seas limitation.²²²

²¹⁹ In the Strait of Malacca which had been the most endangered area in a global comparison for a significant period of time the number of attacks per year has halved between 2005 and 2008 from 82 to 41 attacks, tending to become even less in 2009; see IMB Piracy Report for the period 1 January - 30 September 2009 (note 12).

²²⁰ See general information on ReCAAP at http://www.recaap.org/index_home.html [16.02.2010].

²²¹ The definition provided in Article 1 ReCAAP is identically equal to Article 101 UNCLOS and the definition of 'armed robbery against ships' in the IMO Draft Code of Practice (note 153); the full text of ReCAAP is available at <http://www.recaap.org/about/pdf/ReCAAP%20Agreement.pdf> [16.02.2010].

²²² Collins & Hassan (note 43) at 110.

(ii) Obligations and Mechanisms for Cooperation

For the purpose of effectively combating piracy and armed robbery against ships ReCAAP comprises several obligations for contracting parties and focuses on mechanisms for cooperation.

One of the central provisions of ReCAAP is to be found in Article 3(1) which provides that the contracting parties are obliged to take effective measures (a) to prevent and suppress piracy and armed robbery against ships, (b) to arrest pirates or persons who have committed armed robbery against ships, (c) to seize ships or aircraft used for committing piracy or armed robbery against ships and (d) to rescue victim ships and victims of piracy or armed robbery against ships.

Article 2(1) ReCAAP further stipulates the implementation of ReCAAP ‘to the fullest extent possible’ including the prevention and the suppression of piracy and robbery against ships and in accordance with the contracting parties’ respective national laws and regulations and subject to their available resources or capabilities.

The cooperation among the contracting parties forms the centrepiece of the agreement and can be divided into three different areas of cooperation.

The first and probably most important area of cooperation is information sharing between the contracting parties. ReCAAP has established an Information Sharing Centre (ISC) which is a permanent body with full time staff, located in Singapore and funded by the member states. The ISC consists of the Governing Council, being the decision-making body composed of one representative from each contracting party, and the Secretariat, headed by the Executive Director. The Governing Council makes policies concerning all matters of the ISC whereas the Executive Director is responsible for the administrative, operational and financial matters of the ISC in accordance with the policies as determined by the Governing Council and the provisions of the agreement.²²³ The daily operation of the ISC is undertaken by the Secretariat.²²⁴

The functions carried out by the ISC are provided in Article 7 ReCAAP. The most noteworthy functions are (a) to manage and maintain the expeditious flow of information relating to incidents of piracy and armed robbery against ships among the contracting parties, (b) to collect, collate and analyse the information transmitted by the contracting

²²³ Article 4 ReCAAP.

²²⁴ Article 8 ReCAAP.

parties, (c) to prepare statistics and reports and (d) to provide an appropriate alert, whenever possible, to the contracting parties if there is reasonable ground to believe that a threat of incidents of piracy or armed robbery against a ship is imminent. The ISC states that its operating principles are respect for sovereignty, effectiveness and transparency.²²⁵

In practice, information sharing means that each contracting party designates a so-called focal point responsible for its communication with the ISC and pledges to ensure the smooth and effective communication between its designated focal point and other competent national authorities, including rescue coordination centres as well as relevant non-governmental organisations. Moreover, every contracting party is obliged to make every effort to require its ships, shipowners or shipoperators to promptly notify relevant national authorities including focal points and the ISC, when appropriate, in case of incidents of piracy or armed robbery against ships. But also each contracting party is required to promptly give relevant information to the ISC through its designated focal point if it has received or obtained information about an imminent threat of or an incident of piracy or armed robbery against ships. Likewise, in the event that a contracting party receives an alert from the ISC about an imminent threat of piracy or armed robbery against ships the contracting party has the obligation to promptly disseminate the alert to ships within the area of such an imminent threat.²²⁶

ReCAAP has also designed a mechanism for information exchange between contracting parties. Every contracting party may request any other contracting party through the ISC or directly to cooperate in detecting pirates, other persons who have committed armed robbery against ships and victims of an offence as well as ships used for an offence and victim ships.²²⁷ The contracting party receiving such a request has to make every effort to take effective and practical measures for implementing the request.²²⁸

The second area of cooperation consists in taking legal and judicial measures to prevent and suppress piracy and armed robbery against ships. ReCAAP stipulates that a contracting party is required to try to extradite pirates or persons who have committed armed robbery against ships and who are present in its territory to the other contracting party which has jurisdiction over them at the request of the latter. Furthermore, all contracting parties are obliged to make an effort to render mutual legal assistance to one

²²⁵ See http://www.recaap.org/index_home.html [17.02.2010].

²²⁶ Article 9 ReCAAP.

²²⁷ Article 10 ReCAAP.

²²⁸ Article 11 ReCAAP.

another with regard to criminal matters including the submission of evidence related to piracy and armed robbery against ships. All efforts of the contracting parties are subject to their national laws and regulations.²²⁹

The third area of cooperation is related to the process of capacity building supported by the ISC. Such capacity building cooperation may include technical assistance as for instance educational and training programmes to share one another's experiences and best practices. In order to improve the capacity of all contracting parties to prevent and suppress piracy and armed robbery against ships, each contracting party is bound by ReCAAP to endeavour 'to cooperate to the fullest possible extent with other contracting parties'.²³⁰ The agreement also encourages the contracting parties to make cooperative arrangements such as joint exercises or other forms of cooperation among one another.²³¹

(iii) Limits and Remaining Challenges of ReCAAP

Beyond any doubt ReCAAP and the established ISC can be regarded as a successful attempt to prevent and suppress piracy on a regional level. As the decrease of piratical attacks in Southeast Asia in recent years clearly demonstrates, regional cooperation in terms of ReCAAP basically has the potential to contribute considerably to the improvement of situations in piracy-infested areas.²³²

However, it has to be born in mind that also ReCAAP is still limited in its scope and could be enhanced to combat piracy in the region of Southeast Asia in an even better way if remaining deficiencies were eliminated.

Firstly, in some respect ReCAAP reveals very similar shortcomings to the UNCLOS piracy provisions. Due to the adoption of the UNCLOS definition of piracy, which ultimately was merely extended to piratical acts occurring within each contracting parties' jurisdiction, the same problems remain as under UNCLOS, such as the two ship requirement and the private ends requirement. Moreover, just like Article 100 UNCLOS which does not clarify which level of cooperation between the signatory states is required,

²²⁹ Article 12 and 13 ReCAAP.

²³⁰ Article 14 ReCAAP.

²³¹ Article 15 ReCAAP.

²³² Apparently, the efforts made have proved sufficiently successful to cause Lloyd's to drop the Strait of Malacca from its high-risk list as of August 2006, see J Gardner 'Strait of Malacca off High-risk List; Ship Premiums Likely to Decline' (14.08.2006) *Business Insurance*, available at <http://www.highbeam.com/doc/1G1-149566041.html> [Accessed 17.02.2010].

ReCAAP does not determine more precisely to which extent the contracting parties are obliged to render assistance to one another, either.²³³

Secondly, ReCAAP is also criticised for dealing insufficiently with the practical aspects of anti-piracy measures. Apart from information sharing between contracting parties, cooperation with regard to patrolling and apprehending offenders is still very restricted. Article 2(5) ReCAAP expressly states that contracting parties are not entitled to enter into the territorial waters of a neighbouring state which is also a party to the agreement. Consequently, hot pursuits of offenders into the territorial waters of another contracting party are only permitted if express consent is given.²³⁴ Besides, it is worth mentioning that so far only coordinated but no joint maritime patrols of various contracting parties take place.²³⁵

In essence, the reluctant cooperation among the contracting parties and accordingly ReCAAP's restrictive provisions are based on the fact that most Southeast Asian countries with a recent colonial history 'generally guard their territorial and political sovereignty with extreme jealousy'.²³⁶ Additionally, several still not yet completely unchallenged maritime boundaries and the current political climate may underpin their reluctance and hamper closer cooperation.²³⁷

Thirdly, ReCAAP's effectiveness is substantially dependent on the number of states which accede to the agreement and ultimately ratify it.

Thus, on the one hand, it is very unfortunate that two major states bordering the Strait of Malacca, namely Indonesia and Malaysia, have not yet ratified the agreement.²³⁸ Once again, the main reason for the non-ratification can be seen in issues of sovereignty.

On the other hand, it is argued that the success of ReCAAP is limited by its deliberate exclusion of states such as Australia and New Zealand which otherwise could contribute 'significant resources, both by way of information resources, and ships or aircraft for patrolling'.²³⁹

²³³ Collins & Hassan (note 43) at 111.

²³⁴ Cf. Guilfoyle (note 82) at 698-9.

²³⁵ Bahar (note 5) at 78.

²³⁶ Barrios (note 42) at 159-60.

²³⁷ Cf. Young & Valencia (note 136) at 277.

²³⁸ Keyuan (note 81) at 333; unfortunately the ReCAAP website does not give information on the current status of ratifications.

²³⁹ Collins & Hassan (note 43) at 112.

(b) Replicating ReCAAP in the Region off the Coast of Somalia

Basically acknowledging ReCAAP's success in Southeast Asia, the question of whether and in how far the agreement can serve as a model of law for other regional legal arrangements, such as in the hot spot of piracy off the coast of Somalia naturally arises.²⁴⁰

(i) The Djibouti Code of Conduct

In recent years several regional meetings on combating and preventing piracy inspired by ReCAAP and frequently convened by the IMO took place. Accordingly, a conference held in Dar es Salaam, Tanzania, in April 2008 produced a draft regional memorandum of understanding on the subject of piracy off the Somali coast. This draft formed the basis of 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 Code of Conduct) which was adopted by 17 states from the Western Indian Ocean, Gulf of Aden and Red Sea areas on the last high-level meeting in Djibouti in January 2009 (Djibouti Meeting).²⁴¹ The meeting was also attended by observers from other IMO member states, United Nations specialised agencies and bodies, international and regional inter-governmental organisations (e.g. the ReCAAP ISC), non-governmental organisations and the maritime industry to provide financial and in-kind support for technical assistance activities related to the effective implementation of the Code of Conduct.²⁴²

In the Code of Conduct the signatory states recognise the extent of the problem of piracy and armed robbery against ships in the region and declare their intention to cooperate to the fullest possible extent and in a manner consistent with international law in the repression of piracy and armed robbery against ships.²⁴³

The Code of Conduct is designed to facilitate sharing and reporting relevant information through a system of national focal points and piracy information exchange centres which are to be located in Kenya, Tanzania and Yemen. Further purposes of the Code of Conduct are to interdict ships suspected of engaging in an act of piracy or armed

²⁴⁰ Cf. Keyuan (note 81) at 336.

²⁴¹ The 17 states which participated are Comoros, Djibouti, Egypt, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, Tanzania and Yemen.

²⁴² Detailed information on the Djibouti Meeting is available at http://www.imo.org/About/mainframe.asp?topic_id=1773&doc_id=10933 [Accessed 19.02.2010].

²⁴³ It is to be noted that during the closing ceremony in Djibouti the Code of Conduct was only signed by nine states, namely Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, Tanzania and Yemen, although the Code of Conduct is open for signature by the 21 countries in the region. Nonetheless, the Code of Conduct is effective as from 29 January 2009.

robbery against ships and to ensure that persons committing or attempting to commit acts of piracy or armed robbery against ships are apprehended and prosecuted.²⁴⁴

The signatory states also intend to fully cooperate in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy. Additionally, they state their intention to review their respective national legislations with a view towards ensuring that there are laws in place to criminalise piracy and armed robbery against ships and adequate guidelines for the exercise of jurisdiction, conduct of investigation and prosecution of alleged offenders.²⁴⁵

(ii) Difficulties of Replicating ReCAAP

Altogether the Code of Conduct bears resemblance to ReCAAP in many respects. Partially the Code of Conduct goes even further than ReCAAP as it also provides regional cooperation through the use of shipriders, which are placed as designated law enforcement officials from one signatory state on board the patrol ship of another signatory state.²⁴⁶ Moreover, the signatory states already agreed on establishing a regional training centre within the purposes of the Code of Conduct.²⁴⁷

The fundamental difference, however, consists in the circumstance that contrary to ReCAAP the Code of Conduct is only a non-binding instrument which only reflects the signatory states' intentions with regard to combating piracy off the coast of Somalia.²⁴⁸ Therefore, despite the Code of Conduct's potential to serve as a useful tool to combat piracy its effectiveness will remain very limited unless all signatory states agree on concluding a binding agreement on that subject.²⁴⁹

In order to establish an efficient system of cooperation off the coast of Somalia based on a binding agreement with mutual legal obligations, it could be helpful to involve

²⁴⁴ See Article 2 of 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 full text was adopted by Resolution 1 of the Djibouti Meeting and is available at <http://www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting> [Accessed 19.02.2010].

²⁴⁵ Article 4 and 11 of the Code of Conduct.

²⁴⁶ Article 7 of the Code of Conduct.

²⁴⁷ See Resolution 3 of the Djibouti Meeting adopted on 29 January 2009 'Enhancing Training in the Region', available at <http://www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting> [Accessed 19.02.2010].

²⁴⁸ Cf. Article 15 of the Code of Conduct which clearly states that '[n]othing in this Code of Conduct is intended to create or establish a binding agreement'.

²⁴⁹ As stated in Resolution 1 the Djibouti Meeting has at least the 'aim of arriving at a binding agreement'.

states which have larger navies and generally more facilities to combat piracy to a greater extent. This means that wealthier states could take over leadership, such as Egypt and South Africa.²⁵⁰ In view of the fact that most other African countries simply lack capacities needed for efficient anti-piracy cooperation, particularly these two countries would also act in their own interest. Egypt is heavily dependent on vessels transiting the Suez Canal which regularly also have to pass through the narrow strait between the Horn of Africa and the Arabian peninsula whereas in South Africa it should be noted that the danger of piracy is moving south the African east coast.²⁵¹

Without a common political will of all African countries concerned to address the problem of piracy every form of cooperation will only produce very moderate success. In perspective, also closer cooperation under the umbrella of the African Union (AU) appears to be a useful option to finally obtain results in combating piracy similar to those achieved by ReCAAP in Southeast Asia.

(c) Complementing Regional Cooperation: Establishing Regional Piracy Courts

The establishment of specialised piracy courts provides another possibility to cope with the issue of inconsistent prosecution of apprehended offenders. The question arises which form of a specialised court or tribunal may fit best to ensure effectiveness, particularly considering piracy off the Somali coast and in the Gulf of Aden. The two traditional international law enforcement mechanisms are either supranational tribunals, such as the International Criminal Court (ICC), or the domestication of international law in national courts, for instance through universal jurisdiction.²⁵² Alternatively, regional piracy courts could be established.

It is argued that especially the ICC should be invited to play a decisive role in the fight against piracy.²⁵³ The ICC is an independent, permanent court which tries persons accused of the most serious crimes of international concern, namely genocides, crimes against humanity and war crimes. It was established in 1998 when 120 states adopted the

²⁵⁰ With regard to South Africa's potential leadership role see Fouché (note 155) at 11.

²⁵¹ Corresponding remarks have been made by Colonel J Waweru in his speech ('Realising the Threatening Danger as the Phenomenon is Moving South') at the Combating and Preventing Sea Piracy in Africa Summit 2009, Cape Town, 26 - 28 August 2009.

²⁵² Bahar (note 5) at 81-2.

²⁵³ Keyuan (note 81) at 344; also stating that, during the deliberations of the United Nations Security Council Resolution 1851 in December 2008, several countries such like Egypt or Denmark raised the issue of bringing pirates to international justice.

Rome Statute which entered into force on 1 July 2002 after ratification by 60 countries.²⁵⁴ However, in order to involve the ICC in the prosecution of piracy first of all the scope of the ICC's jurisdiction is to be extended to the crime of piracy. At present, however, the establishment of an international piracy tribunal even under the auspices of the ICC appears to be very difficult because several states are not willing to give up their right to prosecute pirates who attack their interests and additionally there is the question of where such pirates would be imprisoned.²⁵⁵

As regards the domestication of international law in national courts through universal jurisdiction, in recent times Somali pirates have only very rarely been transferred to non-African jurisdictions but rather were sent to Kenya to grant a fair trial, although Kenya's resources and facilities are already nearly exhausted.²⁵⁶

Another approach consists in the establishment of regional piracy courts which could complement initiatives of regional cooperation to combat piracy, such as ReCAAP in Southeast Asia or the Djibouti Code of Conduct in the Western Indian Ocean and the Gulf of Aden. Regional adjudication through regional piracy courts can be an alternative to the above-mentioned traditional international law enforcement mechanisms, combining their advantages and minimising their disadvantages to form an 'ideal compromise'.²⁵⁷

Concerning piracy off the coast of Somalia, a regional piracy court, maybe located in Kenya, could be established through resolutions of the AU or through multilateral treaties, potentially also including affected Arabian states such as Yemen or Saudi Arabia. This court would benefit from the following circumstances.

Firstly, such a regional piracy court could draw on the legal experience of the region and ensure that judges and other lawyers have enough knowledge and skills in international and maritime law. But also in financial matters the court could pool resources from the whole region and additionally may receive financial support from the international community which also has an interest in resolving the problem of piracy in

²⁵⁴ More information on the ICC is available at <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> [Accessed 24.02.2010].

²⁵⁵ Askins (note 56) at 6.

²⁵⁶ Ibid.

²⁵⁷ W Burke-White 'Regionalization of International Criminal Law Enforcement: A Preliminary Inquiry' (2003) 38 *Tex. Int'l L. J.* 729 at 734

the region due to the significance of international maritime trade.²⁵⁸

Secondly, with regard to the specific nature of law enforcement on the high seas, a regional piracy court could promote the development of the utilisation of ‘the most efficient and fair rules of evidence and procedure’.²⁵⁹

Thirdly, the establishment of a regional piracy court would strengthen the effectiveness and attractiveness of the rule of law in the region while largely avoiding that the enforcement of the rule of law could be regarded as an imposition initiated by western countries.²⁶⁰

Fourthly, joint regional adjudication would contribute to reduce jurisdictional conflicts among states. It would also allow states to ‘either share the glory of prosecution, or distance themselves as appropriate’, in particular if prosecutions relate to more politically motivated defendants.²⁶¹

Consequently, regional adjudication through regional piracy courts appears to be the most realistic and useful instrument to ensure consistent prosecution of apprehended offenders, complementing other efforts of regional cooperation.

²⁵⁸ Bahar (note 5) at 82.

²⁵⁹ Ibid.

²⁶⁰ Ibid at 83.

²⁶¹ Ibid at 83-4.

CHAPTER 5: Self-defence, Armed Guards and Armed Escort Vessels

Despite several efforts made so far to reduce the number of incidents, piratical attacks still occur frequently, especially in hot spots like off the coast of Somalia. Due to the vast areas affected by piracy comprehensive protection against piratical attacks appears to be impossible. Thus, the question arises whether and in how far self-defence or the privatisation of anti-piracy efforts, i.e. the employment of armed guards or armed escort vessels, can serve as useful alternative measures to prevent, for instance, hostage-takings off the Somali coast.

I. Self-defence on Board

Given the fact that captains and crews may often not be willing to hand over their vessels to the attacking pirates without any resistance, the recourse to self-defence seems to be easily comprehensible. However, the extent to which crew members should exercise self-defence is vague, particularly the use of lethal measures.

As regards self-defence using non-lethal measures, private security companies are providing various forms of protection for merchant vessels transiting piracy-infested areas. There is a range of tactics and non-lethal technologies to ward off piratical attacks.²⁶² Possible means of defence are for instance water guns as well as so-called long range acoustic devices which beam ear-splitting alarm tones and have proved to be a useful weapon to prevent pirates from boarding the vessel.²⁶³ Also the installation of electric fences or razor wire surrounding the vessel can contribute to hamper the boarding by pirates.²⁶⁴

The use of such non-lethal measures is also recognised by the IMO because these means of defence may serve as appropriate preventive measures to deter attackers and delay boarding.²⁶⁵

²⁶² Kraska & Wilson (note 34) at 47.

²⁶³ See J Straziuso 'Maersk Alabama Attacked Again by Pirates' (19.11.2009) *Navy Times*, available at http://www.navytimes.com/news/2009/11/ap_navy_maersk_piracy_111809w/ [Accessed 20.02.2010].

²⁶⁴ Kraska & Wilson (note 34) at 48; describing more detailed that a Dutch company has developed a 9,000 volt electric fence, but that it may not be an appropriate solution for ships with flammable cargo, such as oil tankers.

²⁶⁵ See IMO 'Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships' MSC.1/Circ.1334 (23.06.2009) [hereinafter IMO Guidance to Shipowners] (note 215) at paragraph 56-8; also noting that in particular water guns are only to be used if the master is convinced that the usage is to the advantage of and without risk to crew members on board.

The use of lethal firearms, however, is much more problematic. Firstly, it has to be born in mind that vessels, which carry firearms on board and enter the territorial waters or ports of another state, are subject to that state's legislation. Accordingly, the importation of firearms is subject to port and coastal state regulations.²⁶⁶

Secondly, the use of firearms carries the risk that an already dangerous situation may escalate as the resistance with firearms may encourage pirates to conduct their attacks even more ruthlessly. Against the backdrop that seafarers are civilians, the effective use of firearms also requires special training and aptitudes in order to preclude or at least minimise the risk of accidents with firearms on board.²⁶⁷

Thirdly, depending on the respective state's jurisdiction shootings with attackers, which may result in life-threatening injuries or even death of a national, may have unforeseen consequences and impose a legal risk even for crew members who believe to have acted in self-defence.²⁶⁸

For these legal and safety reasons, the IMO strongly discourages seafarers from carrying and using firearms on board for personal protection or for the protection of a vessel.²⁶⁹

II. Privatisation of Anti-piracy Efforts

The more controversial issue, also with regard to contemporary international law, is the privatisation of anti-piracy efforts, that is to say either the employment of private armed guards on board merchant vessels or alternatively the commission of private armed escort vessels.

It is argued that so far policy-makers have only insufficiently taken the arming of merchant vessels into account, being the quickest and lowest-cost means of deterring piracy, in favour of the slowest and high-cost options of promoting action through international organisations and using naval forces which cannot resolve the costly problem alone and are generally designed for other purposes.²⁷⁰

²⁶⁶ Ibid at paragraph 59.

²⁶⁷ Ibid at paragraph 60.

²⁶⁸ Ibid at paragraph 61.

²⁶⁹ Ibid at paragraph 60; a dissenting opinion following a more offensive approach of self-defence is to be found at Stiles (note 13) 313-16.

²⁷⁰ D Staub 'Letters of Marque: A Short-term Solution to an Age Old Problem' (2009) 40 *J. Mar. L. & Com.* 261 at 264 and 269.

At first glance the approach of arming merchant vessels may appear to be a helpful and potentially effective short-term solution to the problem of piracy. However, there are several practical and legal concerns which have to be pointed out.

1. The General Risk of Exacerbating the Already Dangerous Situation

First of all, there is the fear that the readiness of merchant vessels to engage in military confrontation with pirates will exacerbate the severity of piratical attacks.²⁷¹ More generally, if force is met with force the violence at sea may be even greater.²⁷² In view of the fact that so far pirates generally do not intend to harm the crew, it is unsure how they would react if a gang members were killed during a hijack.²⁷³

In addition, the danger of setting the cargo and maybe the whole ship on fire, particular in the case of oil tankers or vessels transporting similarly hazardous cargos, should not be underestimated.²⁷⁴

Nonetheless, it is noteworthy that opinions on that matter differ considerably. While an overwhelming number of shipowners in the United Kingdom is against the idea of armed guards on board merchant vessels, the ‘Spanish government gave approval for weapons to be deployed on its fishing fleet ... after three attacks [by Somali pirates] on Spanish trawlers in early September [2009]’ had occurred.²⁷⁵

The use of unarmed security personnel, however, is generally accepted. Such teams can give training and support to the crew with the result that crew members are able and confident to avoid or repel piratical attacks by non-lethal means.²⁷⁶

2. Problems under International Law

Both private armed guards on board merchant vessels and private armed escort vessels cause problems under international law.

²⁷¹ Mo (note 25) at 354.

²⁷² See Shearer (note 98) at 29.

²⁷³ See S Askins’ remarks at the INCE & Co website http://www.incelaw.com/ourpeople/Stephen-Askins/introduction_piracy [Accessed 14.08.2009].

²⁷⁴ Cf. Kraska & Wilson (note 34) at 47.

²⁷⁵ Askins (note 56) at 7.

²⁷⁶ See IMO Guidance to Shipowners (note 215) at paragraph 62.

(a) Armed Guards on Board Merchant Vessels

Concerning armed guards on board merchant vessels, it has to be distinguished between vessels navigating on the high seas on the one hand and vessels transiting territorial waters of other countries on the other hand.²⁷⁷ According to Article 92 UNCLOS vessels on the high seas are only subject to the exclusive jurisdiction of the flag state. Thus, the flag state can permit or deny the carriage of arms as well as private armed guards on board.

The situation alters if an armed merchant vessel enters into the territorial waters of another coastal state and consequently falls under the jurisdiction of that particular state. The coastal state concerned may view such an incident as a violation of its territorial sovereignty and may for instance detain such a vessel if found within its territorial waters.²⁷⁸

Moreover, subject to the contract between the shipowner and the private security company of the armed guards, the master may no longer have control or the final decision in whether weapons will be deployed and used. Article 34(1) SOLAS provides though:

The owner, charterer, the company operating the ship as defined in Regulation IX/1 or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement is necessary for the safety of life at sea and protection of the marine environment.

Hence, making the master give up his discretion in favour of the private armed guards could constitute a violation of the SOLAS provision.²⁷⁹

Another issue respecting armed guards on board merchant vessels consists in the uncertainty how private security companies would be held accountable in case of excessive use of force.²⁸⁰

²⁷⁷ Correspondingly, situations in various piracy-infested areas can differ considerably as for example piratical attacks in the Strait of Malacca predominantly take place in the territorial waters of littoral states whereas a large number of incidents off the Somali coast occurs on the high seas.

²⁷⁸ Kraska & Wilson (note 34) at 47 referring to Malaysia's Internal Security Director, Othman Talib.

²⁷⁹ INCE & Co 'Issues Arising from the Use of Armed Guards' (September 2009) at 2-3, available at <http://www.incelaw.com/documents/pdf/Strands/Shipping/Article/Piracy-issues-arising-from-the-use-of-armed-guards> [Accessed 21.02.2010]; also stating that the content of the SOLAS provision was reinforced in the ISPS Code which provides: 'At all times the master of a ship has the ultimate responsibility for the safety and security of the ship...?'

²⁸⁰ Kraska & Wilson (note 34) at 47.

(b) Private Armed Escort Vessels

The employment of private armed escort vessels also causes problems under international law. Again, it has to be distinguished between the high seas and the territorial waters of a state.

Article 107 UNCLOS provides that on the high seas the right to seize pirate vessels is reserved for warships or other ships which are clearly marked and identifiable as being on government service and authorised to that effect. Consequently, states are obliged to formally commission private armed escort vessels to engage in anti-piracy actions on the high seas as otherwise questions arise whether the armed intervention of a private escort vessel in itself constitutes an act of piracy in terms of Article 101 UNCLOS.²⁸¹ In any case, subject to Article 106 UNCLOS if a commissioned private armed escort vessel makes a seizure of another vessel without adequate grounds the state of the seizing vessels is held liable.

The situation within territorial waters is as follows: Article 2 UNCLOS stipulates that the sovereignty of a state extends to its territorial waters. Thus, a state is entitled to authorise private armed escort vessels to seize pirate vessels within its own territorial waters.

The scenario is more difficult if an armed escort vessel enters into the territorial waters of another state. In general, subject to Article 17 UNCLOS vessels of all states enjoy the right of innocent passage through the territorial waters of other states. Due to Article 19(2)(b) UNCLOS the right of innocent passage is limited though:

Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities:

... any exercise or practice with weapons of any kind.

Hence, the armed escort of merchant vessels through territorial waters of other states would violate Article 19(2)(b) UNCLOS.²⁸²

²⁸¹ Cf. Stiles (note 13) at 317.

²⁸² Therefore, *ibid* at 319-20 offers an amendment to Article 19 UNCLOS on innocent passage to include a provision such as: 'the right of innocent passage is not lost when a ship defends itself or another ship against attacks from hostile ships not in the service of the state, provided the defence is reasonable'.

Apart from these legal issues, in practice it is very likely that many of the relevant coastal states in piracy-infested areas would be very reluctant to permit such practices because private armed escort vessels entering into the territorial waters of a state would be regarded as ‘a serious threat to the national security and sovereignty of that state’.²⁸³

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²⁸³ Mo (note 25) at 351.

CHAPTER 6: Conclusion

Piracy remains a serious threat to international maritime trade and deserves corresponding attention of all stakeholders and policy-makers involved in order to avert further damage. The situation in hot spots of piracy such as off the coast of Somalia is difficult but not hopeless if the international community manages collectively to take the decisive anti-piracy measures on an international or regional level.

Whenever the effectiveness of current international conventions on piracy is debated, the prevailing view expressed is that the major international conventions on piracy, namely UNCLOS and the SUA Convention, lack the capacity to successfully combat piracy. However, this point of view is only correct to a certain extent.

As regards piratical attacks on the high seas the piracy regime of UNCLOS generally serves as a useful tool to combat piracy. Limitations due to the private ends requirement as well as the two ship requirement should not be overestimated, rather they can assist in differentiating between piratical attacks and acts of maritime terrorism. By contrast, a more serious deficiency of UNCLOS consists in the limited right of hot pursuit excluding pursuits commenced on the high seas and continuing into the territorial waters of a coastal state. Likewise, the international cooperation is ultimately a matter of discretion of every signatory state as no international enforcement agency has been established under UNCLOS. Thus, lacking an adequate organisational structure to deal with piracy, UNCLOS is limited in its effectiveness.

The SUA Convention can act as an additional instrument, particularly to fill in the gaps of UNCLOS in respect of piratical attacks occurring in the territorial waters of coastal states. Besides the controversial issue of how to define the offences, the vital problem is that anti-piracy measures subject to the SUA Convention can only be taken effectively if all states affected are parties to the convention. Due to more stringent provisions with regard to international cooperation among the signatory states, many states are rather reluctant to ratify the SUA Convention. But even if all affected states became signatories, the SUA Convention would still reveal deficiencies similar to UNCLOS because prosecution and extradition of offenders are still subject to the respective apprehending state's discretion and no enforcement or sanction mechanism exists. Hence, the convention's basic idea to eliminate safe havens for offenders dilutes significantly.

Despite these undeniable limitations, both under UNCLOS and the SUA Convention, it has to be born in mind that these major conventions would basically provide sufficient means to suppress the majority of types of piracy if all signatory states acted in accordance with the conventions' provisions to the highest possible extent. Especially regarding the SUA Convention it is left to every single state interested in combating piracy to ratify the convention and comply with its provisions.

Moreover, several recommendations have already been made to enhance the existing international legal framework against piracy. In particular the Draft Guidelines for National Legislation could provide support on issues of jurisdiction and prosecution and contribute to a reduction of the inconsistency in national laws concerning acts of piracy and maritime violence. Additionally, regional cooperation as under ReCAAP complemented by regional adjudication can form a strong foundation for further collective acts within piracy-infested regions. In view of the fact that a significantly smaller number of states is involved, achieving progress on a regional level is arguably far easier than a revision of the piracy provisions of UNCLOS, for instance, which does not seem to be realistic anytime soon.

However, in any case, ultimately all forms of cooperation and the implementation of already existing and future international conventions on piracy are heavily dependent on two key aspects, namely the political will in principle to combat piracy regardless of who the suspected offenders are as well as the willingness of coastal states to cede sovereignty over their territorial waters at least to some extent in order to facilitate more effective cooperation among states. An expansion of the right of hot pursuits into other coastal states' territorial waters, for example, appears to be inevitable to eliminate safe havens for pirates. It is insufficient and unhelpful to only controversially debate about more encompassing definitions of piracy.

In absence of a comprehensive response of the international community to the persistent piratical attacks shipowners, masters and crews are increasingly likely to turn to do-it-yourself solutions, such as arming merchant vessels, engaging private armed guards on board or employing private armed escort vessels. The aftermath of such pragmatic anti-piracy measures cannot be foreseen, at the worst the already dangerous situation at sea may escalate.

The specific situation off the coast of Somalia and in the Gulf of Aden requires utmost efforts to cope with the problem of piracy. Although the situation has considerably improved due to the presence of international naval forces in the region subject to the United Nations Security Council resolutions bridging the existing gaps of UNCLOS and the SUA Convention, the attacks of Somali pirates are continuing with serious concerns.

It is to be realised, however, that currently only the symptoms of the failed state of Somalia are combated. Admittedly, the conclusion of a binding regional cooperation agreement on combating piracy and the establishment of a regional piracy court are worth aiming at. Nonetheless, it is highly doubtful that Somali pirates will stop their frequent attacks against merchant vessels, until Somalia can be stabilised and is again properly governed. As *Mejia* correctly states:

*The international maritime community knows full well from the decades of dealing with the problems of piracy, armed robbery against ships, terrorism, and other maritime crimes that the most lasting solutions lie not at sea, but on land.*²⁸⁴

²⁸⁴ *Mejia* (note 161) at 46.

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