

INSECURITY AT SEA: PIRACY AND OTHER RISKS TO NAVIGATION

Edited by

G. Andreone - G. Bevilacqua - G. Cataldi - C. Cinelli



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EDITORS

GEMMA ANDREONE

Legal adviser, LLM, PhD, Research Associate of International Law, Institute for International Legal Studies, Italian National Research Council; Chair of the Cost Action IS 1105 Marsafenet.

GIORGIA BEVILACQUA

LLM in EU Law, College of Europe; PhD in International and EU Law on Socio-Economic Development, University of Naples "Parthenope"; Research Assistant at the University of Naples "L'Orientale"; Member of Marsafenet Working Group 3 on Maritime International Security and Border Surveillance.

GIUSEPPE CATALDI

Professor of International Law, Vice-President, University of Naples "L'Orientale"; Director, Institute for International Legal Studies, Naples' branch, Italian National Research Council; Leader of Marsafenet Working Group 3 on Maritime International Security and Border Surveillance.

CLAUDIA CINELLI

Legal adviser, LLM, PhD in International Law and International Relations, Research Assistant, University of Seville; Adjunct Professor, University of Pisa; Co-leader of Marsafenet Working Group 3 on Maritime International Security and Border Surveillance.

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SCIENTIFIC COMMITTEE

JOAQUÍN ALCAIDE FERNÁNDEZ

*Professor of International Law and International Relations
University of Seville (Spain)*

RAFAEL CASADO RAIGÓN

*Professor of International Law and International Relations
University of Córdoba (Spain)*

ANGELA DEL VECCHIO

*Professor of European Union and International Law
LUISS - The Guido Carli Free International University for Social Studies (Rome - Italy)*

PHILIPPE GAUTIER

*Registrar
International Tribunal for the Law of the Sea (Hamburg)*

MARIA GAVOUNELI

*Assistant Professor of International Law
University of Athens (Greece)*

FOREWORD

The Marsafenet Editorial Project on ‘Insecurity at sea: Piracy and other risks to navigation’ is based on the outcomes of the related Workshop (held in Naples, on 12 October 2012) and on further research activities, including those carried out within the framework of the Marsafenet Working Group n.3 on International Maritime Security and Border Surveillance.

The final scientific output of the Workshop Editorial Project is an analysis of the international legal framework and existing instruments, including European and national law and practice. Particular attention is paid to the most recent issues and solutions thanks to the involvement of public decision-makers, shipping industries, seafarer federations and insurance companies.

Considered one of the oldest crimes, maritime piracy began soon after people began to use the sea to carry trade goods from one place to another. The belief that piracy had entered a period of terminal decline in the twentieth century has proved to be wrong. At the present time, in fact, there seems to be a broad consensus that modern pirates threaten maritime safety and security in particular by endangering the welfare of seafarers and the security of navigation and commerce. As a consequence, in response to several Chapter-VII based Resolutions adopted by the United Nations Security Council, much of the international effort to counter piracy has focused on prevention and prosecution at sea. Nevertheless, it appears that the international community and affected States lack a coherent and effective approach to combat piracy.

The first part of the book focuses on the definition of piracy and on the different enforcement regimes currently adopted to counter piracy. Apparently, international efforts are mainly aimed at improving maritime security through military presence patrolling dangerous waters and coasts. But as the high costs and the huge geographical extension of the critical maritime areas prevent navies from defending every civilian vessel, the phenomenon is far from being eradicated. On the contrary, the critical situation off the Gulf of Guinea proves that further remedies are required to combat the real symptoms of the phenomenon of piracy.

In this context, while the International Maritime Organisation recommends the adoption of the self-protection remedies collected in its Best Management Practices, several States are increasingly adopting national regimes to authorise ship-owners and other operators to rely on military and private armed personnel on board civilian ships transiting pirate-prone hotspots. On these grounds, the second part of the book analyses the counter-piracy state practice from the perspective of national legal frameworks as well as domestic case-law. Although all States are expressly required by Article 100 UNCLOS and by the General Assembly to cooperate to the fullest possible extent in the repression of inter-

national piracy, and even though according to International law, in principle, States enjoy ample powers in this sphere, there are still several arguments, such as the lack of specific national laws, the absence of a strong political will and the weakness of military capabilities that prevent them from prosecuting suspected pirates. Moreover, additional questions and difficulties, including the gathering of sufficient evidence and proof for prosecution, the protection of the human rights of the suspected pirates from one country to another, and the right to a fair trial, provide logistical challenges that currently remain unresolved.

The third part of the book concludes with an analysis of the other related risks to navigation. Indeed, recent international practice indicates that it is no simple matter to draw a boundary between the phenomenon of piracy and other criminal activities, since modern pirates are often connected with transnational criminal organizations and engaged in other criminal activities. The enforcement of counter piracy remedies may lead to further dangerous threats to the safety and security of lives and property at sea.

Finally, we hope that legal advisers, scholars, experts, decision-makers and other stakeholders will find this book helpful and increase their knowledge of applicable laws and the existing international and national instruments that can be used to prevent and pursue maritime piracy and other risks to navigation.

*Gemma Andreone, Giorgia Bevilacqua
Giuseppe Cataldi and Claudia Cinelli*

Rome-Naples-Seville
25 July 2013

I

MARITIME PIRACY: DEFINITION AND LEGAL REGIMES

WHO IS A PIRATE? ON CUSTOMARY INTERNATIONAL LAW AND JURISDICTION IN DOMESTIC COURTS

*Ioannis Stribis**

I. Introduction; II. The Norfolk Trials; A. Facts and Applicable Legal Standard; B. District Court Opinions; 1. Said; 2. Hasan; III. The Crime of Piracy in US Law; A. The Origins; B. 'International' – 'Municipal' Piracy; C. Universal Jurisdiction; IV. The Application of International Customary Law by Domestic Courts; A. Ascertaining International Customary Law; B. Evolutive Character of International Law and Legal Certainty; V. Conclusion.

I. Introduction

Who are today's pirates? The question resounded in the US Supreme Court in fall 2012, followed in the same breath by a second one (*And if Hitler isn't a pirate, who is?*). The query was raised during the oral argument of a litigation that did not involve the prosecution of alleged pirates.¹ It reveals, however, the bewilderment that the definition of maritime piracy may cause in courtrooms around the world, when piratical acts are brought before domestic courts.

A survey of international digests can evidence the varying perceptions regarding the definition of maritime piracy: almost every activity occurring at sea can be or has already been qualified as piracy, from unauthorised broadcasting from vessels on the high seas to sinking of merchant vessels by submarines, to terrorist acts or interdiction on the high seas of vessels suspected of transport of weapons of mass destruction or parts thereof to environmental activism on the high seas (e.g. against nuclear tests, whaling or IUU fishing) or attacks against offshore constructions.

In law, as in any other field of knowledge, the investigation of the meaning of words is the beginning of wisdom.² A reasonable degree of certainty is essential

* Associate Professor, University of the Aegean.

¹ Justice Breyer, Oral Argument before the US Supreme Court, *Kiobel v. Royal Dutch Petroleum*, No.10-1491, October 1, 2012, Transcript, 26. This case relates to question of jurisdiction of US courts on the basis of the Alien Torts Statute (28 U.S.C. § 1350) In various civil cases plaintiffs (and courts) have analogized the alleged torts to piracy in order to assert the jurisdiction of American courts in actions where no other jurisdictional nexus with the US existed.

² Gnome attributed to Anthisthenes (445-360 B.C.), founder or forerunner of Cynic philosophy.

when it comes, in particular to criminal responsibility. To return, for example, to the second question of Justice Breyer, it can reasonably be assumed that the crimes of the Nazi leader would have compelled convictions on many charges at a (domestic or international) trial but piracy could have hardly been one of them.

II. The Norfolk Trials

Due to the counter-piracy operations of the US Navy in the Indian Ocean, prosecutions for piracy have been brought before the federal courts of the United States, after a significant lapse of time.³ The Norfolk Division of Eastern District of Virginia (E.D.Va.) has been, since 2010, at the forefront of United States piracy prosecutions.⁴ More than two dozen alleged pirates captured on the high seas in different areas off the coast of Somalia or further in the Indian Ocean have been so far charged for piracy by E.D.Va. These federal prosecutions resulted in the first successful piracy trials in the United States in almost 200 years: Two first instance judgments were rendered by two different judges of E.D.Va., in August and October 2010. These opinions revealed two different approaches with regard to the contents of the international crime of piracy. The main question raised in these cases concerned the definition of the crime of piracy in accordance with international law. In the first case⁵ the court decided that the crime of ‘piracy as defined by the law of nations’ could not be established in the absence of robbery or other depredation (on the high seas). Two months later, another District judge held the opposite view.⁶

Both opinions were appealed to the Court of Appeal for the Fourth Circuit, which, on 23 May 2012 sided with the judgment in *Hasan* case, upholding thus the wider understanding of the international crime of piracy.⁷ At the same time, the Fourth Circuit vacated the *Said* decision and remanded the case.⁸ The US Supreme Court denied *certiorari* without comment, allowing thus Fourth Circuit’s opinion in *Dire* to stand.⁹

³ Prior to the resurgence of piracy off the coast of Somalia the last prosecution for piracy in the US dated back in 1885, *The Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885).

⁴ Alleged pirates captured on the high seas by US Navy, if not transferred for trial to another nation, are transported to Norfolk, Va. which hosts the largest naval base in the US; in accordance with § 3238 of Chapter 18 U.S.C. ‘the trial of all offences begun or committed upon the high seas ... shall be in the district in which the offender, ..., is arrested or is first brought’.

⁵ *US v. Said et al.*, 757 F. Supp. 2d 554 (E.D.Va. 2010), hereinafter *Said*.

⁶ *US v. Hasan et al.*, 757 F. Supp. 2d 599 (E.D.Va. 2010), hereinafter *Hasan*.

⁷ *US v. Dire*, 680 F.3d 446 (4th Cir. 2012), hereinafter *Dire*.

⁸ *US v. Said*, 680 F.3d 374 (4th Cir. 2012).

⁹ *Dire v. US* (12-6529) and *Said v. US* (12-6576).

A. Facts and Applicable Legal Standard

The elements of fact, common in the two prosecutions that are relevant to the discussion on the definition of the international crime of piracy are that, in early April 2010, the defendants sailing in skiffs in the Gulf of Aden (in *Said*), further south, in the Indian Ocean off the East African coast (in *Hasan*), attacked with rocket-propelled grenade launchers and assault rifles US Navy ships, which were on counter-piracy mission in the Indian Ocean, mistaking them for merchant vessels. The US Navy units repelled the attacks, chased the culprits and eventually captured them. The two groups of the captured, all Somalis, were subsequently transferred to Norfolk to stand trial for piracy and several other charges under US federal law. No doubt existed that, at no time, neither group of the defendants boarded a vessel they had targeted or removed any object from her. As the Court of Appeals put it ‘the defendants boarded [US Navy vessels] only as captives and indisputably took no property’.¹⁰

Upon landing in US territory, the defendants were charged with committing the crime of ‘piracy as defined by the law of nations’ (18 U.S.C. § 1651; Count One of the superseding indictment).¹¹

This crime (piracy under international law or ‘international piracy’) is defined in US law by express incorporation of the definition of piracy under international law. Paragraph 1651 of Title 18 U.S.C. stipulates:

if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, ... be punished ...

The defendants challenged their indictment with regard to the above count (‘piracy, as defined by the law of nations’), claiming that the acts that were attributed to them, even if proven, did not amount to that particular offense. They submitted that ‘general piracy requires a robbery on the high seas, and that, because robbery requires the “taking” of property, the Government’s failure to allege any actual taking precludes a conviction for general piracy’.¹² Consequently, they went on, their bootless attacks on the American Navy ships did not, as a matter of law, amount to a piracy offense in accordance with the applicable US legislation

¹⁰ *Dire*, n. 7 above, at 451.

¹¹ In addition, the captured Somalis were charged with a host of other counts, including attack to plunder a vessel (18 U.S.C. § 1659); act of violence against persons on a vessel (18 U.S.C. §§ 2291(a)(6) and 2290(a)(2)); conspiracy to perform an act of violence against persons on a vessel (18 U.S.C. §§ 2291(a)(9) and 2290(a)(2)); assault with a dangerous weapon within a special maritime jurisdiction (18 U.S.C. § 113(a)(3)), and others.

¹² *Hasan*, n. 6 above, at 600.

(18 U.S.C. § 1651), asserting, in their briefs, that international law requires robbery upon the high seas in order to establish the piracy offence. Accordingly, the defendants motioned¹³ to drop the charge envisaged in 18 U.S.C. § 1651.

Countering the motions of the Somali defendants, the US Government submitted that piracy had historically included different types of conduct and was not limited to the common law definition of robbery on land. More specifically the prosecution asserted that the offence of piracy, as defined by the law of nations, '[did] not require the actual taking of property; rather any unauthorized armed assault or directed violent act on the high seas [was] sufficient to constitute piracy'.¹⁴

B. District Court Opinions

1. *Said*

Granting the above pretrial motion, the *Said* court held that piracy in accordance with the law of nations requires robbery on the high seas. District Court Judge Jackson gave pre-eminence to the 'constitutional rigors of due process',¹⁵ requiring at least 'fair warning' that a behaviour entails criminal responsibility. Contending 'the flexible manner in which international sources treat the definition of piracy', Judge Jackson 'conclud[ed] that the definition of piracy in the international community is unclear and not consistent with Congress' understanding of § 1651'.¹⁶ He opined that the 'true definition' of piracy (as authoritatively expressed by Supreme Court precedent¹⁷) 'is robbery upon the sea',¹⁸ and that that definition was in accordance with the US constitution ('not unconstitutionally vague'¹⁹) as decided by the US Supreme Court in *Smith*, back in 1820.²⁰ This case was the only precedent to have ever *directly* addressed the definition of pira-

¹³ Pretrial motions 'alleging a defect in the indictment' (Rule 12 of the US Federal Rules of Criminal Procedure).

¹⁴ *Said*, n. 5 above, at 556. Cf. Declaration of the US Department of State Legal Adviser Harold Hongju Koh, *United States v. Hasan*, Case No. 2:10cr56 (E.D.Va., 3 September 2010), §§ 10-18.

¹⁵ *Said*, n. 5 above, at 566.

¹⁶ *Said*, n. 5 above, at 567; see also at 563 (Section of the opinion entitled 'Contemporary International Law is Unsettled on the Definition of Piracy').

¹⁷ *US v Smith*, 18 US (5 Wheat.) 153, 161-162 (1820) [hereinafter *Smith*], 'whatever may be the diversity of definitions, all writers concur, in holding, that robbery or forcible depredations, *animo furandi*, upon the sea ... is piracy ... whether we advert to writers on the common law or the maritime law, or the law of nations, we shall find that they universally treat piracy as an offense against the law of nations and that its true definition by that law is robbery upon the sea.'

¹⁸ *Said*, n. 5 above, at 557, 558.

¹⁹ *Said*, n. 5 above, at 566.

²⁰ *Smith*, n. 17 above, at 161-162, 'piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth Section of the act of 1819'.

cy under 18 U.S.C. § 1651. The *Said* court also relied on some other precedents, mainly from the 19th century, considering the robbery as constitutive element of piracy (as opposed to ‘piratical acts’).²¹ Distinguishing precedents relating to civil forfeiture from criminal action, the *Said* court inferred that more stringent requirements apply to criminal sanction as opposed to civil action. Implied in these findings is the critique based on the principle that in US jurisdiction only Congress can create new crimes and thus courts cannot, at the risk of violating the principle of separation of powers, create or add to a criminal offence elements that it did not have at the time Congress made it a crime. This assessment was foretold by the defence in the trial court on certification from which the Supreme Court rendered *Smith*: the defence attorneys argued before the trial court that ‘the words of the act of congress were too vague and loose to authorize the jury to dip their hands in the blood of a fellow citizen’.²²

2. *Hasan*

At the trial of the other group of defendants, the E.D.Va reached an opposite conclusion: in an extensive opinion,²³ the *Hasan* court asserted that the modern definition of piracy in accordance with general customary international law, as codified in article 101 UNCLOS (identical save minor stylistical differences with article 15 of the 1958 High Seas Convention), should be upheld also in US federal law when it comes to the prosecution and trial of piracy. Concretely, this affirmation meant that the international crime of piracy was established in case of acts of unlawful violence on the high seas without an actual taking of property or plundering.

The relevant part of article 101 UNCLOS provides:

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;

The focus of the *Hasan* court was more ‘on piracy’s unusual status as a crime defined by the law of nations and subject to universal declaration’,²⁴ rather than due process considerations (though it addressed them sufficiently and convincingly).²⁵

²¹ *Said*, n. 5 above, at 557.

²² *US v. Chapels*, 25 F. Cas. 399 (C.C. Va. 1819), 16 *Niles’ Weekly Register* (Aug. 7, 1819, “Law Intelligence: Crew of the Irresistible”), 390, 393.

²³ The *Hasan* opinion is five times longer than the *Said* judgment.

²⁴ *Dire*, n. 7 above, at 454.

²⁵ *Hasan*, n. 6 above, at 637-639.

III. The Crime of Piracy in US Law

No one can gainsay that attacking on the high seas *animo furandi* constitutes piracy under international law; this was the undisputed meaning of piracy since the Greek antiquity.²⁶ The issue, however, with which the E.D.Va. and the Fourth Circuit were confronted is whether the contents of the crime of piracy in accordance with international law have evolved since the early 19th century to cover violent acts on the high seas that fell sort from robbery.

A. The Origins

The parameters of the reply to this question go back to the criminalization of piracy -under US federal law at the US Founding era. Article I, Section 8, clause 10 of the US Constitution enables the Congress, among others, ‘to define and punish piracies on the high seas’.²⁷ The implementation of this authorisation by the Congress required several attempts, to reach the present form of 18 U.S.C. § 1651.²⁸ The difficulty stemmed from the dualist approach of the US law²⁹ as well as from the absence of federal common law power to apply the law of nations in criminal trials.³⁰ As a consequence, the prosecution could not merely rely on the law of nations as part of domestic common law in order to charge a defendant with the international crime of piracy. For that crime to be cognizable in the federal courts of the United States, the offense must have been proscribed by an act of Congress. Therefore, the latter had to enact a municipal law that adequately embodied the international crime of piracy.³¹ The chief difficulty, in this respect,

²⁶ It is characteristic that in the ancient Greek texts the terms ‘robbery’ and ‘robber’ are used to designate exactly maritime piracy and pirate, see Homer, *Odyssey*, 3.72, 9.254; Thucydides, *The Peloponnesian War*, 1.10.4, 2.69, 6.104.3; Plato, *Sophist*, 222c; Demosthenes, *Against Aristocrates*, 148.

²⁷ The same authorization enables the Congress to define and punish felonies committed on the high seas, as well as offences against the law of nations, Article I of the Constitution: ‘[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations’. U.S. Const. art. I, § 8, cl. 10 (the ‘Define and Punish Clause’).

²⁸ For a discussion of the history of the piracy-related legislative activity of the Congress, see Samuel P. Menefee, “‘Yo Heave Ho!’: Updating America’s Piracy Laws”, 21 *California Western International Law Journal* (1990-91), 151, 152-160.

²⁹ Reviewing the Framers’ understanding and debates in the 1787 Constitutional Convention, the *Hasan* court noted that ‘the words “define” and “punish” were apparently selected to empower Congress to proscribe crimes with an administrable level of certainty and make clear that international law, by its own force, did not create criminal liability in the United States’, *Hasan*, n. 6 above, at 601.

³⁰ In 1812, the US Supreme Court held that there are no common law federal crimes, see *US v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); *US v. Britton*, 108 U.S. 199, 205-206 (1883).

³¹ *Dire*, n. 7 above, at 455; *Hasan*, n. 6 above, at 610.

was to draft ‘legislation that was broad enough to incorporate the definition of piracy under the law of nations (and, in so doing, invoke universal jurisdiction) but narrow enough to exclude conduct that was beyond the scope of that definition.’³²

Congress acted first in 1790, by enacting the first anti-piracy legislation criminalizing as piratical the following three categories of acts, if committed ‘upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state’:

- murder or robbery, or any other offence which if committed within the body of a country, would by the laws of the United States be punishable with death;
- piratically and feloniously running away with any ship or other vessel, or goods or merchandise to the value of fifty dollars, or yielding up such ship or vessel voluntarily to any pirate;
- violence by any seaman against his commander aiming at hindering or preventing the commander’s fighting in defence of his ship or goods committed to his trust.³³

In 1818, however, the US Supreme Court found that the Act of 1790 did not address piracy in accordance with international law, affording US federal courts with universal jurisdiction, but made triable by US federal courts only some acts, dubbed piratical by that Act of Congress, which had a jurisdictional nexus to the United States, that is when committed by US citizens or against US interests (citizens, vessels, property).³⁴

B. ‘International’ – ‘Municipal’ Piracy

In *Palmer* the Supreme Court drew a distinction between piracy under international law and piracy in accordance with domestic legislation. This division, corresponding to the sovereign character of the criminal repression, is well established in theory and practice³⁵ and amounts to what the District Court in *Hasan*

³² *Hasan*, n. 6 above, at 610.

³³ Act for the Punishment of Certain Crimes Against the United States (April 30, 1790), § 8, 1 *Stat.* 112.

³⁴ *US v. Palmer*, 16 U.S (3 Wheat.) 610, 633-634 [hereinafter *Palmer*], ‘the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States’.

³⁵ ‘Harvard Research in International Law: Original Materials’, 26 *American Journal of International Law, Special Supplement* (1932) 281, 749, ‘piracy under the law of nations and piracy under domestic law are entirely different subject matters and ... there is no necessary coincidence of fact-categories covered by the term in any two systems of law.’; UK House of Lords, *R. v. Margaret Jones* [2006] UKHL 16, [2007] 1 AC 136, where Lord Justice Cornhill noted that a ‘distinction must be drawn between piracy under any municipal act of a particular

qualified ‘unique dual characterization of piracy as an offense against both municipal law and international law’.³⁶ The Fourth Circuit distinguished between ‘general piracy’, that is piracy ‘in contravention of the law of nations’ as opposed to ‘municipal piracy’ i.e. ‘piracy in violation of United States law’.³⁷ The latter type of piracy is ‘created by municipal statute’³⁸, while the former ‘is created by international consensus’.³⁹ Several other terms are used for this crime in accordance with international law including international piracy, piracy in accordance with international law or piracy *iure gentium*.

The *Hasan* court underscored that ‘While municipal piracy is flexible enough to cover virtually any overt act Congress chooses to dub piracy, it is necessarily restricted to those acts that have a jurisdictional nexus with the United States’.⁴⁰

A distinction had been already highlighted in an earlier than *Palmer* federal decision applying the 1790 act: the distinction between ‘piracy, by the common law’, consisting ‘in committing those acts of robbery and depredation upon the high seas, which, if committed on shore, would amount to felony there’⁴¹ and piracy in accordance with statutory law (the 1790 act) which encompassed piracy by the common law, but also ‘ma[d]e certain other acts piracy, which would not be so at common law’.⁴² In this early case the distinction was between the definition by the Congress in the 1790 act and in common law, not in accordance with international law. However, it was commonly accepted at the beginning of the 19th century that as far as piracy was concerned common law definition corresponded with piracy as understood by the law of nations.⁴³ The US Supreme Court sanctioned this view in its first decision applying 18 U.S.C. § 1651. Asserting that the law of nations is part of the common law, the Supreme Court held that the common law definition of piracy incorporated the international law understanding of piracy as ‘an offence against the universal law of society, a pirate being deemed an enemy of the human race’.⁴⁴

country and piracy *iure gentium*’; Lucas Bento, “Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish”, 29 *Berkeley Journal of International Law* (2011), 399, 413-414 and *passim*.

³⁶ *Hasan*, n. 6 above, at 612.

³⁷ *Dire*, n. 7 above, at 455.

³⁸ *Ibid*.

³⁹ *Ibid*. quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J.).

⁴⁰ *Hasan*, n. 6 above, at 606.

⁴¹ *US v. Tully*, 28 F. Cas., 229 (C.C. Mass. 1812).

⁴² *Ibid*.

⁴³ William Blackstone, *Commentaries on the laws of England* (1796), Book 4, ch. 5, considering the common law definition of piracy indistinguishable from the law of nations definition; see also Joel H. Samuels, “The Full Story of United States v. Smith, America’s Most Important Piracy Case”, 1 *Penn State Journal of Law & International Affairs* (2012) 320, 333.

⁴⁴ *Smith*, n. 17 above, at 161.

C. Universal Jurisdiction

One of the crucial points of the Norfolk trials was the issue of *universal jurisdiction*, which is intrinsically associated with the international crime of piracy. The latter is ‘the paradigmatic universal jurisdiction offence’, which allows the ‘narrow and unique exception’⁴⁵ to the traditional bases of adjudicative jurisdiction (territorial, personal, protective or by virtue of the theory of effects), arising mainly out of the difficulty inherent in policing the high seas. This feature has been comprehensively encapsulated by Judge Moore in *The ‘Lotus’* case:

Piracy by the law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate’s operations is the high seas, which it is not the right or the duty of any nation to police, he is denied the protection of the flag he may carry, and is treated as an outlaw, as the enemy of mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish.⁴⁶

The universal jurisdiction is an element ‘inextricably intertwined with ... the substantive elements of the crime as defined by the consensus of the international community’⁴⁷ and thus with the definition of piracy in accordance with international law. The *Hasan* court rightly insists on this point underlining that

a state can only invoke universal jurisdiction to prosecute general piracy against those acts that fall within the definition of general piracy tacitly or explicitly agreed upon by the members of the international community. States are, of course, free to proscribe any number of acts as municipal ‘piracies’, but to the extent that such acts do not also constitute general piracy, principles of customary international law preclude states from availing themselves, in prosecuting such offences, of the universal jurisdiction that applies to prosecution of general piracy.⁴⁸

The explanation is clearly given by the Fourth Circuit: ‘because it is created by international consensus, general piracy is restricted in substance to those offenses that the international community agrees constitute piracy.’⁴⁹

⁴⁵ *Hasan*, n. 6 above, at 607-608; see Malcolm Shaw, *International Law* (5th ed., 2005), 543.

⁴⁶ PCIJ 1927, *The ‘Lotus’ (France v Turkey)*, [1927] *Series A No 10*, 70. Cf. ICJ 14 February 7 September 2002, *Arrest Warrant (Democratic Republic of the Congo v Belgium)*, Separate Opinion President Guillaume, [2002] *ICJ Rep.* 39, 42.

⁴⁷ *Hasan*, n. 6 above, at 608.

⁴⁸ *Hasan*, n. 6 above, at 610 (footnote omitted).

⁴⁹ See *Sosa v. Alvarez-Machain*, n. 39 above, at 762.

It is therefore obvious that only with respect to those offences the exercise of universal jurisdiction by any sovereign nations is warranted.⁵⁰ At the cases before the E.D.Va, the indictments contained several charges based on various paragraphs of Title 18 USC, which, except for the count of ‘piracy, as defined by the law of nations’, have identical jurisdictional scope, requiring a nexus with the United States. This link existed in the trials at Norfolk, as the defendants had attacked US vessels, used force against the vessels and persons on them (federal officers and employees) and employed firearms and explosives.⁵¹ From that point of view, the jurisdiction of the US courts in these cases did not depend upon the qualification of the conduct of the Somali defendants as piracy by virtue of international law, despite the undeniable central position of universal jurisdiction in any discussion on piracy. In both trials the determination whether the acts attributed to the defendants constitutes piracy under international law was of crucial importance for the defence: unlike all the charges brought against the defendants, *only* ‘piracy, as defined by the law of nations’ carried a mandatory life imprisonment.⁵²

The Supreme Court’s reading of the 1790 Act in *Palmer* was too narrow and arguably aberrant; the language of § 8 of that statute (‘if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a country, would by the laws of United States be punishable with death;’) could have effortlessly supported the opposite conclusion than that reached by the Court.⁵³ Be that as it may, this narrow construction

⁵⁰ In early 19th century, while, e.g. in Britain seaborne slave trade was considered to be piracy, US Congress refrained from considering it as piracy in order not to vest federal courts with universal jurisdiction upon slave traders.

⁵¹ See n. 11 above.

⁵² E.g. count two of the indictments (attack to plunder a vessel, 18 U.S.C. § 1659) carries a sanction of up to ten years imprisonment.

⁵³ The reasoning of *Palmer*, n. 34 above, at 631-633, to identify a broader congressional intent than that of the plain language of § 8 of the 1790 Act appears to be *contra legem*.

Chief Justice Marshall, instrumental in the narrow construction of the 1790 act in *Palmer*, seems to have had an equally restrictive reading of the 1819 act as well, see Marshall’s letter to fellow SC Justice Bushrod Washington, 31 October 1819 (while the *Smith* case was pending before the Supreme Court) expressing concern about the enforceability of the 1819 statute: ‘in the trials at Richmond [trials of Smith and his co-defendants] the evidence was perfectly clear and the case was unequivocally a case of piracy according to the laws of every civilized nation. The doubt I entertain is whether there is any such thing as Piracy as “defined by the law of nations”. All nations punish robbery committed on the high seas by vessels not commissioned to make captures yet I doubt seriously whether any nation punishes otherwise than by force of its own particular statute.’ *The Papers of John Marshall*, v. VIII (Ch. F. Hobson ed., 1995), 374. However Chief Justice Marshall did not sit in the Court that rendered *Smith* the year following *Palmer*, because, by effect of riding circuit, he was one of two judges sitting in the circuit court, on certification from which, the SC rendered *Smith*. The latter was handed down by Justice Story.

limiting the scope of the 1790 act to piracy as defined by municipal legislation actually lead into finding that the statute lacked provisions for the trial and punishment in United States courts of pirates by the law of nations. The ‘discovery’ of such an omission was first highlighted by the Circuit Court for Virginia and North Carolina in the trial of the alleged pirates on certification from which the Supreme Court rendered *Smith*.⁵⁴

The conclusion of the US Supreme Court in *Palmer* that US federal courts lacked universal jurisdiction with respect to conduct constituting piracy in accordance with the law of nations, prompted the US Congress to pass in that same year specific legislation aiming at making clear the intent and objective to proscribe piracy as an offence in accordance with international law and thus subject to universal jurisdiction.⁵⁵ This provision is nearly identical with that of 18 U.S.C. § 1651 in its current form;⁵⁶ the only difference between the original 1819 text and the current Section 1651 of Title 18 U.S.C. is that the mandatory capital penalty in the former has been replaced by life imprisonment.⁵⁷ Unlike the 1790 act, the 1819 statute did not specify the acts constituting the crime of piracy. Instead, it referred to ‘the crime of piracy, as defined by the law of nations.’⁵⁸

Just a year following its enactment, the constitutionality of the 1819 Act was challenged on the basis that the ‘Define and Punish’ clause of the Constitution required the Congress to define itself the criminal offense of piracy and not to leave that definition to the interpretation and discretion of the judicial branch. The defence in this challenge argued that the reference by the Congress to ‘the law of nations’ to define piracy was not constitutional because it did not allow individuals to have advance notice of what acts might be considered criminal in accordance with the 1819 statute.

The US Supreme Court did not espouse this line of reasoning. It held that the Constitution gave Congress the power to define piracy, but did not require Con-

⁵⁴ *US v. Chapels*, n. 22 above, at 390, 391.

⁵⁵ Act to Protect the Commerce of the United States, and Punish the Crime of Piracy (March 3, 1819), ch. 77, § 5, 3 *Stat.* 510.

⁵⁶ The relevant provision of the Act of 1819, initially limited to just one year, was subsequently extended without time limitation, see Act to continue in force ‘An Act to protect the commerce of the United States, and punish the crime of piracy..’ and also to make further provisions for punishing the crime of piracy (May 15, 1820), § 2, 3 *Stat.* 600.

⁵⁷ Piracy and Other Offences Upon the Seas (March 4, 1909), ch. 321, § 290, 35 *Stat.* 1145. The punishment for piracy under the 1819 statute was death. In 1897, the penalty was changed to life imprisonment at hard labor. In 1909, the penalty was changed to life imprisonment. The act of 1909 has not been amended since, see 18 U.S.C. § 1651.

⁵⁸ The argument that, because ‘Piracy is War against all mankind which is the highest Violation of the Law of Nations’, the Congress should not ‘declare what is or shall be Felony or Piracy ... but merely ... appoint Courts for the Trial of Piracies and Felonies committed on the High Seas’ was unsuccessfully submitted to Congress in 1785 by the then State Secretary John Jay, 29 *Journals of the Continental Congress* 1785, 682 (J.C. Fitzpatrick ed., 1933).

gress to define it in a particular way. That constitutional grant authorised Congress to enumerate the crimes which shall constitute piracy either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted. The Supreme Court further held that the crime of piracy was defined with reasonable certainty by the law of nations, asserting that ‘whatever may be the diversity of definitions, in other respects all writers concur in holding robbery or forcible depredations upon the sea is piracy.’ It also stated that ‘whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea.’ For the foregoing reasons the Court concluded that it was no less clear for Congress to define piracy by reference to the law of nations than to list the elements of the offence.⁵⁹

The uneasiness felt with respect to the definition of a crime by reference to international law could not be but related to the dualist model of the US legal system of relationship between municipal and international law. While the 1790 act was typical of that dualist approach requiring domestic legislation to give effect to international law, the 1819 statute was closer to a monist approach, incorporating international law into domestic law through reference.⁶⁰ As mentioned above, the Supreme Court held in *Smith* that the law of nations is part of the common law and that, as a result, the common law definition of piracy incorporated the international law understanding of piracy.⁶¹ The fact that this approach was not considered contrary to the US Constitution by the Supreme Court makes the ‘validation of the use of the law of nations to create binding domestic law’ one of the most important features of *Smith* from a lawmaking perspective.⁶² On another occasion involving a challenge to the 1819 act, the Supreme Court held that that statute was ‘designed to carry into effect the general law of nations on the same subject in a just and appropriate manner.’⁶³ Without entering into the inconclusive general discussion of the place of international law in the US internal legal system,⁶⁴ it should be sufficient in the consideration of the issue of the crime of piracy, as defined by the law of nations (18 U.S.C. §1651), to state that

when Congress enacts a statute that *expressly* incorporates customary international law into the domestic law of the United States, the federal courts

⁵⁹ *Smith*, n. 17 above, at 159-162.

⁶⁰ Joel H. Samuels, n. 43 above, at 334, ‘The reference to the law of nations reflected a willingness by American lawmakers to incorporate international law into domestic law’.

⁶¹ *Smith*, n. 17 above, at 161.

⁶² Joel H. Samuels, n. 43 above, at 362.

⁶³ *The Malek Adhel*, 43 U.S. 210, 221 (1844).

⁶⁴ Cf. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938); *Sosa v Alvarez-Machain*, n. 39 above, at 714-715, 729-730.

are required, as with any other constitutional congressional mandate, to follow the statutory language adopted by Congress and apply customary international law.⁶⁵

IV. The Application of International Customary Law by Domestic Courts

For both the trial courts and the Fourth Circuit, the phraseology ‘law of nations’ used by Congress in the 1819 act means customary international law.⁶⁶ Narrowing the sense of the term ‘law of nations’ to international customary law seems to be a construction of US case-law (presumed intention of the Congress), not warranted by the signification of this term either in the early 19th century⁶⁷ or nowadays. Normally the expression ‘law of nations’ is conterminous with ‘international law’. Be that as it may, in the cases at hand, the courts could have also turned for the definition of piracy to treaty law, at least to the 1958 Convention on the high seas, to which the US is a party. However, when it comes to piracy under international law, domestic courts tend to rely on general international law, more than conventional commitments, even if the latter would have provided a solid basis for prosecution of alleged pirates.⁶⁸ Treaty law became nevertheless relevant in the analytical frame adopted by the trial and appeals courts, for they accepted that ‘Treaties are proper evidence of customary international law’.⁶⁹ The choice for customary law in these cases was facilitated by the acceptance by the United States of the provisions of UNCLOS dealing with ‘traditional uses’ of

⁶⁵ *Hasan*, n. 6 above, at 632 (emphasis in the opinion); see also *AI-Bihani v. Obama*, 619 F.3d 1, 17 (D.C. Cir. 2010).

⁶⁶ *Said*, n. 5 above, at 555, ‘The ‘law of nations’ refers to the body of law known as ‘customary international law’; *Hasan*, n. 6 above, at 630, ‘Today the law of nations has become synonymous with the term “customary international law”’; see also *ibid.*, 632, ‘the law of nations, also known as customary international law’. The Fourth Circuit fully upheld this equivalence, *Dire*, n. 7 above, at 461, 464, 467.

⁶⁷ The defendants unsuccessfully submitted that the law of nations, as understood in 1819, did not refer to the customary international law of today, but to an immutable set of obligations based on natural law, see *Dire*, n. 7 above, at 467, and *Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit* (October 1st, 2012), 9-10, fn. 3.

⁶⁸ Cf. High Court of Kenya, *Ahmed v. Republic* (May 12, 2009), 10-11, ‘I would go further and hold that even if the Convention [UNCLOS] had not been ratified and domesticated, the Learned Principal Magistrate was bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations’.

⁶⁹ *Hasan*, n. 6 above, at 633 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 137 (2d Cir.2010)).

the sea as customary international law⁷⁰ as well as by the fact that the definition of piracy in both Conventions is identical. This permitted the *Hasan* court to assert that ‘the definition of general piracy under modern customary international law is, at the very least, reflected in Article 15 of the 1958 High Seas Convention and Article 101 of the 1982 UNCLOS.’⁷¹

A. Ascertaining International Customary Law

The ascertainment of international customary law is not a straightforward issue, in general, let alone for domestic courts. The *Said* court underlined that ‘there is no single, definitive source on what constitutes customary international law’ and therefore subscribed to the view that courts must proceed with extraordinary care and restraint when determining the contents of the law of nations.⁷² The *Hasan* court shared this opinion⁷³ and emphasized the ‘high hurdle’ of affirming customary international law.⁷⁴ Both District judges turned for guidance to *Smith*,⁷⁵ in which the Supreme Court had stated that ‘[w]hat the law of nations is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law’.⁷⁶ Further, based on a celebrated Supreme Court pronouncement,⁷⁷ the *Hasan* court pointed out that

In the absence of a controlling treaty, statute or judicial decision, customary international law, as its name suggests, is most aptly revealed by resorting: to the *customs and usages of civilized nations*; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.⁷⁸

In an approach reminiscent of the line of the defence in the trial case, which

⁷⁰ *Hasan*, n. 6 above, at 619; *Dire*, n. 7 above, at 459, 461; *United States v. Alaska*, 503 U.S., 588, n. 10 (1992).

⁷¹ *Hasan*, n. 6 above, at 633.

⁷² *Said*, n. 5 above, at 561; *Hasan*, n. 6 above, at 629.

⁷³ *Hasan*, n. 6 above, at 630, ‘As is the case with the law of nations, customary international law “does not stem from any single, definitive, readily-identifiable source,” but rather is derived from “myriad decisions made in numerous and varied international and domestic arenas”’ (quoting *Flores*, 414 F.3d, 247-48).

⁷⁴ *Hasan*, n. 6 above, at 639.

⁷⁵ *Said*, n. 5 above, at 561.

⁷⁶ *Smith*, n. 17 above, at 160-161.

⁷⁷ *The Paquete Habana*, n. 64 above, at 700.

⁷⁸ *Hasan*, n. 6 above, at 629-630 (emphasis in the opinion).

on certification lead to *Smith*,⁷⁹ the *Said* court selectively reviewed the writings of some modern scholars in order to draw the conclusion that the doctrinal works devoted to piracy ‘disagree on whether there is an authoritative definition of piracy in the international community’.⁸⁰ That court also found that contemporary international law in general – not only the reviewed scholarly work, but also all the sources the prosecution provided in favour of a larger definition of piracy in accordance with international law – was unsettled on the definition of piracy.⁸¹ It is not at all clear how that court reached such a conclusion, in particular with regard to the two conventional texts, one of which – the 1958 Convention on the High Seas – is ratified by US. In any case, the court hastily swept away the international sources that the US Government submitted to it, displaying by the same token a superficial approach to the ascertainment of international customary law.

This lack of understanding of the role and functioning of international law both at the international and the domestic levels, contrasts with the thorough reasoning of *Hasan* (endorsed by the Fourth Circuit)⁸² in establishing international customary law. After reviewing the US legislative materials and case law, that court turned, for evidence of international customary law to judicial decisions, including foreign case law,⁸³ scholarly writings attesting the ‘customs and usages’ of nations,⁸⁴ and, at the outset, to treaty law as ‘proper evidence of customary international law’.⁸⁵ The court focused its analysis in this respect to UNCLOS for three main reasons: it contains a definition of general piracy that is, for all practical purposes, identical to that of the High Seas Convention, it has many more states parties than the High Seas Convention, and it has been much more widely accepted by the international community than the High Seas Convention.⁸⁶ Not only has the United States accepted as customary international law the UNCLOS provisions dealing with traditional uses of the sea (see *supra*), but also ‘[a]n overwhelming majority of the world, 161 states, are parties to’ it (including Somalia and other Horn of Africa nations).⁸⁷ This scrutiny leads to the conclusion ‘that the definition of piracy in UNCLOS reflects the current state of

⁷⁹ *US v. Chapels*, n. 22 above, at 393, ‘that piracy was a general term, not clearly nor sufficiently defined in the law of nations; that the great fathers of the church, to whom you would look for a definition gave no satisfaction upon it. What says Grotius? Not one syllable. Puffendorf? Profoundly silent. What Barbeyrac? Domat? Rutherford? Montesquieu? Wolffius? Vattel? Not a solitary word, by way of definition’.

⁸⁰ *Said*, n. 5 above, at 565.

⁸¹ *Ibid*, 563-566.

⁸² *Dire*, n. 7 above, at 457-462.

⁸³ *Hasan*, n. 6 above, at 635.

⁸⁴ *Ibid.*, 636.

⁸⁵ *Ibid.*, 633.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

customary international law for purposes of interpreting 18 U.S.C. § 1651.⁸⁸ In this way, customary international law is recognized as a defining element of the applicable US legislation.

B. Evolutive Character of International Law and Legal Certainty

The discussion on the definition of piracy ‘as defined by the law of nations’ in the US courtrooms highlights another aspect of international law-making, the *changing character of international law*. This feature could be the object of another paper⁸⁹. Suffice here to observe that having reviewed the language of § 1651 and US Supreme Court opinions on the nature of international law,⁹⁰ the *Hasan* court convincingly concluded ‘that the ‘law of nations’ connotes a changing body of law, and that the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus definition at the time of the alleged offense.’⁹¹ Without speculating whether Congress had contemplated in 1819 that the definition of piracy could evolve as international law evolved, one has to admit that the reference to the law of nations has had this practical effect.⁹² The Fourth Circuit supported the possibility of evolution, albeit slow and in limited circumstances,⁹³ of statutes of Congress referring to the law of nations⁹⁴ and agreed with the district court ‘that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations.’⁹⁵

The acceptance of the possibility of adaptation of international law to changing circumstances raises the challenge of legal certainty, and in criminal prosecu-

⁸⁸ Ibid.. and 639, ‘UNCLOS reflects the definitive modern definition of general piracy under customary international law.’

⁸⁹ On the effect of time on the normative force of rules of international law, cf. Ioannis Stribis, *La manifestation des lacunes en droit international*(2009), 81-91.

⁹⁰ Mainly *Sosa v. Alvarez-Machain*, n. 39 above, at 692, also *US v. Arjona*, 120 U.S. 479 (1887) and *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

⁹¹ *Hasan*, n. 6 above, at 625; also at 629, ‘the phrase “law of nations” contemplates a developing set of international norms’.

⁹² *Hasan*, n. 6 above, at 623, ‘The plain language of 18 U. S. C. § 1651 reveals that, in choosing to define the international crime of piracy by such a reference, Congress made a conscious decision to adopt a flexible-but at all times sufficiently precise-definition of general piracy that would automatically incorporate developing international norms regarding piracy. Accordingly, Congress necessarily left it to the federal courts to determine the definition of piracy under the law of nations based on the international consensus at the time of the alleged offense’; *Dire*, n. 7 above, at 467.

⁹³ *Hasan*, n. 6 above, at 624, ‘developing international norms may alter the offense’s accepted definition, albeit at a glacial pace’.

⁹⁴ *Dire*, n. 7 above, at 467 (with reference to *Sosa v. Alvarez-Machain*, n. 39 above, at 724-725).

⁹⁵ Ibid, 469.

tions of the respect of the principle of legality.⁹⁶ As mentioned above, the *Hasan* court convincingly refuted the possibility of such a risk in the case of piracy⁹⁷ concluding that ‘it [wa]s far more likely that the Defendants, who claim to be Somali nationals, would be aware of the piracy provisions contained in UNCLOS, to which Somalia is a party, than of *Smith*, a nearly two hundred year-old case written by a court in another country literally half a world away.’⁹⁸ In other words, a definition which is almost 200 years old is a weak authority, even in jurisdictions where *stare decisis* applies.

In this issue we can usefully refer to the standard of foreseeability set by the European Court of Human Rights, in accordance with which legal provisions

must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty is highly desirable, it may entail excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are a question of practice.⁹⁹

This standard is met by the definition of piracy in 18 U.S.C. § 1651, which certainly enables a person ‘to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’.¹⁰⁰

V. Conclusion

The decisions reviewed are interesting from the viewpoint of the perennial discussion on monist and dualist models of the relationship between international and municipal law. The *Hasan* and *Dire* decisions are surely not a break into the dualist approach; they definitely constitute, however, a breach into it. In this respect the *Hasan* court held that by ‘decid[ing] to define piracy by explicit reference to the law of nations’ Congress accepted that ‘any future change in the definition of general piracy under the law of nations would be automatically incorporated into US law’.¹⁰¹

⁹⁶ Central theme and decisive element in *Said*, n. 5 above, at 566-567.

⁹⁷ *Hasan*, n. 6 above, at 637-639.

⁹⁸ *Ibid.*, 639.

⁹⁹ EctHR 25 October 2011, *A.T. Akcam v. Turkey*, § 87 (internal citations omitted).

¹⁰⁰ *Ibid.*, § 91.

¹⁰¹ *Hasan*, n. 6 above, at 623 (relying on *Sosa v. Alvarez-Machain*, n. 39 above, at 762).

Reflecting on these cases, it is submitted that, though there are elements of the modern definition of piracy that can be debated, the nature of the acts envisaged by this international crime is not one of them. Some other elements of that definition –the meaning and contents of ‘illegal’ as a qualification of ‘acts of violence’, the ‘private ends’ condition, the two-ship ‘requirement, the question of mutiny, the relationship with terrorism or other outlawed activities, prohibited by international law, including Security Council resolutions, to name a few– can be usefully discussed. It is however submitted that the restrictive construction of ‘acts of violence’ to encompass only robbery on the high seas, is not warranted from the current state of applicable international law.

INTERNATIONAL LAW AND DOMESTIC LAW: SOLVING SOME PROBLEMATIC ISSUES IN ORDER TO EFFECTIVE COMBAT MARITIME PIRACY

*Matteo Del Chicca**

I. Introduction; II. Jurisdiction; III. Crime Definition: Some Problems Related to the Subjective Element of Piracy Crime; IV. Conclusions.

I. Introduction

International law provides to the international community some precise norms to combat maritime piracy. In particular, 1982 Montego Bay United Nations Convention on the Law of the Sea (UNCLOS)¹ and 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)² provide sufficient and adequate norms for State Parties to create criminal offences and establish jurisdiction in order to suppress maritime piracy.

In this regard, United Nations Security Council has often affirmed that ‘international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (The Convention), sets out the legal framework applicable to combating piracy and armed robbery at sea’.³ Regarding SUA Convention, Security Council has frequently stated that ‘1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation’.⁴ It is important to remind that

* PhD in International Law and EU Law, University of Pisa.

¹ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994).

² Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988; in force 1 March 1992).

³ In, for example: UNSC Resolution S/RES/1851, 16 December 2008; UNSC Resolution S/RES/1897, 30 November 2009; UNSC Resolution S/RES/1918, 27 April 2010; UNSC Resolution S/RES/1950, 23 November 2010; UNSC Resolution S/RES/2015, 24 October 2011; UNSC Resolution S/RES/2020, 22 November 2011.

⁴ In, for example: UNSC Resolution S/RES/1851, 16 December 2008; UNSC Resolution S/RES/1897, 30 November 2009.

It should be noted that some authors did not consider SUA Convention applicable to maritime piracy; in such regard see, for example: Helmut Tuerk, “Combating Terrorism

also some international customary rules, which have been anyway whole embedded (and/or developed) in international treaty law, provide to international community norms to combat maritime piracy.⁵

Even if international law has produced several efficient norms related to maritime piracy, nevertheless international rules are able to effectively suppress such *crimen iuris gentium* only if they are properly introduced, and consequently applied, in States' inner legal systems. Indeed, it should be reminded that only States' domestic courts are able to prosecute alleged pirates (and eventually punish them), simply because no international court has been at the moment established to do that.⁶

Not by chance, Security Council has often urged 'States parties to the [UNCLOS] Convention and the SUA Convention to fully implement their relevant obligations under these Conventions and customary international law and cooperate with the UNODC, IMO, and other States and other international organizations to build judicial capacity for the successful prosecution of persons suspected of piracy

at Sea – The Suppression of Unlawful Acts Against the Safety of Maritime Navigation', in M. H. Nordquist (ed.), *Legal Challenges in Maritime Security* (2008), 41, 45; Natalino Ronzitti, "The Law of the Sea and the Use of Force Against Terrorist Activities", in N. Ronzitti (ed.), *Maritime Terrorism and International Law* (1990), 2; Christopher C. Joyner, "Suppression of Terrorism on the High Seas: the 1998 IMO Convention on the Safety of Maritime Navigation", 19 *Israel Yearbook on Human Rights* (1989), 350. Contrariwise, some other authors value SUA Convention applicable also to maritime piracy; in such regard see, recently: Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", 20 *European Journal of International Law* (2009), 410.

⁵ For the international customary rules traditionally applicable to piracy see the well-known Harvard Research, in: *American Journal of International Law, Supplement* (1935). Anyway, whole such customary rules has been embedded (and/or developed) in the United Nations Convention on the High Seas (Geneva, 29 April 1958; in force 30 September 1962), first, and in the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994), then.

⁶ In this regard, see: Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results (UNSG Report S/2010/394, 26 July 2010).

See also: 'While there is consensus on the need to end the impunity of pirates, views are divided among the principal States engaging in counter-piracy on the methods that should be implemented to achieve that goal. Two radically diverse options have been proposed: the creation of an international criminal tribunal on one hand, and on the other, strengthening the capacities of States in the region without creating an additional mechanism', in: Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia (UNSG Letter S/2011/30, 25 January 2011), at 9.

and armed robbery at sea off the coast of Somalia’.⁷

Although several States have recently begun a process of legislative reform in order to adapt their criminal law to combat piracy,⁸ even nowadays the domestic law of a large number of States alas lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates.⁹ Such deficiency undoubtedly undermines international community efforts to suppress maritime piracy,¹⁰ because it prevents domestic courts to prosecute (and/or punish) apprehended pirates.¹¹ In fact, if domestic law lacks provisions criminalizing piracy, domestic courts are not able to prosecute pirates, and such inactivity leads States to release persons suspected of piracy without facing justice.

In other words, such domestic law deficiency contributes to realize the notorious ‘catch and release’ practice, which severely hinders the international community fight against maritime piracy:¹² in this regard, it should be noted that ‘catch and release’ practice has been condemned as a grave hindrance both by United Nations Secretary General and by United Nations Security Council as well.¹³

⁷ In, for example: UNSC Resolution S/RES/1897, 30 November 2009, paragraph 14; UNSC Resolution S/RES/1950, 23 November 2010, par. 19; UNSC Resolution S/RES/2020, 22 November 2011, paragraph 23.

⁸ ‘Several States (in particular Belgium, France, Japan, Maldives, Seychelles, Spain and the United Republic of Tanzania) have begun such a process of legislative reform in order to adapt their criminal law to combating piracy’, in: Report of the Secretary-General to Security Council S/2010/394, n. 6 above, at 21.

⁹ ‘Noting with concern at the same time that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates’, in: UNSC Resolution S/RES/1918, 27 April 2010.

¹⁰ ‘Failure to criminalize piracy in domestic law is the first obstacle to effective prosecution’, in: Report of the Secretary-General to Security Council S/2010/394, n. 6 above, at 21.

¹¹ ‘Affirms that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community’ [UNSC Resolution S/RES/1918, 27 April 2010].

¹² ‘Catch and release’ is meant to allude to apprehend pirates and to release them without facing justice. It should be noted that several prominent politicians have condemned the ‘catch and release’ practice; in this regard see, for example: Condoleezza Rice, ‘Combating the Scourge of Piracy’, *US State Department Press* (16 December 2008); Nick Britten, ‘Navy Regularly Releases Somali Pirates, Even When Caught in the Act’, *The Telegraph* (29 November 2009); Maxime Verhagen, ‘Speech at the Clingendael Institute, Pioneering for solutions against piracy focusing’ (8 July 2009); Hillary Clinton, ‘Releasing Pirates Sends “Wrong signal”’ (Labott – CNN State Department, 20 April 2009).

¹³ ‘In order to be effective, naval operations apprehending suspects should result in prosecutions. The risk otherwise is that suspects are released at sea, or repatriated, and return to commit further acts of piracy or armed robbery at sea’, in: Report of the Secretary-General to Security Council S/2010/394, n. 6 above, at 10.

‘Noting with concern that the continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more

For all such reasons, it should prove useful to analyze how States have to correctly adapt their criminal law to international law, in order to play a major role in combating a relevant threat for international community, as piracy *iuris gentium* actually is.¹⁴

First, a premise should be specified: it is true that ‘piracy under international law is not necessarily identical to piracy under the domestic law of various states. Every state may create its own law by which to define and punish piracy, and these definitions may or may not overlap with the definition of piracy under international law’;¹⁵ but it is certainly true as well that whenever a State definition do not overlap with the definition of piracy under international law, such State has created norms to define and punish maritime piracy as one of its own domestic crimes, but not to define and punish maritime piracy as *crimen iuris gentium*.

Every State *must* instead create their own law by which to define and punish maritime piracy according *also* to international law provisions, as resulting both by international treaty law and by customary international rules, in virtue of the well-known international law general principles *pacta sunt servanda* and *consuetudo est servanda*.

In order to adapt its domestic criminal law to international law, every State have therefore to produce: rules which establish domestic court jurisdiction over maritime piracy crime; norms which define such crime; norms which provide penalties for the offenders. All such norms must be created according to international law rules currently applicable and in force.

II. Jurisdiction

As is known, the principle of universal jurisdiction was originally proclaimed in customary international law proper to fight maritime piracy.¹⁶ Afterwards,

robust international action against the pirates off the coast of Somalia, and in some cases has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution’, in: UNSC Resolution S/RES/1851, 16 December 2008; UNSC Resolution S/RES/1897, 30 November 2009; UNSC Resolution S/RES/1950, 23 November 2010.

¹⁴ ‘The race between the pirates and the international community is progressively being won by the pirates’[Security Council 6473rd meeting S/PV.6473, 25 January 2011, at 3.

¹⁵ In: Kenneth C. Randall, “Universal Jurisdiction Under International Law”, 66 *Texas Law Review* (1988), at 795. A similar proposition should be also found in Justin W. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (1928), 154: ‘Any state may bring in pirates for trial by its own courts, on the ground that they are “hostes humani generis”. This applies only to persons who are pirates at international law, and acts may be piratical at municipal law, which are not so at international law; for example, in English criminal law it is piracy to engage in slave-trading’.

¹⁶ See, for example: “Decisions of nationals tribunals involving points of international law – Case no. 1 – *In re Piracy Jure Gentium*”, XVI *The British Yearbook of International*

such customary international rule was embedded first in article 19 of 1958 Geneva Convention on the High Seas¹⁷, then in article 105 of 1982 UNCLOS, which so state: ‘On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith’.

The main question related to universal jurisdiction for piracy crime is the following: does international law impose upon the States an *obligation* to prosecute pirates, or does it leave to States a *freedom* to prosecute?

Solving such issue exceeds the limits of the present paper.¹⁸ What is instead important to note here is that if a State is willing to fulfill UNCLOS article 100 obligation – which imposes upon State Parties an express *duty* to ‘cooperate to the fullest possible extent in the repression of piracy’¹⁹ – such State should create appropriate domestic rules in order to prosecute and punish apprehended pirates.

If not, it could result hard to find how such State is cooperating ‘to the fullest possible extent’, because prosecuting and punishing pirates is certainly an essen-

Law (1935), 199; M. Cherif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice”, 42 *Virginia Journal of International Law* (2001), 108; Antonio Cassese, *International Criminal Law* (2003), 284; M. Cherif Bassiouni, “The History of Universal Jurisdiction”, in S. Macedo (ed.) *Universal Jurisdiction* (2004), 47, 48; The scope and application of the principle of universal jurisdiction, Report of the Secretary-General prepared on the basis of comments and observations of Governments (UN Doc. A/65/181, 29 July 2010), 8 [27].

¹⁷ United Nations Convention on the High Seas (Geneva, 29 April 1958; in force 30 September 1962), Article 19: ‘On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith’.

¹⁸ Such question has been addressed in: MD. S. Karim, “Is There an International Obligation to Prosecute Pirates?”, *Netherland International Law Review* (2011), 387. For a partial survey of this question, I take the liberty of referring the reader to my two papers: Matteo Del Chicca, “Universal Jurisdiction as Obligation to Prosecute or Extradite”, 11 *World Maritime University Journal of Maritime Affairs* (2012), 83; Matteo Del Chicca, “La pirateria marittima di fronte ai giudici di Stati membri dell’Unione Europea”, *XCV Rivista di diritto internazionale* (2012), 104.

¹⁹ UNCLOS Article 100 so states: ‘All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’.

tial mean ‘in the repression of piracy’.²⁰ The same UNCLOS article 100 interpretation seems to be shared also by United Nations Secretary General, which so stated: ‘The obligation to cooperate in the repression of piracy is qualified by the phrase “to the fullest possible extent”. *That degree of flexibility should not be used as a pretext for failure to prosecute*’ (italics added).²¹ Furthermore, it should be noted that catching and releasing pirates (without prosecuting them)²² would infringe the article 100 international obligation, at least when the ‘catch and release’ is put in place systematically: in fact, if a State repeatedly release apprehended pirates without prosecuting them, such State should prove defaulting in the repression of piracy.

However, if a State wish to cooperate in the repression of piracy, by creating domestic rules in order to prosecute and punish pirates, such State must first create domestic written rules to establish the jurisdiction of its own courts over piracy crime, moreover stating clearly which precise court – between the several domestic courts available – is entitled to prosecute pirates (High Court, Magistrate Court, Admiralty Court, District Court, etc). If not, each domestic court should not be able to assert its own power of jurisdiction over piracy crime trials, eventually rising positive conflicts of *domestic* jurisdiction.²³

The need to point out which precise domestic court is really competent to *ius dicere* ensues also by piracy special *locus commissi delicti*: the high seas. Such maritime zone, in effect, is located outside the ordinary limits of national jurisdiction;²⁴ for such reason, such special *locus commissi delicti* has sometimes caused some problematic issues in order to understand if and which domestic court was really competent to prosecute pirates who committed the crime in a zone located outside State territorial jurisdiction.

In this regard, a significant example comes from *MV Powerful* case;²⁵ in such

²⁰ See n. 10 and n. 11 above.

²¹ Report of the Secretary-General to Security Council S/2010/394, n. 6 above, at 22.

²² See n. 12 above.

²³ Positive conflicts of *domestic* jurisdiction for piracy trials are certainly more feasible than positive conflicts of jurisdiction *between States* for piracy trials, as instead supposed by: Antonio Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case”, 13 *European Journal of International Law* (2002), at 857.

²⁴ ‘Municipal laws of this kind are enforceable only with the ordinary limits of national jurisdiction. With regard to piracy by the law of nations, the case is different. The offence in its jurisdictional aspects is “sui generis”. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate’s operations is the high seas, which is not the special right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, whom any nation may in the interest of all capture and punish’, in: John Bassett Moore, *A Digest of International Law* (1906), 951.

²⁵ Chief’s Magistrate Court of Mombasa, 10 March 2010, *Republic of Kenya vs. Aid Mohamed Ahmed & Seven (7) Others*, Criminal Case No. 3486 of 2008.

trial, the pirates defence challenged the Chief's Magistrate Court of Mombasa's jurisdiction, stating as follows: '[...] this court had no jurisdiction to hear this case. [...] it was for that reason that the legislature did up with the Merchant's Shipping Act which now gives the court jurisdiction to determine cases where the offence is committed beyond territorial waters'.²⁶ Furthermore, the defence argued that: '[...] the accused being non-Kenyans and the offence having been committed off the Kenyan territory hence not lawful to be tried by this court'.²⁷

For such reasons, Chief's Magistrate Court of Mombasa was forced to resort to complex hermeneutic operations in order to affirm its own competency over *MV Powerful* case²⁸, since Kenyan Penal Code did not include precise rules to establish domestic court extra-territorial jurisdiction over piracy crime, at that time.

Afterwards, Kenya legislature fortunately enacted Merchant's Shipping Act, which provides more precise rules to determine the power of jurisdiction of Kenyan courts over piracy acts, even whenever committed outside Kenya ordinary territorial jurisdiction.²⁹ In this regard seems relevant to remind the *Sherry Fishing Dhow* case,³⁰ arisen after *MV Powerful* case and after Merchant's Shipping Act enactment.

Also in *Sherry Fishing Dhow* trial the pirates defence challenged the competency of Chief's Magistrate Court of Mombasa, on the ground that – under Merchant Shipping Act – only Kenya High Court had jurisdiction; before Kenya High Court, the defence so 'submitted that the accused persons had been arraigned before the Magistrate Court of Mombasa illegally and that, therefore, they should be set at liberty'.³¹

This time – in virtue of Merchant Shipping Act rules, now applicable – the Kenya High Court has dismissed the defence objections to trial with ease, stating that: 'By s.66 of the Criminal Procedure Code and by s.430 of the Merchant Shipping Act, the criminal jurisdiction of the Kenyan Courts has been expressly expanded to embrace piratical depredations committed in the high seas'.³²

Furthermore, it must be underlined that States domestic courts may not recall *only* customary international law in order to affirm their own competency to prosecute pirates. In fact, customary international law norms are *not self-executing* on this point: they give to States a power of jurisdiction over piracy crime –

²⁶ Ibid., at 15.

²⁷ Ibid., at 17.

²⁸ Ibid., at 15-18.

²⁹ See 2009 Kenya Merchant Shipping Act, Articles 369 and 371.

³⁰ High Court of Kenya, 31 May 2011, *Republic of Kenya vs Abdirahman Isse Mohamud and Three (3) Others*, Misc. Application no. 72 of 2011.

³¹ Ibid., 2.

³² Ibid., 21. On the same basis, the Chief Magistrates Court of Mombasa declared its own power to prosecute in: Chief's Magistrate Court of Mombasa, 1 February 2010, *Republic of Kenya vs. Barre Ali Farah & Six (6) Others*, Criminal Case No. 3601 of 2009.

even when it is committed outside ordinary limits of States jurisdiction, *id est* in the high seas – but they do not indicate exactly which precise domestic court is legitimate to prosecute. It follows that, as far as such power of jurisdiction is not specified through a domestic *written* law, each domestic court may not know if it is really competent to prosecute, or if such competency is instead up to another (different) domestic court.

Such problematic issue emerged in several recent domestic trials related to piracy crime: in *Topaz* case,³³ in *Gloria* case³⁴, as well as in *Draco* case,³⁵ for example, the Supreme Court of Seychelles based its own power of jurisdiction upon customary international law, and, in particular, on worth noted *In re Piracy Jure Gentium* case³⁶, and on *Lotus* case.³⁷

On closer inspection it should be noted that customary international law, as expressed in the *In re Piracy Jure Gentium* case, affirmed that ‘[...]any person apprehended for piracy has placed himself beyond the protection of any State and is justiciable by the State that arrests him’,³⁸ but it did not state which exact State court is entitled to trial.

Similarly, in the *Lotus* case, customary international law stated that pirate ‘is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – “hostis humani generis” - whom any nation may in the interest of all capture and punish’,³⁹ but it lacked to point out which precise domestic court is legitimate to prosecute pirates.

In short, customary international law – not being self-executing on this point – is not able, *per se*, to directly provide domestic rules in order to determine domestic court jurisdiction; therefore, it needs to be adapted by States legislature throughout domestic written rules.⁴⁰ Only through such adaptation, the domestic

³³ Supreme Court of Seychelles, 21 July 2010, *The Republic of Seychelles vs. Mohamed Ahmed Dahir & Ten (10) Others*, Criminal Side No. 51 of 2009.

³⁴ Supreme Court of Seychelles, 30 June 2011, *The Republic of Seychelles vs. Abdugar Ahmed & Five (5) Others*, Criminal Side No. 21 of 2011.

³⁵ Supreme Court of Seychelles, 12 October 2011, *The Republic of Seychelles vs. Houssein Mohammed Osman & Ten (10) Others*, Criminal Side No. 19 of 2011.

³⁶ “Decisions of nationals tribunals involving points of international law – Case no. 1 – *In re Piracy Jure Gentium*”, see n. 16 above.

³⁷ Publications of the Permanent Court of International Justice, Collection of Judgements, 7 September 1927, *The Case of the S.S. “Lotus”*, Series A. – No. 10.

³⁸ “Decisions of nationals tribunals involving points of international law – Case no. 1 – *In re Piracy Jure Gentium*”, see n. 16 above.

³⁹ See n. 37 above, at 70.

⁴⁰ Fortunately, several State criminal laws have provided domestic written rules in order to establish the universal jurisdiction of their own inner courts. In this regard, see: *Table I*, Report of the Secretary-General prepared on the basis of comments and observations of Governments, The scope and application of the principle of universal jurisdiction, UN Doc. A/65/181, see n. 16 above, at 28.

court's universal jurisdiction becomes indisputable.

In above quoted *Sherry Fishing Dhow* case, for example, also the High Court of Kenya recalled customary international law applicable, as expressed in *In re Piracy Jure Gentium* case,⁴¹ but it found its legitimacy to prosecute primarily in its own domestic law, *id est* in Merchant Shipping Act, which provides precise rules to establish universal jurisdiction over piracy trials.

Similarly, in the *Samanyolu* case, also the Recthbank of Rotterdam recalled customary international law related to universal jurisdiction over piracy crime, but it asserted its own power to prosecute in virtue of domestic law norms.⁴²

For all such reasons, it results hard to agree with following observations of some Governments, related to the scope and application of the principle of universal jurisdiction, which have been uncritically accepted by United Nations Secretary General: 'Some Governments noted that they accepted that customary international law permitted the exercise of universal jurisdiction over the most serious crimes under international law, which included genocide, crimes against humanity, war crimes, torture, piracy (e.g., Belgium, Malta, Slovenia), and slavery or trafficking in persons (e.g., Belgium), while in some other instances it was noted that there was a subset of crimes such as piracy, genocide and torture, for which the authority to exercise universal jurisdiction derived, at least in part, from a recognition of the offence as a universal crime under customary international law (e.g., the United States)'.⁴³

Such observations may not to be shared for two reasons: because the authority to exercise universal jurisdiction should derive *only* in part, and never entirely (as instead suggested by: '*at least* in part') from customary international law; and, moreover, because customary international law may not permit the exercise of universal jurisdiction over piracy crime *per se*, requiring necessarily that State legislature provides written rules in order to establish domestic courts universal jurisdiction.

III. Crime Definition: Some Problems Related to the Subjective Element of Piracy Crime

The rationale showed above should be also followed regarding the domestic definition of piracy crime. In fact, even if international law provides a definition of piracy, every State legislature has to incorporate such crime in its own domes-

⁴¹ '[...] piracy as a recognized threat to all maritime commerce, a crime to be punished by all States, without jurisdictional impediments, in international customary law', in: High Court of Kenya, 31 May 2011, *Republic of Kenya vs Abdirahman Isse Mohamud and Three (3) Others*, see n. 30 above, at 17.

⁴² Rotterdam Rechtbank, 17 June 2010, Criminal No. 10/600012-09, LJN: BM8116.

⁴³ Report of the Secretary-General prepared on the basis of comments and observations of Governments, The scope and application of the principle of universal jurisdiction, UN Doc. A/65/181, see n. 16 above, at 14 [54].

tic law too, fixing further adequate penalties. If not, prosecuting domestic court would infringe the general principle of legality *nullum crimen, nulla poena sine praevia lege poenali*, which is common to all national legal systems.⁴⁴ Of course, domestic provisions should be created in accord with international law definition of piracy crime.

In this regard, UNCLOS article 101 definition of piracy is generally accepted as the main definition of such crime provided by international law.⁴⁵ However, although such definition represents a considerable expansion of previous customary international law definition, nowadays it does not appear fully satisfactory. In particular, the subjective element of the crime – the well known ‘private ends’ – has arisen several problematic issues, both in theoretical debates and in some recent piracy trials.

From a theoretical point of view, ‘private ends’ subjective element certainly represents an enlargement of the previous customary international law subjective element: the *animus furandi*. Such enlargement was implemented in order to permit States to suppress a larger plethora of piracy acts, because it allowed to punish acts committed for whichever private end, and not acts committed only *in animo furandi*. In sum, the ‘private ends’ intended to expand the punitive power of States in order to suppress piracy. In addition, the ‘private ends’ permitted to discern piracy acts from similar acts committed instead for insurgency purposes, at least with greater certitude than *animus furandi* allowed.⁴⁶

⁴⁴ In this regard see, recently: Alessandro Bufalini, “La rilevanza del diritto interno ai fini del rispetto del principio *nullum crimen sine lege* nel diritto internazionale penale”, *XCV Rivista di diritto internazionale* (2012), 809; Gerhard Werle, *Diritto dei crimini internazionali* (2009), 44; Antonio Cassese, *International Criminal Law* (2003), 139.

⁴⁵ Article 101 of UNCLOS so states: ‘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 air-craft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)’.

⁴⁶ For the uneasy legal relationship between piracy and insurgency see, for example: Justin W. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, n. 15 above; R. Y. Jennings, “The *Caroline* and *McLeod* Cases”, 32 *American Journal of International Law* (1938), 82; Hersch Lauterpacht, “Insurrection et Piraterie”, *Revue Générale de Droit International Public* (1939), 513; *Annuaire de la Commission du Droit International*, 1956, vol. II, U.N. Doc. A/CN.4/SER.A/1956/Add.1, 282; Roberto Barsotti, “Insorti”, XXI *Enciclopedia del diritto*, 796. See also the legal practice related to piracy and insurgency: *United States v. Smith*, 18 U.S. 153, 5 Wheat. 153 (1820); *United States v. Klintonck*, 18 U.S. 144, 5 Wheat. 144 (1820); the *Lexington*, *Huascar*, *Maparari*, and *Francis St Andrew* cases, in: McNair, vol. I *International Law Opinions* (1956), 266.

However, even such enlargement has progressively become unsatisfactory, because – after ‘private ends’ introduction – has begun to emerge a new kind of offences against maritime navigation and security: such offences usually show an objective element of the crime identical to piracy objective element, but they are not committed for ‘private ends’.

In particular, terrorist acts are sometimes similar to piracy acts in whole their constitutive elements, but they should differ from piracy right for the subjective element of the offence.⁴⁷ However, such difference is often not clear, ascertainable, or verifiable:⁴⁸ sometimes offenders commit the crime for ‘private ends’, and for ‘terroristic purposes’ as well; in other cases, it is hard to verify the real intention of offenders. For such reason, it results arduous to distinguish piracy crime from terrorism crime, only on the basis of the subjective element of the crime.

In this regard, the *Achille Lauro* case represented a glaring example of such difficulty: the hijackers, in fact, committed acts similar to piracy for whole their elements, except the *mens rea*,⁴⁹ because they hijacked the Italian cruise vessel not for ‘private ends’, but for ‘terroristic aims’ instead. This different subjective element of the crime prevented to punish the hijackers for piracy crime, and made awkward accusing the offenders for any international offence as well, because at that time no international law instrument allowed to punish a crime which was piracy for a large part of its elements, but with a *mens rea* which was not the ‘private ends’.⁵⁰

⁴⁷ It must be noted that the scholar question about the international legal definition of ‘terroristic aims’ is actually unresolved; in this regard see, for example: Marcello Di Filippo, “Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes”, 19 *The European Journal of International Law* (2008), 533; Antonio Cassese, “The Multifaceted Criminal Notion of Terrorism in International Law”, in 4 *Journal of International Criminal Justice* (2006), 933; Maurice Flory, “International law: an instrument to combat terrorism”, in R. Higgins and M. Flory (eds.), *Terrorism and International Law* (1997), 31; Krzysztof Skubiszewski, “Definition of Terrorism”, 19 *Israel Yearbook on Human Rights* (1989), 39; Gilbert Guillaume, “Terrorisme et Droit International”, III *Recueil des Cours de l’Académie de Droit international* (1989), 295; V. S. Mani, “International Terrorism. Is a Definition Possible?”, 18 *Indian Journal of International Law* (1978), 206.

⁴⁸ Michael Bahar, “Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations”, 40 *Vanderbilt Journal of Transnational Law* (2007), 32; Zou Keyuan, “Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends”, 9 *Singapore Journal of International and Comparative Law* (2005), 44; Tammy Sittnick, “State Responsibility and Maritime Terrorism In The Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait”, 14 *Pacific Rim Law & Policy Journal* (2005), at 758; T. Garmon, “International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th”, in 27 *Tulane Maritime Law Journal* (2002), 274; Samuel P. Menefee, “Piracy, Terrorism, and the Insurgent Passenger”, in N. Ronzitti (ed.), *Maritime Terrorism and International Law*, see n. 4 above, at 60.

⁴⁹ And except the ‘two-ships requirement’, yet not relevant for this paper.

⁵⁰ For the *Achille Lauro* case see, for example: Gerald P. Mc Ginley, “The *Achille Lauro*

For such reasons, afterwards *Achille Lauro* case, international community was persuaded to create a new international law instrument, which allowed (*rectius*: imposed)⁵¹ to suppress whole the unlawful acts against the safety of maritime navigation, regardless of any subjective element of the offence: the 1988 SUA Convention. The *occasion legis* of SUA Convention (the *Achille Lauro* case) should not be confused with the *ratio legis* of such Convention: in fact, despite the terroristic event which originated the SUA Convention, State Parties created new international criminal rules in order to punish *whole* the unlawful acts which undermined ‘the confidence of the peoples of the world in the safety of maritime navigation’,⁵² without defining such acts ‘terrorism’, nor ‘piracy’.

To those who affirm that ‘all of the designated offences remain separate and distinct from unlawful acts of piracy’,⁵³ it could be noted that in the SUA Convention the objective elements of the crime are itemised with great details,⁵⁴ ‘most of which

Affair: Implications for International Law”, 52 *Tennessee Law Review* (1985), 691; George R. Constantinople, “Towards a New Definition of Piracy: the *Achille Lauro* Incident”, in 26 *Virginia Journal of International Law* (1986), 723; Samuel P. Menefee, “Terrorism at Sea: The Historical Development of an International Legal Response”, in B. A. H. Parritt (ed.), *Violence at Sea: a review of terrorism, acts of war and piracy, and countermeasures to prevent terrorism* (1986), 192; Antonio Cassese, *Il caso “Achille Lauro” – Terrorismo, politica e diritto nella comunità internazionale* (1987); “Epilogue judiciaire de l’affaire de l’Achille Lauro (10 juillet 1986)”, *Revue Générale de Droit International Public* (1987), 141; Djamchid Momtaz, “La Convention pour la Repression d’Actes Illicites contre la Securite de la Navigation Maritime”, in *Annuaire Français de Droit International* (1988), 589; Malvina Halberstam, “Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety”, 82 *The American Journal of International Law* (1988), 269; Natalino Ronzitti (ed.), *Maritime Terrorism and International Law* (1990); Tullio Scovazzi, *Elementi di diritto internazionale del mare* (1994), 73; Scott Davidson, “Dangerous waters: combating maritime piracy in Asia”, 9 *Asian Yearbook of International Law* (2000), 12; M. D. Fink and R. J. Galvin, “Combating pirates off the coast of Somalia: current legal challenges”, *LV Netherland International Law Review* (2009), 367.

⁵¹ The SUA Convention imposes upon State Parties the *aut dedere aut iudicare* obligation. The article 10.1 of SUA Convention, in fact, states that: ‘The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State’.

⁵² See the *Preamble* of the SUA Convention, line 4.

⁵³ Christopher C. Joyner, “Suppression of Terrorism on the High Seas: the 1998 IMO Convention on the Safety of Maritime Navigation”, see n. 4 above, at 350.

⁵⁴ The article 3 of SUA Convention describes the objective element of the crime punished: ‘1) Any person commits an offence if that person unlawfully and intentionally:
1. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
2. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

correspond in whole or in part with actions committed by pirates or armed robbers'.⁵⁵ It is also important to observe that the objective elements of the crime – as provided by SUA – are not bordered by any subjective element: the material offences are punished *per se*, regardless of any *mens rea*. This legislative choice was made for two essential reasons: first, because the 'grave nature of those offences' (ex art. 5 of SUA Convention) required a new international criminal *ratio legis*, not limited by any subjective element; secondly, the innovative SUA *ratio legis* derived also from the unsuitability showed by some UNCLOS provisions related to piracy, and mostly by 'private ends' subjective element of the crime, which limited the punitive ambitions of States with regard to suppress any *vulnus* inflicted to the general principle of the safety of maritime navigation, as piracy *also* was (and actually is).

For the same reasons, SUA Convention has implemented a further enlargement of States punishing powers than that already made by UNCLOS, avoiding to indicate any specific (and thus limiting) *nomen iuris* for the crime punished (neither 'piracy', nor 'terrorism'),⁵⁶ and providing also to expand the objective element of the crime: for example, removing the 'two-ships requirement', and punishing the offender even when the act is attempted, and not just when the act is committed.⁵⁷

In short, States should nowadays find in SUA Convention international law

3. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

4. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

5. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

6. communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

7. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2) Any person also commits an offence if that person:

1. attempts to commit any of the offences set forth in paragraph 1; or

2. abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

3) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question'.

⁵⁵ Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", see n. 4 above, at 410.

⁵⁶ 'The term "terrorism" is conspicuously avoided throughout the entire IMO instrument', in: Christopher C. Joyner, "Suppression of Terrorism on the High Seas: the 1998 IMO Convention on the Safety of Maritime Navigation", see n. 4 above, at 350.

⁵⁷ Article 3.2.1 of SUA Convention states that: '2. Any person also commits an offence if that person: 1. attempts to commit any of the offences set forth in paragraph 1'.

instruments more efficient than those provided by UNCLOS, in order to create criminal offences for suppressing *also* piracy acts. Not by chance, some domestic courts recalled the applicability of SUA Convention in piracy trials,⁵⁸ and United Nations Security Council (and Secretary General too) declared such Convention applicable also to piracy crime.⁵⁹

Even from the legal practice viewpoint, UNCLOS definition of piracy crime has recently emerged as a trying issue in some piracy trials.

With regard to ‘private ends’ subjective element of the crime, for example, in the above quoted *Topaz* case⁶⁰ the question arisen showed many of the complexities depicted until now, because the alleged offenders were bring to trial for several counts: some of which were related to piracy crime, and others to terrorism crime. The offenders were certainly punishable in virtue of the objective element of the crime committed, but which precise offence should be alleged to offenders depended on the subjective element proved: if the ‘private ends’ should be verified, the offenders would be punished for piracy crime; if the ‘political ends, with the objective of influencing governments or international organizations’ should be proved, the offenders would be punished for terrorism crime.⁶¹

In this regard, the Supreme Court of Seychelles so got some difficulties to distinguish between the two offences eligible – piracy, and terrorism – only on the basis of the subjective element of the crime, stating that: ‘it is hard, if not impossible, to procure direct evidence to prove the intention of an individual’.⁶² In the event, the Supreme Court of Seychelles dismissed alleged offenders for any charge related to terrorism crime, punishing them only for piracy crime.

However – if Seychelles domestic criminal law had been accordant to SUA Convention, namely providing a criminal offence for unlawful acts against maritime navigation not restrained by any subjective element – the Supreme Court of Seychelles could have punished the offenders far more easily.⁶³

Domestic criminal law correspondence to SUA Convention should prove useful in the fight against piracy also with regard to objective element of the crime. In fact, UNCLOS punishes the offender only when the piracy act is committed,⁶⁴ whereas SUA Convention punishes the offender even when he ‘*attempts to com-*

⁵⁸ Rotterdam Rechtbank, 17 June 2010, Criminal No. 10/600012-09, LJN: BM8116; High Court of Kenya, *Republic of Kenya vs Abdirahman Isse Mohamud and Three (3) Others*, Criminal Case No. 3012 of 2010, Misc. Application no. 72 of 2011.

⁵⁹ See n. 3, 4 and 7 above.

⁶⁰ Supreme Court of Seychelles, 21 July 2010, *The Republic of Seychelles vs. Mohamed Ahmed Dahir & Ten (10) Others*, see n. 33 above.

⁶¹ *Ibid.*, at 18, 19 [37].

⁶² *Ibid.*, at 16 [31].

⁶³ The Republic of Seychelles has ratified SUA Convention on 24 January 1989.

⁶⁴ See n. 45 above.

mit any of the offences set forth in paragraph 1’ (italics added).⁶⁵

Always in *Topaz* case, for example, the alleged offenders ‘never initiated any violence’⁶⁶, so they did not actually commit any criminal act: they only attempted to commit an offence. In order to punish the offenders, the Supreme Court of Seychelles thus recalled customary international law, and in particular the *In re Piracy Jure Gentium* case,⁶⁷ quoting the well known maxim: ‘an actual robbery is not an essential element of the crime. A frustrated attempt to commit a piratical robbery will constitute piracy jure gentium’.⁶⁸

Such expedient should evidently be avoided: as pointed out above, basing a judgement *only upon customary international law*, not properly introduced (and written) in domestic criminal law, could infringe the principle *nullum crimen, nulla poena sine praevia lege poenali*.

United States Judge Raymond A. Jackson – in the *Ashland* case – had in mind this general principle, when he rightly granted the defendant’s motion to dismiss piracy charge, pointing out that: ‘the Government has failed to establish that any unauthorized acts of violence or aggression committed on the high seas constitutes piracy as defined by the law of the nations in 18 United States Code § 1651’.⁶⁹

However – if Seychelles (and United States)⁷⁰ had adapted their criminal law to SUA Convention, namely providing a domestic law which expressly punishes a criminal offence against maritime navigation even when the act is only attempted⁷¹ – the proceeding national Courts would not have been forced to resort to customary international law, inapplicable inasmuch not self-executing.

At last, it is equally important to remind that also penalties should be written in domestic criminal laws, always in accordance with the principle *nulla poena sine praevia lege poenali*.⁷²

⁶⁵ See n. 54 above.

⁶⁶ Supreme Court of Seychelles, 21 July 2010, *The Republic of Seychelles vs. Mohamed Ahmed Dahir & Ten (10) Others*, see n. 33 above, at 12 [18].

⁶⁷ “Decisions of national tribunals involving points of international law – Case no. 1 – *In re Piracy Jure Gentium*”, see n. 16 above.

⁶⁸ *Ibid.*; see also n. 33 above, at 26 [57].

⁶⁹ United States Eastern District Court of Virginia, 17 August 2010, *US v. Cali Saciid et al.*, Memorandum Opinion and Order, Criminal Action no. 2:10-cr-00057-RAJ-FBS, at 20.

⁷⁰ United States have ratified SUA Convention on 6 December 1994.

⁷¹ The desirable goal of punishing piracy even when the act is only attempted has been underlined also by Security Council: ‘Urges all States, including States in the region, to criminalize piracy under their domestic law, *emphasizing the importance of criminalizing incitement, facilitation, conspiracy and attempts to commit acts of piracy*’ (italics added) [UNSC Resolution S/RES/1976, 11 April 2011, paragraph. 13].

⁷² In this regard, it should be noted that SUA Convention imposes upon State Parties to provide severe penalties for the offences set forth in the Convention. Article 5 of SUA Convention, in fact, states that: ‘Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties *which take into account the grave nature of those offences*’ (italics added).

IV. Conclusions

It should seem more evident now that some of the several difficulties that international community is actually facing in suppressing piracy *iuris gentium* derive by the inadequate adaptation of inner legal systems to international law.

Without a correct and pervasive introduction of international law instruments into domestic criminal laws, States are not able to effectively prosecute and punish pirates;⁷³ and failure to prosecute ‘undermines anti-piracy efforts of the international community’.⁷⁴

In this regard, it should be noted that international community has deployed impressive fleets to combat piracy, moreover investing a large amount of resources to transfer several individuals suspected (or found guilty) of piracy to the judicial authorities.⁷⁵ Nevertheless, the number of successful prosecutions is not adequate yet: although more than forty pirates are actually detained in European countries, for example, only four European domestic criminal proceedings have ended to punish pirates;⁷⁶ at the moment, the other piracy trials are not still started in Europe, or they are not come to an end. It is obvious to infer that such deficiencies derive, in whole or in part, from the unsatisfactory adaptation of inner legal systems to international law.

Italy criminal law is significant from this viewpoint, particularly with regard to subjective element of the crime: in fact, Italian domestic law still recalls the largely overtook customary international rule of the *animus furandi* (worded: ‘a scopo di depredazione’).⁷⁷

⁷³ ‘Formerly, only certain navies opted to immediately release the pirates, destroying the skiffs and weapons. *That practice has now become the rule, and judicial prosecution the exception.* From mid-August to mid-December 2010, the command of the Atalanta force captured 51 pirates who were immediately freed’ (italics added), in: Report of the Secretary-General to Security Council S/2010/394, n. 6 above, at 21.

⁷⁴ In, for example, UNSC Resolution S/RES/1897, 30 November 2009; UNSC Resolution S/RES/1918, 27 April 2010; UNSC Resolution S/RES/1950, 23 November 2010.

⁷⁵ ‘At present, 738 individuals suspected or found guilty of piracy have been transferred to the judicial authorities and are being detained in 13 countries. Some are in the region (338 in Somalia, including 78 in Somaliland and 260 in Puntland; 120 in Yemen; 136 in Kenya; 47 in the Seychelles; 12 in Oman; one in the United Republic of Tanzania; and 34 in the Maldives, pending deportation to Somalia, where they will not stand trial). Others are in Europe (15 in France, 10 in Germany, 10 in the Netherlands, 2 in Spain and 1 in Belgium), and 12 are in the United States of America’ [Report of the Secretary-General to Security Council S/2010/394, n. 6 above, at 20].

⁷⁶ Rotterdam Rechtbank, 17 June 2010, Criminal No. 10/600012-09, LJN: BM8116; Audiencia Nacional de Madrid, sección cuarta, sala de lo penal, 3 May 2011, Judgement n. 10/2011, Criminal No. 93/09; Rotterdam Rechtbank, 12 August 2011, Criminal No. 10/960248-10 and 10/960256-10, LJN: BR4930 and BR4931; recently, it seems that also the Rome Domestic Criminal Court had sentenced some pirates, according to: “Italy court sentences eight Somali pirates: report”, *AFP*, 1 December 2012.

⁷⁷ Article 1135 of the Italian navigation code so states: ‘Il comandante o l’ufficiale di nave nazionale o straniera, che commette atti di depredazione in danno di una nave nazionale o straniera

As pointed out above, such limiting subjective element of the crime gravely hinders the State power to punish piracy, being the chance to punish provided by *animus furandi* more narrow than ‘private ends’ is.

Indeed, Italy was also one of the promoter States of the SUA Convention,⁷⁸ therefore it should be desirable that Italian domestic law would adapt to such Convention soon, so benefiting from the wider powers gifted by such international instrument. In so doing, Italian legislature should avoid to include any limiting *mens rea* in the definition of the crime (neither the *animus furandi*, nor the ‘private ends’), incorporating only the objective elements of the offence, as provided *ex article 3* of the SUA Convention. Besides, Italian legislature should also provide penalties for the attempted act with the same degree of severity of those provided for the act committed, as stated by article 5 of the SUA Convention.⁷⁹

Furthermore, it seems important to note that States inner legal systems – regardless of States different mechanisms for incorporating customary (or treaty) international rules⁸⁰ – could introduce customary (and treaty) international rules related to piracy crime only through *expressis verbis* domestic laws. Only passing a domestic written law, in fact, a State legislature would permit to their own State courts to take proceeding against alleged pirates, without infringing the general principle of criminal legality (*nullum crimen, nulla poena sine praevia lege poenali*). Contrariwise, domestic courts would not assert universal jurisdiction by default, neither would able to legitimately prosecute (nor punish) pirates.

At last, by creating domestic criminal rules in order to bring proceedings against pirates, a State should find itself to observe the inner principle of *mandatory criminal prosecution*, which is common to several national legal systems:⁸¹ it follows that such State will be obliged to prosecute pirates. Although such obligation does not come from an international rule, but from a principle of domestic law instead, the final result is anyway valuable, because the application of such domestic principle solves the *vexata quaestio* mentioned above: is there an obligation to prosecute pirates? The answer would be affirmative, at least for the States which have declared the principle of *mandatory* criminal prosecution in their own domestic law.

o del carico ovvero a scopo di depredazione commette violenza in danno di persona imbarcata su una nave nazionale o straniera, è punito con la reclusione da dieci a venti anni. Per gli altri componenti dell’equipaggio la pena è diminuita in misura non eccedente un terzo; per gli estranei la pena è ridotta fino alla metà’.

⁷⁸ As reminded also by: Malvina Halberstam, “Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety”, see n. 50 above, 291.

⁷⁹ See n. 72 above.

⁸⁰ Regarding the different States mechanisms for incorporating customary international rules, see for example: Antonio Marcello Calamia, “L’adattamento del diritto interno al diritto internazionale consuetudinario nelle più recenti costituzioni”, LX *Rivista di diritto internazionale* (1977), 59.

⁸¹ See, for example, Mark Deiters, *Legalitätsprinzip und Normgeltung* (2006); M.Damaska, “The Reality of Prosecutorial Discretion”, 29 *The American Journal of Comparative Law* (1981), 119.

THE EU FIGHT AGAINST PIRACY IN THE HORN OF AFRICA: THE EXTERNAL ACTION AT STAKE

*Enrico Tonelli**

I. Introduction; II. The Structure of the New Treaty: Eea and Fighting Piracy; A. Specific Provisions on the CFSP; B. Specific Provisions on the CSDP; III. CFSP Operations in the Horn of Africa; A. Brief Overview and the Atalanta Operation; B. Other Relevant Operations; C. The Governance Framework; IV. Somali Piracy and EU Agreements with Third States; A. The Status of the European Forces; B. The Effects on Individuals; V. Conclusion.

I. Introduction

European Union operations to safeguard the maritime transport in the Horn of Africa, represent an important case-study in investigating the interrelation between the different aspects of the European External Action (EEA) as reformed by the Treaty of Lisbon. Considering that, this paper intends to underline the general aspects of the aforementioned operations studying, at the same time, the most relevant provisions of the Treaties establishing the European Union with reference to EEA and to existing partnership EU with other subjects operating in the area. In accordance to this aim, it will start analyzing the primary EU law related to counter piracy (II), and it will continue with the analysis of the CSFP operations in the Horn of Africa (III). At last stage, it will deal with the exam of the EU international agreements which have been stipulated in this context, while referring to the status of EU forces and the conditions of transfer of suspected pirates (IV).

II. The Structure of the New Treaty: Eea and Fighting Piracy

Several juridical sources contained both in the Treaty on European Union (TEU)¹ and in the Treaty on the Functioning of the European Union (TFEU)² are dedicated to the External Action but, in accordance with the specific topic of this paper, we underline only the provisions needed to better understand the EU

* PhD candidate in International Law and EU Law, University of Pisa.

¹ Consolidated version of the Treaty on European Union, [2012] OJ C 326/13.

² Consolidated version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47.

approach in fighting piracy off the Somali coasts. After the abolition of the well-known ‘Structure by Pillar’, established by the reform of Lisbon, the Treaties provisions on EEA have been substantially rationalized and autonomous juridical personality was explicitly conferred on the latter.³ The clear distinction between different ‘souls’ of this policy, emerges considering that political, security and defence aspects, on one hand, are regulated by the fifth Title of the TEU while economic, social and environmental aspects, on the other hand, are regulated by specific TFEU provisions.⁴ In accordance with this general framework, Articles 205 and 218 of TFEU are particularly relevant. The former, in fact, addresses the relationship between different legal provisions covering EEA and the latter, instead, refers to EU procedures concerning the negotiation and conclusion of international agreements with third countries or international organizations.⁵

With regard to the TEU regulations, it is important to underline that the Title V mentioned above contains general provisions on the EEA,⁶ and specific provisions concerning the Common Foreign and Security Policy (CFSP)⁷ and the Common Security and Defence Policy (CFSD).⁸ At any rate, it should be recalled that the Union’s action shall be guided by the principles which have inspired its own creation, development and revision, at the same time, a certain will to develop relations and build partnerships with third countries, regional or

³ Article 47 TEU. In conjunction with this process note that Article 1 (3) TEU states that the Union has replaced and succeeded the European Community Union.

⁴ Provisions referred in the Section II, Part Five of TFEU related to EEA are inherent to: ‘common commercial policy (i.e. Articles 216-217); cooperation with third countries and humanitarian aid (i.e. Articles 208-214); restrictive measures (i.e. Article 215); international agreements (i.e. Articles 216-219); the Union’s relations with international organizations and third Countries and Union delegations (i.e. Articles 220-221); solidarity clause (i.e. Article 222)’.

⁵ Article 218 (6) TFEU.

⁶ For a general discussion on this topic see Piet Eeckhout, *EU External relations Law* (2 ed., 2011); Cremona Marise and De Witte Bruno, *EU foreign relations Law* (2011); Jean Laude Piris, *The Lisbon Treaty a Legal and Political Analysis* (2010), 238-288.

⁷ In recent years, several edited volumes and special Issues have been dedicated to this topic: see Van Elsuwege, “EU External Action after the collapse of the Pillar structure: in Search of New Balance Between Delimitation and Consistency”, *47 Common Market Law Review* (2010), 987-1019; Gosalbo Bono, “Some Reflections on the CFSP Legal Order”, *43 Common Market Law Review* (2006), 33-394.

⁸ In recent years, several edited volumes and special Issues have been dedicated to this topic: see Michael Eugene Smith, *Europe’s Foreign and Security Policy: The Institutionalization of Cooperation*, (2004); Giovanni Grevi, Damien Helly and Daniel Keohna, *European Security and Defence Policy: The First Ten Years* (2010); Aurel Sari, “Status of Forces and Status of Mission Agreements under the ESDP: the Eu evolving practice”, *19 European Journal of international Law* (2008), 67-100; Frédéric Mèrand, Stéphanie C. Hofmann and Bastien Irondele, “Governance and State Power: A Network Analysis of European Security”, *49 Journal of Common Market Studies* (2011), 121-147.

global organizations.⁹ Talking about the institutional structure,¹⁰ a leading role is granted to the European Council,¹¹ which identifies the strategic interests and objectives of the Union, in specific relation to the particular situation of a country or a geographical region.¹² The relevant Decisions are to be taken unanimously on a Recommendation from the Council, under the arrangements laid down for each area and should be implemented in accordance with the procedures provided in the Treaties.¹³

A. Specific Provisions on the CFSP

Specific provisions on the Common Foreign and Security Policy are contained in the Section I of the second Chapter of the fifth Title of the TEU. The operating area of CFSP is indicated (*expressis verbis*) by Article 24 of the TEU, concerning all areas of foreign policy and all questions relating to Union security, including the progressive forming of a common defence policy, that might lead to a common defence.¹⁴ The European Council and the Council have a primary role. The former has to identify the Union's strategic interests, determine the objectives and define general guidelines, also for matters having defence implications. The latter, in accordance with the general guidelines mentioned before, has to frame Common Foreign and Security Policy and take the Decisions neces-

⁹ Article 21 TEU. About the purposes of external action the same provision identifies '(a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external border; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance'. This is all in accordance with the necessity of ensuring consistency between the different areas of this policy.

¹⁰ See Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (2010), 379-387.

¹¹ Article 22 TEU.

¹² In these cases European Council shall define their duration, and the means to be made available by the Union and the Member States.

¹³ Note that abstentions are possible in accordance to Article 235 TFEU.

¹⁴ About the concept of common defense see Article 42 TEU.

sary for defining and implementing it.¹⁵ The Political and Security Committee¹⁶ (PSC) contributes to the definition of EU approach in this field, considering that it shall monitoring the international situation in the areas covered by the CFSP and CSDP and issues opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy (HR) or on its own initiative.

The general interest of the Union¹⁷ is promoted by the HR¹⁸ which draws up proposals contributing to the development of the CFSP and ensures implementation of the Decisions adopted by the European Council and the Council.¹⁹

The EU inner coherence²⁰, is ensured by the HR and by the Council, besides the support and respect of the Union's choices by the Member States, following a spirit of loyalty and collaboration.²¹ Furthermore the implementation of the policies listed in the Title I of Part I of TFEU shall not affect the application of the procedure and the extent of the power of the institutions laid down by the Treaties for the exercise of the particular Union competences inherent CFSP and vice versa.²²

However in accordance to the Lisbon's reform, a lot of peculiar aspects endure within the area under examination. As pointed out before, the CFSP is defined and carried out by the European Council and the Council, which decide by unanimity, except in those cases where the Treaties orders differently.²³ The role of the European Parliament, and of the Commission, is delineated by indi-

¹⁵ Article 26 TEU.

¹⁶ Permanent structure of the Council of the European Union See regulated by Article 38 TEU and the Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee (PSC), [2001] OJ L 27/1. About these topic see: Ana E. Juncos and Christopher Reynolds, "The Political and Security Committee: Governing in the Shadow", *12 European Foreign Affairs Review* (2007), 127-147; Simone Duke, "Assessing the Working and Institutional Relations of the Political and Security Committee", *European Institute of Public Administration, Working Paper 2005/W/05*.

¹⁷ Article 27 TEU.

¹⁸ It is assisted by the European External Action Service; See Council Decision 2010/427/EU of the Council, 25 July 2010, establishing the organization and functioning of the European External Action Service, [2010] OJ L 201/30; see Steven Blockmans "Beyond conferral: the role of the European External Action Service in decision-shaping", in M. Moraru and J. Larik (eds.), *Ever-Closer in Brussels Ever-Closer in the World? EU External Action after the Lisbon Treaty* (2011) 7-19.

¹⁹ Any of the member States or the High Representative, in fact, may refer a question relating to the CFSP to the Council.

²⁰ For a general discussion on comprehensive coherence in EU foreign policy-making see Álvaro de Vasconcelos, "A strategy for EU foreign policy", *7 European Institute for Security Studies* (2010) 12-14.

²¹ Article 24 TEU.

²² Article 40 TEU.

²³ Article 31 TEU.

vidual (and marginal) Treaties provisions. So, the CFSP²⁴ is characterized by an inter-governmental method. In this field, the substantial equal partition of power (operated by the Lisbon Treaty) between the Council and the European Parliament²⁵ and the general framework of the Union's Decision-making procedures²⁶ are not applicable and the adoption of legislative acts should be excluded considering that, specific rules and procedures are applicable. The European Court of Justice (ECJ), also, is not competent concerning this policy,²⁷ with the exception of its jurisdiction to monitor compliance with Article 40 of TEU and to review the legality of certain Decisions as provided for by the second paragraph of Article 275 of the TFEU.

B. Specific Provisions on the CSDP

Specific provisions on the Common Security and Defence Policy are contained in the Section II of the second Chapter of the fifth Title of the TEU. In the regulatory framework of CSDP, Article 42 of TEU plays a central role since it grants and ensures the Union's chance to use civil and military²⁸ capability on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.

In this policy, decision making power²⁹ is exercised by the Council adopting Decisions,³⁰ acting unanimously, on a proposal by the HR or an initiative by a Member State.³¹ The Council is assisted by the 'European Defence Agency'.³²

²⁴ See Antonio Marcello Calamia, *Manuale Breve. Diritto dell'Unione Europea* (2013), 194.

²⁵ Article 14 TEU: 'The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions' and Article 16 TEU: 'The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions'.

²⁶ See, for example, A. Dashwood, M. Dougan, B. Rodger, E. Spaventa and D. Wyatt, *European Union Law* (6 ed. 2011), 95.

²⁷ About this topic see Marco Gestri, "Portata e Limiti del Diritto Individuale di Accesso alla Giustizia nell'Ordinamento dell'Unione Europea", in F. Francioni et. al, *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea* (2008), 463-499.

²⁸ EU Treaty (...) In this perspective member States, shall make civilian and military capabilities available to the Union for the implementation of this policy.

²⁹ Article 43 TEU.

³⁰ According to Frederik Naert: '[t]he basic legal instrument governing each EU operation is a Council Decision adopted on the basis of Article 43 EU Treaty, in conjunction with Article 28 EU Treaty...this legal instrument is the successor to the Joint actions that were adopted pursuant to Article 14 pre-Lisbon EU Treaty. However, this is merely a change in name and Article 28 post-Lisbon EU Treaty essentially copies Article 14 pre-Lisbon EU Treaty'["Legal Aspects of EU Military Operations", *15 Journal of International Peacekeeping* (2011), 226].

³¹ Article 44 TEU.

³² This agency is regulated by Article 45 TEU.

Political control and strategic direction of such defence activities are regulated by the PSC³³ (under the responsibility of the HR and Council) which can also take the relevant Decisions under authorization by the Council. Military direction, instead, is exercised by the European Union Military Committee (EUMC) composed of the Member State's Chiefs of Defence, represented by their military representatives.³⁴

III. CFSP Operations in the Horn of Africa

The Union has been playing an active role in protecting commercial maritime routes³⁵ by fighting piracy and armed robbery in the Horn of Africa, since 2008. This action, taking into account the humanitarian crisis affecting several countries in the region, is characterized by a comprehensive approach in accordance with the different causes of the structural problems³⁶ of the geographical area.

A. Brief Overview and the Atalanta Operation

As outlined by the Secretary General speaking in his report on the situation in Somalia, such criminal activity started in early 2007 and has rapidly spread, making waters near the Gulf of Aden, Arabian Sea and Northern Indian Ocean 'one of the most dangerous places in the world for the marine vessels'.³⁷ In accordance with the intent to ensure maritime law enforcement, United Nations Security Council (UNSC) adopted resolution 1816 (2008) on 2 June 2008³⁸ encouraging

³³ See n. 16 above.

³⁴ Established by Council Decision 2001/79/CFSP of 22 January 2001 setting up the Military Committee of the European Union, [2001] OJ L 27/4 that, in the Annex I, indicates the Committee's functions.

³⁵ See the 2013 Draft Report of European Parliament on the maritime dimension of the Common Security and Defence Policy which indicate '90 % of the EU's external trade and 40 % of its internal trade is transported by sea; whereas the EU is the world's leading maritime shipping actor, with European ship owners managing 30 % of the vessels and 35 % of world shipping tonnage – inter alia 55 % of container vessels and 35 % of tankers, representing 42 % of the value of global seaborne trade' [2012/2318(INI), 21 February 2013].

³⁶ See the conclusion of the Council of European Union adopted on 14 November 2011 e.g. 'Strategic Framework for the Horn of Africa' that states that EU engagement in the Horn of Africa is defined by the region's geo-strategic importance, the EU's desire to help lift the people from poverty into self-sustaining economic growth, and the need for EU to protect its own citizens from security threats [found at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/126052.pdf>].

³⁷ See Report of the Secretary General on the situation in Somalia (UN Doc. S/2008/466, 16 July 2008); About a general discussion on fighting piracy in the area see Eugene Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia", *13 American Society of International Law Insights*, available at <<http://www.asil.org/insights090206.cfm>>.

³⁸ See the situation in Somalia (UNSC Resolution S/RES/1816, 2 June 2008) which states 'for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance

member States to cooperate with the Transitional Federal Government of Somalia³⁹ (TFG) to deter acts of piracy and armed robbery at sea. The EU responded to this exhortation with the Council Joint Action 2008/749/CFSP of 19 September 2008⁴⁰ concerning coordinated military action in support of UN Security Council resolution 1816 (2008) (EU NAVCO).⁴¹ In this perspective, a EU coordination cell was created in Brussels to support the activities of member States deploying military assets in the theatre, with a view to facilitating the availability and operational action of those assets.⁴²

This Joint Action was followed by the Council Joint Action 2008/851/CFSP of 10 November 2008⁴³ regarding a European military operation (operation Atalanta) to contribute to the deterrence, prevention and repression of acts of piracy and robbery off Somali coasts.⁴⁴ With the starting of operation Atalanta, the mentioned above coordination cell was closed.

notification has been provided by the TFG to the Secretary-General, may: (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery' [paragraph 7].

³⁹ About the Somali Republic 'as a failed State' see: Riikka Koskenmaki, "Legal Implications Resulting from State Failure in Light of the Case of Somalia", *73 Nordic Journal of International Law* (2004), 1-36; Antonello Tancredi, "Di pirati e di Stati falliti: il Consiglio di Sicurezza Autorizza il Ricorso alla Forza nelle Acque Territoriali della Somalia", *91:4 Rivista di Diritto Internazionale* (2008), 937-966.

⁴⁰ Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO), [2008] OJ L 252/39.

⁴¹ Andrea de Guttry, "Fighting Piracy and Armed Robbery in the XXI Century: Some Legal Issues Surrounding the EU Military Operation Atalanta", *2 Studi Sull'Integrazione Europea* (2010), 325-350.

⁴² Council Joint Action 2008/749/CFSP, n. 40 above, Article 2.

⁴³ Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and robbery off the Somali coast, [2008] OJ L 301/33.

⁴⁴ The operation's legal framework was subsequently amended by: Council Decision 2009/907/CFSP of 8 December 2009 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, [2009] OJ L 322/27; Council Decision 2010/437/CFSP of 30 July 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, [2010] OJ L 210/33; Council Decision 2010/766/CFSP of 7 December 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, [2010] OJ L 327/49; Council Decision 2012/174/CFSP of 23 March 2012 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, [2012] OJ L 89/69.

The mission started on the 8th December 2008,⁴⁵ to offer protection to vulnerable vessels sailing in the area in accordance with UNSC resolution 1816 (2008).⁴⁶

The Joint Action made the mandate of the EU⁴⁷ naval forces explicit:

‘Atalanta shall, as far as available capabilities allow: (a) provide protection to vessels chartered by the WFP, including by means of the presence on board those vessels of armed units of Atalanta, in particular when cruising in Somali territorial waters; (b) provide protection, based on a case-by-case evaluation of needs, to merchant vessels cruising in the areas where it is deployed; (c) keep watch over areas off the Somali coast, including Somalia’s territorial waters, in which there are dangers to maritime activities, in particular to maritime traffic; (d) take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present; (e) in view of prosecutions potentially being brought by the relevant States under the conditions in Article 12, arrest, detain and transfer persons who have committed, or are suspected of having committed, acts of piracy or armed robbery in the areas where it is present and seize the vessels of the pirates or armed robbers or the vessels caught following an act of piracy or an armed robbery and which are in the hands of the pirates, as well as the goods on board; (f) liaise with organisations and entities, as well as States, working in the region to combat acts of piracy and armed robbery off the Somali coast, in particular the ‘Combined Task Force 150’ maritime force which operates within the framework of ‘Operation Enduring Freedom’.

The mandate, as noted by doctrine,⁴⁸ involves the application of international law on the high seas, into territorial waters,⁴⁹ as referred by point (e) of the Article mentioned above as well as by UNSC resolution 1816 (2008).⁵⁰

Regarding the activities permitted to Union forces, the following are particularly relevant: the authorization to use force as well as the authorization to arrest, detain and transfer persons who have committed -or are suspected of having committed- acts of piracy or armed robbery and seize the vessels of the pirates or armed robbers or the vessels caught following an act of piracy or an armed robbery and which are in the hands of the pirates, as well as the goods on board.

About the first issue, it should be observed that piracy is a crime committed for private ends⁵¹, and so, the law of armed conflict is not applicable to the coercive

⁴⁵ See Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), [2008] OJ L 330/19.

⁴⁶ See n. 38 above.

⁴⁷ See Joint Action 2008/851/CFSP, n. 44 above, Article 2.

⁴⁸ See, for example, Tullio Treves, “Piracy Law of Sea, and Use of Force: Developments off the Coast of Somalia”, 20 *European Journal of International Law* (2009), 399-414.

⁴⁹ See Council Joint Action 2008/851/CFSP, n. 44 above, Article 12.

⁵⁰ See n. 38 above.

⁵¹ See the United Nations Convention on the law of the Sea, (Montego Bay, 10 December

methods that the Union's contingent can take. There is no conflict, in fact, between pirates and EU naval forces that patrol the waters off the coast of Somalia and this is why, the use of weapons should be strictly permitted only in response to the use of weapons against them.⁵² About the second issue, it should be noted that to ensure maritime law enforcement in the area, the EU has stipulated specific international law agreements with third States interested in that activity.⁵³

B. Other Relevant Operations

In addition to operation Atalanta, the Union has decided to fight piracy through the development of regional law enforcement capabilities by activating two additional CFSP missions: 'EUTM SOMALIA'⁵⁴ to contribute to the training of Somali security forces and 'EUCAP NESTOR'⁵⁵ to enhance the maritime capacity of four countries in the Horn of Africa and the Western Indian Ocean.

These missions play a complementary role to operation Atalanta and highlights the UE purpose of fighting piracy in accordance with an holistic approach taking into account the link between such criminal activity under exam and the weak governance powers.

EUTM SOMALIA, is a training mission activated in Uganda to 'contribute to a comprehensive and sustainable perspective for the development of the Somali security sector by strengthening the Somali security forces through the provision of specific military training'.⁵⁶

EUCAP NESTOR is a civilian mission carried out under the CFSP that seeks 'to assist the development in the Horn of Africa and the Western Indian Ocean States of a self-sustainable capacity for continued enhancement of their maritime security including counter-piracy, and maritime governance'.⁵⁷ It has two main objectives: strengthening sea-going maritime capacities in the countries in the

1982; in force 16 November 1994), Article 101; See Alferd P. Rubin, *The Law of Piracy* (2 ed., 1998) available on <<http://www.usnwc.edu/Research-Gaming/International-Law.aspx>>; Ivan Shearer, "Piracy", *Max Planck Encyclopedia of Public International Law* (2008).

⁵² See UNSC Resolution 1816, n. 38 above, that specify that such action must taken also and not only 'with applicable humanitarian law'.

⁵³ Agreements analyzed infra at Section IV.

⁵⁴ Council Decision 2010/96/CFSP of 15 February 2010 on a European Union military mission to contribute to the training of Somali security forces, [2010] OJ L 44/16; Decision amended by Council Decision 2011/483/CFSP of 28 July 2011 amending and extending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia), [2011] OJ L 198/37.

⁵⁵ Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR), [2012] OJ L 187/40.

⁵⁶ Council Decision 2010/96/CFSP, n. 54 above, Article 1.

⁵⁷ Council Decision 2012/389/CFSP, n. 55 above, Article 2.

region (with the exception of Somalia) and, inside Somalia, training of a coastal police force as well as judges.⁵⁸

C. The Governance Framework

In accordance with a comparative study of the general legal framework of the EU missions in the area a common structure of the governance of the operations emerges.⁵⁹

Political control and strategic direction of these missions is attributed to the PCS⁶⁰ while military direction is attributed to the EUMC.⁶¹

The PCS, moreover, is authorized by the Council to take the relevant Decisions concerning the tasks,⁶² including the powers to amend the implementation plan.

In relation with the authority vested, the latter must report to the Council at regular intervals concerning its activity and so coordinate with the Head of the competent EU authorities in relation to every single action.⁶³ The EUMC,⁶⁴ in its

⁵⁸ Council Decision 2012/389/CFSP, n. 55 above, Article 3, which states that the tasks of EUCAP NESTOR must: ‘(a) assist authorities in the region in achieving the efficient organisation of the maritime security agencies carrying out the coast guard function; (b) deliver training courses and training expertise to strengthen the maritime capacities of the States in the region, initially Djibouti, Kenya and the Seychelles, with a view to achieving self-sustainability in training; (c) assist Somalia in developing its own land-based coastal police capability supported by a comprehensive legal and regulatory framework; (d) identify priority equipment capability gaps and provide assistance in addressing them, as appropriate, to meet the objective of EUCAP NESTOR; (e) provide assistance in strengthening national legislation and the rule of law through a regional legal advisory programme, and legal expertise to support the drafting of maritime security and related national legislation; (f) promote regional cooperation between national authorities responsible for maritime security; (g) strengthen regional coordination in the field of maritime capacity building; (h) provide strategic advice through the assignment of experts to key administrations; (i) implement mission projects and coordinate donations; (j) develop and conduct a regional information and communication strategy’.

⁵⁹ See Section II, above.

⁶⁰ See n. 16 above.

⁶¹ See n. 33 above.

⁶² See Joint Action 2008/749/CFSP, n. 49 above, Article 6; Joint Action 2008/851/CFSP, n. 44 above, Article 6; Council Decision 2010/96/CFSP, n. 54 above, Article 5; Council Decision 2012/389/CFSP, n. 55 above, Article 5.

⁶³ See Joint Action 2008/749/CFSP, n. 49 above, Article; Joint Action 2008/851/CFSP, n. 44 above, Article 6; Council Decision 2010/96/CFSP, n. 54 above, Article 5; Council Decision 2012/389/CFSP, n. 55 above, Article 9.

⁶⁴ In this perspective see Council Decision 2001/79/CFSP, n. 16 above, that clarifies in the Annex I ‘(a) Upon the PSC’s request, it issues an Initiating Directive to the Director General of the EUMS (DGEUMS) to draw up and present strategic military options. It evaluates the strategic military options developed by the EUMS and forwards them to the PSC together with its evaluation and military advice. On the basis of the military option selected by the Council, it authorizes an Initial Planning Directive for the Operation Commander. Based upon the EUMS evaluation, it provides advice and recommendation to the PSC: – on the

turn, must monitor proper performance of EU military actions, receiving a report from the head of the competent EU authorities.

The coherence of Union response is guaranteed since the HR, the EU operations commanders and the EU Forces commanders must coordinate their respective activities closely, regarding the implementation of all operations.⁶⁵ In this perspective, of special relevance are the appointment of an European Union Special Representative (EUSR) for the Horn of Africa⁶⁶ and the activation of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa.⁶⁷

Concept of Operations (Conops) developed by the Operation Commander, – on the draft Operation Plan (OPLAN) drawn up by the Operation Commander. It gives advice to the PSC on the termination option for an operation. (b) The EUMC monitors the proper execution of military operations conducted under the responsibility of the Operation Commander. The EUMC members sit or are represented in the Committee of Contributors.’

⁶⁵ See Joint Action 2008/749/CFSP, n. 49 above, Article 8; Joint Action 2008/851/CFSP, n. 44 above, Article 8; Council Decision 2010/96/CFSP, n. 54 above, Article 7; Council Decision 2012/389/CFSP, n. 55 above, Article 14.

⁶⁶ See Council Decision 2011/819/CFSP, 8 December 2011 appointing the European Union Special Representative for the Horn of Africa [2011], OJ L 327/62; Council Decision 2012/329/CFSP of 25 June 2012 extending the mandate of the European Union Special Representative for the Horn of Africa [2012], OJ L 165/62 which states ‘the mandate of the EUSR shall be to: (a) engage with all relevant stakeholders of the region, governments, existing regional authorities, international and regional organisations, civil society and diasporas, with a view to furthering the Union’s objectives and contribute to a better understanding of the role of the Union in the region(...); (h) regarding piracy, maintain an overview of all Union actions within the EEAS, the Commission and Member States, and maintain regular high level political contacts with the countries in the region affected by piracy originating in Somalia, the regional organisations, the UN Contact Group on Piracy off the Coast of Somalia, the UN and other key actors in order to ensure a coherent and comprehensive approach to piracy and to ensure the Union’s key role in the international efforts to fight piracy. This includes the Union’s active support to regional maritime capacity-building and for the judicial treatment of pirates, and ensuring that the root causes of piracy within Somalia are adequately addressed. It also includes continued support to the ESA/IO region in the implementation of its counter piracy strategy and action plan as well as the Djibouti Code of Conduct;(...)(k) contribute to the implementation of the Union’s human rights policy in the Horn of Africa, including the EU Guidelines on human rights, in particular the EU Guidelines on Children and Armed Conflict as well as on violence against women and girls and combating all forms of discrimination against them, and the Union’s policy on Women, Peace and Security, including by monitoring and reporting on developments as well as formulating recommendations in this regard’.

⁶⁷ Council Decision 2012/173/CFSP, 23 March 2012 on the activation of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa, [2012] OJ L 89/66. About the general framework of the EU Operation Center see Articles 3 and 5 of the Decision above that respectively states the political control and strategic direction of PSC, and, as appropriate, under the military direction of the EUMC and that the Center shall

IV. Somali Piracy and EU Agreements with Third States

The EU has coordinated its activity in fighting piracy in the Horn of Africa with that carried out by other international subjects through ad hoc international agreements⁶⁸ referring by operation Atalanta. In this context, it seems appropriate to identify the main features of the such a decision analyzing, on the one hand, the general framework of the agreements stipulated with the Somali Republic,⁶⁹ the Republic of Djibouti,⁷⁰ the Government of Kenya,⁷¹ the Republic of Seychelles⁷² and the Republic of Mauritius⁷³ (concerning the status of European

be organised along functional responsibilities corresponding to the requirements of the CSDP missions and operation which it supports. It shall perform the following tasks: ‘(a) to provide, using its military expertise and specialized planning expertise, direct support to the Civilian Operations Commander for the operational planning and conduct of the RMCB mission; (b) to provide support to the EUTM Mission Commander and enhance strategic coordination between EUTM Somalia and the other CSDP mission and operation in the Horn of Africa; (c) to liaise with Operation Atalanta; (d) to provide support to the Crisis Management and Planning Directorate (CMPD), at its request, in its strategic planning for the CSDP missions and operation in the Horn of Africa; (e) to facilitate interaction between the Horn of Africa CSDP missions and operation and the Brussels-based structures; (f) to facilitate coordination and improve synergies amongst Operation Atalanta, EUTM Somalia, and RMCB, in the context of the Horn of Africa Strategy and in liaison with the European Union Special Representative for the Horn of Africa’.

⁶⁸ For a general discussion about the Treaty Making Power see Rames A. Wessel, “The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities”, in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (2008), 152-187; Elisa Baroncini, “L’Unione Europea e La Procedura di Conclusione degli Accordi Internazionali Dopo il Trattato di Lisbona”, *5:1 Cuadernos de Derecho Transnacional* (2013), 5-37.

⁶⁹ Council Decision 2009/29/CFSP of 22 December 2008 concerning the conclusion of the Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta, [2009], OJ L 10/27.

⁷⁰ Council Decision 2009/88/CFSP of 22 December 2008 concerning the conclusion of the Agreement between the European Union and the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta, [2009], OJ L 33/41.

⁷¹ Council Decision 2009/293/CFSP, 26 February 2009 concerning the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, [2009], L 79/47.

⁷² Council Decision 2009/916/CFSP, 23 October 2009 concerning the signing and conclusion of the Agreement between the European Union and the Republic of Seychelles on the status of the European Union-led force in the Republic of Seychelles in the framework of the EU military operation Atalanta, [2009], OJ L 323/12.

⁷³ Council Decision 2011/640/CFSP, 12 July 2011 on the signing and conclusion of the

forces and the condition and manner for transferring persons suspected of having committed acts of piracy and detained by the European Union-led naval force, and seized property in the possession of EUNAVFOR).

While, on the other hand, analysing the general framework of the agreements stipulated with the Republics of Croatia⁷⁴ and Montenegro⁷⁵ (concerning participation in the operations and the conditions of transfer of persons arrested and detained with a view to their prosecution)⁷⁶.

At any rate, it should be borne in mind that international law, with specific reference to UN activities⁷⁷ involving UNCLOS⁷⁸ and the resolutions adopted by

Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, [2011] OJ L 254/1.

⁷⁴ Council Decision 2009/597/CFSP, 27 July 2009 on the signing and provisional application of the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), [2009] OJ L 202/83.

⁷⁵ Council Decision 2010/199/CFSP, 22 March 2010 on the signing and conclusion of the Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), [2010] OJ L 88/1.

⁷⁶ In that way see the Situation in Somalia (UNSC Resolution S/RES/1851, 16 December 2008) that '[i]nvites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreement or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ('shipriders') from the latter countries(...) to facilitate the investigation and persecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia'[paragraph 3]. In addition, it is important to remark that forces and personnel seconded to the operation by the Republics of Croatia and Montenegro shall carry out their duties and conduct themselves solely with the interest of the EU military crisis management operation in mind. At the same time, their status is equiparated to the status of EU forces as explained *infra* at paragraph 'A'.

⁷⁷ Article 21 TEU.

⁷⁸ See United Nations Convention on the law of the Sea, n. 51 above, in which Articles 100 to 107 and 110 are referred to piracy. Particularly relevant are Article 101 that states that piracy consist of 'any illegal acts of violence or detention, committed for private ends by the crew or the passengers of a private ship or aircraft and directed(...) on the high seas against another ship or aircraft or against person or property on board such ship or aircraft' and Article 105 that states 'on the high seas, or in any place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of the third parties acting in good faith'.

the Security Council -1814 (2008)⁷⁹, 1816 (2008)⁸⁰, 1838 (2008)⁸¹, 1851(2008) and 1872 (2009)⁸²- is the general framework of the aforementioned cases. In this context, the EU intention of strengthening a series of existing partnership and through building new partnership⁸³ emerges clear.

A. The Status of the European Forces

The International agreements discussed here indicate specific obligations on third States concerning the status of the European contingents.

Immunity is granted to EU forces vessels and aircraft and also to European staff.⁸⁴ The former, as well as their means of transport, shall be immune from search, requisition, attachment or execution⁸⁵ while the latter shall enjoy immunity from the criminal, civil and administrative jurisdiction of the Host State under all circumstances.⁸⁶

⁷⁹ The Situation in Somalia (UNSC Resolution S/RES/1814, 15 May 2008).

⁸⁰ The Situation in Somalia (UNSC Resolution S/RES/1816, 2 June 2008).

⁸¹ The Situation in Somalia (UNSC Resolution S/RES/1838, 7 October 2008).

⁸² The Situation in Somalia (UNSC Resolutions: S/RES/1851, n.76 above; S/RES/1872, 7 May 2009).

⁸³ See conclusions of Council of the European Union of 14 November 2011 that clarify the EU intention to maintain relations ‘with the countries of the region and civil society, through the Cotonou Agreement, trade, the CSDP and mediation, for the ownership, better understanding and sustainability of processes and developments in the region, but also with the countries of the Arabian peninsula, in particular Yemen whose proximity and historical ties with the Horn region mean that developments and challenges spill out across the Bab-el-Mandeb strait; with third countries in capacity building on the rule of law, criminal justice, counter-radicalisation, terrorist financing in the region and conflict resolution; with regional and international organisations, especially the AU and the UN, but also with COMESA, EAC and IGAD on regional cooperation e.g. in trade, conflict prevention and other areas of mutual concern, the Nile Basin Initiative Secretariat on resource management, and the League of Arab States (LAS), with the World Bank and International Monetary Fund plus the African Development Bank and NGOs on development and peacebuilding issues, with the IMO, the UN Office on Drugs and Crimes (UNODC), the International Police Organisation (INTERPOL), the European Police Office (EUROPOL), the UN Contact Group on Piracy off the Coast of Somalia and, where appropriate, NATO on counter-piracy and rule of law cooperation’.

⁸⁴ Concerning identification of the EU personnel see, for example, the agreement between the European Union and the Somali Republic, n. 69 above, Article 1 ‘EUNAVFOR personnel shall mean the civilian and military personnel assigned to EUNAVFOR as well as personnel deployed for the preparation of the operation and personnel on mission for a Sending State or an EU institution in the framework of the operation, present, except as otherwise provided in this Agreement, within the territory of the Host State, with the exception of personnel employed locally and personnel employed by international commercial contractors’.

⁸⁵ See the agreement between the European Union and the Somali Republic, n. 69 above, Article 5; the agreement between the European Union and the Republic of Djibouti, n. 70 above, Article 5; the agreement between the European Union and the Republic of Seychelles, n. 72 above, Article 5.

⁸⁶ See the agreement between the European Union and the Somali Republic, n. 69 above,

The agreements with the Republics of Djibouti and of the Seychelles are explicitly set out such conditions. Immunity from criminal and administrative jurisdiction is recognized in respect of words spoken or written and all acts performed by them in the exercise of their official functions upon certification (in that sense) by the EU Force Commander and the competent authority of the Sending State or EU institution. So, any prosecution concerning activities carried out in the exercise of official functions shall not be initiated, whereas otherwise proceedings may be undertaken. In the latter hypothesis, executive actions are permitted on EU's personnel properties with exception of those necessary for the fulfillment of official functions, as specifically certified by the EU Force Commander.

It is affirmed that, the competent authorities of a Sending State shall have the right to exercise on the territory of the Host State all the criminal jurisdiction and disciplinary powers conferred on them by the law of the Sending State with regard to all personnel subject to their relevant law. Disputes concerning claims for damage to or loss of civilian or government property not related to operational necessities,⁸⁷ shall be settled by amicable agreement.⁸⁸ At the same time,

Article 6; the agreement between the European Union and the Republic of Djibouti, n. 70 above, Article 6; the agreement between the European Union and the Republic of Seychelles, n. 72 above, Article 6.

⁸⁷ As well as claims for death of or injury to persons and for damage to or loss of EUNAVFOR property.

⁸⁸ See the agreement between the European Union and the Somali Republic, n. 69 above, Article 13, which states that these claims, 'shall be settled by diplomatic means. In the event of legal action instituted in connection with a prejudice caused to third parties, the Republic of Somalia shall stand in lieu of EUNAVFOR in the proceedings. In all events, the Republic of Somalia shall pay any compensation due as redress for prejudice caused to third parties other than those referred to in paragraph 1. If such compensation is attributable to EUNAVFOR, the amount of compensation shall be totally or partially refunded by EUNAVFOR'; the agreement between the European Union and the Republic of Djibouti, n. 70 above, Article 15 and the agreement between the European Union and the Republic of Seychelles, n. 72 above, Article 15 that recognize 'These claims shall be forwarded to EUNAVFOR via the competent authorities of the Host State, as far as claims brought by legal or natural persons from the Host State are concerned, or to the competent authorities of the Host State, as far as claims brought by EUNAVFOR are concerned. Where no amicable settlement can be found, the claim shall be submitted to a claims commission composed on an equal basis of representatives of EUNAVFOR and representatives of the Host State. Settlement of claims shall be reached by common agreement. Where no settlement can be reached within the claims commission, the dispute shall: (a) for claims up to and including EUR 80000, be settled by diplomatic means between the Host State and EU representatives; (b) for claims above the amount referred to in point (a), be submitted to an arbitration Tribunal, the decisions of which shall be binding. The arbitration Tribunal shall be composed of three arbitrators, one arbitrator being appointed by the Host State, one arbitrator being appointed by EUNAVFOR and the third one being appointed jointly by the Host State and EUNAVFOR. Where one of the parties does not appoint an arbitrator within two months or where no agreement can be found between the Host State and EUNAVFOR on the appointment of the third arbitrator, the arbitrator in question shall be appointed by the President of the Supreme Court of the Republic of Djibouti. An administrative arrangement shall be concluded between

all issues arising in connection with the application of these Agreements shall be examined jointly by representatives of EU forces and the Host State's competent authorities, and in the event of failure of such composition, claims shall be settled exclusively by diplomatic means between parties.

The possibility of arrangements implementing conduct is expressly recognized.⁸⁹

B. The Effects on Individuals

Legal regulations concerning the conditions of transfer of suspected pirates and property seized by EU-led naval force, shows the high relevance and importance attributed by the EU to respect of human rights.⁹⁰

This is in accordance, with the EU primary law as reformed by the Lisbon Treaty⁹¹ (i.e. the Charter of Fundamental Rights of the European Union and Fundamental rights, as far as fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as the emerge from the constitutional traditions common to the Member States) and with human rights obligations regulated to the States party by the European Convention for the Protection of Human Rights and Fundamental Freedoms⁹² and with international human rights obligations regulated to the States party by the International Covenant on Civil and Political Rights.⁹³

EUNAVFOR and the administrative authorities of the Host State in order to determine the terms of reference of the claims commission and the Tribunal, the procedure applicable within these bodies and the conditions under which claims are to be lodged'.

⁸⁹ They may be specifically referred to operational, administrative and technical matters as regulated by: the Agreement between the European Union and the Somali Republic, n. 69 above, Article 16; the Agreement between the European Union and the Republic of Djibouti, n. 70 above, Article 18; the Agreement between the European Union and the Republic of Seychelles, n. 72 above, Article 18; of the Agreement between the European Union and the Republic of Croatia, n. 74 above, Article 8; the Agreement between the European Union and the Republic of Montenegro, n. 75 above, Article 7.

⁹⁰ All in accordance to the Council Joint Action 2008/851/CFSP, n. 69 above; UNSC resolutions about fighting piracy as above cited in the Section III; the UNCLOS convention, n. 51 above ; the international Human Rights Law; about this topic see Kety Crossley Frolick, "The European Union and Transitional Justice: Human rights and post-conflict reconciliation in Europe and Beyon", 3 *Contemporary Readings in Law and Social Justice* (2011), 33-57.

⁹¹ Article 6 TEU; about this topic see Douglas Guilfoyle: 'So long as national authorities determine the disposition of seized piracy suspects, they will be bound by applicable human rights law. States cannot escape such obligations through acting as part of EU or NATO forces, unless the relevant international organization effectively controls suspects disposition' ["Counter piracy Law Enforcement and Human Rights", 59 *International and comparative Law Quarterly* (2010), 141-169].

⁹² European Convention for the Protection of Human Rights and Fundamental Freedom (Rome, 4 November 1950; in force 3 September 1953); About this Convention and countering piracy see Stefano Piedimonte Bodini, "Fighting Maritime Piracy under the European Convention on Human Rights", 22 *The European Journal of International Law*, (2011), 829-848.

⁹³ International Covenant on Civil and Political Rights (United Nations General

Concerning this, it should be stressed that the contracting parties have agreed on several provisions concerning treatment, prosecution and trial of transferred persons⁹⁴ comparable to those indicated by Articles 3, 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of which only the main aspects will be analyzed.⁹⁵

Any transferred person shall be treated humanely and shall not be subjected to torture or cruel, inhuman or degrading treatment or punishment and shall receive adequate accommodation, nourishment and access to medical treatment and shall be able to carry out religious observance. The same shall have the right to be brought promptly before the competent authorities that will have to judge the lawfulness of the detention.

The right to a fair trial, in accordance with the presumption of innocent, is recognized and also any judgment must be delivered by a competent, independent and impartial Tribunal established by law, in accordance with adversarial principle and in full equality. Legal assistance is assigned in any case where the interests of justice so require and no transferred person shall be sentenced to death or be the subject of an application of the death penalty.

The agreements discussed here also lay down procedural safeguards in accordance with the above attribution of rights, in order to ensure effective compliance.⁹⁶ Any transfer shall be the subject of an appropriate document signed

Assembly, 16 December 1966; in force 23 March 1976); In this perspective see the General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13, 26 May 2004) which recognize the obligations of the States Party to ‘respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within territory of the State party(...)[and also] within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation’.

⁹⁴ See the Exchange of Letters between the European Union and the Government of Kenya, n. 71 above, Article 3; the Agreement between the European Union and the Republic of Mauritius, n. 73 above, Article 4; the Agreement between the European Union and the Republic of Croatia, n. 74 above, Annex I, Article 3; the Agreement between the European Union and the Republic of Montenegro n. 75 above, Annex I, Article 3.

⁹⁵ In this perspective see Section II above and remember Article 12 of the Council Joint Action 2008/851/CFSP, n. 44 above ‘persons having committed, or suspected of having committed, acts of piracy or armed robbery in Somali territorial waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred: – to the competent authorities of the flag Member State or of the third State participating in the operation, of the vessel which took them captive, or – if this State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property’.

⁹⁶ See the Exchange of Letters between the European Union and the Government of Kenya, n. 71 above, Article 5; the Agreement between the European Union and the Republic

by a representative of operation Atalanta and a representative of the competent third State law enforcement authorities that have to make out detention records with regard to any transferred person including (but not limited) to: physical condition, any charges against them and any significant Decisions taken in the course of their prosecution and trial respectively. National and international humanitarian agencies shall, at their request, be allowed to visit any persons transferred while representatives of the EU shall have access to and shall be entitled to question them.⁹⁷ Regarding the nature of the agreements under exam, it must be emphasized that the European Parliament (EP) with appeal of 21 December 2011,⁹⁸ asked the European Court of Justice to annul the aforementioned Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the agreement between the European Union and the Republic of Mauritius. The EP, in fact, considers that the contested Decision has breached its prerogatives over the conclusion of international agreements.⁹⁹ In its opinion, the agreement under judicial control also refers to judicial cooperation in criminal matters, police cooperation, and development cooperation, covering fields to which ordinary legislative procedure applies¹⁰⁰ (as known, a case in which the conclusion of the agreement would have to obtain consent from the Parliament).¹⁰¹

However, in practice, the application of the provisions concerning treatment, prosecution and trial to the suspected pirates are influenced by the differences between judicial systems that the judge is asked to apply at any individual case.¹⁰² Although any EU State recognize high human rights standards, the same

of Mauritius, n. 73 above, Article 6; the Agreement between the European Union and the Republic of Croatia, n. 74 above, Annex I, Article 5; the Agreement between the European Union and the Republic of Montenegro n. 75 above, Annex I, Article 5.

⁹⁷ In this perspective note that, any deterioration of physical condition of any person transferred must be notified by Third States Authorities to EU and EUNAVFOR.

⁹⁸ ECJ, Case C-658/11, Parliament v. Council, under decision, [2011] OJ C 58/6.

⁹⁹ See Article 218 (6) TFEU that states that The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement without EP participation as long as it concern ‘exclusively to the Common Foreign and Security Policy’.

¹⁰⁰ See Section II above and n. 9 above.

¹⁰¹ This opinion is shared by the principal authors: See Van Elsuwege, “EU External Action after the collapse of the Pillar structure: in search of new balance between Delimitation and Consistency”, *47 Common Market Law Review* (2010), 987 – 1019; Bart Van Vooren, “The Small Arms Judgment in an Age of Constitutional Turmoil”, *14 European Foreign Affairs Review* (2009), 231-248; Marcus Klamert, “Conflicts of legal basis: no legality and no basis but a bright future under the Lisbon Treaty?”, *35 European Law Review* (2010), 497-515.

¹⁰² Anyway considering the existing link between ECHR and EU international agreements concerning the conditions of transfer of suspected pirates, the interpretation of the relative provisions contained in the latter could turn out to be easier according to the several ECtHR case law. About this topic remember also that the option of an international Tribunal was sponsored by Russia as recognized by Christian Bueger, “An International Piracy Tribunal? The forthcoming Security Council Resolution and the Further Legalization of Responses to Piracy”, available on <[- 70 -](http://piracy-</p>
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are reluctant to arrest and prosecute suspected pirates, considering difficulties correlated with determining the appropriate jurisdiction, conflict of laws, the inadequacy of domestic laws, evidentiary procedures, and the cost of the judicial consequence. Nevertheless, this choice may involve possible adverse issues to procedural safeguards mentioned above considering that, for example, the real capacity of Kenya to respect the rights recognized to suspected pirates is not (*rectius* has never been) clear.¹⁰³ At the same time, despite EU efforts inherent the current democratization process in Somalia it should be recalled that this process will take time for achieve satisfactory results, also as regards to prisons and detention centers conditions.¹⁰⁴ In other words, under current circumstances,

studies.org/2010/an-international-piracy-tribunal-the-forthcoming-security-council-resolution-and-the-further-legalization-of-responses-to-piracy/.

¹⁰³ See, for example, United States Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2012 that, referring to Kenya, recognize '[t]here were numerous reports that the government or its agents committed arbitrary and unlawful killings. Human rights groups estimated that police were responsible for approximately 1,000 extrajudicial killings between 2008 and 2012; in 200 of those cases, there was credible evidence of police involvement, according to civil society groups... Police reportedly used torture and violence frequently during interrogations and as punishment of pretrial detainees and convicted prisoners. According to IMLU, physical battery was the most common method of torture used by the police(...) Human rights organizations, churches, and the press reported numerous cases of torture and indiscriminate police beatings(...) IMLU's *National Torture Prevalence Survey Report 2011 for Kenya*, released in November 2011, detailed the results of a nationwide survey on the prevalence of torture, the definition of which included psychological torture--such as harassment, threats, and forcing victims to make impossible choices--as well as physical abuse by the police and other security forces. Data was collected in interviews with members of public and private organizations and a national survey of 1,200 randomly selected respondents. In the survey, 23 percent of respondents reported that they had been tortured and 29 percent claimed to know someone who had been tortured. Police were the perpetrators in two-thirds of the reported cases. Of victims who reported torture, only 25 percent claimed that action was being taken on their complaints and only 3 percent expressed complete satisfaction with the action taken' [found at <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>>].

¹⁰⁴ See, for example, United States Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2012 that, referring to Somalia recognize '[p]rison and detention center conditions remained harsh and life threatening throughout the country (...) The approximate total number of prisoners and detainees throughout the country, including juvenile and female prisoners, was not known..Harsh conditions in prisons and detention centers throughout the country included overcrowding, poor sanitation, and lack of health care. Inadequate food, water, ventilation, and lighting continued to be persistent problems. Tuberculosis and pneumonia were reportedly widespread. Prisoners relied on their families and clans, who were expected to pay the costs associated with detention. In many areas prisoners depended on family members and relief agencies for food(...) Prison recordkeeping remained inadequate (...) In April the UN Independent Expert for Somalia visited several detention centers in Puntland and Somaliland. He found a significant number of unlawful or arbitrary detentions. Women and girls were detained for disobeying their parents or husbands. He described detention conditions as

a violation of the positive obligation inherent the prohibition of torture or cruel, inhuman or degrading treatment or punishment can not be excluded.¹⁰⁵

V. Conclusion

The situation in the Horn of Africa exemplifies the development-security nexus, considering that the huge presence of criminal activity (i.e. piracy) in the area, has been able to reach its current dimensions through the vicious circle of insecurity, instability, poverty and bad TFG governance.

There is a European (and International) dual interest to maintaining security in the area: the safeguard of an efficient regime of international commercial trade and the support provided to the UN by the EU Founding Treaties. In this context, the Union activity in a unique position, has tried to address the root causes of the problems through countering piracy, judicial international cooperation to end impunity, building regional maritime capacities and stabilization in Somalia. All of this working in partnership with key international partners.

In an overall view, it seems beneficial for the EU to formalise the bridging among existing EU tools and bodies in order to achieve greater synergy across the several operations undertaken.¹⁰⁶ Anyway, the example of complementarity and coordination between operation Atalanta (the first EU naval CFSP op-

“close to inhumane, and water and sanitation were frequently lacking. Ventilation was poor, with only small slits for windows. Prisons were overcrowded and stifling[ly] hot. Inmates slept on bare floors.” A team composed of representatives of different UN agencies conducted an assessment of the Mogadishu Central Prison and held meetings with officials from various institutions within the criminal justice sector. The assessment team also consulted with representatives of civil society and interviewed prisoners detained at the Mogadishu Central Prison. The UN team confirmed the separation of women and men, but noted separation between adults and juveniles was not consistent. The UN team also concluded prisoners’ living conditions in Mogadishu Central Prison fell short of meeting minimum international and national standards. For example, 120 inmates were being held in cells designed for a maximum of 50 persons’ [found at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>].

¹⁰⁵ In a comparative view see, about the obligation of non-refoulement, ECtHR 28 February 2008, *Saadi v. Italy*, Reports of Judgments and Decisions 2008, that at paragraph 147 states ‘The Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention’; ECtHR 28 June 2011, *Sufi and Elmi v. The United Kingdom*, Reports of Judgments and Decisions 2011; see also A. Denselow, ‘Seychelles cells – The Somali pirates jailed in paradise’, *BBC News Magazine* (18/05/2013).

¹⁰⁶ In this perspective see the cooperation with other EU actors, such as the SatCen and EMSA, particularly in the field of satellite vessel imagery interpretation, even when there are no formal arrangements underpinning such cooperation.

eration), EUTM SOMALIA and EUCAP NESTOR should inspire other such actions where CSDP missions and operations are engaged in responding to a multifaceted problem.¹⁰⁷ In this perspective one should moreover note that the aforementioned holistic and multidisciplinary approach taken by the EU has on the one hand, provided greater concreteness to EU activity and, on the other hand, represents an important opportunity to outline the interrelation between the different aspects of EEA as reformed by the Treaty of Lisbon.¹⁰⁸

These are issues on which only the practice and the ECJ's case law can give real answers.

¹⁰⁷ See the 2013 Draft Report of the European Parliament, n. 35 above.

¹⁰⁸ In the event that the aforementioned European Parliament position about the nature of the international agreements will be confirmed, several consequences would occur on the application of EU law. For example, it should be recalled that, with the reform of Lisbon Treaty the ECJ has acquired general jurisdiction to give preliminary rulings in the area of freedom, security and justice, as a result of the disappearance of the pillars (and the repeal by the Treaty of Lisbon of Articles 35 EU and 68 EC). The field of police and criminal justice, in fact, is now considered as part of the general law, and any Court or Tribunal will be able to request a preliminary ruling from the Court of Justice in accordance to the relative transitional provisions (Protocol N. 36 on transitional provisions, Article 10).

THE EU MILITARY LAND-BASED OPERATION AGAINST SOMALI PIRACY: CRITICAL REMARKS

Claudia Cinelli*

I. Introduction; II. Legal Basis; A. The SC Authorization(s) to Use Land-based Operations in Somalia; B. The ATALANTA Operation and its Extension to Somali Internal Waters and Land Territory; III. ATALANTA Land-based Intervention: Mission Creep?; IV. Conclusion.

I. Introduction

As it is generally accepted, piracy in the waters off the Horn of Africa is a symptom of the wider instability that has plagued Somalia since the early 1990s.¹ In their 1992 report, Amnesty International described Somalia as a ‘human

* LL.M, PhD. in International Law and International Relations, Research Assistant at University of Seville (Spain) and Adjunct Professor at University of Pisa (Italy).

¹ Consistent with a comprehensive and holistic approach to the nexus security-development and in order to generally understand the *ratio* of conducting military intervention on Somali territory against piracy, it seems useful to summarize briefly the Somalia political situation from an historical perspective, focusing on peace enforcement operations [in general terms, see, among others, Paolo Picone, *Comunità Internazionale ed Obblighi Erga Omnes* (2ed., 2010), 321-329]. In 1969, the president was assassinated and a military government assumed power in a *coup d'état* led by General Siad Barre. He was ousted by combined northern and southern clan-based forces in 1991 when a violent power struggle developed between two warring clan lords caused de facto division of the Somalia region; i.e. the northeastern area (Puntland) from the north-western (Somaliland) and from the south (Jubaland). Meanwhile, the fighting caused a famine and the deaths of up to 300,000 people (n. 2 below). In 1992 the UN responded by authorizing a limited peacekeeping operation, UNOSOM I [UNSC Resolution S/RES/751, 23 January 1992]. While not impeding humanitarian catastrophe, a US led-coalition (Unified Task Force or UNITAF) entered in Somalia in December 1992, whose legality is much debated as it is considered by a consistent part of the doctrine as a non-UN operation led by the US. UNITAF was replaced by a peace-enforcement operation, the UNOSOM II [UNSC Resolution S/RES/814, 26 March 1993]. In 1995 the UN withdrew its troops having suffered significant casualties, and with effective government still not restored. Somalia was followed by all out inter-clan war. In the meantime, precisely between 1996 and 2000, several international reconciliation meetings aimed at re-establishing a Somali government took place, unfortunately without any success until the adoption of Arta Declaration (Djibouti, 25 May 2000) and the formation of the Transitional National Government (TNG), the first Somali government since 1991 to secure a measure of international recognition. It subsequently developed into the Transitional Federal Government (TFG) with the formal adoption of a Federal Transitional

rights disaster'.² Since 2004 the internationally recognized Transitional Federal Government (TFG)³ has unsuccessfully struggled to form a functional unity government and to reconstitute national security and law enforcement entities.⁴ It is being seen as a 'black hole' of anarchy where the absence of rule of law hereby facilitates the increasing presence of subversives and criminals, above all pirates.⁵

Somali pirates take advantages not only of a situation of failed State institutions and weak rule of law, but also of the combined effects of two more elements: the geographical position of Somalia –where a 40% of global marine transportation transits– and the length of its coast, which make easier the access to sea and, at the same time, more difficult the international forces' monitoring of remote coastal areas.

This situation expands the geographic scope of the piracy phenomenon to tens of thousands of square miles of open water, where relatively few military forces patrol. Therefore, maritime offshore operations alone have proved to be insufficient for effectively combating piracy. One alternative has been to progressively expand the military scope based on the conviction that the 'solution to piracy lies onshore'. In this sense, also the relevance and key role of ashore supplies cannot be underestimated: they provide shelter for returning pirates and access to ports and markets for stolen goods, while facilitating services needed for pirate attacks offshore.

Charter in 2003. Formally, the Transitional Federal Government of the Republic of Somalia was established in 2004 and internationally recognized. From 9 to 29 January 2004 a conference was held in Nairobi, Kenya, at which the Transitional Federal Government developed further. See, e.g., Concetta Maria Pontecorvo, "Somalia e Nazioni Unite", in P. Picone (ed.), *Interventi delle Nazioni Unite e Diritto Internazionale* (1995), 201 ss; Kreijen Gerad, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (2004), 66, 353; Rossella Marangio, "The Somali Crisis: Failed State and International Interventions", *Istituto Affari Internazionali-12/15 Working Papers* (2012), found at: <<http://www.iai.it/pdf/DocIAI/iaiw1215.pdf>>.

² At the end of 1992 it was estimated that more than 500,000 people had died in the war and famine in Somalia, this included 300,000 children. Subsequently, some 1.5 million Somalis had fled the country, and more have since died. See, Amnesty International, *Somalia: A Human Rights Disaster* (1992).

³ See, n. 1 above.

⁴ Amongst others, in its report of July 2011, the UN Monitoring Group on Somalia 'noted that the TFG leadership's political disarray, its endemic corruption and its resistance to power sharing represented the principal impediments to security and stabilization in southern Somalia [*Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2002 (2011)*] found at <http://www.somaliareport.com/downloads/UN_REPORT_2012.pdf>].

⁵ For a definition of pirates as criminal from historical perspective, see Joaquín Alcaide Fernández, "Hostes Humani Generis: Pirates, Slavers, and Other Criminals", in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 120-144. For a contemporary perspective, see, *inter alia*, David Guilfoyle, "The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?", 11 *Melbourne Journal of International Law* (2010), 141-153.

The use of force *in* Somalia has been authorized by a UN Security Council (SC) series of resolutions since 2008.⁶ Over 40 countries are involved in military counter-piracy operations, i.e. in national missions –particularly, China, India, Japan, Malaysia, Russia, Saudi Arabia, South Korea and Yemen– or through three main coalitions, namely: the European Union (EU) Naval Force Somalia, Operation Atalanta;⁷ the Standing Naval Group of the North Atlantic Treaty Organization (NATO), Operation Ocean Shield;⁸ and, finally, the US-led multinational naval partnership, Combined Task Force 151.⁹

They have all moved to fight piracy off the Horn of Africa, but only the EU has conducted a military land-based operation.¹⁰

This paper will analyze the legal basis for conducting a military land-based operation in Somalia (II), focusing on facts and features of the EU air attack on Somali territory (III) and it will conclude with some critical remarks (IV).

II. Legal Basis

According to general customary law, when pirates enter Somali territorial sea after an attack on high seas or in any area outside Somali jurisdiction –or when they directly attack ships in Somali territorial waters–, (war)ships of any States or coalitions are not legitimate to intervene, without the consent of the coastal States or(/and¹¹) specific authorization by the UN SC.¹² The following sections

⁶ Complementary, the UN General Assembly has also repeatedly encouraged States to cooperate to address piracy and armed robbery at sea in its Resolutions on oceans and the law of the sea. For example, in its Resolution 64/71 the GA recognized ‘the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy’ [A/RES/64/71, 12 March 2010, paragraph 82].

⁷ <<http://eunavfor.eu/>>.

⁸ <<http://www.mc.nato.int/ops/Pages/OOS.aspx>>.

⁹ <<http://combinedmaritimeforces.com/ctf-151-counter-piracy/>>.

¹⁰ <<http://eunavfor.eu/eu-naval-force-delivers-blow-against-somali-pirates-on-shoreline/>>.

¹¹ See n. 13 below.

¹² Customary international of piracy are codified by Articles 100-107 and 110 of the UN Convention Law of the Sea Convention (UNCLOS, Montego Bay, 10 December 1982; in force 16 November 1994). It is also important to distinguish the crime of piracy from armed robbery offence against ships, which can occur within the internal and territorial waters of a coastal State. In accordance with Part II of UNCLOS, in cases of armed robbery against ships, primary responsibility for enforcement normally falls on the coastal State. Armed robbery at sea also constitutes an offence under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention, Rome, 10 March 1988; in force 1 March 1992) and, in some cases, the United Nations Convention against Transnational Organized Crime (15 November 2000; in force 29 September 2003) and other relevant instruments to

will analyze the UN SC Resolution(s) and the EU Joint Action and subsequent amending Decisions which authorize the EU military force to enter Somali territorial and internal waters as well as territory (respectively, Section A and B).

A. The SC Authorization(s) to Use Land-based Operations in Somalia

Discussion within SC meetings about military interventions *in* Somalia has been ongoing since 2008, when facing an increasing necessity for ensuring effectiveness in the international fight against piracy.

In order to ensure such effectiveness, in June 2008 the SC authorized –under Chapter VII of the UN Charter and with advance notification provided by the TFG to the UN Secretary-General¹³– States cooperating with the TFG to ‘(a) enter the territorial waters of Somalia [...] in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and (b) use, within the territorial waters of Somalia [...] all necessary means to repress acts of piracy’.¹⁴

A few months before, in April 2008, the case of the French-flagged luxury cruise *Le Ponent* –hijacked by pirates, while sailing off the coast of Somalia– marked a significant strategic shift in the fight against piracy. Pursuant to the co-operation between the authorities of France and the TFG, French forces succeeded in releasing all the crew of the French yacht and in apprehending the suspect pirates in Somali territory.¹⁵ Following this event, the French Government took the occasion to make a proposal to the SC on measures to allow foreign naval forces to enter States’ territorial sea, when engaging in operations against pirates.¹⁶

which concerned States are party [S/RES/1838, 7 October 2008, and subsequent Resolutions].

¹³ Considering that the Somali Republic is a failed State, is the general principle *volenti non fit iniuria* applicable? For a discussion on the legal question related to the TFG consent to a foreign military presence on Somali territory and the ‘overlap’ with the SC authorization under Chapter VII of the UN Charter, see Tullio Treves, “Piracy Law of Sea, and Use of Force: Developments off the Coast of Somalia”, 20 *European Journal of International Law* (2009), 399-414; Antonello Tancredi, “Di Pirati e di Stati Falliti: il Consiglio di Sicurezza Autorizza il Ricorso alla Forza nelle Acque Territoriali della Somalia”, 91:4 *Rivista di Diritto Internazionale* (2008), 937-966; Natalino Ronzitti, *Introduzione al Diritto Internazionale* (4 ed., 2013), 409-411; Paolo Picone, *Comunità Internazionale ed Obblighi Erga Omnes*, n. 1 above.

¹⁴ The situation in Somalia (UNSC S/RES/1816, 2 June 2008, paragraph 7). For a general view, see, Douglas Guilfoyle, ‘Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts’ 57 *International and Comparative Law Quarterly* (2008) 690-699.

¹⁵ From the sources available to the author, it seems not to be clear whether France received explicit permission or a mere acquiescence *a posteriori* by the TFG. The legality of the French operation is debated as it occurred before the adoption of the SC Resolution 1816 (2008).

¹⁶ Quoting the original text, France propose to the SC: ‘la possibilité d’un droit de suite automatique pour les marines qui auraient reçu l’accord du Conseil de sécurité en cas de flagrance; le développement de patrouilles maritimes dans les zones dangereuses pour assurer

In a context of deep international concern at the escalation of piracy off Somalia's coast in 2008, the French proposal was not only welcomed during the SC meetings, but also extended. By considering that maritime operations alone were insufficient for combating piracy, States and regional organizations – including the EU – were enabled to act with force on land in Somalia, while respecting applicable international humanitarian¹⁷ and human rights law.¹⁸

Particularly, the United States Secretary of State, Condoleezza Rice –who tabled the draft Resolution¹⁹ to be issued as Resolution 1851 (2008)²⁰ and secured its unanimous support–, affirmed that ‘the United States believed that, with the agreement of the Transitional Federal Government [...] pursuing pirates on land would have a significant impact’.²¹

la dissuasion’ [the text is reproduced by the section, ‘L’affaire du Ponant’, 145 *Sentinelle*, 20 April 2008, found at: <<http://www.sentinelles-droit-international.fr/bulletins.php>>]. The French proposal also received the support of the International Maritime Organization (IMO) thus the then Secretary-General, Efthimios E. Mitropoulos commented: ‘This is fully in line with the similar request made by the Organization to the UN Security Council in July 2007, at the request of the IMO Council and through the UN Secretary-General, a request that was reiterated by the IMO Assembly in November 2007 [...] I warmly welcome the initiatives being pursued by the Government of France, which are so closely aligned with IMO’s own initiatives and objectives and I look forward to continued co-operation with the Government of France, and all other interested nations, so that appropriate solutions may be found and implemented speedily, to the benefit of the Government and people of Somalia; of the seafarers, who may be the innocent, and so often overlooked, victims of acts of piracy and armed robbery; and of shipping in general’ [found at <http://www.imo.org/blast/mainframe.asp?topic_id=1709&doc_id=9159>].

¹⁷ See n. 27 below. Moreover, it has to be noted that, according with the Geneva Academy Report, *Counter-piracy under international law* (2012) that ‘[t]hrough the resolution speaks of humanitarian law, this should not be taken as evidence that the Security Council considers that an armed conflict exists between pirates and the states affected by piracy. Even though they are sometimes heavily armed, pirates operating off the coast of Somalia and in other areas are not conducting hostilities against their own or another government or other organized armed groups. They are motivated by the potential for gain, notably through ransoms, and to the extent they are organized it is for this purpose. In consequence, they are not organized armed groups that constitute a party to the non-international armed conflict that continues in parts of Somalia’ [found at <<http://www.geneva-academy.ch/docs/projets/Counterpiracy.pdf>>, at 29].

¹⁸ See n. 28 below. In addition, Geneva Academy Report, *Counter-piracy under international law*, *ibid.* 31-34. In doctrine, *inter alia*, Dougke Guilfoyle, “Counter Piracy Enforcement and Human Rights”, 59 *International and Comparative Law* 1, 141-169.

¹⁹ The Situation in Somalia (Draft Resolution UNSC S/2008/789, 2 December 2008).

²⁰ The Situation in Somalia (UNSC S/RES/1851, 16 December 2008).

²¹ *Secretary-General Briefs on Political, Security, Humanitarian Situations; Says Anti-Piracy Efforts Must Be in Context of Approach That Fosters Peace Process* [SC/9541, 16 December 2008]. Most Council members affirmed they had voted in favour of the text ‘because they sought robust action to address that serious threat off Somalia’s coast and they welcomed the practical measures that had been agreed. The need to address the root of the piracy problem -- namely

Nevertheless, the United States was not planning any military land-operations against Somali piracy,²² and no other subject took such a step until the EU's initiative, four years later.

On 16 December 2008, the unanimous adoption of United States-led Resolution 1851 (2008) indeed authorized a temporal extension of twelve months (from the adoption of Resolution 1846²³)²⁴ 'to undertake all necessary measures appropriate *in* Somalia' – where '*in* Somalia' must be read as the Somali region as whole, including its territory and the maritime areas under its sovereignty, sovereign rights and jurisdiction.²⁵

the poverty and lawlessness that had plagued Somalia for decades – and to not look at it through the prism of international trade alone was also emphasized. Still other speakers underscored that actions to combat the dangerous phenomenon must conform to international law standards, including the Law of the Sea Convention. Particularly, *inter alia*, the English Statement: Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom, David Miliband, who said 'he had voted in favour of resolution because he supported robust action to address that serious threat off Somalia's coast. [...] That was an important additional tool to combat piracy. Any use of force, however, must be both necessary and proportionate' [Ibid.].

²² See, *Press Remarks Following UN Security Council Meeting on Somalia* U.S. Secretary of State Condoleezza Rice, 16 December 2008, which reports the following dialogue: '[*Question*]: Over the last 24 hours, there's been another two hijackings off the coast of Somalia. I'd like to get your reaction to that. And also, do you see the eventuality of U.S. troops going ashore in Somalia to catch the pirates? [*Secretary Rice*]: Well, I don't want to take a kind of speculative look at this. I think it's better not to comment in theory. We the United States is a part of an international effort. We do have naval forces that have been involved in this effort. What this does, though, is to authorize that the sea the boundary of the maritime cannot become a safe haven boundary for pirates. And so what we do or do not do in issues like hot pursuit or so forth, I think we'll have to see and you'll have to take it case by case. So I don't want to commit in a speculative way or in a hypothetical way to anything for the United States. But again, the authorization was a very important authorization. As to the two incidents that have taken place, I think it just shows the increasing problem that this is. The pirates are a threat to commerce. They are a threat to security. And perhaps most importantly, they are a threat to the principle of freedom of navigation on the seas. [...] [*Question*]: Two things, Madame Secretary. First of all, military a U.S. military commander in the area has expressed reservations about going ashore, so I'm wondering if that means that the resolution lacks teeth and if there is a disagreement between the State Department and the Pentagon on the use of force. [*Secretary Rice*]: I wouldn't be I would not be here seeking authorization to go ashore if the United States Government, perhaps most importantly the President of the United States, were not behind this resolution. And therefore, any voices about this are voices that need to be understood in the context that I was sent here to get authorization to go ashore so that we did not create a dividing line that was a maritime-to-land sanctuary for the pirates. And that is a position that is supported by the United States Government as a whole' [found at <<http://www.state.gov/secretary/rm/2008/12/113272.htm>>].

²³ UNSC S/RES/1846, 2 December 2008.

²⁴ UNSC S/RES/1851, n. 20 above, paragraph 6.

²⁵ *Ibid.* Pursuant to this Resolution, the Contact Group on Piracy off the Coast of Somalia (CGPCS) was created on 14 January 2009: <<http://www.state.gov/t/pm/ppa/piracy/contactgroup/index.htm>>.

As final remark, it is important to underline that the authorization is clearly consistent with international law as *lex generalis* as well as with the applicable *lex specialis*, namely UNCLOS,²⁶ international humanitarian law²⁷ and human rights law.²⁸ It has to be strictly interpreted, as it cannot be applied to similar situations in other regions,²⁹ nor considered as establishing customary law.³⁰ However, the authorization leaves it entirely to the States' and coalitions' discretion to decide which measures to be undertaken and to what extent they will be used at sea (within or beyond the State jurisdiction) and/or on/ashore.

Subsequent Resolutions renewed the authorization until November 2013.³¹

B. The ATALANTA Operation and its Extension to Somali Internal Waters and Land Territory

SC Resolution 1851 (2008) welcomed the launch of the first EU military naval operation, EU NAVFOR–ATALANTA.³² It was launched as complementary part of the EU's comprehensive and holistic approach to fighting piracy. Since 2005, the costs delivery of development aid had increased without attaining relevant results in terms of solving the root causes of conflict and strengthening the effectiveness of the TFG.³³ A complementary military action was therefore considered necessary.

The forerunner of Atalanta operation was an EU coordination action adopted on 19 September 2008 under the then Common Foreign Security Policy (CFSP). It was called 'EU NAVCO' with the aim of military coordination in support of the implementation of the aforementioned SC Resolution 1816 (2008).³⁴ The EU

²⁶ UNSC S/RES/1851, n. 20 above, Preamble and paragraph 10.

²⁷ *Ibid.*, paragraph 6.

²⁸ *Ibid.*

²⁹ *Ibid.*, paragraph 10.

³⁰ *Ibid.*

³¹ On 30 November 2009, the UN Security Council, following the receipt of two letters conveying the consent of the TFG [about the legal question on the TFG consent, see n. 13 above], decided to renew his authorization for one additional year (UNSC Resolution 1897/2009). In Particular, Resolution 1897 (2009) renewed the Security Council's call upon States and regional organizations to take part in the fight against piracy off the coast of Somalia, in particular by 'deploying naval vessels, arms and military aircraft and through seizures and disposition of boats, vessels, arms and other related equipment[...] [paragraph 9]. *Mutatis mutandis*, see, UNSC Resolutions: S/RES/1950, 23 November 2010; S/RES/2020, 22 November 2011; S/RES/2077, 21 November 2012.

³² UNSC S/RES/1851, n. 20 above, Preamble, paragraph 7.

³³ <http://ec.europa.eu/europeaid/news/horn_of_africa_en.htm>.

³⁴ Council Joint Action 2008/749/CFSP, 19 September 2008. According to Article 1: 'The European Union shall conduct a military coordination action in support of UN Security Council resolution 1816 (2008), named EU NAVCO'.

NAVCO supported the activities of Member States deploying military assets in theatre, with a view to facilitating the availability and operational action of those assets, in particular by setting up a so-called, Coordination Cell.³⁵

Two months later, the Joint Action 2008/851/CFSP established the Atalanta operation as the first EU military naval counter-piracy operation.³⁶ From its beginning, the Atalanta operation was put under British Command and its operational headquarters were located at Northwood (United Kingdom). Its flagship headquarters rotate every 4 months among States contributing vessels.³⁷

As far as its legal basis, Atalanta was adopted within the CFSP framework³⁸ of what is currently denominated as the European Common Security and Defence Policy (CSDP pursuant to the Lisbon Treaty reform, which replaced the former European Security and Defence Policy, ESDP)³⁹ and in accordance with relevant aforementioned UN SC Resolutions and International Law.⁴⁰

In this sense, according with the Article 1, the EU is authorized to conduct a military operation in support of main SC Resolutions in a manner consistent with action permitted with respect to piracy under UNCLOS.⁴¹ Article 1 goes on to define the main aims of the mission. Initially, there were two of them: firstly, ‘the protection of vessels of the WFP [World Food Programme] delivering food

³⁵ Ibid., Article 2.

³⁶ Council Joint Action 2008/851/CFSP, 10 November 2008.

³⁷ Ibid., Article 4.

³⁸ For a general definition, see, inter alia, Antonio Marcello Calamia, *Manuale Breve. Diritto dell’Unione Europea* (2013); Piet Eeckhout, *EU External Relation Law* (2nd ed., 2011); Cremona Marise and De Witte Bruno, *EU Foreign Relation Law* (2011). Particularly, Articles concerned of the TUE are: Articles 28 (ex Article 14), 38 (ex Article 25) and 41 (ex Article 28).

³⁹ See the Chapter of this volume, written by Enrico Tonelli. Generally speaking, CSDP enables the Union to develop its civilian and military capacities for crisis management and conflict prevention at international level and to conduct operations in this area, thus helping to maintain peace and international security, in accordance with the United Nations Charter (Articles 42-46 TUE). According to the CSDP structures and instruments, Atalanta operation is conducted under the responsibility of the Council of the EU, while the Political and Security Committee (PSC) has its political control and strategic direction and it is obliged to report to the Council (see also Council Joint Action 2008/851/CFSP, n. 37 above, Article 6 (1) and (2)). On the other hand, the European Union Military Committee (EUMC) monitors the proper execution of the military operation and provides the PSC with advice and recommendations on several matters concerned with Atalanta (ibid., Article 6(3) and Article 7). As far as the advising body, the European Union Military Staff (EUMS) is a part of the European External Action Service and provides in-house military expertise for the High Representative of the Union for Foreign Affairs and Security Policy (HR) and performs early warning; strategic planning; and situation assessment in support of Atalanta operation. Finally, the coherence of the EU military operation is required by Article 8 of the Council Joint Action 2008/851/CFSP a close coordination of the aforementioned activities.

⁴⁰ See n. 20, 27 and 28 above.

⁴¹ Council Joint Action 2008/851/CFSP, n. 36 above, Article 1.

aid to displaced persons in Somalia [...]’;⁴² secondly – and more relevant to the analysis carried out in this paper –, ‘the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UNSC Resolution 1816 (2008)’.⁴³

Concerning the second aim, the mandate includes the objective, amongst other tasks, to keep watch over areas off the Somali coast –including Somalia’s territorial waters–, and to take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present.⁴⁴ The EU negotiated a specific Treaty with the Somali Republic on the status of the European Union-led naval force in the Somali Republic.⁴⁵ Particularly, the Agreement disposed rules regarding border crossing and movement within the Somali territorial and internal water as well as territory.⁴⁶

⁴² Ibid.

⁴³ Ibid. In addition Article 1 (2): ‘The forces deployed to that end shall operate, up to 500 nautical miles off the Somali coast and neighbouring countries, in accordance with the political objective of an EU maritime operation, as defined in the crisis management concept approved by the Council on 5 August 2008’.

⁴⁴ Ibid., Article 2 deals with the Atalanta mandate in the following terms: ‘(a) provide protection to vessels chartered by the WFP, including by means of the presence on board those vessels of armed units of Atalanta, in particular when cruising in Somali territorial waters; (b) provide protection, based on a case-by-case evaluation of needs, to merchant vessels cruising in the areas where it is deployed; (c) keep *watch over areas off the Somali coast, including Somalia’s territorial waters*, in which there are dangers to maritime activities, in particular to maritime traffic; (d) take the necessary measures, including the *use of force*, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed *in the areas* where it is present; (e) in view of prosecutions potentially being brought by the relevant States under the conditions in Article 12, arrest, detain and transfer persons who have committed, or are suspected of having committed, acts of piracy or armed robbery in the areas where it is present and seize the vessels of the pirates or armed robbers or the vessels caught following an act of piracy or an armed robbery and which are in the hands of the pirates, as well as the goods on board; (f) liaise with organizations and entities, as well as States, working in the region to combat acts of piracy and armed robbery off the Somali coast, in particular the ‘Combined Task Force 150’ maritime force which operates within the framework of ‘Operation Enduring Freedom’ [emphasis added]. In addition, as far as the task (f), the EU has been actively participating in the Contact Group on Piracy off the Coast of Somalia (CGPCS), created on 14 January 2009 pursuant to UNSC Resolution 1851 (2009), n. 20 above. [<http://www.thecgpcs.org/main.do?action=main>].

⁴⁵ Council Decision 2009/29/CFSP, 22 December 2008 concerning the conclusion of the Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta -Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta [Official Journal L 010 , 15/01/2009 P. 0027 – 0034].

⁴⁶ It has to be underlined that the Agreement takes into account ‘[1]United Nations (UN)

To sum up: the Atalanta operation was originally set up for one year with two main aims, i.e. the protection of vessels of the WFP and the fight against piracy off the Somali coast and in Somalia's territorial sea.

As acts of piracy near the Somali coast continued to increasingly threaten shipping and fisheries activities in the area, EU Decisions subsequently extended the Atalanta mandate on three occasions. Although no substantial changes were introduced in these occasions, pursuant to the amending process of the original Joint Action,⁴⁷ in light of the experience gained during its implementation and adaptation to new piracy challenges, the mission's scope has been progressively expanded *ratione temporis* and *materiae*.

The first occasion took place in December 2009, when the Atalanta mandate was about to expire and it was considered necessary to extend it for another year, until December 2010.⁴⁸ Moreover, one more aim was added to the mission, establishing that Atalanta also contributes to the monitoring of fishing activities off the coast of Somalia.⁴⁹ In 2009, with the purpose of integrating a

Security Council Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) and successor Resolutions; [2] the letter dated 1 November 2008 from the Prime Minister of the Transitional Federal Government of the Republic of Somalia to the Secretary-General of the Council of the EU/High Representative of the Common Foreign and Security Policy of the EU in response to the EU's cooperation offer and the notification by the Transitional Federal Government of the Republic of Somalia of this offer to the UN Secretary-General dated 14 November 2008; [3] EU Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (operation Atalanta)' [Ibid., Preamble]. In addition Article 4 regulates, *inter alia*: '4. EUNAVFOR personnel may drive motor vehicles, navigate vessels and operate aircraft within the Host State's territory provided they have valid national, international or military driving licences, ship master's certificates or pilot licences, as appropriate. 5. For the purpose of the operation, the Host State shall grant EUNAVFOR and EUNAVFOR personnel freedom of movement and freedom to travel within its territory, including its waters and airspace. Freedom of movement within the territorial sea of the Host State shall include stopping and anchoring under any circumstances. 6. For the purpose of the operation, EUNAVFOR may carry out within the Host State's waters and its airspace, any exercise or practice with weapons as well as the launching, landing or taking on board of any aircraft or military device' [n. 44 above].

⁴⁷ See n. 36 above.

⁴⁸ Council Decision 2009/907/CFSP, 8 December 2009. In addition, for more details, House of Lords Report, *Combating Somali Piracy: the EU's Naval Operation Atalanta Report with Evidence* (2009), found at <<http://www.publications.parliament.uk/pa/ld200910/lldselect/ldeucom/103/103.pdf>>.

⁴⁹ Ibid. In addition and related to ashore operation, the Council Decision underlines that '[o]nce sufficient progress has been made ashore in the area of maritime capacity-building, including security measures for the exchange of information, assist Somali authorities by making available data relating to fishing activities compiled in the course of the operation'. Moreover, for an analysis of early years of the Atalanta operation, see, Andrea de Guttry, "The CSDP in Action: Two Years of Operation Atalanta- Some Legal Issues", in L. Marchi Balossi-Restelli (ed.), *An EU Innovative External Action?* (2011), 161-200.

comprehensive EU approach to piracy, other CSDP Missions in the region were established, including the EUCAP Nestor – which supports regional maritime capacity building⁵⁰– and the EU mission for training of Somali security forces (EUTM Somalia⁵¹).⁵²

In December 2010, Atalanta mandate was renewed for the second time and extended for two years, until December 2012.⁵³ Furthermore, amendments were adopted in order, on the one hand, to allow for the collection of physical characteristics and transmission of certain personal data, such as fingerprints, of suspected persons, with a view to facilitating their identification and traceability and their possible prosecution; and, on the other hand, to provide for the possibility of exchanging classified information in the theatre of operations.

However, before the mandate came to an end, precisely on 20 February 2012, the EU proposed an extended cooperation to the TFG⁵⁴ – complementing its previous proposal in 2008, when the Atalanta operation was launched – in conformity with the UN Security Council authorization to military intervention in Somalia, i.e. Resolutions 1851 (2008) and 2020 (2011).⁵⁵

After the TFG notification to the UN Secretary General,⁵⁶ the third occasion for amending the original Joint Action was taken in order to authorize Atalanta naval force and air units to engage targets also in the Somali shoreline. More precisely, the EU Decision – in line with the SC’s open-ended authorization ‘to undertake all necessary measures appropriate *in Somalia*’⁵⁷– established that ‘[i]t is *necessary* to extend the mandate of Atalanta to include *Somali internal waters and Somali land territory*’⁵⁸ until 12 December 2014.⁵⁹

⁵⁰ <<http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eucap-nestor>>.

⁵¹ <<http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eu-somalia-training-mission?lang=en>>.

⁵² Together, EU NAVFOR, EUCAP Nestor and EUTM support the EU’s *Strategic Framework for the Horn of Africa*, guiding the EU’s cross-faceted engagement in Somalia. It defines five priorities for EU action: 1) building robust and accountable political structures; 2) contributing to conflict resolution and prevention; 3) mitigating security threats emanating from the region; 4) promoting economic growth, and 5) supporting regional economic cooperation.

⁵³ Council Decision 2010/766/CFSP, 7 December 2010.

⁵⁴ Council Decision 2012/174/CFSP, 23 March 2012, Preamble, paragraph 9.

⁵⁵ See, n. 20 and 31 above.

⁵⁶ Council Decision 2012/174/CFSP, n. 54 above, Preamble, paragraph 10.

⁵⁷ See n. 20 above.

⁵⁸ Council Decision 2012/174/CFSP, n. 55 above, Preamble paragraph 11. [Emphasis added]. In addition, Article 1 (2) states: ‘The area of operations of the forces deployed to that end shall consist of the Somali coastal territory and internal waters, and the maritime areas off the coasts of Somalia and neighbouring countries within the region of the Indian Ocean, in accordance with the political objective of an EU maritime operation, as defined in the crisis management concept approved by the Council on 5 August 2008’.

⁵⁹ See, n. 55 above. Accordingly, the EU High Representative for Foreign Affairs and

This amendment offers so far the legal basis for a significant strategy shift pursuant to the extension of Atalanta military rules of engagement until 2014, which authorize intervention(s) on land aimed at disrupting pirates' logistic bases ashore. Such strategic shift may happen at the expenses of an alternative onshore policy targeted at tackling both the symptoms and root causes of piracy in Somalia.

On May 2012, the first (and, so far, only) military land-based intervention was conducted.⁶⁰

III. ATALANTA Land-based Intervention: Mission Creep?

Despite the recent records of success achieved by international maritime operations against piracy,⁶¹ on 15 May 2012, an Atalanta air intervention targeted piracy equipments and supplies on land with the aim of disrupting the pirates' 'strategic centre of gravity'⁶² near the city port of Harardhere. The closest village to the raid was Handulle, which is in the Mudug region, about 11 miles from the port city of Harardhere.⁶³

No civilian casualties were reported.⁶⁴ This risk, however, can not be ruled out, should this type of operation be carried out again in the future.⁶⁵ Aerial

Security Policy, Catherine Ashton, declared that: 'Fighting piracy and its root causes is a priority of our action in the Horn of Africa. Operation Atalanta has made a significant contribution to this effort, in coordination with our international partners. Today's important decision extends Atalanta's mandate for two more years and allows it to take more robust action on the Somali coast', found at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/129216.pdf#>.

⁶⁰ It is important to underline that on April 2012, unidentified forces – presumably the Puntland Marine Police Force –, conducted a land-based attack against Somali piracy which confused and scared local fishermen. More details are available at *Somalia Report*: <http://www.somaliareport.com/index.php/post/3257/Terrorists_Pirates_or_Fishermen>.

⁶¹ As far as piracy deterrence and disruption, the Factsheet on NATO-Ocean Shield Operation reported that '[i]n January 2012 there were four pirate attacks all of which were unsuccessful. In addition, 80 suspected pirates were captured by counter piracy forces of which 59 were captured by NATO ships. In comparison, in January 2011 there were 29 attacks and six ships were pirated' [found at: <http://www.nato.int/nato_static/assets/pdf/pdf_topics/20120518_Factsheet_Op-OceanShield_16May_en.pdf>].

⁶² See, House of Lords Report, *Turning the Tide on Piracy, Building Somalia's Future: Follow-up report on the EU's Operation Atalanta and beyond*, found at <<http://www.publications.parliament.uk/pa/ld201213/ldselect/ldecom/43/4302.htm>>, paragraph 29].

⁶³ Helicopter gunships destroyed five speed boats that were identified as having been used for piracy, while piracy source claimed only three skiffs were destroyed [*Somalia Report*, n. 60 above]. In addition, sources from pirates told *Somalia Report* that the pirates in that area are now sleeping on the board of vessels – because they fear another attack from EUNAVOR [*Ibid.*].

⁶⁴ *Ibid.*

⁶⁵ From the sources available to the author at the time of writing, there is no evidence that

surveillance seems to be inadequate for distinguishing between pirates and fishermen supplies. Piracy ‘infrastructures’ are usually temporary and it seems that they do not have a permanent centre of gravity. Mobile pirate camps are made up of little more than a few vehicles and moored boats. What distinguishes pirates from fisheries’ supplies seems to be only the presence of heavy weapons, ladders and other boarding equipment. Indeed, there were justifiable concerns about civilian casualties, considering that usually pirates stay in the city mingling with the people.⁶⁶

The same concern was already expressed by Spanish Foreign Minister, Jose Manuel Garcia-Margallo, who told reporters: ‘The EU plan is to allow attacks on land installations when ships are assaulted at sea [...] “much care” would be taken to avoid civilian deaths’.⁶⁷ However, Spain was one of the six EU Member States to be involved in land-based intervention, jointly with France, Germany, Italy, Denmark and Portugal.⁶⁸

the EU or other national capacities and/or coalitions are planning more military land-based intervention against piracy. However, the TFG seems to welcome more frequent attacks inland for the future as the only solution to fight piracy. See, n. 69 below. On the other hand, Operation Commander of the EU Naval Force, Rear Admiral Duncan Potts said: ‘We believe this action by the EU Naval Force will further increase the pressure on, and disrupt pirates’ efforts to get out to sea to attack merchant shipping and dhows. The local Somali people and fishermen – many of whom have suffered so much because of piracy in the region, can be reassured that our focus was on known pirate supplies and will remain so in the future’[found at <<http://eunavfor.eu/eu-naval-force-delivers-blow-against-somali-pirates-on-shoreline/>>].

⁶⁶ *Somalia Report* conducted interviews recollecting declarations among civilians. Among others, Ahmed Jama, an older persons in Handulle, declared: ‘Westerners can’t clarify who is the pirate and who is the civilian, if they target Harardhere –a lot of civilians will die so we are asking to the world to target pirates carefully’ [*Somalia Report*, n. 60 above].

⁶⁷ ‘Somalia pirates: EU approves attacks on land bases’, *BBC.News* (23 March 2012). In addition, also German politicians agreed with Spanish position. For example, Reinhard Buetikofer, a German Green MEP, warned that the new mandate had escalated the risk of EU forces entering into ‘a high intensity conflict’ with armed militias in Somalia. He added that ‘[e]xtending the Atalanta mission involves huge risks, notably the high probability that EU military forces could be involved in causing civilian casualties or fatalities in Somalia’, found at: <<http://www.spiegel.de/international/world/eu-agrees-to-expand-anti-piracy-mission-to-include-air-strikes-a-824030.html>>.

⁶⁸ See, House of Lords Report, *Turning the Tide on Piracy, Building Somalia’s Future: Follow-up report on the EU’s Operation Atalanta and beyond*, n. 62 above. The report also recollects different declarations from British politicians, academics and stakeholders. Quoting the report: ‘According to Nick Pickard and Dr Willett, its aim had been to demonstrate to the pirates that they were not invulnerable ashore. For Alexander Rondos, the attack had been an interesting signal that the EU had been prepared to fire shots ‘in anger’. Dr. Willett also thought that it had been fundamental in demonstrating that the navies concerned and their national capitals were prepared to authorize an increased use of force and to entertain the risks that might bring. By contrast Christian Le Mière, IISS, argued that, while on-land attacks had the potential to be a “game-changer” the attack in May had been so benign as to be largely

The TFG declared that the government and the European Union ‘had agreed upon inland attacks on pirates, avoiding civilian casualties. We encourage frequent inland attacks – this is the *only* solution to piracy’.⁶⁹ In the light of the EU comprehensive and holistic approach to fighting piracy,⁷⁰ the fact that counter-piracy operations require that some sort of military action is also taken ashore to definitively defeat piracy does not mean that the deployment of ground troops or air strikes on Somali territory is the *only* solution – which would be in-coherent *par se* with the EU comprehensive approach to fighting piracy.⁷¹

On the contrary, frequent land based operations seem to represent a potential for mission creep since they exacerbate the situation of weak institutions and lack of rule of law, without effectively solving the problem. Land based operations inevitably involve considerable human and material costs and can result in alienating local population.⁷² This could strengthen pirates’ ability to establish their supplies elsewhere, benefitting from Somalia’s very long coast and winning land-based support from – among many others – corrupted government officials, businessmen, clan elders and members, militia and religious leaders, and members of local communities. Additionally, their ineffectiveness in fighting piracy is shown

ineffective’. About, legality of the attacks, the report wrote down the position of Captain Reindorp, who was wrong since he assured ‘that the attacks were legal in international law as self defence’[*ibid.*, at 12]. Following quoting the report, ‘Alexander Rondos told us that the legal basis was sound, with clear rules of engagement. However, there were different opinions about how the attack had been received by the Somali population. Nick Pickard told us that the TFG had been calling for the attack and he understood that it had been well received by the rest of the Somali population. Alexander Rondos said that approval had been given by the Somali government and the coastal states’ [*ibid.*, at 12 -13]. By the other hand, ‘The Council of Somali Organisations told us that the attack on land had been “greeted with incredulity” locally and they thought it might have been intended for domestic political consumption internationally, rather than as a message to pirate groups. They also criticized the ‘more aggressive posture of naval forces’ operating closer to the shoreline for incidents in which, they said, ‘innocent Somali fishermen had been killed due to misidentifications’ [*ibid.*, at 13]. However, the report conclude this part affirming the ‘We welcome the EU Atalanta attack on the pirate land base as an effective demonstration to the pirates that they are not invulnerable on land’[*ibid.*].

⁶⁹ Y. Bayoumy, ‘EU helicopters strike Somali pirate base on land’, *Routers* (15 May 2012) [emphasis added]; see also the Report, *Counter-piracy under international law* (2012), n. 18 above. According with the *Somalia Report*, the attack was conducted in an area beyond the control of TFG [http://www.somaliareport.com/index.php/post/3353/First_Official_EU_Strike_on_Land>] However, the legality of the military intervention is given by the UNSC Resolution 1851 (2008) and subsequent resolutions. See n. 20 above.

⁷⁰ <http://eeas.europa.eu/somalia/docs/2012_ec_development_programme_en.pdf>.

⁷¹ <<http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>>.

⁷² Christian Bueger, Jan Stockbruegger and Sacha Werthes, “Pirates, Fishermen and Peacebuilding: Options for Counter-Piracy Strategy in Somalia”, 32:1 *Contemporary Security Policy*, 356-381.

by the fact that piracy off the coast of Somalia has dropped in 2012 without a significant contribution from the (only) EU military land based operation.⁷³

IV. Conclusion

The Atalanta Operation is the first ever EU military naval operation, as well as the first one and only to conduct a military intervention on land against piracy, while, additionally, constituting the first EU operation for safeguarding a global common good which is relevant for the CSDP maritime dimension: the strategic maritime trade routes.⁷⁴

Four years since the Resolution 1851 (2008), only the EU decided to use force inland. Why, among all international actors involved in fighting piracy,⁷⁵ is the EU the only one to have carried out a military intervention on land?

It seems that the Atalanta land-intervention could be motivated more by internal than external reasons. These are basically of two kinds: operational and political reasons.

Concerning operational reasons, the EU military intervention far from the village, guaranteed successful results in terms of disrupting piracy supplies and equipments with low risk of losses within the force itself. It can also be read as the willingness to prove to Member States and institutions the EU's credibility as new global security actor, including in terms of 'market security' since 90 % of the EU's external trade and 40 % of its internal trade is transported by sea.⁷⁶

Concerning political reasons, it seems to show the possibility of overcoming limits marked by the difficulty of coordinating the Council of the EU – which controls the direction of the CSDP – and the European Commission, which controls the budget of the EU, including the Development Fund.

Despite internal reasons, the EU military intervention inland did not play any relevant role in fighting piracy and potential future interventions inland seem to be unnecessary, since they might go beyond the original aim of the EU involvement in Somalia: to try and solve the root causes.

⁷³ See, *in primis*, IMB Report found at: <<http://www.icc-ccs.org/news/747-six-month-drop-in-world-piracy-imb-report-shows>>; See also more information available at: <<http://www.state.gov/t/pm/rls/fs/2013/207651.htm>>; <<http://usun.state.gov/briefing/statements/200826.htm>>.

⁷⁴ European Parliament, Draft Report, 2012/2318(INI), 21 February 2013.

⁷⁵ According with the NATO Operation Shield Ocean Factsheet of May 2012, the Area of operation is identified as follow: "NATO naval forces operate off the Horn of Africa, including the Gulf of Aden and the Western Indian Ocean up to the Strait of Hormuz. An area greater than 2 million square miles or approximately the size of Western Europe. With the consent of Somali authorities, NATO vessels may enter the territorial waters of Somalia. *Operations on Somali land are not part of the NATO mandate*' [emphasis added], n. 61 above. See also the US position on counter piracy land intervention, n. 22 above.

⁷⁶ See, n. 74 above.

Furthermore, current developments seem to point to a need for less robust use of force. The launch on 3 June 2013 of the UN Assistance Mission in Somalia (UNSOM)⁷⁷ – which is expected to be an integrated mission by 1 January 2014 – has marked a ‘fresh start’⁷⁸ to ensure continued support for the Somali peace-building process, beyond the authorization of use of force under Chapter VII of the UN Charter. The SC stresses UNSOM’s role in supporting the Government of Somalia in coordinating international support and calls for cooperation from international partners and organizations, including the European Union.

⁷⁷ UN SC S/RES/2012, 2 May 2013. For more information, see also: <<http://unsom.unmissions.org/>>.

⁷⁸ UN SC 6975th Meeting (AM) SC/11025, 6 June 2013.

ALLOCATING RESPONSIBILITY BETWEEN EU AND MEMBER STATES: THE CASE OF PIRACY OFF SOMALIA

*Efthymios Papastavridis**

I. Introductory Remarks; II. The Responsibility of International Organizations and their Member States; A. The Elements of the Responsibility; B. The Question of Attribution in General; C. The Allocation of Attribution between International Organizations and Member States; 1. The UN Practice; 2. The Relevant Case-Law; III. The Responsibility of the EU and Member States in the Context of Operation Atalanta; A. The Responsibility of the EU for Military Missions; 1. Legal Obligations of the EU; 2. The Issue of Attribution in the Context of CDSP Operations; B. EUNAVFOR Operation Atalanta: the Rheinland Pfalz Incident Revisited; IV. Concluding Remarks.

I. Introductory Remarks

A rather neglected, yet extremely significant question in the ongoing discussion over piracy off Somalia is the allocation of responsibility between International Organisations, and more specifically the European Union (EU), and their Member States for potential violations of international law in counter-piracy operations. Arguably, many interdictions and seizures of pirate vessels, which have taken place in the context of EU Operation Atalanta¹ might have been in violation of international law, in particular the law of the sea and international human rights law. Such violations would undoubtedly give rise to the responsibility of the flag States; however, it is far from certain whether the wrongful conduct should be attributed to EU itself or to the Member States. Is there any room for shared responsibility of both the EU and the Member States? Should either the former or the latter be held responsible for aiding or assisting?

In addition, suspected pirates are transferred to third States, such as Kenya or Seychelles, pursuant to bilateral agreements with the EU or other States, in order to be tried for their alleged crimes. Who bears responsibility for any violation of human rights law in the case of arrest and the transfer of pirates to the said States? Is it the EU itself, which has concluded the relevant agreement, or the capturing Member State?

Indeed, these questions have come to the fore since the first days of Operation Atalanta; suffice it to mention the following incident and the ensuing judicial proceedings:

* LL.M., PhD University College London (UCL), (UK), Part-time Lecturer, University of Thrace, Research Fellow, Academy of Athens (Greece).

¹ On EUNAVFOR Operation Atalanta see further information at <<http://www.eunavfor.eu/>>.

‘On 3 March 2009, the German warship RHEINLAND PFALZ, which joined the EU NAVFOR ATALANTA counter-piracy operation on 8 February, successfully fended off a pirate attack on the German owned MV COURIER as it transited through the Gulf of Aden. On receiving the alarm call the German frigate, helped by the American CTF 151 destroyer MONTEREY, launched helicopters to assist the besieged vessel [...] The pirates abandoned their attack soon after the helicopters arrived ‘on scene’ and the RHEINLAND PFALZ’s Sea Lynx pursued one of the two escaping skiffs for over 10 miles, firing warning shots to stop the vessel before the warship closed in to board and search it [...] A total of nine suspects were arrested and a large amount of fuel, weapons and ladders were discovered and confiscated’.²

Following their arrest, the suspected pirates or the applicants, *Mohamed Hashi and 8 others*, were transferred to Kenya pursuant to the bilateral EU-Kenya transfer agreement and they faced trial for the crime of piracy *jure gentium*. The Kenyan Court of First Instance, however, held that ‘Kenyan Courts are not conferred with or given jurisdiction to deal with any matters arising or which have taken place outside Kenya’.³ As the crime concerned was not committed in territorial waters within the jurisdiction of Kenya under Section 5 of Kenyan Penal Code,⁴ the Court ordered immediate and unconditional release of the applicants from custody.⁵ This decision was appealed by the Prosecutor and on 12 November 2010, the High Court of Kenya decided not to release the prisoners until further notice, while the Court of Appeal overruled the decision of the Court of First Instance and convicted them for piracy.⁶

In between, the applicants initiated proceedings in Germany complaining that their arrest and their transfer of the applicants had been in violation of the German Constitution, the ECHR and the ICCPR. On 11 November 2011, the administrative court of Cologne ruled that Germany had violated the prohibition of torture, inhuman and degrading treatment (Articles 3 ECHR and 7 ICCPR) by transferring them to Kenya.⁷ Interestingly, the Government claimed that

² See EUNAVFOR Press Release (4 March 2009); found at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/106500.pdf>.

³ See *Re Muhamud Hashi and 8 Others v. Republic*, [2009] KLR Miscellaneous Application No 434 of 2009; available also at Lloyd’s List (8 November 2010), 17.

⁴ The Section provides: ‘[t]he jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters; see <http://www.kenyalaw.org/kenyalaw/klr_app/frames.php>.

⁵ See n. 3 above, at 33. See also Ademuni-Odeke, ‘Somali Piracy: Jurisdiction over Foreign Pirates in Domestic Courts and Third States under International Law’, 17 *Journal of International Maritime Law* (2011), 121, 139.

⁶ See the decision of the Kenyan Court of Appeal on 18 October 2012; found at <<http://piracylaw.files.wordpress.com/2012/10/kenya-hashii-appeal-opinion.pdf>>.

⁷ See summary of the case at <http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html> (in German). See also commentary of the case in Claus Kress, Die

the decision for the transfer was made under the authority of the EUNAVFOR Operation Commander and thus Germany was under no responsibility for any potential violation of human rights law; however, the Court held that ‘the decision to hand over suspected pirates to Kenya had been taken by German authorities, since the latter had the option to transfer the suspected pirates to Kenya or any other third country or to leave prosecution to the public prosecutor in Hamburg’.⁸ On the other hand, the German court rejected two other claims by the plaintiffs that the capture and detention on the “Rheinland-Pfalz” were in violation of international and German constitutional law.⁹

Evidently, the above-mentioned decision of the German Court brings to the fore the cardinal issue of the allocation of responsibility between EU and its Member States, as Germany *in casu*, for the transfer of suspected pirates to third States with questionable human rights record. Similar questions may arise also in relation to the interdiction operation itself and the arrest of the Somali pirates on the high seas. For example, in the case at hand, the German warship was assisted by an American warship, destroyer MONTEREY, and thus, arguably, both Germany and the US may be held responsible for any violation of the rules governing piracy.

All these questions concerning the allocation of responsibility between EU and its Member States in the context of Operation Atalanta as well as with third States will be shortly addressed in the present paper. The purpose of this endeavour is to highlight the complexities of the relevant legal framework, not only insofar rules on attribution are concerned, but also with regard to the other element of international responsibility, i.e. the existence of an internationally wrongful act, and to draw some cautious conclusions. Accordingly, it will, first, succinctly present the rules on the allocation of responsibility between international organizations and their Member States, in light of the recent work of the ILC, and then it will shift its focus to the particular questions regarding the responsibility for internationally wrongful acts in the context of Operation Atalanta, having the above-mentioned incident of *Rheinland Pfalz* as a case-study. Needless to say that due to the spatial confines of the present paper, the discussion will revolve solely around the counter-piracy operations off the coast of Somalia.

moderne Piraterie, das Strafrecht und die Menschenrechte Gedanken aus Anlass der deutschen Mitwirkung an der Seeoperation ATALANTA in D. Weingärtner (ed.), *Die Bundeswehr als Armee im Einsatz* (Nomos, 2012), 95-123.

⁸ Ibid.

⁹ Ibid.

II. The Responsibility of International Organizations and their Member States

A. The Elements of the Responsibility

After the successful completion of its work on State Responsibility in 2001, the UN International Law Commission (ILC) decided to take up the topic of the responsibility of international organizations as a suitable follow-up project.¹⁰ In elaborating the Articles on the Responsibility of International Organizations,¹¹ the ILC largely followed the model of its Articles on State Responsibility for Internationally Wrongful Acts (ASR).¹² In general, when an international organization commits a wrongful act, its responsibility is entailed.¹³ One may find a statement of this principle in the Advisory Opinion of the International Court of Justice (ICJ) on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court said: ‘The United Nations may be required to bear responsibility for the damage arising from such acts’.¹⁴

Under article 4 of ARIO, ‘there is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization’. As in the case of States, the attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur. The term ‘conduct’ is intended to cover both acts and omissions on the part of the

¹⁰ See *ILC Report, Fifty-Fourth Session*, UN Doc. A/57/10 (, day/month, 2002), 228–236.

¹¹ See Draft Articles on the Responsibility of International Organizations (2011); *ILC Report, Sixty-Third Session*, UN Doc. A/66/10, 2011, 50–170 [hereinafter: ARIO]; found at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf>. Resolution 66/100 of 9 December 2011 of the GA took note of the articles on the responsibility of international organizations, presented by the International Law Commission, the text of which was annexed to the resolution.

¹² See ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Official Records; 56th Session, Supp. No. 10 at UN. Doc A/56/10; at 31 [hereinafter: ASR]; available at: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

¹³ In general see *inter alia* Chittharanjan Felix Amerasinghe, *Principles of Institutional Law of International Organizations* (2nd edn. 2005), 399; Jan Klabbbers, *An Introduction to International Institutional Law* (2002), 306; Andrew Stumer, ‘Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections’ 48 *Harvard International Law Journal* (2007), 553, 555 and *International Tin Council cases*; UK, Court of Appeal, *Maclaine Watson & Co Ltd v. Department of Trade & Indus.*, [1988] 3 All E.R. 257; House of Lords, *J.H. Rayner Ltd v. Department of Trade & Indus.*, [1989] 3 W.L.R. 969.

¹⁴ I.C.J. Reports 1999, 88–89, paragraph 66.

international organization. A second essential element is that conduct constitutes the breach of an obligation under international law incumbent upon the international organization. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization.¹⁵

B. The Question of Attribution in General

As far as the element of attribution is concerned, articles 6 to 9 of ARIO deal with attribution of conduct, not with attribution of responsibility and cover most issues that are dealt with in regard to States in articles 4 to 11 of the ASR. Article 6 sets out that ‘the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization’, while Article 7 enunciates that ‘[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct’.

In short, the distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization. The conduct of both organs and agents is attributable to the organization. As it is stated in the ARIO Commentary, ‘an organ or agent of an international organization may be an organ or agent who has been seconded by a State or another international organization’.¹⁶ The ARIO, accordingly, applies two distinct and mutually exclusive rules of attribution to these two situations: it treats the conduct of fully seconded State organs as an act of the receiving organization under Article 6, but applies the test of effective control to not fully seconded State organs under Article 7 in order to determine whether their conduct should be attributed either to the contributing State or to the receiving organization.¹⁷ In other words, Article 7 deals with the situation in which the

¹⁵ As the International Court of Justice noted in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, international organizations ‘are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’; I.C.J. Reports 1980, 89–90, paragraph 37.

¹⁶ See ILC, “Draft Articles on the Responsibility of International Organizations with Commentaries”, II *Yearbook of the International Law Commission* (2011), Part Two, 17 [hereinafter: ARIO Commentary].

¹⁷ See Aurel Sari and Ramses Wessel, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’, B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?*, (2013); available at <<http://www.utwente.nl/mb/pa/research/wessel/wessel88>>.

seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization.

C. The Allocation of Attribution between International Organizations and Member States

1. The UN Practice

It is true that the latter rule concerning not fully seconded Member State organs was adopted against the backdrop of the UN peace support operations. Due to the lack of a standing army, the UN has constantly employed military contingents of its Member States in classical peacekeeping operations or in operations under Chapter VII. Thus, often it has been questioned whether a specific act or omission in the context of such operations was to be attributed to the UN or to the Member States respectively.

As the ARIIO Commentary suggests, recourse must be first made to any agreement between the receiving organization and the contributing State.’ The agreement may stipulate which State or organization would be responsible for conduct of that organ or agent. For example, according to the model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States, the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as ‘loss, damage, death or injury [arising] from gross negligence or willful misconduct of the personnel provided by the Government’¹⁸ At any event, ‘this type of agreement is not conclusive because it governs only the relations between the contributing State [...] and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules’.¹⁹

Absent a relevant treaty, the criterion for attribution of conduct either to the contributing State or to the receiving organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal. This axiological criterion, which is to be assessed on an ad hoc basis and by taking into account of all the ‘full factual circumstances and particular context’, is consistent with both the UN practice and the international legal doctrine.²⁰

pdf>, 10 [hereinafter: Sari/Wessel].

¹⁸ See ARIIO Commentary, n. 16 above, at 20.

¹⁹ Ibid.

²⁰ See Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (1998), 301. In the words of Paul de Visscher, ‘[w]hile responsibility is based on control, it is also a guarantee off the effectiveness of control... Indeed, it is clear that if responsibility for wrongful acts committed by UN forces was to be borne by participating States, the latter would naturally be inclined either to refuse to participate in

In more detail, on the one hand, the UN assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force.²¹ However, because of the control that the contributing State retains over disciplinary and criminal matters, this may have consequences with regard to attribution of conduct to the Member States and not to the Organization itself. For instance, the Office of Legal Affairs of the United Nations took the following line with regard to compliance with obligations under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora: ‘[s]ince the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention’²² In the same vein, the wrongful conduct was attributed solely to the Member State in the case of UNOSOM II.²³ In conclusion, even in peacekeeping operations, in which the UN, presumably, retains the exclusive authority over the operation, there is room for the attribution of the wrongful conduct solely to the Member States.

This is more patent in the case of joint operations, where the criterion of ‘effective control’ becomes decisive; as the UN Secretary-General has stated: ‘in joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the States or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the *degree of effective control exercised by either party in the conduct of the operation*.’²⁴

peacekeeping operations, or to require full control of their divisions at the tactical and strategic levels’; Paul de Visscher, ‘Les conditions d’ application des lois de la guerre aux operations militaires des Nations Unies’ 54:1 *Annuaire Institut de Droit International* (1971), 48, 56.

²¹ As the UN Legal Counsel has stated ‘as a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation’; see Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN.4/545, sect. II.G.

²² See *United Nations Juridical Yearbook* (1994), 450.

²³ ‘The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM’s mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel.’; S/1994/653, paragraph.. 243-244, .’ cited in ARIO Commentary, 22.

²⁴ See A/51/389, paragraphs 17-18, 6 (emphasis added); cited in ARIO Commentary, 23.

2. *The Relevant Case-Law*

Nevertheless, this view was not shared by the European Court of Human Rights in the celebrated *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* case,²⁵ which involved the conduct of forces placed in Kosovo at the disposal of the United Nations (UNMIK) or authorized by the United Nations (KFOR). The Court referred to the present work of the International Law Commission and in particular to the criterion of ‘effective control’ that had been provisionally adopted by the Commission. While not formulating any criticism to this criterion, the Court considered that the decisive factor was whether ‘the United Nations Security Council retained *ultimate authority and control* so that operational command only was delegated’.²⁶ While acknowledging ‘the effectiveness or unity of NATO command in *operational matters*’ concerning KFOR, the Court noted that the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council and concluded that ‘KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, ‘attributable’ to the UN.’²⁷

This *ratio decidendi* was also endorsed in subsequent Judgments of the Court in relevant cases, such as in the *Kasumaj v. Greece case*;²⁸ it was, however, heavily criticized by the international doctrine,²⁹ while it was not followed in the recent *Al-Jedda v. UK case*.³⁰ In *Al-Jedda*, the Court considered that ‘the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United

²⁵ See *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (App. No.71412/01 and 78166/01), Decision on Admissibility (Grand Chamber), 2 May 2007.

²⁶ *Ibid*, paragraph 133.

²⁷ *Ibid*, paragraph 141.

²⁸ *Bl. Ilaz Kasumaj v. Greece*, Decision of 5 July 2007, Application No. 6974/05. See also *Slavisa Gajic v. Germany*, Decision of 28 August 2007, Application No. 31446/02; *Dusan Beric and Others v. Bosnia and Herzegovina*, Decision of 16 October 2007, Application Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

²⁹ See *inter alia* Kjetil Mujezinović Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’, 19 *European Journal of International Law* (2008), 509, 521-522; Marco Milanović and Tatjana Papić, ‘As Bad as It Gets: The European Court of Human Rights *Behrami* and *Saramati* Decision and General International Law’, 58 *International and Comparative Law Quarterly*, (2009), 267 at pp. 283-286; Alexander Orakhelashvili, note, 102 *American Journal of International Law* (2008), 337, 341; Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases’, 8 *Human Rights Law Review*, (2008), 151, 164.

³⁰ See *Al-Jedda v. UK*, Judgment (Grand Chamber), 7 July 2011.

Nations’.³¹ The Court unanimously concluded that the applicant’s detention had to be attributed to the respondent State.

Lastly, reference should be made to the Judgment of the Hague Court of Appeal in the *Mustafic and Nuhanovic* cases, concerning the attribution of the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the massacre in Srebrenica.³² The Court applied the criterion of ‘effective control’ to the circumstances of the case and reached the conclusion that the respondent State was responsible for its involvement in the events at Srebrenica which had led to the killing of three Bosnian Muslim men after they had been evicted from the compound of Dutchbat.³³ Very importantly, it found that attribution could potentially be to both the UN and the Netherlands.³⁴

In conclusion, it seems that both international legal doctrine and the majority of international decisions consider that the decisive criterion for the attribution of the wrongful conduct to either the international organization or its Member States lies in who exerts effective control over the act or omission in question³⁵ or, in the view of the author, who has the decision-making authority over the act or omission. This attribution of conduct will usually entail also the attribution of the responsibility as such, except from the case that a treaty between the international organization and the Member States allocates the responsibility in a different fashion.

In addition, there may be cases that both the international organization and the Member State may be held responsible for an internationally wrongful act. For example, the ARIIO does recognize that an international organization and one or more states may commit the ‘same wrongful act’.³⁶ From the Commentary, it is clear that the ILC considered that that responsibility of two or more States or international organizations for the same wrongful act can be a joint responsibility.³⁷

³¹ *Ibid.*, para. 84. The Court found that Al-Jedda’s ‘internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and [that] the applicant was therefore within the authority and control of the United Kingdom throughout’ (paragraph 85).

³² See Court of the Appeal in The Hague, *Mustafic and Nuhanovic*, LJN Br0132, 5 July 2011.

³³ *Ibid.*, especially at paras. 5.8 and 5.9. When giving a wide meaning to the concept of “effective control” so as to include also the ability to prevent, the Court followed the approach taken by Tom Dannenbaum, “Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troops Contingents as United Nations Peacekeepers”, 51 *Harvard International Law Review* (2010), 113, 157.

³⁴ *Ibid.*, at 5.3. See also André Nollkaemper, ‘Dual Attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica’ 9 *Journal of International Criminal Justice* (2011) 1143- 1157.

³⁵ For a contrary view opting for a rebuttable presumption in favour of the responsibility of international organizations, see Sari & Wessel at 11-12.

³⁶ Article 48 (1) stipulates that ‘where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act’.

³⁷ See ARIIO Commentary, at 77.

According to A. Nollkaemper, ‘the principle of joint responsibility has to mean that when the EU and one or more Member States commit an internationally wrongful act that results in a single injury, both are responsible, not for the injury that they individually have caused, but for the *same*, undivided injury’.³⁸

Situations of joint or shared responsibility, even though they involve different wrongs respectively, arise when, for example, a State or an international organization is aided or assisted in the commission of the wrongful act (complicity).³⁹ Such situations are envisaged, firstly, in articles 14-16 of ARIIO, which include the cases of aid or assistance, direction or control or coercion of a Member State by an international organization and secondly in articles 57-60 concerning the responsibility of a State in connection with the conduct of an international organization.⁴⁰ It is true that these articles reflect more progressive development of international law, rather than firmly established rules of international customary law.⁴¹

III. The Responsibility of the EU and Member States in the Context of Operation Atalanta

A. The Responsibility of the EU for Military Missions

As an international legal person,⁴² the EU bears responsibility under international law for any violations of its international obligations. The applicability of this principle is reinforced by Article 3(5) TEU, which provides that in its relations with the wider world the Union shall contribute to ‘the strict

³⁸ André Nollkaemper, ‘Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements’, *ACIL Research Paper No. 2011-14* (Shares Series); available at <www.sharesproject.nl>; at 5.

³⁹ On complicity and international responsibility see Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011); John Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’ 57 *British Yearbook of International Law* (1987) 57; Olivier Corten, ‘La «Complicité» dans le Droit de la Responsabilité Internationale: un Concept Inutile’, *LVII Annuaire Français de Droit International* (2011), 57-84.

⁴⁰ See ARIIO Commentary, at 89 et seq.

⁴¹ See Nataša Nedeski and André Nollkaemper, Responsibility of international organizations ‘in connection with acts of States’ SHARES Research Paper 08 (2012), ACIL 2012-05; available at <www.sharesproject.nl>.

⁴² Article 47 TEU. This provision is widely understood to endow the EU with legal personality under international law: eg Marise Cremona, ‘Defining Competence in EU External Relations: Lessons from the Treaty Reform Process’, in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (2008) 34, 38.

observance and the development of international law'. Such responsibility may arise in the milieu of the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), in particular with respect to EU crisis management missions.⁴³ In the latter case, the question of allocation of responsibility looms large, since the EU must rely on its Member States and third parties to conduct military operations in third countries just like the UN had to rely on the national authorities of the Member States in order to maintain international peace and security.⁴⁴

1. Legal Obligations of the EU

As regards the obligations that the EU bears in the context of its missions, it is beyond any doubt that the EU would be bound by the agreements that it makes with third States. Such *ex contractu* responsibility was explicitly acknowledged by the EU in its observations after the first reading of the Draft Articles.⁴⁵ Besides treaty obligations, as it is recognized by ARIO, 'for an international organization many obligations are likely to arise from the rules of the organization, which are defined in article 2, subparagraph (b), of the present articles as meaning 'in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization'.⁴⁶ Such obligations would definitely include the Charter of Fundamental Human Rights of the E.U. as well as any other primary and secondary rules concerning EU missions.

In addition, ARIO acknowledges that 'the obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization',⁴⁷ namely general international law.⁴⁸ Rules of general international law are certainly the fundamental rules of international humanitarian law and of international human rights law, which are particularly relevant in EU missions. Hence, it is submitted that the EU would be responsible for the violation of these rules in the course of an EU Mission.

⁴³ On this issue see Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy* (Atwerp: Intersentia 2010); Nikolaos Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', in M. Trybus and N. White (eds), *European Security Law* (The Hague: Martinus Nijhoff, 2007), 102.

⁴⁴ In fact, as Esa Paasivirta and Pieter Jan Kuijper have pointed out, the EU 'is in many ways a classical intergovernmental organization with problems similar to the UN in respect of peace-keeping and police action'; Esa Paasivirta and Pieter Jan Kuijper, "Does one Size Fit All? The European Community and the Responsibility of International Organizations", 36 *Netherlands Yearbook of International Law* (2005), 169, 174.

⁴⁵ See ILC, *Responsibility of International Organizations*, Comments and Observations by International Organizations (14 February, 2011); at 23.

⁴⁶ See ARIO Commentary, at 31.

⁴⁷ *Ibid.*, at 14.

⁴⁸ See n. 17 above.

2. *The Issue of Attribution in the Context of CDSP Operations*

Without dwelling upon the particularities of the legal position of Member States in CDSP operations, it can tenably be argued that Member States are not *de jure* organs or agents of the EU under article 6.⁴⁹ Even under the ‘organic’⁵⁰ or the ‘competence’ model,⁵¹ it is hard to attribute the acts in question to the EU: on the one hand, ‘the EU acts are carried out via the authorities of its Member States, instead of the EU itself, having its own administrative presence in its Member States’,⁵² which is at variance with the ‘organic model’. On the other hand, the ‘normative control’ exerted by the EU in case of the ‘competence model’ includes the idea that the legality of the Member State’s action is ultimately controlled by the EU judiciary and it is the EU rather than the Member State concerned which can remedy the alleged wrongs.⁵³ This is not the case with regard to the conduct of CDSP operations, which fall under article 275 TFEU, providing that, subject to two exceptions that are not relevant here, the ECJ ‘shall not have jurisdiction with respect to the provisions relating to the [CFSP] nor with respect to acts adopted on the basis of those provisions’.

Also, it is contested whether there are *de facto* organs, i.e. being under the ‘effective’ control of the EU under article 7 of ARIO. It is true that the criterion for the attribution of conduct either to the contributing State or to the international organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal.⁵⁴

As a result, there have been strong views that the EU does indeed exercise ‘effective control’, in the sense of article 7 in the context of CDSP missions; for example, writing on the status of EU Member States in crisis management operations, like *Operation Atalanta*, Sari and Wessel maintain that

⁴⁹ See e.g. Case T-271/10 R, *H v Council and Commission*, Order of the President of the General Court, 22 July 2010, paragraph 20. In accord are Sari and Wessel, n. 17 above, p. 23 and Tsagourias, n. 43 above, at 122.

⁵⁰ By ‘organic model’ it is meant simply that the organization can be shown to have been acting by its organs; see Pieter Jan Kuiper and Esa Paasivirta, “EU International Responsibility and its Attribution: From the Inside Looking out”, M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union* (2013), 35, 49.

⁵¹ According to the ‘competence model’ the responsibility should basically lie where the competence is. This approach responds to the core of EU activities in the internal market; *ibid.*, at 54.

⁵² *Ibid.*

⁵³ See *ibid.*, at 55 and also Frank Hoffmeister, “Litigating against the European Union and its Member States-Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?”, 21 *European Journal of International Law* (2010), 723, 741.

⁵⁴ See the ARIO Commentary to article 7, at 19-26.

‘bearing in mind the applicable legal arrangements, it seems justified to conclude that the EU acquires a ‘particularly great degree of control’ over national contingents participating in its missions, albeit be it on a temporary basis, and that the contingents are completely dependent in their action upon the EU during their assignment. On this reasoning, EU military missions should be classified as *de facto* organs of the EU’.⁵⁵

In the same vein, Kuijper and Paasivirta acknowledge that the EU ‘may feel more comfortable with the ‘effective’ control test’.⁵⁶

Truly, as Wessel and den Hertog maintain, it is tempting to apply the effective control argument *mutatis mutandis* to CSDP missions.⁵⁷ After all, these missions may be under the operational control of the EU through CSDP bodies: indeed, overall responsibility for the conduct of EU missions rests with the Council; it is for the Council to launch and terminate operations, to determine their mandate, to appoint the Operational and Force Commanders and to approve key documents, such as the Operation Plan and the Rules of Engagement. Moreover, acting under the authority of the Council, the Political and Security Committee (PSC) exercises political control and strategic direction of EU missions.⁵⁸

This notwithstanding, as the above authors acknowledge, attribution to the international organization is no rigid rule... a case-by-case analysis and application of the ‘effective control’ concept is crucial’.⁵⁹ Thus, reference will be made to the actual conduct of the *Operation Atalanta*, which aptly demonstrates that the exclusive attribution of the alleged wrongful conduct to the Union is the exception rather than the rule.

In any case, there may be situations where both would incur responsibility; *ex hypothesis*, while an incident of torture may be attributed to a Member State, the EU could simultaneously bear responsibility for lack of due diligence.⁶⁰ The possibility of shared or joint responsibility for such a violation of human rights law attains greater prominence, in contemplation of the fact that neither the Court

⁵⁵ Sari & Wessel, at 21.

⁵⁶ See Kuijper and Paasivirta, n. 50 above, at 54.

⁵⁷ See Ramses. Wessel and Leonard den Hertog, ‘EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?’ in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart Pub. 2013), 339, at 351.

⁵⁸ Sari & Wessel, at 18.

⁵⁹ See Wessel and den Hertog, n. 57 above, at 351.

⁶⁰ In the words of Guilfoyle, ‘[o]ne might be directly responsible for the wrongful conduct (ie where the official is acting as its organ), while the other might be in breach of a separate ‘due diligence’ or similar obligation to take positive steps designed to secure effective human rights protection. Where, for example, an international organization is in a position to regulate acts in territory under its legal or effective control it might perhaps be held responsible for failure to take measures to prevent certain abuses’; *ibid.*, ‘Counter-Piracy Law Enforcement and Human Rights’, 59 *International and Comparative Law Quarterly* (2010), 141, at 154.

of Justice of the European Union, nor the European Court of Human Rights (ECtHR), for the time being,⁶¹ are *ratione personae* competent to assess a complaint against EU for such incident. Also, according to the Strasbourg Courts, EU Member States would not be held responsible for a human rights violation when they have transferred the relevant competences to an international organization, which guarantees an ‘equivalent protection’ of the relevant provisions of the European Convention of Human Rights.⁶²

B. EUNAVFOR Operation Atalanta: the Rheinland Pfalz Incident Revisited

On 10 November 2008, the first maritime operation of the European Union was launched (EUNAVFOR Operation Atalanta) pursuant to the Council Joint Action 2008/851. Its mission was set out in article 1 as follows: ‘The European Union (EU) shall conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), in a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea signed in Montego Bay on 10 December 1982 (hereinafter referred to as ‘the United Nations Convention on the Law of the Sea’) and by means, in particular, of commitments made with third States...’.⁶³ While Operation Atlanta was scheduled only for a year, its mandate has been consecutively renewed until December 2014.⁶⁴

The first operation of the EUNAVFOR Operation Atalanta was actually the interdiction operation conducted by *Rheinland Pfalz* on 3 March 2009.⁶⁵ It is proposed to have regard to this incident, which is more than apposite for the present purposes, that is, for the analysis of the responsibility of the EU and its Member States in the context of Operation Atalanta. At the outset, it must be stressed that this interdiction operation and the subsequent trials in Kenya and Germany

⁶¹ Cf. however, Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 204.

⁶² See, *inter alia*, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*; 42 EHRR 2005-VI, 1 *Waite and Kennedy v Germany*, 30 EHRR 1999-I, 261. Cf. however *Matthews v. UK*, EHHR 1999-I, 12-13. See also T. Lock, ‘Beyond Bosphorus: The European Court of Human Rights Case Law on the Responsibility of Member States of International Organizations under the European Convention on Human Rights’, 10 *Human Rights Law Review* (2010), 529-545.

⁶³ European Union, Council Joint Action 2008/851/CFSP of November 10, 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia, 2008 *O.J.* (L 301) 31-37 (EU).

⁶⁴ On the pertinent EU legislation see <<http://www.consilium.europa.eu/showPage.aspx?id=1518&lang=EN>>.

⁶⁵ See n. 2 above and accompanying text.

have various aspects, which call for different assessment as far as the applicable rules of international law or the ostensible responsibility of the EU or its Member States are concerned.

First, the question of the interdiction operation on the high seas: the pursuit and the arrest of the suspected pirates, Hashi *et al.*, were made by the German *FGS Rheinland-Pfalz* and were subject to the relevant rules of the law of the sea, in particular, articles 105 and 110 of LOSC and the relevant customary law.⁶⁶ In view of the fact that the command of the interdiction operation was held by the EU Force Commander, it stands to reason to presume that the conduct was attributed to the EU itself. Thus, in case that the firing of warning shots by *Rheinland-Pfalz* was not in accordance with the legal framework of law enforcement at sea, and more specifically, with the Rules of Engagement (RoEs) of the Operation and with the principle of necessity, or the suspicions for piracy were completely unfounded, the wrongful acts would have been attributed to the EU and not to Germany, the flag State of *Rheinland-Pfalz*. Consequently, the EU would *prima facie* bear responsibility for these internationally wrongful acts.

A prerequisite for this would be that the EU is under certain obligations under the law of the sea. It is true that the right of visit of pirate vessels is accorded to the warships of State parties to the LOSC as well as to the warships of all States under customary international law. The question is whether it is also granted to international organizations. As far as the EU is concerned, which has launched Operation Atalanta, the following comments are in order: EU is not party to LOSC in respect of Part VII on the high seas. By virtue of article 4 (3) of Annex XI of LOSC, ‘an international organization [EU] shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, *on matters relating to which competence has been transferred to it by those member States*. The EU Member States never transferred to the Union competences in respect of piracy *jure gentium*.⁶⁷

As regards customary international law, *prima facie*, the EU is not a ‘State of registry’ of vessels so as to enjoy the respective freedoms of the high seas and the rights that is accorded to flag States, such as e.g. to exercise jurisdiction over pirate vessels.⁶⁸ Nevertheless, the fact that it has competence, even a *sui generis*

⁶⁶ On piracy *jure gentium* off the coast of Somalia in general see Robin Geiss & Anna Petrig, *Piracy and Armed Robbery at Sea. The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011).

⁶⁷ See <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.

⁶⁸ In accord is also Stefan Talmon, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), 405, 411. Cf. the European Parliament resolution of 10 May 2012 on maritime piracy, *P7_TA-PROV(2012)0203*, noting that, ‘on the high seas, according to international law, in all cases, including actions taken in the fight against piracy, the national jurisdiction of the flag state applies on the ships

one,⁶⁹ in the field of Common Foreign and Security Policy (CFSP), including the Common Security Defence Policy (CSDP), under which the Operation Atalanta has been launched, entails, by necessary implication, that it has the competence to engage in counter-piracy operations. Such operations are not conducted *in vacuo jure*, but in accordance with the international law of the sea. And as the ECJ has repeatedly confirmed, the EU, including the Communities, must, as subject of international law, respect international law- both treaty and customary- in the exercise of its powers.⁷⁰

Even if the EU is bound by the relevant international legal obligations, it can be questioned whether the alleged wrongful conduct as such was attributed to the EU solely. Firstly, even though the order to pursue the suspected pirates was given by the EU Commander, which exercised the overall control of the operation, a significant discretion as regards the interdiction as such is retained by the Commanding Officer of the warship involved and of the respective flag State, *in casu* Germany. Thus, the act in question may not be attributed solely to the EU and either it would be dually attributed to both the EU and the flag State or it will be attributed to the Germany and the EU could be held responsible for adding Germany in the commission of the wrongful conduct under article 14 of ARIO. In addition, the US could have been held responsible under article 16 of ASR (aid or assistance), as US destroyer *Monterey* assisted *Rheinland-Pfalz* in the operation under scrutiny.

Moving now to the second phase of the present incident, it is submitted that the transfer of the suspected pirates to Kenya, where they allegedly faced degrading and inhumane treatment and their right to fair trial was not guaranteed may equally be attributed solely to Germany. It is true that both Germany and the EU as such are under an obligation to respect the aforementioned rights; so, there is no question here of non-existence of primary obligations incumbent upon the Union, as was the case for interdiction. Also, it must be taken into account that the transfer was made pursuant to the then just concluded EU-Kenya transfer agreement.⁷¹ Should we consider that the decision-making authority rested with

concerned, as well as to the military staff deployed on board...'; paragraph 30.

⁶⁹ Marise Cremona avers that 'it is logically difficult to imagine a type of competence that is neither exclusive, nor shared nor complementary, the CFSP appears to be a type of *sui generis* competence that shares characteristics of both shared and complementary competences'; Marise Cremona, *Defining Competence in EU External Relations*, in A. Dashwood, M. Maresceau (eds.), *Law and Practice of EU External Relations* (2008), 34, 65.

⁷⁰ See *inter alia*: Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9-10; Case C-162/96 *Racke* [1998] ECR I-3655, paragraphs. 45-46; Case C-366/10, *The Air Association of America*, Judgment of December 2011, paragraph 101. See also Alessandra Giannelli, *Customary International Law in the European Union* in E. Cannizzaro, P. Plachetti and R. Wessels (eds.), *International Law as Law of the European Union* (2012), 93.

⁷¹ See Exchange of Letters between the EU and the Government of Kenya on the

the Union in sending these people to Kenya, then, the EU would be responsible. Conversely, if Germany had the ‘effective control’ in terms of article 7 of ARIO over the decision to send these people to Kenya, then this State should incur responsibility. In other words and along the lines of the *Dutchbat case*, it must be pr that Germany had the ‘ability to prevent’ the commission of the wrongful conduct on part of Kenyan authorities.⁷² This was also the conclusion of the German administrative tribunal, which found that despite the contentions of the German Government, the decision to transfer the suspected pirates and thus the responsibility for the said act rested with Germany.⁷³ This conclusion, however, does not mean that the EU cannot be held responsible for the omission to exercise the duty of diligence in this regard.

IV. Concluding Remarks

The allocation of responsibility between EU and its Member States is undoubtedly a very perplexing issue, which has attained greater prominence in view of the ever increasing activity of the Union. The discussion above in respect of the responsibility of the EU or its Member States in the course of the EUNAVFOR Operation Atalanta suffices to highlight the problem. A factor that exacerbates this perplexity is that the relevant legal framework is now being delineated and thus there are no established rules and clear-cut answers. However, there are certain criteria that may prove helpful, such as the criterion of ‘effective control’; also necessary is the determination of the primary rules prior to any discussion of rules on attribution or responsibility.

conditions and modalities for the transfer of persons suspected of having committed acts of piracy (6 March 2009).

⁷² See n. 33 above.

⁷³ See n. 7 above and accompanying text.

CORPORATE SOCIAL RESPONSIBILITY: AN ALTERNATIVE DEVELOPMENT STRATEGY FOR PIRACY MANAGEMENT

*Giorgia Bevilacqua**

I. Introduction; II. From Political and Socio-Economic Instability to Maritime Piracy; III. The Implementation of Development Programmes as Counter-Piracy Measures; IV. Public-private Partnerships: A Possible Sustainable Alternative.

I. Introduction

According to the figures of the International Maritime Bureau¹ (IMB) acts of modern piracy off the coast of Somalia are declining, but piracy is still far from being eradicated worldwide. On the contrary, the phenomenon is becoming more violent and sophisticated by the day. Pirates operate on the high seas or move between the territorial waters of different States, carrying heavy weapons, and causing serious harm to life and property.

Over the past ten years, the recrudescence of maritime piracy, especially hijackings of ships and crews in East Africa, has been extremely rapid. At present, a major concern is that the success of the Somali pirates is likely to influence and inspire other criminals from similarly poor and unstable areas. Thus, for example, the most alarming signs of piracy today arise from the complex situation in the Gulf of Guinea.

Against this background, and even though there seems to be consensus that modern pirates seriously threaten the freedom of navigation of a large number of civilian vessels, counter-piracy measures taken by the affected States and the international community as a whole appear to be somewhat ineffectual, especially if considered in the long run. In this harsh scenario, and bearing in mind the Marsafenet context (Network of Experts on the Legal Aspects of Maritime Safety and Security), it seems necessary to assess whether the implementation

* LLM in EU Law at the College of Europe, Bruges (Belgium) and PHD in International and EU Law on Socio-Economic Development, University of Napoli "Parthenope" (Italy).

¹ The IMB is a non-profit organisation established in 1981 in accordance with International Maritime Organization Resolution A 504 (XII) (5) and (9). This was adopted on 20 November 1981 to urge, *inter alia*, governments and organisations to cooperate and exchange information with each other. The IMB Reporting Centre makes information and figures on piracy available, found at: <<http://www.icc-ccs.org/piracy-reporting-centre>>.

of alternative strategies to tackle piracy at sea is needed. For this purpose, we will first explore the political and economic situation in various piracy-infested areas (Section 2). We will then proceed to an analysis of the main counter-piracy measures by dedicating special attention to the development programmes adopted by the European Union (EU) and other international organisations in the field (Section 3). We will conclude by addressing alternative initiatives aimed at contributing to the re-establishment of an equilibrium between local communities in the coastal States and the main maritime powers (Section 4).

II. From Political and Socio-Economic Instability to Maritime Piracy

The political and economic instability and the growing impoverishment of several coastal areas of Africa, both eastern and western, have contributed to the fervent and atrocious resurgence of the phenomenon of piracy. This phenomenon is detrimental to international shipping and is spreading towards regions where the authorities are incapable of implementing maritime law and, consequently, of monitoring and protecting the territorial waters off their coasts.²

Specifically, in Somalia, the phenomenon started with the collapse of the Somali government in 1991, when President Mohamed Siad Barre was deposed by a *coup d'état*. Since that time, the clan system around which Somali society revolves has been unable to find a worthy successor capable of controlling the territory and assuring order, peace and stability within the country. At the present time, even though the international community has undertaken numerous efforts to address the sovereignty crisis in Somalia, there are still tens of thousands of inhabitants who have abandoned their homeland in order to escape epidemics, famine and civil war. For over twenty years, Somalia has completely lacked functioning institutions or any form of political control of the territory, to the extent of being defined as the *locus classicus* of a Failed State.³ The continued

² The definition of piracy is provided by Article 15 of the Convention on the High Seas and Article 101 of the Convention on the Law of the Sea. For a systematic reconstruction of this phenomenon refer to Francesco Munari, "La "nuova" pirateria e il diritto internazionale. Spunti per una riflessione", 2 *Rivista di diritto internazionale* (2009), 325-362; Louis Le Hardy de Beaulieu, "La piraterie maritime à l'aube du XXIe siècle", 115:3 *Revue générale de droit international public* (2011), 653-674; Ivan Shearer, "Piracy", *The Max Planck Encyclopedia of Public International Law*, R. Wolfrum (ed.), Heidelberg and Oxford University Press (2008), online edition, 1; Natalino Ronzitti, "Pirateria (diritto vigente)", XXXIII *Enciclopedia del diritto* (1983), 912.

³ For a very recent update on Somali issues, see, Annual Report of the United Nations High Commissioner for Refugees on Global Trends 2012, June 2013, 12, which reports that on-going violence and drought in southern and central Somalia continued to force a large number of people to flee; in 2012, 75,000 Somalis sought refuge abroad, mainly in Ethiopia, Yemen, and Kenya. For a reconstruction of the Somali crisis, for doctrine see GERARD KREIJEN,

existence of a State incapable of exercising any control over its own population plagued its territory and its shores – the longest in Africa and very rich in marine life – and they were quickly invaded by giant foreign fishing vessels. In particular, according to international agencies, foreign flagged ships began dumping poisonous and toxic waste in Somali waters. Other official sources have reported that some European countries were getting rid of their waste products by dispatching it in Somalia.⁴

Maritime piracy in Somalia was born in this harsh context. Local communities responded by arming themselves and hijacking the invading foreign fishing trawlers and later turned their attention towards the merchant ships that were transiting the waters off their coasts.⁵ Shortly afterwards, the Somali pirate practice moved deeper into the Indian Ocean, off the coast of Seychelles and the Maldives, and further south along the East African coast, which includes the coasts off Kenya, Madagascar and Mozambique. This is the immediate manifestation of the success of the Somali business model, a criminal venture that is now likely to be one of the most lucrative forms of business in Somalia. Modern day pirates operate as veritable criminal gangs, well organized and heavily armed, routinely using mother-ships and smaller, armed motorboats capable of intercepting targeted vessels even at a significant distance from the coast.⁶ In this scenario, an additional reason for great concern is the fact that the Somali pirates appear to be aware of this latent anarchy and, by virtue of this anarchy, compel captured ships, along with their crews and passengers, to approach Somali coasts, where they

State Failure, Sovereignty And Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa, Brill Academic Pub, Leiden, Boston (2004), 64; for case law see European Court of Human Rights, *Sufi and Elmi vs. Regno Unito*, Application No. 8319/07 and 11449/07, concerning the appeal by two Somali citizens at risk of inhumane treatment if returned to Mogadishu.

⁴ Report of the Secretary-General on the protection of Somali natural resources and waters, UN Doc. S/2011/661, 25 October 2011, paragraphs 46-48; A Desk Study of the United Nations Environment Programme (UNEP) on The State of the Environment in Somalia, 2005, 33-35. For doctrine see, Bashir Mohamed Hussein, *The Evidence of Toxic and Radioactive Wastes Dumping In Somalia and its Impact on the Enjoyment of Human Rights: A Case Study*, Paper presented at the United Nations Human Rights Council 14th Session – Panel discussion on Toxic Wastes, Geneva, 8 June 2010, 5-10.

⁵ See Report of the Secretary-General n. 4 above, paragraph 25, paragraph 44.

⁶ For a description of the *modus operandi* of pirates, see, in doctrine, Antonello Tancredi, “Di pirati e stati “falliti”: il consiglio di sicurezza autorizza il ricorso alla forza nelle acque territoriali della Somalia”, 4 *Rivista di diritto internazionale* (2008), 937; Fausto Pocar, “Pirateria in Somalia: per sradicare il fenomeno necessario coinvolgere gli Stati della regione”, XVI:19 *Guida al diritto* (2009), 11; Matteo Tondini, “Stato di diritto e lotta alla pirateria, nelle acque somale”, 19:2 *Diritto penale e processo*, 2012, 230; for case law, *Audiencia Nacional* di Madrid (section four), decision No. 10, judgment of 3 May 2011, condemning Somali pirates for seizing the fishing vessel “Alakrana” off the Somali coasts. Decision confirmed on appeal by the Supreme Court, December 12 of the same year.

can take shelter and continue their criminal activities while awaiting a generous ransom.⁷

At the same time, alarming data also arises from maritime piracy off the West African coast, especially in the Gulf of Guinea, where violent incidents of piracy resulting in the killing of crew members represent an increasing percentage of accidents at sea. In particular, the IMB reported that pirate attacks are on the rise across this region, with twenty-two recorded in the first six months of 2013. What is more, the actual number of attacks in this area is said to be even higher since the majority of attacks remain unreported and, therefore, do not appear in any statistics. The fact that many attacks go unreported can be explained by a variety of reasons: successful acts of piracy tend to reflect negatively on shipping companies, embarrass the coastal State where the attacks occur and increase insurance costs.⁸ On these grounds, President Boni Yayi of Benin sent a letter to the UN Secretary-General expressing his concern and asking for international support similar to the response to Somali piracy.⁹ His country was being hindered by pirates, who were scaring the shipping industry away from the ports on which Benin directly depend on for revenue.

The issue of piracy in West Africa presents peculiar characteristics, which may have a significant influence with respect to the specific definition of the phenomenon, the establishment of the applicable legal framework and the enforcement of possible counter-piracy remedies. As is known, indeed, according to customary international law, as codified by the 1958 Geneva Convention on the High Seas (High Seas Convention) and then reaffirmed by the 1982 UN Convention on the Law of the Sea (UNCLOS), maritime piracy consists of unlawful acts of violence, detention or depredation ‘on the high seas’ committed for ‘private ends’ by a private vessel against another vessel.¹⁰ By contrast, most of

⁷ Falling under the Convention on Organized Crime, see IMO report of 17 May 2011, note 19. On the relationship between piracy and terrorism, see Doris König, Tim René Salomon, Thilo Neumann, Andreas S. Kolb, “Piraterie und maritimer Terrorismus als Herausforderungen für die Seesicherheit: Objektive Rechtsunsicherheit im Völker-, Europa- und deutschen Recht”, 7 *PiraT-Arbeitspapiere zur Maritimen Sicherheit*, July 2011, 23; José Manuel Sobrino, *Le terrorisme et la piraterie maritime*, in J. M. Sobrino Heredia (ed.), *Sûreté maritime et violence en mer*, Emile Bruylant, Bruxelles, 2011, 155.

⁸ IMB, n. 1 above.

⁹ In June 2008, following a letter from the Somalian Transitional Federal Government (TFG) to the President of the UN Security Council requesting assistance for the TFG’s efforts to counter piracy off the coast of Somalia, the UN Security Council unanimously passed a declaration authorizing nations that have the consent of the TFG to enter Somali territorial waters to deal with pirates.

¹⁰ The origins of the modern definition of piracy lie in the Harvard Draft Convention, which strongly influenced the draft of the High Seas Convention (Geneva, 29 April 1958, 450 UNTS 11) and in turn the UNCLOS (10 December 1982, 1833 UNTS 397), where the modern definition of piracy is found (see Articles 14-22 of the High Seas Convention and Articles 100-110 of the UNCLOS).

the reported attacks off the coasts of States in the Gulf of Guinea took place in territorial waters or in ports rather than on the high seas. As a consequence, most of the pirate attacks off the coast of West Africa may not be considered as acts of piracy in the sense of the definition provided by the UNCLOS and the High Seas Convention.¹¹ Moreover, even though West African pirates increasingly demand ransoms, piracy in this region is driven much more by political and social complaints, rather than by ‘private ends’.¹² In this area, in fact, many attacks target oil tankers, with pirates seizing the oil and then selling it for a profit on the black market. In addition, pirates are often hired with the specific aim of attacking political opponents, which they carry out by kidnapping close family members.¹³

Notwithstanding these peculiarities, we believe that among modern pirates in East and West Africa at least two commonalities may be found, which are highly relevant in the perspective of our analysis. Firstly, the current alarming situation in the Gulf of Guinea confirms that piracy poses challenges to maritime safety and security strategies predominantly in places that face increasing political and economic instability and in regions with inadequate law enforcement capacity. Piracy attacks in Nigeria, for instance, are very frequent in the Niger Delta area where law enforcement is extremely scarce. And this holds especially true for other coastal States in West Africa, such as Nigeria, Lagos, Benin and Togo, which still have quasi-functioning governments and, hence, are not void of authority like Somalia. Their states and judicial systems, however, are extremely weak and have been unstable for many years.¹⁴

Secondly, the resurgence of piracy, both in East and West Africa, constitutes a concrete threat, not only to domestic stability but also to international peace and security.¹⁵ In this respect, it is worth recalling that, nowadays, the scourge of

¹¹ In particular, violent acts against ships and crews committed in territorial waters are not piracy in the sense of Article 17 of the High seas Convention and Article 101 of the UNCLOS. However, they may nevertheless be indirectly covered by international law, such as Article 3 SUA Convention. This provision requires State Parties to enact domestic provisions criminalizing such conduct; on this issue, see Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea, The Legal Framework of Counter-Piracy Operations in Somalia and the Gulf of Aden*, (1st ed. 2011).

¹² The requirement of ‘private ends’ is understood here as being fulfilled if the aim or motivation behind the pirate attack is political in nature. However, in doctrine, there is no consensus on how this requirement should be understood. There are notably authors stating that the requirement is narrower and that only state-sponsored piracy falls outside the definition of piracy, i.e. that piracy can be committed by private persons being politically motivated. For doctrine see, Robin Geiss and Anna Petrig, n. 11 above, 41.

¹³ See Lawal B. Dogarawa, “Sustainable Strategy for Piracy Management in Nigeria”, 3:1 *Journal of Management and Sustainability*, 2013, 124.

¹⁴ For doctrine see Paul Musili Wambua, “Enhancing regional maritime cooperation in Africa: The planned end state”, 18:3 *African Security Review* (2010), 45-59.

¹⁵ See, Panel of the UN High-level on Threats, *Challenges and Changes, A More Secure*

piracy challenges maritime safety and security by endangering, in particular, the welfare of seafarers and the freedom of navigation of civilian vessels belonging to maritime powers. Notably, pirate hijackings are likely to affect the countries whose nationals were aboard the ship and whose flag the ship was flying, as well as the country for which the ship's cargo was destined. As a result, States with relevant shipping industries have been particularly disrupted by modern-day pirates.

III. The Implementation of Development Programmes as Counter-Piracy Measures

As is well known, a range of remedies have been taken to tackle modern piracy since the resurgence of the phenomenon. In implementing the counter-piracy resolutions of the United Nations Security Council (UNSC),¹⁶ the main international effort has been directed at prevention activities at sea. In particular, naval forces patrol piracy-infested areas in order to act as deterrents, using their powers under international law to board vessels where acts of piracy are suspected.¹⁷ This includes collaborating with other naval forces through a series of combined operations and strategic alliances aimed at ensuring the freedom of navigation to merchant vessels.¹⁸ Military presence has been relatively successful in disrupting piracy off the coast of Somalia.¹⁹ However, this type of protection is not only

World: Our Shared Responsibility, UN Doc. A59/565 (2004), and Resolutions of the Security Council 733 (1992) adopted 23 January 1992; Resolution 746(1992) adopted 17 March 1992; and more recently, Resolution 2073(2012) adopted 7 November 2012, which reads "... the situation in Somalia continues to constitute a threat to international peace and security in the region".

¹⁶ See UN Security Council Resolution 1846 (2008) of 2 December 2008, paragraph 9. In particular, according to the Security Council, the situation in Somalia, exacerbated by piracy, constitutes a threat to international peace and security. On this, see Robin Geiss and Petrig, n. 11 above, 77, 85.

¹⁷ See Article 21 of the High Seas Convention and Article 107 of the UNCLOS.

¹⁸ The most prominent coalitions of forces currently operating in the fight against piracy are the NATO Operation Ocean Shield, the European Union Naval Force – Operation Atalanta, Combined Task Force 151, and Malacca Strait Patrols. Moreover, China, India, Japan, Malaysia, Russia, Saudi Arabia, South Korea, Yemen have activated national counter-piracy missions. See Geneva Academy of International Humanitarian Law and Human Rights, *Counterpiracy under International Law*, Academy Briefing No. 1, August 2012, 15.

¹⁹ IMB n. 1 above. In addition, specifically on operation Atalanta, see EU Council Joint Action 2008/851/CFSP of 10 November 2008 (OJ (2008) L301/33, Art. 12(1)), on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. More recently, the EU mandate was extended until December 2014, along with its scope of action, which now also includes the Somali shoreline, thus allowing EU forces to disrupt pirate operations onshore. See Council Decision 2012/174/CESP of 23 March 2012. For doctrine, see Robin Geiss and Anna Petrig, n. 11 above, 18; Andreas Fischer-Lescano and Lena Kreck, "Piracy and Human Rights: Legal Issues in the Fight against Piracy

extremely expensive, but it is also impossible to defend every merchant ship in the vast patrol area, which creates a security gap. As a consequence, operators increasingly rely on alternative protection measures, most notably armed security personnel on board civilian vessels transiting piracy hotspots. Even though the use of armed security personnel on board merchant ships can hardly be the definitive solution to piracy, in the short-run they seem to act as an actual deterrent and consequently reduce the risks piracy poses to the lives and well-being of those on board targeted vessels.²⁰

More recently, in addition to these various anti-piracy efforts, the international community has realized that modern piracy is not only caused by a desire to profit financially. As aforementioned, piracy off the coast of Somalia began as a reaction to illegal fishing and toxic waste dumping by international cargo vessels that further reduced the presence of fish and other forms of sea life. Similarly, in Nigeria, piracy and other organised crimes also started as a kind of reaction based on political and social motivations. Thus, against these complex backgrounds, it seems clearer now that the way to control piracy may only be driven by a combination of factors, notably including more effective actions on land in all pirate-infested regions.

At present, the international community is promoting further complementary measures aimed at the establishment of a long-term development strategy, covering socio-economic, legal, security and humanitarian aspects. A significant example at the development level is illustrated by the initiatives recently adopted by the EU both in East and West Africa. In 2011, the EU Council of Ministers approved a ‘Strategic Framework for the Horn of Africa’ in order to affirm an interdisciplinary approach in the region. Specifically, this document sets out that the EU will pursue its strategic engagement, working in partnership with the region itself, predominantly the African Union, and other key international parties, focusing on building stable and accountable political structures, contributing to conflict resolution and prevention, promoting economic growth, and supporting regional economic cooperation.²¹

within the Context of the European ‘Operation Atalanta’”, 52 *German Yearbook of International Law* (2009), 525 ; House of Lords (European Union Committee), *Combating Somali Piracy: The EU’s Naval Operation Atalanta*, 14 April 2010; Maria Luisa Sanchez Barrueco, “The European Strategy against Piracy Off the Somali Coast. A Multi-Pillar Response to a Cross-Pillar Concern”, in J. M. Sobrino Heredia (ed.), *Maritime Security and Violence at Sea* (2011), Bruxelles, 323.

²⁰ For a thorough analysis of the current use of armed security services, see Anna Petrig, “The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates”, *International & Comparative Law Quarterly*, Cambridge (2013), 667-701; Matteo Tondini, “Some Legal and Non-Legal Reflections on the Use of Armed Protection Teams on Board Merchant Vessels: An Introduction to the Topic”, 51:1 *Military Law and the Law of War Review* (2012), 7-19; Giorgia Bevilacqua, “Counter Piracy Armed Services, XXII *The Italian System and the Search for Clarity on the Use of Force at Sea* (2012), publication in progress.

²¹ For a thorough analysis of the EU approach in the region, see the Report of the European

The problem of illegal, unreported and unregulated fishing off the coast of Somalia has also drawn the attention of EU institutions. The legal instruments taken into account to help the national policies of the fisheries sector are mainly fisheries partnership agreements, specifically aimed at improving surveillance at sea, as well as technical assistance for the sustainable management of domestic resources.²² In the same vein, the EU and the UN are also trying to enable the Somali justice sector to better deal with phenomena like piracy and other kinds of crimes at sea.²³ One of the main problems concerning piracy suppression in both East and West Africa arises from the inadequacy of the domestic legal and juridical systems. The exercise of domestic criminal jurisdiction over alleged pirates is often unlikely since the courts lack jurisdiction, allowing piracy to go almost entirely unpunished.²⁴ Furthermore, in this context, even regulation of most of the African ocean areas has been additionally compromised by the disharmony between the regimes of the coastal States. Indeed, States such as Benin, Congo-Brazzaville and the Democratic Republic of Congo have no legislative provisions for even a delineation of their maritime zones. Others, such as Libya and Somalia, make unusual claims to ocean areas off their coastlines, extending up to 200 nautical miles.²⁵ Against this background, the goal of these initiatives is to restore effective law enforcement capacities within the African institutions that can apply the rule of law in the ports and villages along the coast, as well as on the high seas.

Ultimately, similar measures support local governments so as to improve the security of essential maritime routes. An example is provided by the recently adopted ‘Critical Maritime Routes in the Gulf of Guinea Programme’ (CRIMGO), which intends to enhance maritime security by providing training for coastguards and by establishing a network to share information between countries and agencies across the entire region.²⁶ Similarly, specific initiatives in Somalia are also

Commission on The EU Strategic Framework for the Horn of Africa: a Critical Assessment of Impact and Opportunities, EXPO/B/AFET/FWC/2009-01/Lot2/11 September 2012.

²² One of these programmes is the so called “Smartfish Programme”, which is currently underway with the purpose of increasing the level of social, economic and environmental development in the Indian Ocean region, as well as supporting the Somali fishing industry. Information on this programme can be found at <<http://www.smartfish-coi.org/>>.

²³ Information on the Rule of Law and Security programme can be found at <http://www.gw.undp.org/documents/RoLS_factsheet_English.pdf>.

²⁴ Regarding the problem of impunity, see Resolution of the European Parliament dated 10 May 2012 on maritime piracy (2011/2962(RSP) and, for doctrine, Francesco Munari, n. 2 above, 325-362; Eugene Kontorovich, Steven Art, “An Empirical Examination of Universal Jurisdiction for Piracy”, *The American Journal of International Law* (2010), *Faculty Working Papers. Paper* 38, 243-275; Giorgia Bevilacqua. “Il problema della repressione del reato di pirateria marittima e il necessario bilanciamento tra le esigenze di esercizio effettivo della giurisdizione e di garanzia dei diritti individuali, 3 *Il Diritto marittimo* (2012), 664-686.

²⁵ Paul Musili Wambua, n. 14 above, 52.

²⁶ Since 2009, the CRIMGO supports maritime security and safety in the Western Indian

aimed at improving domestic security capacities, which include the training of local police officers and supporting the African Union peacekeeping mission in Somalia (AMISOM).²⁷

In sum, even though each of the presented measures adopted by the EU, UN and other intergovernmental organisations has its distinct purpose, most of them seem to be based on the firm belief that only the establishment of stable state governance, security and economic growth will undermine the breeding ground for violent and organised crimes on shore as well as at sea. Hence, the implementation of such measures is absolutely necessary, especially in order to find a sustainable solution to the problem of piracy. While not directly focused on counter-piracy, initiatives aimed at capacity building may also have a positive effect in that they enhance regional maritime safety and security capacities in general. And yet, much remains to be done in order to tackle the real symptoms of piracy. However, this phenomenon is too widespread and complex to be solved by any segment of society alone. Collective actions and a combination of actors and factors appear to be necessary to achieve true sustainable security in the region.

IV. Public-private Partnerships: A Possible Sustainable Alternative

Our proposal to tackle modern piracy is to implement additional sustainable measures. In our view, specific efforts should be addressed towards the promotion of partnerships involving both the public stakeholders of African coastal States and the private stakeholders of the main maritime powers. Notably, both parties would have an interest in the elimination of piracy. Hence, it is imaginable that where both cooperating parties have a common interest to achieve, a collaborative approach will have a better chance of being successful, to the advantage of all those involved.

As far as African coastal States are concerned, we have seen earlier that local communities have a very limited number of alternatives to the significant financial incomes offered by the piracy business and similar criminal activities. Most of the piracy hot spots seem to be compromised by poverty, economic disadvantage, toxic waste impacting the local fishing industry, fragmented institutions and

Ocean region by enhancing information sharing and training capacities. It contributes to the implementation of the regional Djibouti Code of Conduct targeted at fighting piracy and armed robbery against ships.

²⁷ AMISOM (*African Union Mission in Somalia*) is a mission initiated jointly by the Union for Peace in Africa and the United Nations Security Council (SC) on January 19, 2007, and recently extended up to March 7, 2013 by Resolution 2073 (2012), adopted by the SC on 7 November 2012 and, subsequently, up to 28 February 2014 by Resolution 2003 (2013). Similar goals are being pursued by the EU Training Mission (EUTM Somalia), and the CSDP operation, focused on the training of security forces, including Somali soldiers and officers.

underdeveloped socio-political systems. In a broader understanding, however, this scenario includes a basic need for development, such as clean water and the provision of food, housing and other forms of material welfare, health services and education, human rights and gender equality, democracy and freedom, and fair distribution of economic growth while also considering the sustainable use of natural resources.²⁸ Thereby, these basic needs can be interpreted as both an end in themselves, as well as a means to achieve progress. In more practical words, since most of the counter-piracy measures currently in force are unable to combat such socio-economic challenges, additional efforts might now be focused on the creation of concrete alternatives for local communities. As is known, piracy is indeed a very dangerous business, one which can often end in death or criminal prosecution. It can be presumed that the vast majority of pirates would be interested in another means of employment if it were available to them.²⁹

At the same time, industrial States active in the shipping industry appear to have an interest in the eradication of piracy since they also feel the negative impacts of acts of piracy. As mentioned above, the recrudescence of the phenomenon results in the loss of life, physical harm to or hostage-taking of seafarers, significant disruptions to global trade, financial losses to shipowners, increased insurance premiums and security costs, as well as increased costs to consumers and producers. Additionally, private companies of industrialised countries could be interested to drive social change in Africa relying on their own specific core competences. Against this background, African coastal States should be viewed as a chance to access new markets and obtain new revenues. It is indeed recognized today that ‘development objectives cannot be achieved without economic growth’.³⁰ On the other hand, however, it is also demonstrated that economic growth does not ensure sustainable development.³¹ It follows that, for this purpose, private stakeholders will also need to work together with local institutions (when they exist!).

In this complex scenario, a contribution to a sustainable development strategy to counter maritime piracy could be driven through the model of ‘corporate social responsibility’ (CSR). This is a relatively recent concept, according to which companies integrate – on a voluntary basis – social and environmental consider-

²⁸ See Report of the Secretary-General n. 4 above, paragraph 25, paragraph 44.

²⁹ For doctrine see, Christian Bueger, Jan Stockbrugger and Sascha Werthes “Pirates, Fishermen and Peacebuilding: Options for Counter-Piracy Strategy in Somalia”, 32:2 *Contemporary Security Policy* (2011), 356-381.

³⁰ Report of the UN Global compact and the World business council for sustainable development on Joint report to the high-level panel of the post-2015 UN development agenda, March 2013; Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda on A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development, 2013. For doctrine see, Marco Faciglione, “Imprese e diritti umani: il Global Copmact delle Nazioni Unite”, in Paolo Greco (ed.), *Lavoratori e impresa socialmente responsabile* (2007), 183-194.

³¹ Report of the UN Global compact and the World business council, n. 28 above, at 4.

ations in their business actions.³² A ‘do-no-harm’ approach is not completely foreign to the perspective of modern companies. In fact, businesses are increasingly embracing and integrating values measured in economic, environmental, and social terms. Additionally, more and more private initiatives are focusing on critical areas – such a water, energy, food and forests. As a result, it is demonstrated that CSR in developing countries can constitute a powerful instrument to alleviate poverty and make significant contributions to the progress of local communities, including job creation, capacity building and the transfer of new technologies.³³

Bearing in mind the example illustrated by some multinational companies that share CSR’s values,³⁴ the shipping industry should undertake similar actions, which can contribute to the elimination of the symptoms of piracy in the African coastal States. In our opinion, additional cooperation and synergies might be the occasion for foreign flagged vessels to improve their visibility with local communities and contribute to the re-establishment of a reciprocal equilibrium between local communities in the coastal States – which, on the one hand, are in search of peace and socio-economic stability – and the main maritime powers – which, on the other hand, are in search of freedom of navigation.

In conclusion, while we are aware that CSR in developing countries can also cause critical issues, such as increased corruption at the local institutional level, practice proves that additional remedies aimed at eradicating the ever-expanding phenomenon of piracy are desperately needed. The recourse to public-private partnerships – thus far still unexplored – could be a valid alternative to all parties affected by the current recrudescence of piracy. However, it is very important for the success of sustainable developing strategies that ready-made models are avoided. Measures must be adapted to the addressed local contexts.

Furthermore, in the first instance, their relevance in the long-run must be understood by the possible interested stakeholders. The fear, indeed, is that neither the public institutions of the African costal States nor the shipping companies of the maritime powers can be obliged to adopt a specific form of conduct in line with the CSR principles since no binding legal instruments exist in the field.

³² For a recent definition of Corporate Social Responsibility, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 25 October 2011.

³³ Dima Jamaly, Ramez Mirshak, “Corporate Social Responsibility (CSR): Theory and Practice in a Developing Country Context”, 72 *Journal of Business Ethics* (2007), 243-252; Rhys Jenkins, “Globalization, Corporate Social Responsibility and Poverty”, 81:3 *International Affairs* (2005), 525-540.

³⁴ For a thorough analysis of the history of Shell Petroleum, one of the largest oil and gas multinational company operating in Nigeria, in its assistance to the communities in the Niger Delta, see Uwem E. Ite, “Multinationals and Corporate Social Responsibility in Developing Countries: a Case Study of Nigeria”, 11:1 *Corporate Social Responsibility and Environmental Management* (2004), 1-11.

II

COUNTER-PIRACY STATE PRACTICE

THE LEGAL TREATMENT OF MARITIME PIRACY CARRIED OUT BY THE SPANISH LEGISLATOR

Gabriela A. Oanta*

I. Introduction; II. A Short Overview of and Comments on the Legal Regulation of Maritime Piracy in Spain Before the Last Reform of the Spanish Criminal Code; III. The Current Legal Regulation of Maritime Piracy in the Spanish Legal System; IV. Final Remarks.

I. Introduction

The vastness of the seas and oceans characterized by the absence of physical borders has always been an area for maritime pirates. Today, maritime piracy challenges both universal enforcement jurisdiction under Article 105 of the United Nations Convention on the Law of the Sea (hereinafter, UNCLOS)¹ and a national enforcement jurisdiction that is specific to each State, in accordance with its national laws or criminal codes, which may be exercised only on the basis of the territorial jurisdiction of that State.²

Traditionally, maritime piracy has come and gone into the Spanish legal system and its classification has caused major legal problems in Spain, especially in recent years. And the fact that the Spanish legal framework did not contain anymore the crime of maritime piracy when the hijackings of the fishing vessels *Playa de Bakio* and *Alakrana* occurred in April 2008 and October 2009, respectively, drew specific attention to the non-existing regulation. Perhaps the Spanish legislator thought, at the time, that pirates were no longer a crime or that it was an obsolete crime or maybe that the international regulation was already more than enough to prevent and punish it. We consider that it was a big mistake. Nowadays, there still exist pirates, and in the last years also the number of pirate attacks internationally has increased and huge ransoms were paid for the release of hostages. According to the data handled by the International Maritime Orga-

* Ph.D Lecturer in Public International Law and International Relations, Faculty of Law, University of A Coruña (Spain).

¹ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; entered into force on 16 November 1994).

² Regarding a distinction between the prosecution of the crime of maritime piracy at international level and the one made in the domestic law, see José Manuel Sobrino Heredia, "Piratería y terrorismo en el mar", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2008 (2009)*, 135-142.

nization, during the period 1984-2012 there have been 6,569 reported incidents of piracy and armed robbery on ships, of which only 544 occurred in 2011 and another 341 in 2012.³

Thus, when the incidents mentioned above happened, it was the Spanish Criminal Code of 1995 which was in force, did not contain anymore the crime of piracy at sea. This inexcusable legal vacuum was widely criticized by the doctrine at the time.⁴ Even it was said that Spain had breached the provisions of UNCLOS and that extradition could not be granted as the requirements for double criminality or principle of normative identity were not fulfilled.⁵ In relation to this, it should be mentioned that Article 100 UNCLOS establishes the duty of all States of the international community to cooperate in the repression of piracy ‘to the fullest possible extent’.

This peculiar situation was addressed by the modification of the 1995 Spanish Criminal Code by approving the Organic Law 5/2010, of 22 July, which came into force on 23 December 2010.⁶ Today, the Articles 616 *ter* and 616 *quáter* regulate the crime of maritime piracy as a crime of the international community. Thus, unlike the detained persons in the case of the hijacking of *Alakrana* which, as we shall see in the following part of this paper, could not be accused for a crime of maritime piracy because of the absence at that time of this specific offence in the Spanish legal order, the new legal regulation will be applied to those arrested for the attempted assault of the Spanish warship *Patiño* on 12 January 2012. This recent incident occurred when the warship was sailing in the Indian Ocean about 50 miles from Mogadishu in the framework of the European Union’s Atalanta Operation.⁷ Indeed, the Spanish public prosecutor’s office is requesting 23 years of prison for the detained persons, who are accused of a crime of maritime piracy as well as of other offenses that they have presumably committed in conjunction with that.⁸

³ Data found at “Reports on acts of piracy and armed robbery against ships. Annual Report – 2012” (International Maritime Organization, MSC.4/Circ. 193, 2 April 2013).

⁴ José Luis Rodríguez-Villasante y Prieto, “Problemas jurídico-penales e internacionales del crimen de piratería. Una laguna imperdonable de nuestro Código penal y, ¿por qué no decirlo?, un crimen de la competencia de la Corte Penal Internacional”, 93 *Revista Española de Derecho Militar* (2009), 203.

⁵ Article 3 of the Passive Extradition Act. In this regard, see Alicia Rodríguez Núñez, “El delito de piratería”, *L Anuario de Derecho Penal y Ciencias Penales* (1997), 257-260.

⁶ BOE 152, 23 June 2010.

⁷ See the notice “La Audiencia decidirá si juzga a los piratas que asaltaron al buque español”, *El País* (13 January 2012) found at <<http://politica.elpais.com>>.

⁸ In addition to Articles 616 *ter* and 616 *quater*, the Spanish public prosecutor’s office considers that the presumed pirates are also guilty of an offense of storing weapons of war under the Articles 566 and 567 of the Spanish Criminal Code. See the notice “El fiscal pide 23 años para los piratas que asaltaron el buque de guerra *Patiño*”, *El Mundo* (3 June 2013); found at <<http://www.elmundo.es>>; “El fiscal pide 23 años de cárcel para los piratas que asaltaron el *Patiño*”, *Europa Press* (11 June 2013); found at <<http://www.europapress.es>>.

It should be pointed out that this reintroduction of the crime of maritime piracy in the 2010 Spanish Criminal Code was accompanied by the change, on the one hand, of Article 23(4) of the Organic Law of the Judiciary (hereinafter, OLJ) regarding the Spanish court jurisdiction over the crime of piracy at sea; and, on the other hand, of the Spanish legislation on defense under which private security guards may carry and use war weapons for the provision of protection of persons and property, to prevent and repel attacks. The deployment of armed private security guards is only allowed on Spanish merchant and fishing vessels sailing in waters where there are serious risks to the safety of persons or property. The ministries of Defense and the Interior regulate the deployment of these private security companies jointly and set up standards which they have to meet, or of both.

Taking into considerations all these aspects, the present study will be divided into two main parts: In the *First Part*, we will address the legal regulation of maritime piracy in Spain before the last reform of its Criminal Code in 2010 and which legal problems in Spain caused the arrest of the persons responsible of the hijacking of the fishing vessel *Alakrana*. In the *Second Part*, we will analyze the today legal norms regulating maritime piracy in the Spanish legal system as well as its more direct legal consequences.

II. A Short Overview of and Comments on the Legal Regulation of Maritime Piracy in Spain Before the Last Reform of the Spanish Criminal Code

The phenomenon of maritime piracy wasn't addressed in Spain the same way over the years. Sometimes it was considered a crime against the exterior security of the State and those who violate the law of nations, being understood as a serious crime committed at sea, from ships, against other ships or against land installations, treating them as an aggravated form of the offense of robbery with violence.⁹ Piracy was defined, for the first time, in the 1928 Spanish Criminal Code when this offence was introduced in the legal order. Although the revisions of the Code made in 1944, 1963 and 1973 still mentioned piracy, there was no clear definition of what piracy really signified.¹⁰ We believe that it was an insuf-

See also Alfonso Barrada Ferreirós, "Las sentencias de la Audiencia Nacional y el Tribunal Supremo sobre el caso "Alakrana"", Instituto Español de Estudios Estratégicos, 20 June 2012, 33; found at <http://www.ieee.es>.

⁹ See José Manuel Sobrino Heredia, n. 2 above, at 138.

¹⁰ Indeed, the Spanish Criminal Codes from 1822, 1844, reformed in 1850, 1870, 1928, 1932, 1944, 1963, 1973 and 1995 did not always defined the crime of piracy. For a synthesis over the presence of the crime of piracy into the Spanish legal system in different moments, see: Francisco Carlos López Rueda, "Piratería marítima, terrorismo y figuras afines", XXIX Anuario de Derecho Marítimo (2012), 103-104; Fernando Marín Castán, "Marco jurídico de la seguridad marítima", 140 Cuadernos de Estrategia (2008), 188-202; José Luis Rodríguez-Villasante y Prieto, "Aspectos jurídico-penales del crimen internacional de piratería", in R.

ficient regulation of this subject, so the special normal prevailed in this area.¹¹ Suffice it to say that the Criminal and Disciplinary Law of the Merchant Marine (1955) foresaw the capital punishment for those persons accused of piracy in certain circumstances and, in any case, for the chief pirate. However, nowadays this regulation is obsolete and, in fact, it would be unthinkable that the current Spanish legal system could require the capital punishment or lifetime imprisonment in this area/context.¹²

The 1995 Spanish Criminal Code didn't even specify or mention maritime piracy any more. And the special law concerning air navigation was the only legal text in Spain which considered piracy a crime. But obviously this law referred to the unlawful seizure of aircraft and was not applicable to the sea. However, this peculiar situation was defused by the possibility to apply Article 23(4)(c) O.L.J. One should not forget that there is an important distinction between the punishment of a crime of maritime piracy in the Spanish Criminal Code and the enforcement jurisdiction of the Spanish courts for this offence. According to this article, the Spanish courts could find and prosecute crimes of piracy and unlawful seizure of aircraft, whether the victim of the offense was a Spanish subject or a foreigner, by virtue of the principles of universal criminal jurisdiction. We consider that this is in line with the provisions of the 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter, SUA Convention).¹³ Furthermore, the Resolution 1846 (2008) of the United Nations Security Council has recognized enforcement jurisdiction to States and regional international organizations, which are cooperating with the Transitional Federal Government of Somalia, in the territorial waters of Somalia in order to repress acts of piracy and armed robbery at sea.¹⁴

Thus, the Spanish jurisdiction was concurrent with the one of the flag State of the vessel: Article 105 UNCLOS provides that the State which has seized a pirate ship or aircraft shall have jurisdiction either on the high seas or in any other maritime space where there is no jurisdiction of another State. Therefore, the initiation of criminal proceedings in Spain against the persons responsible for such acts of piracy would have been possible once having verified the passivity of the authorities of the flag State. In these circumstances, Spain might have sought the

Castillejo Manzanares (ed.), *La persecución de los actos de piratería en las costas somalíes* (2011), 124-129.

¹¹ We are referring to the Criminal and Disciplinary Law of the Merchant Marine, of 22 December 1955, and also to the Criminal and Procedural Law of the Air Navigation, of 24 December, modified by the Law of 8 January 1986.

¹² In this regard, see: Francisco Carlos López Rueda, n. 10 above, at 63-64.

¹³ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) was adopted in the framework of the International Maritime Organization (Rome, 10 March 1988; entered into force, 1 March 1992); text found at <<http://www.imo.org>>. See specially Articles 3 and 6 of the SUA Convention.

¹⁴ On repressing acts of piracy and armed robbery at sea off the coast of Somalia (UNSC Resolution S/RES/1846, 2 December 2008. See specially paragraph 10.

assistance of the flag State for the investigation and prosecution of these crimes, by virtue of Article 100 UNCLOS. In addition, Spain could have wielded visit, inspection and detention of a foreign flag vessel on the high seas when it reasonably suspected that the ship was carrying out piracy activities as regulated in Articles 105, 107 and 110(1)(a) UNCLOS. Undoubtedly, this is a very contentious and controversial issue from a legal point of view since it is related to the question regarding stateless vessels or flags of convenience.¹⁵ The only limit to the universal jurisdiction practiced by Spain at that time was that international courts would have intervened in relation with this offense.¹⁶

However, this legal vacuum of the 1995 Spanish Criminal Code allowed the use of ordinary crimes that could not be invoked on behalf of the principle of universal jurisdiction.¹⁷ In addition, it produced certain confusion and caused other problems, such as in the field of extradition.¹⁸ In this context, we would like to mention that in this Criminal Code, unless international agreement on it, it was not possible to request the pirate's extradition being a refugee in a foreign country since he could not be tried in Spain for that offense due to the fact of the missing norm under Spanish law, and therefore the principle of identity had not been met, according to the well-known principle *nullum crimen, nulla poena sine praevia lege*. This is also in line with the Spanish Constitution whose Article 25(1) stipulates that 'no one may be convicted or sentenced for actions or omissions which, when committed, did not constitute a crime, infraction or administrative offense under the law then in force'.

The Spanish courts were very close to apply this interpretation of the international and national law in two cases, although the pirates were finally transferred to Kenya and judged by its courts as foreseen by an international agreement (in the form of exchange of letters) signed by the European Union and Kenya in March 2009. This was the case of the detention by the Spanish warship *Marques de la Ensenada* in May 2009 of the two groups of Somali pirates who had tried to storm, on two successive days, the ship vessels *Nepheli* and *Anny Petrakis*.¹⁹

¹⁵ For an analysis of this problem, see Doris König, "Flags of Convenience", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), 123; José Manuel Sobrino Heredia, "Pabellones de conveniencia y pesca ilegal", in J. Branco de Sampaio, F. Mayor Zaragoza and M. Oreja Aguirre, *Soberanía del Estado y Derecho Internacional. Libro Homenaje al Prof. J. A. Carrillo Salcedo* (2005), 1331-1348.

¹⁶ Alicia Rodríguez Núñez, "Delitos contra la Comunidad Internacional", in C. Lamarca Pérez (ed.), *Delitos y faltas. La parte especial del Derecho penal* (2012), 865.

¹⁷ Guillermo Portilla Contreras, "Delito de piratería (arts. 616 ter y 616 quáter)", in G. Quintero Olivares (ed.), *La reforma penal de 2010: análisis y comentarios* (2010), 390.

¹⁸ In connection to this, we should point out that the extradition could be requested and granted under the Articles 824-833 of the Criminal Procedure Law and also under the Act 4/1985 of passive extradition of 21 March. In this regard, see José Manuel Sobrino Heredia, "Le terrorisme et la piraterie maritime", in J. M. Sobrino Heredia (ed.), *Sûreté maritime et violence en mer / Maritime Security and Violence at Sea* (2011), 187.

¹⁹ For more informations, see Alfonso Barrada Ferreirós, n. 8 above, at 15-16; Araceli Manjón-

Now, we consider that the participation of Spain in the framework of the European Union's Atalanta Operation, under the Council Joint Action 2008/851/CFSP of 10 November 2008,²⁰ as amended by the Council Decision 2012/174/CFSP of 23 March 2012 must be mentioned.²¹ Furthermore, in OJL Article 23(1) and (4) is laid down that the international commitments entered into by Spain have to be taken into account at the time of establishing the jurisdiction of the Spanish courts in criminal matters. For the purpose of our study, the signature of agreements, in form of exchange of letters, by the European Union and Kenya and Seychelles²² in 2009 and Mauritius²³ in 2011 regarding the extradition of persons suspected of having committed crimes of piracy to those three countries with the purpose to take them to court there.

This raises again the question of the existence of concurrent competent criminal jurisdictions. Thus, in Article 12 of the Joint Action 2008/851/CFSP it is laid down the jurisdiction "of the flag Member State or of the third State participating in the operation of the flag of the vessel which took them captive". However, it is a jurisdiction that might be transferred to another Member State or to a third State which offers to exercise it if the State cannot or doesn't want to exercise it.²⁴ Moreover, in the event of a seizure by Spanish warships in the context of the Atalanta Operation, be it in international waters or in Somali territorial waters, Article 65 OJL might be interpreted in the sense that, under certain conditions, the exercise of jurisdiction is not mandatory for Spain and, in addition, it can decide freely whether to exercise it or to assign it to another European Union's Member State or to a third State.

Finally, before beginning the study of criminalization of maritime piracy in the Spanish legal system in force today, we would like to briefly mention the legal problems caused by the hijacking of the fishing vessel *Alakrana* and the subsequent extradition of the responsible pirates, and what answers were found by the Spanish courts.²⁵ Actually, this incident was the trigger for the criminaliza-

Cabeza Olmeda, "Alcance de la jurisdicción universal española tras la modificación operada por la L.O. 1/2009, de 3 de noviembre", in R. Castillejo Manzanares (coord.), *La persecución de los actos de piratería en las costas somalíes* (2011), 162. See also Council Decision 2009/293/CFSP of 26 February 2009 concerning the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, [2009] OJ L79/47; Exchange of Letters between the European Union and the Government of Kenya, [2009] OJ L79/49.

²⁰ [2008] OJ L301/33.

²¹ [2012] OJ L89/69.

²² [2009] OJ L315/35.

²³ [2011] OJ L254/1.

²⁴ In this regard, see Francisco Carlos López Rueda, n. 10 above, at 107.

²⁵ For a detailed analysis of these topics, see Raquel Castillejo Manzanares, "Jurisdicción

tion of maritime piracy in the 2010 Spanish Criminal Code.

In the case of assault and hijacking of the tuna vessel *Alakrana* (2 October 2009), the hijackers could not be directly accused of piracy as this offense wasn't existent in the Spanish legislation in force at that time. However, they were sentenced for each of the acts committed. Finally, the acts committed by the he pirates were qualified as illegal detention (Articles 163 and 164 Criminal Code) and robbery with violence and use of weapons (Article 242(1) and (2) Criminal Code). The prosecution of these hijackers was possible due to the Spanish court's jurisdiction derived from Article 23(1) O LJ,²⁶ and since the Spanish National High Court declared itself competent it was also based on Article 65(1)(e) O LJ as the offences were crimes committed abroad and finally, the crimes were identified as activities as defined in Article 3 of the SUA Convention.²⁷ The Criminal Chamber of the Spanish Supreme Court delivered its judgment on 12 December 2011 in appeals brought against the judgment issued on 3 May 2010 by the National High Court in the case of the hijacking of the tuna fishing vessel *Alakrana* in October 2009 by Somali pirates.²⁸ In the edn, the Spanish law didn't sentenced the detained persons having had committed piracy, but condemned them because of other offenses. Undoubtedly, these "pirates" were harshly sentenced at a time when they couldn't be held responsible for the crime of piracy.²⁹

III. The Current Legal Regulation of Maritime Piracy in the Spanish Legal System

The Organic Law 5/2010 which amended the Spanish Criminal Code, adopted by the Organic Law 10/1995, has introduced in the Spanish substantive criminal law the Chapter V "Crime of Piracy", which belongs to Title XXIV "Crimes against the international community" of the Second Book "Crimes and their punishment" of the Criminal Code.³⁰ Thus, it defines offenses that are in the same line

española para perseguir actos de piratería: especial referencia al caso *Alakrana*", in R. Castillejo Manzanares (ed.), *La persecución de los actos de piratería en las costas somalíes* (2011), 207-235.

²⁶ Araceli Manjón-Cabeza Olmeda, n. 19 above, at 161.

²⁷ Alicia Rodríguez Núñez, n. 16 above, at 911.

²⁸ For a comprehensive analysis of judgments in connection with the hijacking of *Alakrana*, see Alfonso Barrada Ferreirós, n. 8 above, at 1-35.

²⁹ In this regard, see Francisco Carlos López Rueda, n. 10 above, at 117.

³⁰ For a comprehensive analysis of these topics, see Fernando Marín Castán, "El tratamiento jurídico de la piratería marítima en el ordenamiento jurídico español", Instituto Español de Estudios Estratégicos, March 2011, 8-13. Furthermore, some amendments have been made in relation to the crimes of genocide, crimes against humanity, and crimes against persons and property protected in the event of armed conflict.

with the various international commitments assumed by Spain in recent years³¹ and also corresponding to ‘the need to respond to the problem of possible unlawful acts against the safety of maritime and air navigation’. Nowadays, they are essential for the interpretation and implementation of the Spanish Criminal Code.³²

The crime of piracy at sea is criminalized again in a criminal code, which has been considered from the outset as the toughest of the Spanish Democracy period.³³ Thus, in Articles 616 *ter* and 616 *quater*, the Spanish legislator provides a definition of maritime piracy that does not match the definition of international treaties, but we consider that it is in line with the definitions contained in the recommendations and positions adopted by international organizations and bodies dealing with the safety and security of maritime navigation.³⁴

Indeed, Article 616 *ter* stipulates that there will be a crime of piracy when

“by violence, intimidation or deception” a person “seizes, damages or destroys an aircraft, ship or other vessel or platform at sea, or harms people, cargo or goods which are found on board of the same”.

And paragraph 1 of Article 616 *quater* provides:

“The person, in the event of prevention or prosecution of the acts described in the previous article, withstand or disobey a warship or military aircraft, or other ships or aircraft clearly marked and can be identified as ship or aircraft in the service of the Spanish State is authorized to do so”.

As it was expressed in the doctrine, Article 616 *ter* contains what the Spanish legislator means by maritime piracy. Article 616 *quater* refers more to an improper piracy or quasi-piracy as it contains a questionable assumption of resistance and disobedience.³⁵ But in this way the Spanish legislator has moved away from the international definition of the crime of maritime piracy contained in Article 101 UNCLOS which provides a very restricted notion of maritime piracy, and has developed an all-encompassing notion of maritime piracy, which for some observers is not correct,³⁶ and also results in a limited outcome.³⁷

³¹ See Explanatory Memorandum of the Organic Law 5/2010.

³² In this regard, see Alicia Rodríguez Núñez, n. 16 above, at 863.

³³ “El Código Penal más duro de la democracia”, *El País* (15 November 2008); found at: <<http://www.elpais.com>>.

³⁴ See José Manuel Sobrino Heredia, “La piratería marítima: un crimen internacional y un galimatías nacional”, 17 *Revista Electrónica de Estudios Internacionales* (2009), 4.

³⁵ Guillermo Portilla Contreras, n. 17 above, at 389.

³⁶ Amongst others, see Fernando Marín Castán, n. 30 above, at 9; José Luis Rodríguez-Villasante y Prieto, n. 4 above, at 187-222.

³⁷ In this regard, see Guillermo Portilla Contreras, n. 17 above, at 391.

Thus, Article 15 of the 1958 Convention on the High Seas and Article 101 UNCLOS provide that some conditions must be fulfilled in order to qualify an illegal action at sea as a crime of maritime piracy, namely: (1) that it is an illegal act committed on the high seas or in a place not subject to the jurisdiction of any State; (2) aiming at making profit or for personal reasons; (3) that the people involved in the illegal act are part of the crew or they are passengers of a private ship or a private aircraft; (4) and that such acts are directed against a ship or against persons or property on board of the same.³⁸

Regarding the conditions to be met in order that it is qualified as maritime piracy under Article 616 *ter* of the 2010 Spanish Criminal Code, it should be mentioned, *firstly*, that unlike UNCLOS it is indifferent regarding the maritime area where piracy may occur. This can take place both in the territorial sea and in those areas authorized thereto by the United Nations Security Council³⁹ and under bilateral or multilateral agreements which Spain has signed. The same also, for example, holds true for the Italian legal system.⁴⁰

Therefore, it can be assessed as an act of piracy if the attack occurred in territorial waters (theft in a boat). Thus, what is only defined as a common offense becomes a crime of piracy with fines ranging from 10 to 15 years (paragraph 2 of Article 616 *ter*). We believe that this new provision of the Spanish Criminal Code is closer to Article 3 of the SUA Convention than to Article 101 UNCLOS. This draws the attention to as the SUA Convention refers more to the offenses of terrorism than to the crime of piracy. And thus, piracy ‘by analogy’ helps to treat piracy and maritime terrorism uniformly, which does not occur in the international arena.⁴¹ Perhaps this positioning of the Spanish legislator is due to the fact that about 80% of pirate hijacking are carried out in the territorial waters of States.

Precisely in relation to the question where acts of maritime piracy take place, the modification of Article 23(4) OLJ enabled by the Organic Law 1/2009 is par-

³⁸ Suffice to mention, amongst others, the following writings: Robert C. Beckman, “The piracy regime under UNCLOS: problems and prospects for cooperation”, in R. C. Beckman y J. A. Roach (eds.), *Piracy and International Maritime Crimes in ASEAN. Prospects for Cooperation* (2012), 20-25; Francisco Carlos López Rueda, n. 10 above, at 74 and 77-78; José Luis Rodríguez-Villasante y Prieto, n. 4 above, at 197-202; José Manuel Sobrino Heredia, n. 2 above, at 100-106.

³⁹ Suffice it to say now the case of the Resolutions of the United Nations Security Council adopted in relation to the territorial sea of Somalia. See Resolution 1846 (2008), n. 14 above, at paragraph 10.

⁴⁰ Article 1135 of Codice della navigazione, named “Pirateria”, stipulates: ‘Il comandante o l’ufficiale di nave nazionale o straniera, che commette atti di depredazione in danno di una nave nazionale o straniera o del carico, ovvero a scopo di depredazione commette violenza in danno di persona imbarcata su una nave nazionale o straniera, è punito con la reclusione da dieci a venti anni. Per gli altri componenti dell’equipaggio la pena è diminuita in misura non eccedente un terzo; per gli estranei la pena è ridotta fino alla metà’.

⁴¹ Francisco Carlos López Rueda, n. 10 above, at 78.

ticularly procedural interesting.⁴² On this occasion, the Spanish legislator wished to update the catalog of offenses subject to universal prosecution and added two rules of particular significance which limit the principle of universal persecution in the Spanish national law.⁴³ Thus, nowadays the existence of certain connections with Spain is needed for the exercise of universal jurisdiction by the Spanish courts, namely: that the victim has the Spanish nationality; that the alleged perpetrators are in Spain; and that there is 'some link of relevant connection with Spain'. Furthermore, the Spanish courts may hear this crime only if a procedure has not been initiated before by an international criminal tribunal or in another competent country.⁴⁴

Secondly, and in relation to the motive of the act of piracy, Article 616 *ter* of the Spanish Criminal Code does not require any personal purpose. In fact, the concept of piracy is extended by not demanding a certain reason, and the perpetrator of the offense is not determined. Thus, it could be punished as piracy any common offense.⁴⁵ Undoubtedly, it alienates this article from the provisions of Article 101 UNCLOS.⁴⁶ But, at the same time, it maintains the essence of the crime of piracy and allows adapting this concept to current developments in the international law of the sea which reflect the changes in relation both to maritime piracy and to other offenses regarding maritime safety.⁴⁷ Another part of the doctrine considers that the purpose to be pursued is irrelevant as long as it does not become a terrorist offense, in which case the provisions of Articles 571 and following of the Spanish Criminal Code would be applied under the specialty principle provided by Article 8(1) of this Code.⁴⁸

Thirdly, in principle, unlike UNCLOS the crime of piracy may be committed by a single individual. We consider that it is hard to believe that an act of this nature is committed by a single person.⁴⁹ Furthermore, no special condition is required to be an active subject of piracy activities.

And fourthly, regarding the passive subject of the act, we must mention that this is the person who is on board of the aircraft, of the vessel or the assaulted

⁴² BOE 266, 4 November 2009.

⁴³ Alfonso Barrada Ferreirós, n. 8 above, at 16; Araceli Manjón-Cabeza Olmeda, n. 19 above, at 145-243.

⁴⁴ In this regard, see Fernando Marín Castán, n. 30 above, at 13. See also Antonio Fernández Hernández, "Delito de piratería", in J. Álvarez García and J. L. González Cussac (eds.), *Comentarios a la reforma penal de 2010* (2010), 547; Yamila Fakhouri Gómez and Mariona Llobet Anglè, "Delitos contra la comunidad internacional y piratería", in J-M. Silva Sánchez (ed.), N. Pastor Muñoz (eds.), *El nuevo Código Penal. Comentarios a la reforma* (2012), 748.

⁴⁵ See Guillermo Portilla Contreras, n. 17 above, at 391.

⁴⁶ *Ibid.*, 392.

⁴⁷ In accord seems to be Marín Castán. See Fernando Marín Castán, n. 30 above, at 10.

⁴⁸ See Yamila Fakhouri Gómez and Mariona Llobet Anglè, n. 44 above, at 743; Antonio Fernández Hernández, n. 44 above, at 546.

⁴⁹ In accord seems to be Fernández Hernández. See Antonio Fernández Hernández, n. 44 above, at 547.

platform, and also may be the owner of the same.⁵⁰

Furthermore, we would like to mention that paragraph 2 of Article 616 *ter* stipulates concurrent offenses between piracy and those offenses that could be committed. This distinction allows the international community to be protected, while individual assets concerned are defended through the penalties for offenses that could be committed regarding the former.⁵¹

Regarding the provisions of Article 616 *quáter* of the 2010 Spanish Criminal Code, we should point out that the behavior described is not in itself a crime of piracy, but a case of resistance or disobedience opposed to ships and aircrafts in the service of Spain which were involved in the persecution of crimes of piracy. Activities realized against foreign ships and aircrafts are excluded, acts which all under the provisions of Article 616 *ter*. This new article introduced by the Spanish legislator in 2010 has been criticized as it might be confused with the criminalization of piracy when in reality it is supposed to undermine the authority or its agents, which are regulated in Articles 550, 554 and 556 of the Spanish Criminal Code.⁵² This could result in the in a wholly disproportionate penalty. While it is also true that these offenses are not subject to universal prosecution under the OJ, as is the case of maritime piracy. Furthermore, Article 616 *quáter* must be interpreted in the light of Articles 105, 106, 107, 110 and 111 UNCLOS.

The crime of disobedience or resistance provided by Article 616 *quáter* includes a penalty of imprisonment of 1-3 years that may be increased up to 10-15 years in those cases in which force or violence is used.

Moreover, we should point out that nowadays there is an abundant practice of the use of force in situations defined as maritime piracy. This raises, firstly, the problem of self-defense either of the active or passive subjects. And, secondly, it opens the question of the use of force in different maritime areas. As it is well known, Article 2(4) of the United Nations Charter prohibits the threat or use of force in international relations. Hence, the national law of each state regarding defense matters is particularly relevant as this lays down if it is possible for the armed forces (public or private) to help those ship flying its flag affected by an act of maritime piracy.⁵³

In relation to this, we would like to mention that the Spanish legislator also saw the need to change the national legislation regarding defense issues in order

⁵⁰ In addition, it should be mention that unlike UNCLOS the 2010 Spanish Criminal Code does not define what is meant by offshore platform. For this it has to use the Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, of 2005. See Francisco Carlos López Rueda, n. 10 above, at 75-76.

⁵¹ See Yamila Fakhouri Gómez and Mariona Llobet Angl , n. 44 above, at 747; Guillermo Portilla Contreras, n. 17 above, at 392.

⁵² Guillermo Portilla Contreras, n. 17 above, at 392-393.

⁵³ Regarding it, see Jos  Manuel S nchez Patr n, "Pirater a mar tima, fuerza armada y seguridad privada", 23 *Revista Electr nica de Estudios Internacionales* (2012), 1-20.

to allow armed private guards be deployed on Spanish tuna vessels sailing in the Indian Ocean. After some clarifications, the Spanish government considered that it could not deploy military on board of these private vessels as the Defense Act did not allow it.⁵⁴ In this sense, Spain revised the Private Security Regulations and the Arms Rules by the Royal Decree 1628/2009, of 30 October, which entered into force on 31 October 2009.⁵⁵ These changes were necessary to enable armed guards to use appropriate means on the board of Spanish vessels in order to prevent and effectively deter potential attacks⁵⁶ by using weapons if necessary as a defense to repel armed aggressions properly and proportionately.⁵⁷ Other states, among others France and Belgium, including some of those that are integrated in the Atalanta Operation, however, chose to deploy militaries in order to protect the seafarers.⁵⁸ Incidents between tuna vessels with private security personnel on board and pirates weren't long in coming. Suffice it to mention the case of the *Albacora* tuna vessel, which was attacked 350 miles off the coast of Kenya in March 2010. Sometimes this new fishing scenario has been compared with private wars that existed in the past⁵⁹; and this, on the basis of the latest developments, does not seem to be so far away. We believe that it would have been preferable that this decision of Spain was only temporary, and that in the near future it would opt for military personnel rather than private security guards as it is the case today. From the very moment on when serious incidents will occur, including injured or killed persons or the loss of ships caused by the activities of private armed guards on board of these ships, could involve the international responsibility of a State.

⁵⁴ Organic Law 5/2005 on defense.

⁵⁵ BOE 263, 31 October 2009.

⁵⁶ By virtue of Article 81(c)(9) of the Private Security Regulations, approved by the Royal Decree 2364/1994, of 9 December, and amended by the Royal Decree 1628/2009, of 30 October.

⁵⁷ Under the Article 86(4) of the Private Security Regulations, approved by the Royal Decree 2364/1994, of 9 December, and amended by the Royal Decree 1628/2009, of 30 October; and according to the Articles 6(3) and 124(1) of the Arms Rules, approved by the Royal Decree 137/1993, of 29 January, amended by the Royal Decree 1628/2009, of 30 October.

⁵⁸ For a study of these topics, see Paul-Alexandre Janssens, «La loi française de lutte contre la piraterie maritime à l'épreuve des mesures pionnières adoptées par la Belgique», 726 *Droit maritime comparé* (2011), 544-551.

⁵⁹ For a comprehensive analysis of the private security guards on board, see Annina Christina Bürgin, «The Spanish maritime security governance in the Indian Ocean region», 8 *Journal of the Indian Ocean Region* (2012), 127-141; José Manuel Sobrino Heredia, «Les opérations militaires internationales dans la prévention et la poursuite de la piraterie maritime et l'usage de la force», in J. M. De Faramiñán Gilbert and V. L. Gutiérrez Castillo (eds.), *Coopération, sécurité et développement durable dans les mers et les océans. Une référence spéciale à la Méditerranée / Sea and ocean-related cooperation, security and sustainable development. An analysis with a special focus on the Mediterranean* (2013), 215-228.

IV. Final Remarks

Undoubtedly, the definition of the crime of maritime piracy in the Spanish legal order since 2010 is a very positive development, but we believe that these changes are only a first step in this regard, and the practice is already showing that some issues related to this crime have to be developed. And at international level, in the line with what was stated by the United Nations Secretary General, States will need to work together to secure the prosecution and imprisonment of the true pirates. The current problem is that very few States have the capacity or the political will to prosecute suspected pirates.⁶⁰

In this regard, Mr. Ban Ki-Moon has identified seven different options⁶¹, namely: (1) the assistance to regional States from the Horn of Africa to build its capacity to prosecute and imprison pirates; (2) the establishment of a Somali court in a third state in the region; (3) the establishment of special chambers with the national jurisdiction of a state or more states in the region, without United Nations participation; (4) the establishment of a regional special chamber with United Nations participation; (5) the establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation; (6) the establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations; (7) the establishment of an international tribunal based on Chapter VII of the United Nations Charter.

We consider that the arrest and prosecution of suspected pirates accused of jacking the Spanish warship *Patiño* will test the strength of the Spanish Criminal Code amended in 2010 that introduced the crime of maritime piracy under the Articles 616 *ter* and 616 *quáter*, after an unexplained absence of this crime in the last fifteen years from Spanish legal system. It will be for the first time that a Spanish court will rule on a crime of maritime piracy. This is a case where it has been also found that Articles 23(4) and 65(1) of the OLJ will be applied because: firstly, there is a link of relevant connection with Spain; secondly, there is no preferential jurisdiction by another State; and thirdly, it is not established to date that other State could have enforcement jurisdiction under the international treaties and the European Union's legislation regarding Atalanta Operation.⁶²

⁶⁰ Barry Hart Dubner, "On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty law and the Jurisdictional Implications Thereof", 42 *Journal of Maritime Law and Commerce* (2011), 98.

⁶¹ Report of the Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia (S/2010/394, 26 July 2010). Regarding an analysis of some possible answers for a better fight against piracy at the international level, see: Francisco Carlos López Rueda, n. 10 above, at 68-69; José Luis Rodríguez-Villasante y Prieto, n. 4 above, at 218-222. Beckman has analyzed the weaknesses in the international regime of maritime piracy in Robert C. Beckman, n. 38 above, at 28-29.

⁶² Memoria 2012, vol. I, Fiscalía de la Audiencia Nacional (2012), 603-604.

THE EMPLOYMENT OF ARMED PERSONNEL ON BOARD TO FACE PIRATE ATTACKS. A COMPARISON BETWEEN SPAIN AND ITALY

*Valeria Eboli**

I. The Employment of Armed Personnel on Board as an Alternative Way to Fight Piracy; II. Some Preliminary Remarks on Private Military and Security Companies; III. The IMO Perspective on the Use of Armed Guards on Board to Face Pirate Attacks; IV. The EU Point of View; V. The Spanish Solution; VI. The Italian Approach.

I. The Employment of Armed Personnel on Board as an Alternative Way to Fight Piracy

With the increase in violence by pirates, a number of private military and security companies (PMSCs) emerged, offering an interim short-term solution to the problem of piracy in the Gulf of Aden. They provide different kinds of services, including risk assessment and consulting, training, logistics support, vessel tracking and provision of armed guards.¹ The use of armed personnel on board is an increasing practice and it is due to several reasons.

First of all, the incremented pirate attacks in some areas made evident the need for a prompt and quick response. Even if multinational maritime forces are in the area with a counter piracy task, they have to cover a very large area and it may happen that they arrive late. Furthermore, the employment of vessels to protect other vessels is a very demanding activity, in terms of deployment of forces and expenses. The employ of personnel on board resulted cheaper and easier. So, many companies opted for the use of private forces on vessels. As regards as the use of privately contracted armed security personnel (PCASP) on merchant ships, as well as the employment of Vessel Protection Detachments ('VPDs') is concerned, some legal issues are at stake. In particular, those concerning the possibility to employ them and the rules on the use of force, are very relevant. The use of PMSCs in anti-piracy operations has proven the lack of any regulation in the field.

* Adjunct Professor of International Law, Department of Law, University of Pisa-Naval Academy of Livorno.

¹ International Maritime Organization, Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia. Best Management Practices for Protection against Somalia Based Piracy (MSC.1/Circ.1339 , 14 September 2011), <<http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1339.pdf>>, 39.

Before analyzing the domestic legislations providing for counterpiracy actions based on the presence of personnel on board commercial vessels, it seems opportune to recall which is the related international legal framework.

II. Some Preliminary Remarks on Private Military and Security Companies

An analysis of the problems arising in relation to the employment of privately contracted armed security personnel (PCASP) requires some preliminary remarks about the issue of private military and security companies under international law.

The use of Private Security Companies in the fight against piracy is only a part of the widespread phenomenon of the employment of such companies.

PMCs and PSCs respectively provide military and security services. The companies furnishing services to fight piracy usually provide armed guards and/or training and this is qualified more as a security than a military activity.

Private military and private security companies (PMSCs) were attracted by the business of pirate hunting and shipping protection when criminal activities on the high seas or in territorial waters increased.²

Blackwater Maritime Security Services equipped the ship ‘*McArthur*’ to this aim. Anyway it was not hired by any State. The Companies providing armed guards to embark to protect the ship and the crew were much more successful. This kind of services are mainly provided by British companies.³

The legitimacy of such use and the legal norms applicable have been largely debated. Efforts were made to regulate the phenomenon in all its possible dimensions, i.e. concerning States, companies, individuals.

A group of 17 States approved a document known as Montreux Document⁴. It clarifies which are the pertinent existing obligations under International Humanitarian Law (IHL) and Human Rights law and contains about 70 good practices designed to assist States in complying these obligations.⁵

² Natalino Ronzitti, ‘The Use of Private Contractors in the Fight against Piracy: Policy Options’, in F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011), 37, 41.

³ UK Parliament, Piracy off the Coast of Somalia, <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/131802.htm>>.

⁴ Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine and the United States of America are the participating States.

⁵ For the text of the Montreux Document, see Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, (UN doc. A/63/467/ S/2008/636, 6 October 2008), Annex.

The non-binding document is the result of a process launched by the Government of Switzerland and the International Committee of the Red Cross (ICRC) with the aim to promote IHL and human rights law. It has also been sent as a letter to the General Assembly of the United Nations⁶. The obligations and good practices contained within the document specially rely to the employ of PMCs and PSCs during armed conflict. Some of them have a very general character, so that they could be potentially applicable to other situations as well. For instance the para. 2 containing the criteria for the selection of PMSCs could be applicable every time: it provides, *inter alia*, for the obligation to acquire weapons lawfully.⁷

All the obligations arising from the Montreux Document are mainly intended to orientate the behavior of the States hiring the Companies.

Another effort for the regulation has been made in the framework of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.⁸

In the list of the tasks to be pursued by the WG set up in para. 12 of the basic resolution 2005/2, it is stated that it has ‘‘to monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities’’. In order to accomplish this task a draft of an *International Convention on Private Military and Security Companies* has been proposed in the frame of the WG on Mercenaries on October 2008.⁹ The draft text was elaborated by the experts for Regional Consultation for Eastern European Group and Central Asian Region in Moscow, held on 16-18 October 2008. The purpose of the agreement as enounced in draft Article 1 is the ‘‘promotion of cooperation between the States so that they can more effectively solve differ-

⁶ As stated in paragraph. 2 of the Preface to the Document (UN doc A/63/467/S/2008/636, n. 5 above, at 5) ‘...th[e] document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two)’.

⁷ Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary General, n. 5 above, at 14.

⁸ The Working Group (WG on Mercenaries) was established in 2005 by the Commission on Human Rights pursuant to Commission on Human Rights resolution 2005/2 and is now linked to the UN High Commissioner for human rights. (Office of the High Commissioner for Human Rights, The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Human Rights Resolution 2005/2, <<http://www.unwg.rapn.ru/en/1.htm>>). Among the aims of the WG on Mercenaries there is the elaboration of concrete proposals on possible new standards, general guidelines or basic principles encouraging the further protection of human rights.

⁹ The most recent text is available online at <<http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>>.

ent problems related to the activities of private military companies and private security companies (PMSCs) which are of international character'. Once again the States are held responsible for the regulation of PMSCs and their activities.

Some Companies also self-regulated their activities through Codes of Conduct, which are not binding under a legal point of view, but testify the will of the companies to conform their behavior to some rules. Some examples are the International Peace Operations Association (IPOA) Code of Conduct,¹⁰ the British Association of Private Security Companies (BAPSC) Charter,¹¹ the Private Security Company Association of Iraq (PSCAI) Charter.¹²

Finally, as far as the individual dimension is concerned, a document worth mentioning is the International Committee of the Red Cross (ICRC) Document concerning the concept of Direct Participation in Hostilities under International Humanitarian Law,¹³ issued on May 2009. It is especially relevant in so far as the status of the individuals acting as contractors during armed conflicts is concerned. The document is not binding but contains an important and authoritative clarification of a relevant notion, functional to the definition of the activities and the status of PMSCs under IHL.

In particular there is stated that 'in accordance with the object and purpose of IHL, the concept of direct participation in hostilities must be interpreted as restricted to specific hostile acts'.¹⁴ In the light of this statement, according to the ICRC Guidance, the contractors are qualified as civilians *unless and for such time as they take a direct part in hostilities* or are incorporated in the armed forces of one of the parties to the conflict. So they can enjoy the protection assured to civilians by IHL.¹⁵

¹⁰ <www.IPOAonline.org>.

¹¹ <www.bapsc.org>.

¹² <www.psc.ai>.

¹³ International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009 found at <www.icrc.org>.

¹⁴ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, n. 13 above, at 45. It also specifies that 'Those conducting hostilities already face the difficult task of distinguishing between civilians who are and civilians who are not engaged in a specific hostile act (direct participation in hostilities), and distinguishing both of these from members of organized armed groups (continuous combat function) and State armed forces. In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurrent basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians, thus undermining their protection which is at the heart of IHL'.

¹⁵ It is possible to grant them this kind of protection in so far as the notion of *direct participation* in the hostilities is interpreted in the abovementioned sense. In fact, it would not

III. The IMO Perspective on the Use of Armed Guards on Board to Face Pirate Attacks

The International Maritime Organization (IMO) provided for an Interim Guidance to private maritime security companies providing privately contracted armed security.¹⁶ with the aim to improve governance, reduce the potential for accidents, and promote competent, safe and lawful conduct at sea.

In the IMO perspective, the decision to allow PCASP on board ships is the prerogative of flag States only and not all flag States may allow their use, because Article 92 of UNCLOS refers to the flag State's 'exclusive jurisdiction on the high seas', and article 94 of UNCLOS to 'duties of the flag State'¹⁷.

As far as the personnel on board ships in the high risk area is concerned¹⁸, the Interim Guidance indicates which are the standards required to the Private Maritime Security Companies (PMSC) which operate in the high risk area.

In particular, they should have awareness and understanding of applicable laws of flag, port and coastal States with respect to the transport, carriage, storage and use of firearms and security-related equipment and the use of force. Furthermore PMSCs should assure a full understanding of applicable national laws with respect to the transport, carriage, storage and use of firearms and security-related equipment.

The shipowners and ship operators should obtain the approvals from the flag State and the privately contracted armed security personnel (PCASP) engaged should carry the required firearms license issued or endorsed by the flag State as prescribed.

In relation to the use of force, PMSC should recognize that laws governing the use of force may differ over time and according to location.¹⁹

be otherwise possible such an interpretation, because 'the great majority of private contractors and civilian employees currently active in armed conflicts have not been incorporated into State armed forces and assume functions that clearly do not involve their direct participation in hostilities on behalf of a party to the conflict (i.e. no continuous combat function)'. ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, n. 13 above, at 38.

¹⁶ Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, (MSC.1/Circ.1443, 25 May 2012), <<http://www.imo.org/ourwork/security/secdocs/documents/piracy/msc.1-circ.1443.pdf>>.

¹⁷ Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, n. 16 above, Annex, at 1.

¹⁸ High Risk Area: an area as defined in the Best Management Practices for Protection against Somalia Based Piracy (MSC.1/Circ.1339), unless otherwise defined by the flag State. See Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia. Best Management Practices for Protection against Somalia Based, n. 1 above.

¹⁹ Ibid., at 9.

The activities of the PCASP are subject to the applicable national law, including criminal law, and the laws and regulations of coastal, port and other States. They should have clear and well defined rules on the use of force.

IMO Guidance is not binding, but provides for a set of norms of behavior, in the absence of any other regulation. It is suggested that private security should be employed in conjunction with Best Management Practices in order to deter piracy off the Coast of Somalia, and that the vessel Master retains the overall command and control of the vessel.

Despite these concerns, the IMO has recognized the need for safety of the crew and passengers on board the vessels in high-risk areas, and self-protection seems to be the best way to ensure that at present.

The possibility to employ such armed personnel is not explicitly envisaged by the relevant norms, nevertheless articles 105-110 of the UN Convention on the law of the Sea (UNCLOS) can be helpful. According to Article 105, States may seize a ship on the high seas. Anyway Article 107 adds that such seizure may only be carried out by ships on government service. The use of force by private actors is not envisaged.

In the judgment in the case *MV Saiga*²⁰ it was stated that, the use of force on the high seas must be avoided as far as possible and when it is unavoidable it must respect the requirements that it must be a measure of last resort, strictly necessary and proportionate. If the use of force by private entities is in self defense and under all the aforementioned strict requirements conditions it could be admissible.

IV. The EU Point of View

In so far as the EU is concerned, the fight on piracy is mainly conducted through the deployment of naval forces. Following the Joint Action 2008/851/CFSP of 10 November 2009, establishing the military operation ATALANTA sustained by UNSCR 1814, 1816 and 1838, the involvement of the EU in the fight against piracy was increasing. Initially the goal was to support the activities of member States, deploying military facilitating the operational action of the assets they deployed.²¹

The EU NAVFOR Operation ATALANTA was launched in order to contain piracy. In particular the EU Council evaluated it necessary in the strategic inter-

²⁰ ITLOS, 1st July 1999, *Saint Vincent and Grenadine vs. Guinea*, Case No. 2, <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf>.

²¹ See Jean Paul Pierini, 'Apprehension, arrest, detention and transfer of suspected pirates and armed robbers within the legal framework of the European security and defence policy (ESDP): the 'mantra' of the existence of a proper legal base', 29 *Quaderni europei* (2010), <http://www.lex.unict.it/cde/quadernieuropei/giuridiche/29_2011.pdf>, 6.

est of the coastal countries of the Horn of Africa. In the long run, they should secure by themselves their waters, so that the EU is keen to help them in developing capacities to ensure maritime security.²² To this aim the EU mission EUCAP Nestor was established. Beside these actions the EU also supported the initiative to receive suspects transferred for prosecution.²³

The EU's engagement is due to the need to protect its own citizens from security threats as well as the will to allow the local economic growth. The approach that the EU developed is a comprehensive one, handling both the symptoms and the causes of the problem.²⁴

As far as the employment of private security guards on board is concerned, there isn't any specific regulation of the EU.²⁵ Anyway, as regards as the use of private security, the European Court of Justice affirmed that private security services fall in principle within the scope of application of internal market law²⁶ and the Council adopted Recommendation 2002/C 153/01 of 13 June 2002 regarding cooperation between the competent national authorities of Member States responsible for the private security sector.

The EU involvement seems to be accessorial to that of member States. Many of them adopted domestic legislations about the fight against piracy, envisaging both counter piracy actions conducted by naval units and through the presence of armed personnel on board. In the last case, the security can be provided, according to the different legislations, through private armed guards and/or military personnel.

The attitude to allow the presence of the ones or the others changes from State to State. In the Netherlands, the government put VPDs at the disposal of Dutch shipping companies since 2011. In fact, as the Constitution guarantees the state's monopoly on the use of force, and as such explicitly prohibits private security personnel from bearing arms, Dutch shipping companies are not able to hire private guards for vessels flying the Dutch flag.²⁷

²² < www.eeas.europa.eu/piracy/regionall_maritime_capacities_en.htm>.

²³ Jean Paul Pierini, *L'aspetto giuridico nazionale, Pirati di ieri e di oggi. Supplemento alla rivista marittima* (2009), <[http://www.marina.difesa.it/documentazione/traffico_mercantile/documents/l'aspetto%20giuridico%20nazionale%20\(diritto%20marittimo%20e%20penale\).pdf](http://www.marina.difesa.it/documentazione/traffico_mercantile/documents/l'aspetto%20giuridico%20nazionale%20(diritto%20marittimo%20e%20penale).pdf)>.

²⁴ Strategic Framework for the Horn of Africa, 14 November 2011, <www.consilium.europa.eu>.

²⁵ See F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011).

²⁶ See ECJ, Case C-114/97, *Commission v Spain*, judgment [1998] ECR I-6717; EJC, Case C-355/98, *Commission v Belgium*, [2000] ECR I-1221; ECJ, Case C-283/99, *Commission v Italy*, [2001] ECR I-4363; EJC, Case C-171/02, *Commission v Portugal*, [2004] ECR I-0000; ECJ, Case C-189/03, *Commission v Netherlands*, [2004] I-09289; ECJ, Case C-514/03, *Commission v Spain*, [2006] ECR I-963; ECJ, Case C-465/05, *Commission of the European Communities v. Italian Republic*, [2007] ECR I-11091 .

²⁷ Jerry Hofhuis, *Dutch use of Vessel Protection Detachments in the Indian Ocean*, <<http://internationalsecuritydisciplulus.wordpress.com/2012/09/26/dutch-use-of-vessel-protection->

France, as well as other not EU States such as Thailand, and Israel, also choose the option to employ VPDs on board merchant vessels.²⁸

The UK followed a different approach. Taking into account that the armed forces are very heavily committed. So that it was impossible to accept the request for providing VPDs, the option for the industry to pay for vessel protection detachments of British naval or military personnel on board commercial shipping was preferred. On 6 December 2011, the UK Department for Transport issued guidance on the use of private armed guards.²⁹

A not EU State which followed the same approach was India. The India's Ministry of Shipping issued some Guidelines on Deployment of Armed Security Guards on Merchant Ships on August 2012,³⁰ in compliance with IMO guidance.

V. The Spanish Solution

In particular the legislation of Spain has to be taken into account, being one of the more comprehensive on the issue in the context of the EU Member States.

The use of private armed guards in Spain is regulated by the Law 23/1992, the following Private Security Royal Decree 2364/1994 approved to develop and implement this Law, and the recent Royal Decree 1628/2009, by which is modified the mentioned Spanish regulation on private security with the aim of allowing for private security guards to carry out their duties on board Spanish fishing or commercial vessels.

In order to justify the allowing of private security guards on board Spanish commercial vessels, the Royal Decree 1628/2009 mentions the 'Recent attacks on Spanish fishing vessels operating in international waters subject to special situations of risk to life and safety of its crew, and affirms that they advise the adoption of special measures to improve security through the use of means to prevent and dissuade potential attacks'. (Preamble)

Then it specifies that as such attacks have occurred 'through the use of weapons of war', the response to the entity and nature of the threat, requires the use

detachments-in-the-indian-ocean/http://internationalsecuritydiscipulus.wordpress.com/2012/09/26/dutch-use-of-vessel-protection-detachments-in-the-indian-ocean/>.

²⁸ Civil Military Fusion Centre, *Armed Guards on Merchant Vessels* <<http://www.docstoc.com/docs/155017670/Armed-Guards-on-Merchant-Vessels---Civil-Military-Fusion-Centre>>.

²⁹ UK Parliament, Piracy off the Coast of Somalia, <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaif/1318/131802.htm>>. UK Department of Transportation, Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, <<http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/UK/UseOfArmed.pdf>>.

³⁰ Guidelines on Deployment of Armed Security Guards on Merchant Ships, <http://oceansbeyondpiracy.org/sites/default/files/indian_policy_armedguards.pdf>.

of means of defense and prevention adequate and proportionate to such kinds of aggression’.

So the regulations on private security is retained necessary to enable the development of private security services.

Then, it was necessary to modify the former legislation on private security, i.e. the Royal Decree 2364/1994, implementing the Law 23/1992, in order to allow personnel from private companies to provide security on board merchant and fishing ships flying the Spanish flag, in those situations of particular risk to people and property, by a properly and controlled use of weapons suitable for protection and prevention.

The Law 23/1992, of Private Security, mentioned the vigilance and protection of movable and immovable property and the protection of persons who may be in the same among the duties of the private security companies (Article 11). As far as the use of force is concerned, it stated that the use of weapons by the security guards will be allowed only in those cases that are determined in special regulation, and adds that the class and category of the weapons will be also determined by regulation (Article 14).

The Spanish Government ruled these items approving the Royal Decree 2364 of 9 December 1994 which developed and implemented the aforementioned law, determining the conditions to be met in this security services. It ruled on issues such as the organization of private security activities, the characteristics that must meet the technical and material used for this purpose, and the functions, duties and responsibilities of private security personnel using them.

Then the Royal Decree 1628/2009 modifies such legislations to allow personnel from private companies to provide security on board merchant and fishing ships flying the Spanish flag, in those situations of particular risk to people and property, by a properly and controlled use of weapons suitable for protection and prevention³¹.

In particular, it introduces a new text of the Article 81, adding that private security guards may also be allowed to use fire arms in its services (as well as in buildings and facilities like banks, museums, hypermarkets, industrial estates, casinos, schools...) in ‘Merchant ships and fishing vessels, flying the Spanish flag, in waters where there is serious risk to the safety of persons or property, or both’. The fire arms will be determined by the Ministry of Interior.

Furthermore, in case of military weapons, it establishes that private security guards may be allowed to carry and use them just ‘to provide services to protect people and property’, ‘for preventing and repelling attacks’, ‘with the characteristics, conditions and requirements to be determined by the Government, on a joint proposal of the Ministries of Defense and Interior’. The Government shall establish the ‘terms and conditions for the possession, control, use by private

³¹ This modification has been done by initiative of the Minister of Defense, with Interior Minister’s proposal, according to the State Council, and after deliberation by the Government in its meeting of October 30, 2009.

security companies, military weapons, as well as characteristics of the latter' (Article 86).

This solutions furnishes a legal framework for the employment of private security guards.

It gives a quite wide authorization to the use of force and weapons.

VI. The Italian Approach

The Italian legislation authorizing the use on board of military personnel or private armed guards is also interesting, with special attention to the problems of international law related to such employment.

In Italy, there is a very recent regulation on the issue. In the framework of the Law No. 130 of 2 August 2011 concerning the Interventions for Development Cooperation, Support of Peace and Stabilization Processes, and Participation of the Armed and Police Forces in International Missions, a specific Article contains Urgent Provisions against Piracy³².

Article 5 of the said Law authorizes the Ministry of Defence to set up some 'conventions' with the Italian Shipowners' Association for the protection of vessels flying the Italian flag and sailing in areas, individuated by the Ministry of Defence by Decree, where there is the risk of pirate attacks³³.

The said conventions should provide for the boarding on the interested merchant ships of some Vessels Protection Detachments (VPD)³⁴, formed by military personnel of the Italian Navy or coming from other armed forces but under the control of Italian Navy³⁵.

The activities of such VPDs shall be done in conformity with the directives and the rules of engagement issued by the Ministry of Defence, while the commander of each VPD has the exclusive responsibility for the military activity against piracy.

³² Law No. 130 of 2 August 2011, Conversion into Law of the Decree-Law No. 107 of 12 July 2011, concerning the Extension of the Interventions for Development Cooperation, Support of Peace and Stabilization Processes, and Participation of the Armed and Police Forces in International Missions and for the set up of the Resolutions 1970 (2011) and 1973 (2011) of the UN Security Council. Urgent Provisions against Piracy, <<http://www.parlamento.it/parlam/leggi/100301.htm>>.

Law No. 130 of 2 August 2011 was published in *Gazzetta Ufficiale* No. 181 del 5 August 2011. Decree-Law No. 107 of 12 July 2011 was published in *Gazzetta Ufficiale* No. 160 of 12 July 2011.

³³ Article 5 of Law No. 130 of 2 August 2011, n. 32 above.

³⁴ In the Italian version they are called 'Nuclei militari di protezione' (NMP).

³⁵ Jean Paul Pierini, Valeria Eboli, 'Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: The *Enrica Lexie* Case', in 51/1 *Military Law and the Law of War Review* (2012), 117.

As for the financial provisions, the military personnel will receive the same salary of the navy personnel sailing in international maritime spaces³⁶ and have the same *status* of military personnel acting in military missions abroad. The convention shall provide for the reimbursement of all the expenses, including those for human resources, by the Shipowners' Association.

Furthermore, according to paragraph 4 of the same Article, when the VPD is not provided, private security guards³⁷ may protect merchandises and values on merchant ships and fishing ships flying the Italian flag and sailing in international maritime spaces where there is risk of piracy³⁸.

The provision of Article 5 were substantially confirmed, with a few modifications, by the Decree-Law No. 215 of 29 December 2011 on the extension of international missions of the armed and police forces, the initiatives of cooperation for development and support of peace and stabilization processes.³⁹

Following Law No. 130/2011, a Memorandum of Understanding (MoU) was done between the Ministry of Defence and the Italian Shipowners' Association ('Confederazione italiana armatori' or 'Confitarma')⁴⁰. The MoU was signed on 12 October 2011 by the Chief staff of the Italian Navy and Mr. D'Amato, President of 'Confitarma', before the then Ministry of Defence, Ignazio La Russa. According to this MoU, 10 VPDs, each composed by 6 unities of personnel, will be boarded on Italian merchant ships sailing in waters at risk of pirate attacks, on request of the ship-owner.

The military personnel will not be subordinated to the civilian commander of the ship but will just depend on the Italian Joint Operations Headquarters

³⁶ International waters include, beside the high seas, other marine areas such as the exclusive economic zone.

³⁷ Only those authorized by Article 133 of the Royal Decree No. 773 of 1931 (Regio Decreto 18 giugno 1931, n. 773, 'Testo unico delle leggi di pubblica sicurezza') published in *Gazzetta Ufficiale* No. 146 of 26 June 1931.

³⁸ The first bill presented to the parliament concerned only the private security services (proposta di legge n. 3406, 'Disposizioni concernenti lo svolgimento di servizi di vigilanza privata per la protezione delle navi mercantili italiane in alto mare contro gli atti di pirateria', see Camera dei deputati, doc. A.c. 3321 e a.c. 3406, available online at <http://www.camera.it/701?leg=16&file=ac0606_0>.

³⁹ Decreto-Legge 29 dicembre 2011, n. 215, Proroga delle missioni internazionali delle forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione, nonché disposizioni urgenti per l'amministrazione della difesa, published in *Gazzetta Ufficiale* No. 302 of 29 December 2011 <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2011;215>>.

⁴⁰ Memorandum of Understanding of 11 October 2011 between the Ministry of Defence and the Italian Shipowners' Association for Boarding on Italian Merchant Ships Vessels Protection Detachment (VPD) in order to Fight Piracy. Text at <<http://ebookbrowse.com/b-101011-convenzione-difesa-confitarma-ug-pdf-d269673315>>.

(Ministry of Defence) and a dependent command in Djibouti. On its hand the ship-owner requiring the VPD will pay for the related expenses.

The legislative process was accelerated following the event which occurred to the Italian merchant Ship *Montecristo* in October 2011,⁴¹ seized by the pirates off the coast of Somalia with all its seafarers. The vessel was assaulted by a boat with five armed men on board. Following the attack, the captain immediately put in place the prescribed safety procedures, as prescribed by the IMO best practices, to counter it.⁴² The *Montecristo*'s crew locked themselves inside an armored area of the vessel when the pirates boarded the ship. The crew, locked in this area and safe from the pirates' threats, continued to navigate the ship. Then, the crew wrote a message, placed it in a bottle, and tossed it into the sea through a porthole.

Following the seizure, the NATO's naval task force 508 sent a naval unit to ascertain what happened to the *Montecristo*, in the frame of the NATO's Operation Ocean Shield.⁴³

Afterward the bottle was retrieved by NATO warships and it was the signal for Royal Marine commandos to launch an attempt to rescue the crew, in full knowledge that they could do so without risking lives, as the message in the bottle said.⁴⁴

The crew was then freed and the 11 pirates captured and given to the Italian authorities, on board the destroyer warship 'Andrea Doria', in order to judge them.

Another recent case of the 'Enrica Lexie' showed some critical issues related to the presence of armed military personnel on board⁴⁵ and also accelerated the enactment of the executive decree allowing the use of private guards.

The Decree of the Home Department ('Ministero dell'Interno') 28 December 2012, No. 266, published on the Official Journal No. 75 of 29 March 2013, regulates the employment of private security guards on board merchant vessels flying

⁴¹ The ship, owned by the Livorno-based D'Alesio group, was flying the Italian flag. There were 23 crew members: 7 Italians, 10 Ukrainians and 6 Indians (<<http://www.corriere.it/International/english/articoli/2011/10/11/somali-pirates-seize-montecristo.shtml>>).

⁴² IMO, Piracy and armed robbery against ships in waters off the coast of Somalia. Best Management Practices for Protection against Somalia Based Piracy, MSC.1/Circ.1339, n. 1 above.

⁴³ Ibid. The Operation Ocean Shield commenced 17 August 2009 and continues the NATO's previous counter-piracy mission Operation Allied Protector. It has the aim to contribute to international efforts to combat piracy off the Horn of Africa. In the frame work of this mission, beside the traditional counter-piracy operation, a new element of regional-state counter-piracy capacity building has been developed. In particular, NATO will assist regional states, upon their request, in developing their own ability to combat piracy activities with the aim to contribute to a lasting maritime security solution off the Horn of Africa. <http://www.manw.nato.int/page_operation_ocean_shield.aspx>.

⁴⁴ <<http://www.guardian.co.uk/world/2011/oct/11/somali-pirates-captured-british-forces>>

⁴⁵ Jean Paul Pierini, Valeria Eboli, 'The Enrica Lexie Case and the limits of Extraterritorial Jurisdiction of India', in 39 *Quaderni europei*, (2012), <http://www.cde.unict.it/sites/default/files/39_2012.pdf>.

the Italian flag and sailing in international waters at risk of piracy attacks⁴⁶.

It implements the second part of the aforementioned Article 5 of the No. 130 of 2 August 2011 and completes the framework of the instruments that the ship-owners can legitimately use to face pirate attacks.

It contains provisions on the employment of such private armed personnel and the level of force⁴⁷ they are allowed to use.

First of all, the private personnel can be of two kinds: the armed guards can belong to a private institute furnishing security services or each single guard can be directly employed by the Ship-owner.

The first option is related to guards belonging to the so called *Istituti di vigilanza privata*. They are entities authorized according to Article 134 of the Public Security Unified Law of 1931⁴⁸ to furnish private security services⁴⁹.

The second option regards guards directly hired by the Ship Owner.

Before being employed, each armed guard has to pass a six months course and obtain the related final certification. Furthermore, the armed guards should preferably have served as military personnel.

Once on board, they are organized in a team, composed by a minimum of 4 guards, whose one has to act as the responsible.

As to where they can be employed, reference is made to the high seas areas individuated as at risk of private attack by decree of the Ministry of Defence. It is the same territorial limit where the VPD can operate, so that there is substantial coincidence.

The employment of armed guards is supposed to be subordinated to the impossibility to use the VPD.

The norms concerning the use of force are very strict. They are allowed to use arms only for self-defence.⁵⁰ It can reasonably be interpreted as to use the force strictly necessary and proportionate to face an actual or imminent pirate attack.

⁴⁶ Decree of the Home Department 28 December 2012, No. 266 Regulation concerning the employment of armed guards on board merchant vessels Flying Italian flag, shipping on International waters at risk of piracy (Decreto del Ministero dell'Interno 28 December 2012, n. 266, Regolamento recante l'impiego di guardie giurate a bordo delle navi mercantili battenti bandiera italiana, che transitano in acque internazionali a rischio pirateria), published on the Official Journal No. 75 of 29 March 2013.

⁴⁷ In this case the right of self-defence envisaged is the right of self-defence of human beings, usually recognized by all legal orders and recognized in Italy in Article 52 of the Penal Code. Here it is not the right of self-defence of states as embodied in Article 51 of the United Nations Charter.

⁴⁸ Public Security Unified Law Royal Decree No. 773 of 1931 ('Testo unico delle leggi di pubblica sicurezza', Regio Decreto 18 giugno 1931, n. 773) published in *Gazzetta Ufficiale* No. 146 of 26 June 1931.

⁴⁹ For instance, on the National territory, they are privately hired and employed to guard the banks.

⁵⁰ The self defence is defined making reference to Article 52 of the Italian Penal Code.

They can use only individual weapons. So it shall be excluded any use of war weapons.

The number of such weapons that can be embarked on the merchant vessel they have to protect is limited: it can be only one weapon for guard, plus two additional reserve weapons. The weapons shall be kept in conformity with the Italian domestic provisions on their detention, so that they have to be locked in a security cabinet and can be given to the guards only during the working time by a Security Officer in charge.

Almost all the law provisions limiting the use of force on the territory also apply⁵¹ and the provisions regulate the use of weapons in about the same way they are allowed on the territory.

Furthermore, Article 10 of the Decree under review imposes some obligations on the Ship Commander as far as the duty of communication is concerned. The foreign authorities of the port where the ship embarking armed guards is entering, shall be informed about the presence of weapons on board. Such communication shall also contain details about the kind of weapons and the sea lane that the ship will follow in the internal waters.

The ship Commander shall also inform the Italian Navy Fleet Command and the Ministry of Foreign Affairs about the transit in the areas of high seas at risk of pirate attack.

The Italian Shipowners Association ('Confitarma') was very skeptical about this regulation⁵².

The main issue of concern is that the armed guards can be employed only after passing a 6 months course, that has not yet been regulated. So, in the view of the Italian Shipowners' Association, Paolo D'Amico, the term of the 30th June to employ them has to be prorogated to 31st December 2013. So, lacking prompt administrative rules to implement such a decree, it risks to remain ineffective.

The solutions adopted by Spain and Italy offer two models of employment of armed personnel on board to fight piracy. In the first case the use of private guards is allowed and the use of force is regulated. In the case of Italy, a different solution is adopted as the security service is provided by military personnel on the basis of a specific agreement or by private guards, given anyway the priority to the use of VPDs. The common feature of both the solutions is the aim to provide for a security service on board, which resulted cheaper and quicker than the naval counter-piracy actions.

⁵¹ Reference is made, in particular to the Public Security Unified Law Royal Decree No. 773 of 1931 ('Testo unico delle leggi di pubblica sicurezza', Regio Decreto 18 giugno 1931, n. 773), n. 48 above, and the Law 18 April 1975 No. 110 concerning the control of weapons, munitions and explosives, published in the *Gazzetta Ufficiale* 21 April 1975 No. 105.

⁵² <<http://www.lastampa.it/2013/04/04/societa/mare/niente-contractor-a-bordo-delle-navi-italiane-9dodnlWc0Roe1tutK5bnbL/pagina.html>>.

Some conclusive considerations on the lights and shadows of the actual legal context can be made, taking into account the aforementioned legal experiences.

Both Spain and Italy lead the employ of private security back to a legal framework. The strict regulation of the private armed guards, all the provisions limiting the use of force, let aside any possibility of unregulated resort to Companies or Individual Contractors not matching the standards required.

The Italian domestic provisions, enacted after the Guidelines issued by the IMO on private maritime security companies, implement in a very strict way them in the domestic law. The Spanish legislation is older, so it is less correspondent to the IMO Guidelines, anyway without being apparently in contrast with them. In this case, the use of force allowed is a very high level one. The preference given to the use of VPDs instead of privately armed security personnel is also in line with the IMO Guidelines, which state that ‘the provision of Military Vessel Protection Detachments (VPDs) deployed to protect vulnerable shipping is the recommended option when considering armed guards’.⁵³

The Italian legislation, compared to other solutions, appear more comprehensive, as it allows both the use of VPDs and private guards. The priority is given to VPDs, but, lacking them, the shipowners have also the chance to hire private guards, under certain conditions.

Anyway, the rationale of both Spanish and Italian legislation is to find another way to fight piracy beside the naval actions. In the practice, the employ of (military or private) armed personnel on board is cheaper and more cost-effective than a naval action.

It seems to be a winning solution, compared to the naval intervention on other grounds too. Even if a ship is in the area, it can arrive late to face an imminent pirate attack to a merchant ship, while the presence on board allows a faster reaction. For these reasons, nowadays several domestic solutions, bearing in mind the IMO suggestions, appear oriented to follow the approach of employing armed personnel on board to fight piracy.

⁵³ International Maritime Organization, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia. Best Management Practices for Protection against Somalia Based Piracy*, n.1 above, at 40.

ARREST, DETENTION AND TRANSFER OF PIRACY SUSPECTS: A CRITICAL APPRAISAL OF THE GERMAN *COURIER* CASE DECISION

Anna Petrig*

I. Introduction; II. The Courier Case in a Nutshell; III. Legal Basis for Arresting Piracy Suspects; A. Courier Case: Article 105 Unclos Provides Sufficient Legal Basis; B. Critical Appraisal; 1. Lawfulness as a Component of the Right to Liberty; 2. Article 105 UNCLOS Lacks a Procedural Component; IV. Procedural Safeguards for Detained Piracy Suspects; A. Courier Case: Sufficient to See a Judge in the Receiving State; B. Critical Appraisal; 1. The Principle: Judicial Control by the Seizing State; a) Rigopoulos and Medvedyev: Impertinent Cases to the Issue at Hand; b) Arguments against the Proposition 'a Judge is a Judge'; 2. The Modalities: When and How to bring Piracy Suspects Before a Judge; a) Granting Judicial Control Soon after the Initial Arrest; b) Providing an Opportunity to be Heard; V. Conclusion.

I. Introduction

Patrolling naval States contributing to national or multinational counter-piracy missions are only exceptionally willing and able to prosecute piracy suspects they took captive in their own criminal courts. The preferred course of action is to transfer the suspects for prosecution to a third State located in the region prone to piracy. Current transfer practices, as well as detention pending surrender for prosecution, is not unproblematic in terms of human rights law, notably when measured against the principle of non-refoulement and the right to liberty. The *Courier* decision by the first instance administrative court of Cologne, Germany, in late 2011¹ demonstrated that this concern is not of a purely academic nature: States engaged in counter-piracy operations off the coast of Somalia and the region may well be held accountable for a failure to respect certain minimum human rights standards – even if enforcing the law as a part of a multinational operation in an extraterritorial, maritime context.

II. The *Courier* Case in a Nutshell

On 3 March 2009, the German frigate *Rheinland Pfalz* contributing to the EU-led Operation Atalanta intercepted a group of persons in a skiff suspected of hav-

* Dr. iur. Anna Petrig, LL.M. Harvard (USA) and University of Basel (Switzerland).

¹ *Re, 'MV Courier'* [2011] 25 K 4280/09 (Verwaltungsgericht Köln, 25. Kammer); as of 25 May 2013, the case was still pending at the appellate level: *Re 'MV Courier'*, 4 A 2948/11 (Oberverwaltungsgericht Münster).

ing carried out a pirate attack against the *Courier*, a vessel owned by a German shipping company and flying the flag of Antigua and Barbuda. The competent German prosecutorial authorities opened an investigation and issued arrest warrants against all nine intercepted persons on 6 March 2009. On the following day, however, the prosecutorial authority discontinued the investigation according to Section 153c of the German Code of Criminal Procedure. This decision was taken after the inter-ministerial decision-making body informed the prosecutorial authorities about its finding that the suspects should be transferred to Kenya pursuant to the transfer agreement concluded between the European Union and Kenya on 6 March 2009. On 10 March 2009, the suspects were handed over to the competent Kenyan authorities for criminal prosecution and detained at Shimo-La-Tewa prison located close to Mombasa, Kenya. One of the transferred suspects brought an administrative action against the German State submitting that his initial arrest, his detention from 3 to 10 March 2009 on board the German frigate and his transfer to Kenya had been unlawful.²

The complaint was successful as to the allegation that the transfer was in breach of human rights law. The Court held Germany³ accountable for transferring the complainant to Kenya in violation of the principle of non-refoulement. It stated that the conditions of detention at the Shimo-La-Tewa prison at the time of the transfer, namely the overcrowding, poor sanitary facilities, shortage of water for hygiene and pest infestation in combination with high temperatures amounted to inhuman and degrading treatment as prohibited by, *inter alia*, Article 3 ECHR, which implicitly contains a prohibition of refoulement.⁴

Meanwhile, the part of the complaint relating to arrest and detention at sea did not convince the Court: It held that the initial arrest was lawful since Article 105 UNCLOS provides a sufficient legal basis for arresting piracy suspects on the high seas.⁵ Furthermore, the Court found that the complainant's detention

² *Re 'MV Courier'*, n. 1 above, at paragraphs 2-9.

³ The German Federal Government argued before the administrative court of Cologne that acts taken by Germany while contributing to EUNAVFOR were not attributable to the German State because a transfer of authority to the European Union took place. While the Court left the issue open regarding arrest and detention, it decided the attribution question regarding the transfer part of the complaint. It opined that Germany played a decisive part in the decision to transfer the suspect and that the violations in relation thereto were attributable to Germany: *ibid.*, at paragraphs 32, 38, 52-59. On the attribution of human rights violations in the context of counter-piracy operations, see Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), 116-130 and Douglas Guilfoyle, "Counter-Piracy Law Enforcement and Human Rights", 59 *International & Comparative Law Quarterly* (2010), 141, 153-159.

⁴ *Re 'MV Courier'*, n. 1 above, at paragraphs 59-77; Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; in force 3 September 1953) (ECHR).

⁵ *Re 'MV Courier'*, n. 1 above, at paragraphs 31-36; United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994) (UNCLOS).

on board the German frigate was in line with the procedural safeguards flowing from the right to liberty. Most importantly, it did not find a violation of the right to liberty even though the complainant was not brought before a German judge while detained on board the German frigate for more than a week. Rather, it decided that the right to be brought before a judge was respected because the complainant was before a Kenyan judge upon his transfer.⁶

It is argued in this paper that the Court's reasoning as to the right to liberty is partly flawed. The right to liberty stipulated in Article 5(1) ECHR and Article 9(1) ICCPR⁷ requires that every arrest and detention is lawful. While Article 105 UNCLOS seems to be a sufficient legal basis in terms of substantive lawfulness, i.e. with regard to deprivation of liberty as such, it is doubtful whether the provision lives up to the requirements of *procedural* lawfulness. As regards the right to be brought promptly before a judge, it is submitted that piracy suspects seized by patrolling naval States have a right to have the legality of their arrest and detention reviewed by a judge of the *seizing* State.

III. Legal Basis for Arresting Piracy Suspects

A. *Courier* Case: Article 105 UNCLOS Provides Sufficient Legal Basis

The applicant alleged that his arrest on 3 March 2009, which took place on the high seas, was unlawful. The Court rejected this part of the complaint finding that the first sentence of Article 105 UNCLOS provides a sufficiently clear and precise legal basis for arresting piracy suspects. It decided that the requirements of this provision were fulfilled in the case at hand. The arrest of the suspect by military forces on board the German frigate – a warship in the sense of Article 107 UNCLOS – took place on the high seas. Furthermore, there was reasonable suspicion that the vessel in question was a pirate ship as defined in Article 103 UNCLOS. The applicant's ship was spotted by a US helicopter in the vicinity of the *Courier* shortly after the vessel was attacked. Moreover, the skiff intercepted by the German frigate carried piracy paraphernalia on board, namely boarding tools and the type of weapons used in the attack against the *Courier*. Overall, the Court concluded that the initial arrest of the complainant was lawful.⁸

B. Critical Appraisal

According to the right to liberty stipulated under Article 5 ECHR and Article

⁶ *Re 'MV Courier'*, n. 1 above, at paragraphs 37-50.

⁷ International Covenant on Civil and Political Rights (New York, 16 December 1966; in force 23 March 1976) (ICCPR).

⁸ *Re 'MV Courier'*, n. 1 above, at paragraphs 31-36.

9 ICCPR, every deprivation of liberty must be covered by a justificatory ground, free from arbitrariness and lawful. The issue at stake in the *Courier* case was the lawfulness requirement, which is also at the centre of the following analysis.

1. Lawfulness as a Component of the Right to Liberty

Both the right to liberty under the ECHR as well as the similar guarantee of the ICCPR require that arrest and detention is lawful. The lawfulness requirement flows from two textual elements of Article 5(1) ECHR, namely from its *chapeau* stating that a person can only be deprived of his liberty ‘in accordance with a procedure prescribed by law’, and from the justificatory ground stipulated in Article 5(1) (c) ECHR where the attribute ‘lawful’ precedes the words ‘arrest and detention’. The provision thus contains a double test of legality.⁹ A fundamental command flowing from the lawfulness requirement is that any arrest or detention requires a legal basis.¹⁰ The requirement that a legal basis for deprivation of liberty must exist relates to both the deprivation of liberty as such, namely describing the grounds justifying a deprivation of liberty (‘substantive lawfulness’), and the domestic procedure by which arrest and detention are imposed (‘procedural lawfulness’). The legal basis providing for deprivation of liberty and describing the relevant procedure to deprive a person of his liberty is generally found in national law.¹¹ However, it can also stem from international law.¹² Regardless of whether the legal basis governing deprivation of liberty is a rule of international or domestic law, it must fulfil certain formal criteria. First of all, the legal basis providing for deprivation of liberty and governing the relevant procedure must be pre-existing.¹³ Further, the general principles of legal certainty and rule of law, which are particularly important regarding interferences with the right to liberty, require domestic law to be of a certain quality. According to the Court, the ‘quality of law’ standard implies that a law governing deprivation of liberty must be ‘sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness’.¹⁴ Sufficient precision, in turn, ‘allow[s] the citizen – if need

⁹ Stefan Trechsel and Sarah Summers (eds.), *Human Rights in Criminal Proceedings* (2006), at 419. In their case law, the Strasbourg organs do not clearly distinguish between these two textual elements. Rather, they examined them together under the heading of ‘lawfulness’: instead of many, see ECtHR, 8 February 2005, *Bordovskiy v. Russia*, App no 49491/99, at paragraph 41.

¹⁰ ECtHR, 21 April 2009, *Stephens v. Malta (No 1)*, App no 11956/07, at paragraph 61.

¹¹ On the notion of ‘law’, see Trechsel and Summers, n. 9 above, at 419.

¹² Council of Europe/European Court of Human Rights, “Guide on Article 5: Right to Liberty and Security – Article 5 of the Convention” (2012) found at: <www.echr.coe.int/NR/rdonlyres/45CE4A15-7110-494E-8899-AC824132C136/0/POINTS_CLES_Article_5_EN.pdf>, referring to ECtHR, 29 March 2010, *Medvedyev and Others v. France (Grand Chamber)*, App no 3394/03, at paragraph 79.

¹³ ECtHR, 7 June 2007, *Garabayev v. Russia*, App no 38411/02, at paragraph 87.

¹⁴ See, e.g., ECtHR, 11 October 2007, *Nasrulloev v. Russia*, App no 656/06, at paragraph 71; ECtHR, 24 April 2008, *Ismoilov and others v. Russia*, App no 2947/06, at paragraph 137; ECtHR, 23 October 2008, *Soldatenko v. Ukraine*, App no 2440/07, at paragraph 111; ECtHR,

be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’.¹⁵

Article 9(1) ICCPR stipulates that no person shall be deprived of his liberty ‘except on such grounds and in accordance with such procedure as are established by law’. Thus, similar to Article 5(1) ECHR, the Covenant requires that deprivation of liberty is governed by law. On the one hand, there must be a legal basis describing grounds on which liberty may be deprived. This is referred to as the substantive component of lawfulness. On the other hand, the procedure applied in order to deprive a person of his liberty, i.e. the procedural component of lawfulness, must also be laid down in law.¹⁶ Thereby, the law governing deprivation of liberty must be of a certain quality. It must describe the grounds and procedure for depriving a person of his liberty clearly¹⁷ and with sufficient specificity.¹⁸ In other words, vague provisions or provisions couched in general terms are not in line with the principle of legality,¹⁹ which requires that rules governing arrest and detention are predictable.²⁰ Furthermore, these legal bases must be accessible to all persons subject to the relevant jurisdiction.²¹

2. *Article 105 UNCLOS Lacks a Procedural Component*

Domestic law does not necessarily provide a legal basis for arrest and detention of piracy suspects. This holds especially true for States, such as Germany, which contend that their codes of criminal procedure ordinarily governing arrest and detention on suspicion of criminal activity is inapplicable *ratione personae* to their navies.²² These States generally argue that Article 105 UNCLOS fills this normative gap left by domestic law regarding arrest and detention of piracy suspects on the high seas carried out by military forces. However, to date, neither the European Court of Human Rights nor the Human Rights Committee has had

8 January 2009, *Khudyakova v. Russia*, App no 13476/04, at paragraph 68.

¹⁵ *Stephens v. Malta (No 1)*, n. 10 above, at paragraph 61.

¹⁶ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn., 2005), at 223.

¹⁷ *Ibid.*, at 223.

¹⁸ Scott Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (2003), at 82.

¹⁹ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed., 2004), at 309; Carlson and Gisvold, n. 18 above, at 83.

²⁰ Roza Pati, *Due Process and International Terrorism* (2009), at 42.

²¹ Nowak, n. 16 above, at 223; Carlson and Gisvold, n. 18 above, at 83.

²² For the German Navy, see Claus Krefß, “Die moderne Piraterie, das Strafrecht und die Menschenrechte: Gedanken aus Anlass der deutschen Mitwirkung an der Seeoperation ATALANTA”, in Dieter Weingärtner (ed.), *Die Bundeswehr als Armee im Einsatz: Entwicklungen im nationalen und internationalen Recht* (2010), 99, 110.

a chance to examine Article 105 UNCLOS in light of the lawfulness requirement.²³ In doctrine, opinions diverge as to whether Article 105 UNCLOS is a sufficient legal basis in terms of Article 5(1) ECHR and Article 9(1) ICCPR, and the discussion is generally concentrated on the former provision. It is argued in the following analysis that the UNCLOS provision seems sufficient in terms of *substantive* lawfulness but lacks a procedural component and, as a result, arguably does not live up to the requirement of *procedural* lawfulness under the right of liberty.

With regard to piracy in the technical sense, i.e. as defined in Article 101 UNCLOS, it is argued that Article 105 UNCLOS sufficiently regulates deprivation of liberty as such. *Ratione personae*, Article 105 UNCLOS allows for the arrest of persons on board a pirate ship or a ship taken by piracy and under the control of pirates. Read together with the other piracy enforcement provisions of the UNCLOS, notably Article 101 UNCLOS defining ‘piracy’ and Article 103 UNCLOS defining a ‘pirate ship’, Article 105 UNCLOS sufficiently describes who can be deprived of his liberty. Furthermore, since piracy can only be committed on the high seas according to Article 101 UNCLOS, also the area in which a person can be deprived of his liberty is sufficiently defined.²⁴ Seen through the eyes of law enforcement officials deployed to counter-piracy operations, these legal norms indeed define the circle of persons against whom enforcement measures can be taken with sufficient clarity. The far greater challenge for forces deployed is of an operational rather than legal nature and lies in distinguishing alleged pirates from fishermen armed for the purpose of self-defence. Yet, from a legal point of view, the concepts of ‘pirate ship’ and ‘ship taken by piracy and under the control of pirates’ used in Article 105 UNCLOS and defined by virtue of Articles 101 and 103 UNCLOS – which taken together define the category of persons against whom the enforcement measures of arrest and detention can be taken – leave many definitional ambiguities. Essentially, it suffices to state that these interpretational uncertainties mainly stem from a complicated system of cross references between Articles 101, 103 and 105 UNCLOS.²⁵ However, despite these definitional ambiguities with regard to Article 105 UNCLOS, read together with Articles 101 and 103 UNCLOS, the provision seems to sufficiently describe who may be arrested in what geographical area.

The requisite level of suspicion required for an arrest is not explicitly mentioned in Article 105 UNCLOS. However, guidance in this respect can be gained from other UNCLOS counter-piracy provisions and most notably from a comparison with the right of visit stipulated in Article 110 UNCLOS. For the exercise of the (mere) right of visit, it suffices that the patrolling naval State has ‘rea-

²³ Ibid, at 112.

²⁴ Ibid, at 111; the author makes this statement regarding Article 105 UNCLOS read together with the German law pertaining to UNCLOS (*deutsches Vertragsgesetz*).

²⁵ For a detailed account on definitional ambiguities with regard to pirate ships, see Geiss and Petrig, n. 3 above, 64-65.

sonable grounds for suspecting' that the ship in question is engaged in piracy.²⁶ The logic of Article 110(2) UNCLOS is that as the initial suspicion is gradually substantiated, the range of enforcement powers is proportionally extended.²⁷ Ultimately, once the suspicion has been confirmed and the ship identified as a pirate ship according to Article 103 UNCLOS, the enforcement powers of Article 105 UNCLOS become available.²⁸

In sum, Article 105 UNCLOS, when read in its context, is arguably sufficiently clear and precise in terms of defining the requisite level of suspicion necessary for carrying out an arrest as it is with regard to the persons that can be arrested and the geographical area in which an arrest can take place. Therefore, it can be concluded that Article 105 UNCLOS may be a sufficient legal basis when measured by the standard pertaining to *substantive* lawfulness.

We now turn to the question whether Article 105 UNCLOS is sufficient in terms of *procedural* lawfulness as required by Article 5(1) ECHR and Article 9(1) ICCPR. With regard to the procedure to be followed when arresting or detaining a piracy suspect, it has been argued that Article 105 UNCLOS provides a sufficient legal basis – even though the provision is completely silent in terms of procedure. Germany, among other States, argues that in situations of private arrest, the domestic provision giving everybody the right to arrest persons caught red-handed²⁹ does not set forth procedural rules either, and yet it is a sufficient legal basis for depriving a person of his liberty.³⁰ However, this analogy seems inaccurate. The right of any person to arrest under domestic law primarily aims to avoid private persons being held liable for unlawful confinement because they took the (commendable) initiative to overpower an alleged offender caught in the act. It would, quite obviously, not make sense to oblige private persons to undertake further procedural steps. Even though the words 'any person' in the German provision regarding private arrest can be understood as also encompassing law enforcement officials, the flagrant character of situations under this provision and in counter-piracy operations are different and hardly comparable. Truly, pirates are also caught red-handed. Such arrests occur, however, within a planned and authorized law enforcement operation where States patrol the sea for the very purpose of combating the criminal phenomenon of Somali-based piracy, notably

²⁶ Article 110(1) UNCLOS.

²⁷ This follows from the third sentence of Article 110(2) UNCLOS, according to which more far-reaching enforcement powers are only available '[i]f suspicion remains'.

²⁸ Geiss and Petrig, n. 3 above, at 56-57.

²⁹ For an example of a provision allowing for private arrest, see Section 127(1) of the German Code of Criminal Procedure (StPO) [2011] Brian Duffet and Monika Erbing (original trs.); Kathleen Müller-Rostin (updated tr.): 'If a person is caught in the act or is being pursued, any person shall be authorized to arrest him provisionally, even without judicial order, if there is reason to suspect flight or if his identity cannot be immediately established'.

³⁰ Kreß, n. 22 above, at 112.

by means of arresting suspects and submitting them for criminal prosecution. Hence, an arrest carried out in the counter-piracy context does not have the same incidental and accidental character as situations of private arrest of alleged offenders caught *in flagranti*. For these reasons, the fact that the provision on private arrests is silent in terms of the procedure to be followed (and yet a valid legal basis for deprivation of liberty) is not a convincing argument for the proposition that Article 105 UNCLOS, which contains no explicit procedural component either, is a sufficient legal basis in light of the procedural lawfulness requirement.

One could argue that Article 105 UNCLOS contains an *implicit* procedural element. However, such an argument must be rejected in light of the drafting history of the provision. Admittedly, a treaty provision must not necessarily be interpreted historically.³¹ However, it bears mentioning that the *travaux préparatoires* of Article 105 UNCLOS (and the other counter-piracy provisions of UNCLOS) suggest that the focus of these provisions is clearly on granting enforcement powers rather than confining them. In other words, Article 105 UNCLOS does not seem to contain a procedural element aimed at curtailing the power to arrest, notably by setting forth a procedure to be followed in cases of arrest and detention or by obliging the seizing State to grant procedural safeguards to persons deprived of their liberty. The UNCLOS was adopted in 1982 – that is, at a time when the idea that human rights considerations must be given weight when enforcing the law had already gained ground. However, during the Third United Nations Conference on the Law of the Sea, held between 1973 and 1982, the interest in piracy was marginal. The counter-piracy provisions were not really discussed but rather (with some largely unexplained, minor changes) imported from the 1958 Convention on the High Seas. Therefore, Article 105 UNCLOS was not given a new meaning in 1982 when the UNCLOS was adopted, but rather reflects the idea behind the identically worded Article 19 of the 1958 Convention on the High Seas.³² The latter provision, in turn, was not thoroughly discussed during its adoption in the 1950s. This was mainly due to the fact that the drafters perceived piracy as an 18th century phenomenon and considered the application of the provision as a rather theoretical scenario.³³ Therefore, Article 43 of the draft of the International Law Commission was adopted as Article 19 of the 1958 Convention on the High Seas without any changes. The basis for the draft of the International Law Commission, in turn, was the Harvard Draft Convention on Piracy of 1932.³⁴ Thus, even though adopted in 1982, the content of Article 105 UNCLOS was largely inspired by a provision drafted in the early 1930s and thus

³¹ Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 444-448.

³² Geiss and Petrig, n. 3 above, 40-41, 148-49.

³³ This even led some delegates to propose the deletion of all provisions relating to piracy: *ibid.*, at 148.

³⁴ *Ibid.*, at 39-40.

at a time when the individual rights of persons subject to law enforcement measures were not a primary concern. Today, more weight is given to the interests of persons against whom law enforcement measures (at sea) are taken, and the idea of limiting enforcement powers in light of individual rights finds express mention in treaty provisions. This is, for example, evidenced by the safeguards stipulated in the boarding provision of the 2005 SUA Protocol.³⁵

Overall, Article 105 UNCLOS not only lacks an explicit but also an implicit procedural component. Therefore, it is doubtful whether the provision lives up to the requirement of *procedural* lawfulness under Article 5(1) ECHR and Article 9(1) ICCPR. Most notably, Article 105 UNCLOS hardly seems sufficiently precise, clear and foreseeable in terms of the procedure for arrest and detention of piracy suspects and the procedural safeguards to be granted to them as required by the quality of law standard developed under the lawfulness requirement of the right to liberty. In sum, the findings of the Court in the *Courier* case that Article 105 UNCLOS provided a sufficient legal basis for the arrest of the complainant suspected of piracy may be correct as regards substantive lawfulness, but arguably did not sufficiently take into account the procedural dimension of the lawfulness requirement of the right to liberty stipulated in Article 5(1) ECHR and Article 9(1) ICCPR.

IV. Procedural Safeguards for Detained Piracy Suspects

A. *Courier* Case: Sufficient to See a Judge in the Receiving State

The applicant in the *Courier* case further complained that his detention on board the German frigate without being brought before a judge within 48 hours after the arrest as required by Article 104(3) of the German Constitution was unlawful.³⁶ This part of the complaint was rejected even though the applicant was not brought before a German or any other judge while detained on board the German frigate between his arrest on 3 March 2009 and his transfer on 10 March 2009. It was only upon his transfer, on 11 March 2009, that he could avail himself of the right to see a judge.³⁷

The German Government's defence was two-fold. In the first place, it argued that the acts in question were not attributable to Germany, but rather to the European Union. In any event, the aim behind the procedural safeguards granted by the German Constitution is not to hinder the effectiveness of counter-piracy

³⁵ Article 8bis (10) 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (London, 14 October 2005; in force 28 July 2010) (2005 SUA Protocol).

³⁶ *Re 'MV Courier'*, n. 1 above, at paragraphs 37, 39.

³⁷ *Ibid*, at paragraphs 5, 48-49.

operation authorized and encouraged by international law. Even if Germany did not provide for legal review of arrest and detention or any other procedural safeguards, there would be no protective gap so long as it is ensured that the suspect is transferred to a State where he ultimately benefits from the respective human rights guarantees.³⁸ Concretely, Article 5(3) ECHR guaranteeing the right to be brought promptly before a judge was not violated in the case at hand because the suspect was brought promptly before a Kenyan judge.³⁹ Thus, while the German Government does not deny the applicability of Article 5(3) ECHR as such,⁴⁰ it takes the stance that the provision does not require that the piracy suspect be brought before a judge of the seizing State, i.e. Germany. Rather, it suffices that the person is brought promptly before a judge in the receiving State, which was Kenya and thus not a State bound by the ECHR in the case at hand. In short, Germany's interpretation of Article 5(3) ECHR seems to be that 'a judge is a judge' – whether the judge is from the seizing State or a third receiving State (even if not bound by the ECHR) does not seem to matter.

This argument received support by the administrative court of first instance of Cologne. It decided that Article 104(3) of the German Constitution stipulating that every criminal suspect must see a judge within 48 hours had to be modified in two ways due to the special context of the case. Firstly, it stated that the strict time frame of 48 hours stipulated in Article 104(3) of the German Constitution need not be respected. Rather, in the Court's view, it suffices if – in line with the wording of Article 5(3) ECHR and Article 9(3) ICCPR – the suspect is brought 'promptly' before a judge and, in the case at hand, seven days was considered sufficient to meet the promptness requirement.⁴¹ Secondly, it held that Article 104(3) of the German Constitution was not violated by bringing the suspect before a Kenyan judge rather than a German judge. To the contrary, it argued that since the suspect's criminal prosecution was ultimately going to take place in Kenya, only a Kenyan judge was competent to review the legality of arrest and detention.⁴²

This reasoning begs the fundamental question whether the word 'judge' of Article 5(3) ECHR and Article 9(3) ICCPR – both granting the right to be brought promptly before a judge or judicial officer – refers to a judge of the seizing State only, or whether it can be a judge of the receiving and ultimately prosecuting State or even a judge of any third State.

³⁸ Ibid, at paragraphs 20-23.

³⁹ Ibid, at paragraphs 24-26.

⁴⁰ Rather, it expressly states that this provision has been respected: *ibid*, at paragraph 24.

⁴¹ Ibid, at paragraphs 39-48.

⁴² Ibid, at paragraph 49.

B. Critical Appraisal

1. *The Principle: Judicial Control by the Seizing State*

It is submitted here that Article 5(3) ECHR and Article 9(3) ICCPR are not respected if piracy suspects are brought before a judge of the receiving and ultimately prosecuting State for judicial control of deprivation of liberty at sea by the seizing State. Rather, piracy suspects must be brought before a judge of the seizing State.

a) *Rigopoulos and Medvedyev: Impertinent Cases to the Issue at Hand*

The German Federal Government argued in the *Courier* case that Article 5(3) ECHR was complied with because the suspect was transferred to Kenya where he was brought before a judge on the day following his surrender. It argued that the delay of seven days between arrest and judicial control met the promptness requirement since, according to *Rigopoulos v. Spain* and *Medvedyev and Others v. France*⁴³ decided by the European Court of Human Rights, exceptional circumstances can justify a longer time frame and Germany transferred the suspect to the closest State willing to prosecute.⁴⁴

It is certainly true that the European Court of Human Rights bestowed the notion of ‘promptness’ with a broad meaning in *Rigopoulos* and *Medvedyev*.⁴⁵ However, it is submitted here that these two cases are impertinent to the situation at hand because the facts differ as to a crucial point. In both *Rigopoulos* and *Medvedyev*, after about two weeks, the suspects were ultimately brought before a judge of the seizing State where they could challenge the legality of their arrest and detention by the seizing and – *nota bene* – arresting and detaining State. Absent from the facts to be considered in *Rigopoulos* and *Medvedyev* were a possible surrender to a third State for prosecution and the proposition that the suspects could be brought before a judge of that receiving State. In short, the question decided by the Court was how long State A, which has seized suspects at sea far from the mainland authorities, can take to bring the suspects before its *own* judge on the mainland (i.e. a judge of State A).⁴⁶

⁴³ ECtHR, 12 January 1999, *Rigopoulos v. Spain*, App no 37388/97 and *Medvedyev*, n. 12 above.

⁴⁴ *Re ‘MV Courier’*, n. 1 above, at paragraphs 37-50, specifically at paragraph 47.

⁴⁵ The European Court of Human Rights decided in these two cases that the exceptional circumstances of these specific arrests on the high seas justified longer periods and that no violation on the promptness requirement occurred even though 16 and 13 days respectively elapsed between arrest and judicial control: *Rigopoulos*, n. 43 above, at paragraphs 8-13 of the legal considerations, and *Medvedyev*, n. 12 above, at paragraphs 127-134.

⁴⁶ The facts of these two cases, which at no point involved the idea of surrender for prosecution and bringing the suspects before a court of the receiving and ultimately prosecuting State, are as follows: In *Rigopoulos*, n. 43 above, Spain requested and received flag State authorization to board and search the suspected vessel, which was intercepted on the high seas by Spanish customs officials. The ship was thereupon escorted to the Canary Islands, which belong to Spain, and from there flown to the Spanish mainland for investigation and prosecution (The

However, in the situation under consideration in the *Courier* case and counter-piracy operations in general, piracy suspects are seized, arrested and detained by State A and brought before a judge of State B, which is supposed to grant judicial control of deprivation of liberty at sea by State A. Whether this is permissible under Article 5(3) ECHR – and, if so, how long such a process can take – was not decided in *Rigopoulos* or *Medvedyev*. Put differently, the European Court of Human Rights did not decide a case involving disposition of a criminal case involving suspects seized at sea and their ultimate transfer to a third State and the meaning of Article 5(3) ECHR in such a situation. Rather, it ruled on an arrest by State A that brought the suspects before its own courts in State A – where the suspects could ultimately challenge the legality of arrest and detention by State A before a judge of that same State. The simple fact that both the arrest of piracy suspects and the arrests in *Rigopoulos* and *Medvedyev* took place in a maritime context is not sufficient to apply the Court’s *ratio decidendi* to piracy suspects seized by one State and brought to a third State for prosecution and judicial control of deprivation of liberty at sea. Hence, the administrative court’s references to *Rigopoulos* and *Medvedyev* in the *Courier* case are not particularly pertinent to the issue at stake.

b) Arguments against the Proposition ‘a Judge is a Judge’

There are various arguments against the proposition that ‘a judge is a judge’, i.e. that it does not matter whether the suspect deprived of his liberty is brought before a judge of the seizing or receiving State. To begin, two important aspects regarding the right to be brought before a judge, which flow from the principle of *par in parem non habet iudicium/iurisdictionem*,⁴⁷ must be recalled. Firstly, the seizing State can only guarantee and ensure that a piracy suspect it took captive is brought before its own authorities, but the seizing State cannot force the receiving State to bring piracy suspects before a judge of its own courts upon transfer. Secondly, the receiving State is only competent to exercise judicial control over arrest and detention carried out under the authority of its own officials, but not over arrest and detention by the seizing State. Put differently, a judge of the

Facts, A.). In *Medvedyev*, n. 12 above, the French law enforcement authorities requested and received flag State authorization to intercept the suspected ship, which attracted the attention of the Central Office for the Repression of Drug Trafficking (OCRTIS), a ministerial body attached to the Central Police Directorate of the French Ministry of Interior (*ibid*, at paragraphs 9-10). French naval authorities instructed the commander of the French frigate to locate and intercept the suspected ship (*ibid*, at paragraph 12). On 13 June 2002, the suspected ship was spotted and intercepted (*ibid*, at paragraph 13). The same day, a French public prosecutor referred the case to the OCRTIS for examination under the *flagrante delicto* procedure (*ibid*, at paragraph 16). On 24 June 2002, a French prosecutor opened an investigation into the charges (*ibid*, at paragraph 17). On 26 June 2002, the suspected ship entered a port in France under escort (*ibid*, at paragraph 18). The suspects were ultimately prosecuted in France (*ibid*, at paragraphs 24-25).

⁴⁷ See, e.g., Yoram Dinstein, “Par in Parem Non Habet Imperium”, 1 *Israel Law Review* (1966), 407-420.

seizing State is the only judge who can effectively decide whether deprivation of liberty of piracy suspects at sea by officials of the seizing State is justified (and, if not, to order their release). Meanwhile, a judge of the receiving State is only competent to review the legality of arrest and detention upon transfer, i.e. land-based deprivation of liberty (and, if not, to order the suspect's release).⁴⁸ Hence, deprivation of liberty at sea by the seizing State and deprivation of liberty on land by the receiving State upon transfer are two separate spheres, each of which falls within the purview of a different jurisdiction.

Departing from this premise, we now turn to the purpose of Article 5(3) ECHR and Article 9(3) ICCPR, which equally exclude the idea that deprivation of liberty at sea by the seizing State can be reviewed by the receiving State upon transfer. First of all, it must be stressed that Article 5(3) ECHR and Article 9(3) ICCPR are not conceptualized as compensatory rights as are Article 5(5) ECHR and Article 9(5) ICCPR. From this follows that it is insufficient if judicial control is only provided *after* deprivation of liberty has ended in order to decide whether it was justified and, if not, to provide for monetary or another form of compensation – a remedy of a merely *compensatory* character. Rather, the purpose behind Article 5(3) ECHR and Article 9(3) ICCPR is of a *preventive* nature – concretely, to prevent arbitrary detention, abuse of power and ill-treatment by the very intervention of a judge. Hence, only if the right to be brought before a judge is granted *while* the person is deprived of his liberty can the purpose of Article 5(3) ECHR and Article 9(3) ICCPR be realized. Put another way, if judicial control is only granted in the receiving State upon surrender, i.e. when deprivation of liberty at sea has already ended, the preventive purpose of these provisions cannot be achieved.

Even if, *arguendo*, the receiving State had granted judicial control while the suspects were still detained by the seizing State at sea (for example, by means of video link), the remedy would still be ineffective because a judge of the receiving State is not competent to decide on a violation of the right to liberty by the seizing State and to order release in a case of unjustified deprivation of liberty – which is a necessary characteristic of a judge in the sense of Article 5(3) ECHR and Article 9(3) ICCPR⁴⁹ – due to the principle *par in parem non habet iudicium/iurisdictio-nem*. Furthermore, the right to be brought before a judge cannot be interpreted in

⁴⁸ See, e.g., *Re 'MS Samanyolu' (Judgment)* [2010] LJN: BM8116 (Rotterdam District Court, English translation provided by UNICRI), 5-7, where the Rotterdam court could not decide on a violation of Article 5(3) ECHR by the seizing State (Denmark) and limited its judicial control to the question whether the violation by the seizing State was attributable to the receiving State (the Netherlands).

⁴⁹ Council of Europe/European Court of Human Rights, n. 12 above, at paragraph 139 (regarding the ECHR); Stephen Bailey, "Rights in the Administration of Justice", in David Harris and Sarah Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995), at 205 (regarding the ICCPR).

a way that leads to absurd or unreasonable results that run counter to the effective protection of persons under a State's jurisdiction.⁵⁰ Yet, this is exactly what happens if the notion of 'judge' is read as offering a choice between bringing the piracy suspect before a judge of the seizing or receiving State. While the seizing State does not see itself competent to grant judicial control (for factual reasons), the receiving State is certainly not competent to do so either (for legal reasons) – this leads to the result that judicial control of arrest and detention of piracy suspects at sea disappears into a 'black hole' of jurisdictional conflict, so to speak. Such an interpretation of Article 5(3) ECHR and Article 9(3) ICCPR seems impermissible.

Moreover, we must bear in mind that a great number of suspects – up to 90 per cent in early 2011 when the catch-and-release practice peaked once more – are ultimately released for various reasons, namely for a failure to identify a State willing and able to receive piracy suspects for criminal prosecution.⁵¹ In all these cases, the initial arrest and detention pending the decision of the seizing State whether to prosecute the suspects in its own courts is based on Article 5(1)(c) ECHR, hence Article 5(3) ECHR applies. However, despite the existence of an obligation to bring the suspects before a judge, many patrolling naval States do not discharge it properly, i.e. the suspects are not granted judicial control by a judge of the seizing State at any point. Besides, given that no transfer will take place for one reason or another, no argument can be made that a judge of the receiving State can grant judicial control instead of the seizing State. Hence, in the significant number of cases where suspects are ultimately released rather than transferred, no judicial control of their arrest and detention takes place – not even, as is proposed in cases of transfer, by the receiving State.

To conclude, the basic idea behind the right to be brought before a judge – to subject the power of arrest and detention to judicial control – is also valid in the context of piracy. The power to deprive a person of his liberty and the obligation to grant judicial control of arrest and detention thus cannot be split between two States. Rather, the authorization to arrest and detain and its control must always be glued together – otherwise protection against arbitrary and unjustified deprivation of liberty is seriously weakened. Therefore, the notion of 'judge' in Article 5(3) ECHR and Article 9(3) ICCPR only refers to a judge of the seizing State, under the authority of which arrest and detention of piracy suspects at sea takes place. Applied to the fact pattern of the *Courier* case, this implies that the complainant should have been brought before a German judge in order to have his

⁵⁰ Steven Greer, *The Margin of Appreciation: Interpretation and discretion under the European Convention on Human Rights* (2000), at 15; Birgit Schlütter, "Aspects of Human Rights Interpretation by the UN Treaty Bodies", in Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012), 286-287.

⁵¹ Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region (UN Doc. S/2012/50, 20 January 2012), at paragraph 9.

arrest and detention at sea by German officials subjected to judicial control. We now turn to the question of how such judicial control can be granted in practice.

2. *The Modalities: When and How to bring Piracy Suspects Before a Judge*

We concluded that Article 5(3) ECHR and Article 9(3) ICCPR require that the suspect is brought before a judge of the seizing State rather than before a judge of the receiving or any other third State. This begs the question of the moment when judicial control must be granted – whether it is immediately after seizure and during the deliberations of the seizing State whether to prosecute the suspects in its own courts or only once the seizing State has decided to exercise its jurisdiction over the suspects. Furthermore, it must be discussed whether, under the provisions, it is necessary that piracy suspects physically appear before a judge or if the decisive aspect is the granting of the right to be personally heard.

a) Granting Judicial Control Soon after the Initial Arrest

According to Article 5(3) ECHR and Article 9(3) ICCPR, the right to be brought before a judge must be granted ‘promptly’. As a general rule, the promptness requirement does not permit a delay of more than approximately three days. However, the acceptable delay ultimately depends on the specificities of each case.⁵² Thus, the European Court of Human Rights found in *Rigopoulos* and *Medvedyev* that the wholly exceptional factual circumstances did not allow for the applicants to be brought before a judge any earlier than 16 and 13 days respectively after arrest at sea, which occurred far from the mainland authorities of the intercepting State, and thus the Court did not find a violation of the promptness requirement.⁵³ As a result, the question is whether arrest and detention of piracy suspects is comparable to the situations adjudicated in *Rigopoulos* and *Medvedyev*, and thus whether the broad interpretation of the promptness requirement is applicable to the situation under consideration here.

In the context of piracy, the initial arrest, and also detention during the deliberations of the seizing State whether the suspects will be prosecuted in domestic courts, must be based on Article 5(1)(c) ECHR. The provision equally applies in cases where the seizing State decides to exercise its criminal jurisdiction over the suspects. Hence, Article 5(3) ECHR is applicable from the initial seizure and also during the deliberations of the seizing State whether to prosecute the suspects in its courts – and remains applicable if it exceptionally decides to do so. Put differently, Article 5(3) ECHR is already applicable at a time when it is not yet clear whether the suspect will ultimately be prosecuted at all and, if such a prosecution occurs,

⁵² Pieter Van Dijk and others (eds.), *Theory and Practice of the European Convention on Human Rights* (4th edn., 2006), at 488; Robert Esser, “Die Strafprozessordnung und das Gerichtsverfassungsgesetz: EMRK, IPBPR”, in Volker Erb (ed.), *Grosskommentar Löwe-Rosenberg* (26th edn., 2012), at 276; Council of Europe/European Court of Human Rights, n. 12 above, at paragraphs 118-121.

⁵³ See n. 45 above.

whether it will take place in the seizing State or in a third State, i.e. when the case is in limbo as regards the criminal forum in which the suspects will be prosecuted. This identification and determination of the forum is the very purpose of the disposition of piracy cases.

In *Rigopoulos* and *Medvedyev*, no such disposition procedure took place. Rather, it was clear from the outset that the suspects were to be submitted for investigation and prosecution in the intercepting State, as evidenced by the fact that France and Spain sent law enforcement officials out for the very purpose of seizing these specific vessels and crews.⁵⁴ Put another way, during the 16 and 13 days, no disposition procedure took place but this time was rather necessary to physically bring the suspects to a home port and to bring them before a judge – the endeavour to transport the suspects to the mainland was immediately started after interdiction and was not delayed by a disposition procedure, i.e. the identification and determination of a criminal forum. Therefore, *Rigopoulos* and *Medvedyev* do not contain a statement on whether and for how long judicial control can be delayed when a disposition procedure is necessary. Hence, the cases do not answer the question whether judicial control must be granted after the arrest, or whether a State can wait until it has decided whether to prosecute the suspects in its own court.⁵⁵

Various arguments are in favour of granting judicial control soon after arrest. The only advantage of waiting until the disposition procedure yields a clear result on whether the suspects will be prosecuted in the courts of the seizing State is that in cases where it decides to exercise criminal jurisdiction over the suspects, they could physically be brought before a judge of the seizing State – rather than by another means. However, the cases where the seizing State ultimately decides to prosecute the suspects in its own courts are extremely rare. And even if the seizing State decides to do so, proceedings may be discontinued for one reason or another before the suspects are brought on the mainland of the seizing State. Thus, in the vast majority of cases, the seized suspects will never be brought to the mainland of the seizing State and the same operational or practical difficulties – notably how to ‘bring’ a person before a judge when he cannot physically attend a court hearing – exist regardless of whether judicial control is granted soon after arrest or only at a later point. Also, if suspects are not brought before a judge soon after

⁵⁴ See n. 46 above, for the description of the main facts of *Medvedyev* and *Rigopoulos*.

⁵⁵ There is also the view that *Rigopoulos*, n. 43 above, and *Medvedyev*, n. 12 above, are pertinent to the situation at hand. See, e.g., *Re ‘MS Samanyolu’*, n. 48 above, 5-6; the Court considered the cases pertinent for deciding whether the promptness requirement in this case was fulfilled, even though the delay between arrest and judicial control of 40 days was first and foremost due to the forum determination, i.e. disposition procedure, rather than the transport from the Danish warship to Dutch territory. However, it then decided that more than one month was not necessary in light of the factual circumstances of the case. See also Robert Esser and Sebastian Fischer, “Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen: Die EU-Operation Atalanta im Spiegel von EMRK, IPBPR und GG” *Juristische Rundschau* (2010), 513, 521-523, who depart from the idea that the *ratio decidendi* of these two cases is, in principle, pertinent.

their arrest, and they are ultimately released because a State willing and able to prosecute them cannot be identified, it is an illusion (and not in the interest of the seized persons either) that they are kept on board the warship of the seizing State any longer than necessary for presenting their case to a judge controlling the legality of their arrest and detention because of the scarce resources available for counter-piracy operations.

In addition to these arguments of a rather practical and operational nature, there are also more principled reasons for granting judicial control immediately. We concluded earlier that the lawfulness of detention, especially as regards its procedural component, may raise issues in the context of piracy. Therefore, the intervention of a judge who decides on the merits of arrest and detention allows for deprivation of liberty in counter-piracy operations to be subjected to the rule of law. Moreover, the purpose behind Article 5(3) ECHR and Article 9(3) ICCPR, to prevent abuse of power and to keep unjustified deprivation of liberty to a minimum, can only be realized if judicial control is granted soon after the arrest given that the disposition phase may not last very long overall – even if, in some cases, more than one month had elapsed between arrest and surrender for prosecution.⁵⁶

b) Providing an Opportunity to be Heard

Since judicial control of deprivation of liberty at sea by the seizing State must be granted soon after the arrest by the seizing State, it is by and large materially impossible for the suspect to physically appear before a mainland judge. At the same time, there is generally no official with judicial powers in the sense of Article 5(3) ECHR and Article 9(3) ICCPR on board the law enforcement vessel of the seizing State.

It is submitted here that the essence of the right to be brought before a judge is to enable the suspect to exercise his right to be heard and present his case. The wording of the provision does not explicitly state that the person must be ‘physically’ brought before a judge. Yet even if the wording of the provision were to be read in this way, a teleological reduction of the provision is necessary: If requiring personal attendance at a hearing implies that *no* judicial control is granted because such attendance is materially impossible, it is still more protective if there is an opportunity to be heard by means other than physical presence (even if such means are said to be weaker). Hence, Article 5(3) ECHR and Article 9(3) ICCPR must be interpreted as requiring that the suspect can exercise his right to be heard, i.e. be provided with an opportunity to present his case – whether through personal attendance of a hearing or by another means.

There are a number of options for ensuring direct or indirect communication between the suspect detained at sea and the mainland judge. As an example, in the Danish *Elly Mærsk* case, the suspects detained at sea were given legal coun-

⁵⁶ *Re ‘MS Samanyolu’*, n. 48 above, at 5: in this case, more than a month elapsed between arrest by the Danish forces and transfer to the Netherlands.

sel who represented them at an oral hearing held in Copenhagen, Denmark.⁵⁷ Thereby, it is necessary that counsel can communicate with the suspects, for example, by means of video link – with which warships of many States contributing to the counter-piracy operations off the coast of Somalia and the region are equipped.⁵⁸ By means of video link, it is even possible to allow for direct communication between the judge and the piracy suspects. The example of Spain demonstrates that this is a practicable solution.⁵⁹ It is important that the judge receives information not only from the arresting and detaining authorities but also directly or indirectly (through the legal representative) from the suspect deprived of his liberty. Hence, even though the newly enacted French law providing for a decision by a judge on deprivation of liberty occurring at sea within 48 hours of arrest is highly commendable, it remains to be seen whether it is compatible with Article 5(3) ECHR and Article 9(3) ICCPR since it is in the discretion of the judge whether to communicate with the suspects or to base the decision on information requested from the prosecutor.⁶⁰

V. Conclusion

The *Courier* decision is arguably flawed as regards the finding that Article 105 UNCLOS provides a sufficient legal basis for arresting piracy suspects. While the provision seems sufficient in terms of substantive lawfulness in the sense of Article 5(1) ECHR and Article 9(1) ICCPR, it lacks a procedural component and arguably does not fulfil the procedural lawfulness component of the right to liberty. Furthermore, the proposition by the administrative court of first instance that ‘a judge is a judge’ – whether from the seizing or receiving State – is arguably not in line with the requirements flowing from the right to be brought promptly before a judge as

⁵⁷ Birgit Feldtmann, “Should we rule out criminal law as a means of fighting maritime piracy: An essay on the challenges and possibilities of prosecuting Somali pirates”, in Ulrika Andersson, Christoffer Wong and Helén Örnemark Hansen (eds.), *Festskrift till Per Ole Träskman* (2011), at 179; *Re ‘MV Elly Mærsk’*, U.2011.3066H, TfK2011.923/1 (Højesteret – Supreme Court of Denmark) (Dansk straffemyndighed for forsøg på at kapre dansk skib i internationalt farvand).

⁵⁸ *Re ‘MS Samanyolu’*, n. 48 above, at 6, states that according to the Dutch Ministry of Justice and Ministry of Defence, naval vessels of the Netherlands participating in the counter-piracy operations off the coast of Somalia and the region are equipped with video teleconferencing systems, precisely to protect the human rights of arrested suspects.

⁵⁹ Spain has already ‘brought’ suspects before a judge by means of video link: information on file with author.

⁶⁰ See third paragraph of Article L. 1521-15 of the Code de la défense, partie législative (2012) (Code de la défense): ‘Sauf impossibilité technique, le juge des libertés et de la détention communique, *s’il le juge utile*, avec la personne faisant objet des mesures de restriction ou de privation de liberté.’ (emphasis added).

stipulated in Article 5(3) ECHR and Article 9(3) ICCPR. Currently, the *Courier* case is pending at the appellate level. It remains to be seen how the second instance court will interpret the right to liberty and what concessions it is ready to make regarding the generally valid standard due to the specificities of counter-piracy operations, notably their extraterritorial, multinational and maritime nature.

To respect the requirements flowing from the right to liberty, which have the purpose of ensuring that no one is deprived of his liberty in an unjustified and arbitrary manner, is certainly not at the discretion of the State. In *El-Masri v. 'the former Yugoslav Republic of Macedonia'*, the Grand Chamber of the European Court of Human Rights stressed yet again that although the investigation of a specific type of criminality, *in casu* terrorist offences, 'undoubtedly presents the authorities with special problems, that does not mean that the authorities have *carte blanche* under Article 5 [ECHR] to arrest suspects and detain them in police custody, free from effective control by the domestic courts'.⁶¹ Hence, the special difficulties and challenges arising in counter-piracy operations, and specifically regarding the arrest and detention of piracy suspects, do not absolve patrolling naval States from the obligation to respect the right to liberty, notably the granting of effective judicial control in the realm of deprivation of liberty.

⁶¹ ECtHR, 13 December 2012, *El-Masri v. 'the former Yugoslav Republic of Macedonia'*, App no 39630/09, at paragraph 232.

**COUNTER-PIRACY STATE PRACTICE IN MAURITIUS.
EXPOSÉ MADE FOR WORKSHOP ON “INSECURITY AT SEA:
PIRACY AND OTHER RISKS TO NAVIGATION”**

*Nataraj J Muneesamy**

I. Introduction; A. The Statutory Crime of Piracy; 1. Piracy; 2. Attempts and Conspiracy; 3. Maritime Attacks and UNCLOS Issues; a) High Seas Requirement; b) Two Ships Requirement; B. Locus Delicti; C. Investigation and Prosecution; 1. Agreements on Handing Over and Transfer of Persons; 2. Guidance; 3. Evidence Package; D. Trial and Evidential Issues; 1. A New Statutory Exception to Hearsay; 2. Deposition Through Cideo Link; II. Conclusion.

I. Introduction

Mauritius, a small island off the coast of Africa, decided that it had to take a more active part in the fight against piracy. The Somalian fishermen restyled as pirates were the cause of great instability in the region. The attacks though originally located near the Horn of Africa were then slowly moving towards Mauritius and had obvious impacts on tourism, fishing and maritime trade.

The country consequently upgraded its laws concerning piracy and enacted the Piracy and Maritime Violence Act 2011 (PMVA). The new Act came into force fairly recently in June 2012. The crime of Piracy was previously outlawed under Section 213 of Merchant Shipping Act of Mauritius. The relevant provisions dealing with Piracy are now found in PMVA which was enacted with the following objectives in mind: (a) the prosecution of piracy and related offences pursuant to the obligations under the United Nations Convention on the Law of the Sea (UNCLOS), (b) the handing over to Mauritius of persons suspected of having committed acts of piracy, maritime attack and related offences, pursuant to agreements or arrangements with the European Union or other States, for the purposes of investigation and prosecution (c) admissibility, of an out of Court statement in criminal proceedings where the maker of the statement is not available to give evidence and (d) the repatriation of non-citizens suspected of having committed offences, or the transfer of persons convicted of offences.

The purpose of this paper is to provide an overview of the new laws regulating piratical acts in Mauritius and analyse some of the legal and practical issues posed by (A) Statutory crime of Piracy (B) *locus delicti* (C) Investigation and Prosecution (D) Trial and Evidential Issues.

A. The Statutory Crime of Piracy

1. Piracy

Section 3 of ('PMVA'), inspired by Article 101 of UNCLOS, outlaws Piracy. Under Section 3(3)(a), Piracy is defined as being an illegal act of violence or detention, or any act of depredation for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (a) on the high seas against another ship, or aircraft, or persons or property on board such ship or aircraft; or (b) against a ship, aircraft, persons or property on board the ship or aircraft in a place outside the jurisdiction of a State.

Section 3(b) and (c) extend the casting net of offenders to those who indulge in (a) any act of voluntary participation in the operation of a ship or of an aircraft, with knowledge of facts making it a pirate ship or aircraft or (b) any act of inciting or of intentionally facilitating an acts described above.

2. Attempts and Conspiracy

Under Mauritian Criminal Law, accomplices to an offence and attempts to commit a criminal offence are penalised under Section 45 of Interpretation and General Clauses Act. Acts which would amount to Piracy but which fail to materialise through circumstances independent of the perpetrators' intention is punishable. The sentence for accomplices or attempts is the same as that of the predicate offence i.e. 60 years.

The offence of Conspiracy, as per Section 109 of the Criminal Code (Supplementary) Act, is also relevant and criminalises an agreement between two or more persons to do an act which is unlawful, wrongful or harmful to another person. Applied strictly, persons who conspire to commit an act of Piracy would also be criminally liable and can be sentenced to up to a term of ten years imprisonment. Hence, the aforementioned Sections on Attempts and Conspiracy considerably widen the purview of the offences under the PMVA.

3. Maritime Attacks and UNCLOS Issues

a) High Seas Requirement

The UNCLOS piracy provisions concentrate on piratical acts on the high seas but not those occurring in territorial waters.¹ The PMVA, even though inspired by the UNCLOS, differs as it also deals with piratic activities that occur within territorial waters. Under Section 3(3) of PMVA, Maritime Attacks is distinguished from Piracy 'jurisdictionally'. Indeed, Piracy concerns those acts that occur on the high seas while Maritime Attacks occur within territorial waters. It is apposite to note that, as per Section 2 of PMVA, "high seas" is to be interpreted as including the EEZ, and has the same meaning as in UNCLOS i.e. all parts of the sea that are not included in territorial sea or internal waters of Mauritius.

¹ Martin Murphy, "Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?", *Violence at Sea: Piracy in the age of global terrorism* (2011), 155, 182.

From the perspective of the victims, this is a distinction without a difference² and is more legalistic rather practical. Essentially, Section 3(3) on Maritime Attacks ensures that perpetrators of the piratical acts on the high seas are also criminally liable should they pursue their unlawful endeavours within the territorial waters of Mauritius.

b) Two Ships Requirement

The above reasoning would also apply to the ‘two ships’ requirement in the UNCLOS inspired definition of Piracy. Passengers who come “aboard a ship with the express intention of hijacking the ship”³ will not be subject to prosecution for Piracy or Maritime Attack given that the ‘two ships’ element of the offences would be lacking. Section 4 of the PMVA fills in this lacuna to a certain extent by creating the offence of Hijacking where there is use of force or threats of any kind to seize a ship or exercise control of it. Moreover, the aforesaid offence is not restricted to acts committed on territorial waters only. As per Section 4(3), the offence of hijacking is complete irrespective of whether the ship is in Mauritius or elsewhere and irrespective of whether the acts are committed in Mauritius or not.

Similarly, the sentencing provisions are non-discriminatory and treat attacks on the sea as equals. Offenders, be they pirates on the high seas, maritime ‘attackers’ or hijackers are all punished by the same sentence i.e. by a custodial term not exceeding 60 years equating the seriousness of those offences with that of the crime of Murder.

B. *Locus Delicti*

As mentioned above, the difference between Piracy and Maritime Attack is depends on whether the acts take place on the high seas or not. The PMVA therefore gives a wide reach to national courts covering territorial and extra territorial situations. However, the PMVA excludes acts committed within the jurisdiction of another state.

Section 3(a)(i) and Section 3(a)(ii) of PMVA restrict the *locus delicti* to the high seas and to ‘a place outside the jurisdiction of a State’. Consequently, the powers of the Police under Section 3(2) are equally restricted. It is only within the aforesaid boundaries that the police can proceed to stop, board, search, detain or seize a pirate ship or aircraft, or a ship or aircraft taken by and under the control of pirates, arrest any suspects, seize any property or make use of force.

The limitation is common and stems from the respect of the sovereignty of states. However, this gives rise to the problem of “reverse hot pursuit”⁴ e.g. ships from Mauritius will not be able to pursue pirates from the high seas into the

² Ibid.

³ Ibid.

⁴ Ibid.

territorial waters of other states. This problem can be accentuated by the lack of effective sea patrol in the other states and can facilitate the escape of pirates. ‘Reverse hot pursuit’ can nevertheless be resolved by cooperation and agreements among states in the region.

C. Investigation and Prosecution

1. Agreements on Handing Over and Transfer of Persons

Suspects apprehended by naval forces will have to be transferred to Mauritius for detention and prosecution. Consequently, Section 8 of PMVA enables the local authorities to enter into agreements with other Governments or International Organisations for (i) handing over and transfer of persons suspected of having committed offences for the purpose of investigation and eventual trial in Mauritius; (ii) the repatriation of those persons where they are not prosecuted or convicted in Mauritius, and the post-trial transfer of persons convicted.

Interestingly, the PMVA makes specific mention of an agreement entered with European Union on 14th July 2011. The agreement deals with (i) the transfer of persons suspected of attempting to commit, committing or having committed acts of piracy within the area of operation of EUNAVFOR, on the high seas off the territorial seas of Mauritius, Madagascar, the Comoros Islands, Seychelles and Réunion Island, and detained by EUNAVFOR and (ii) the transfer of associated property seized by EUNAVFOR from EUNAVFOR to Mauritius.

2. Guidance

The Office of the Director of Public Prosecutions, the national prosecution agency of Mauritius, issued guidance on the ‘Transfer of Suspected Pirates and Seized Property to Mauritius’ in September 2012 (Guidance’). It sets out standards and procedures for investigations, evidence gathering, successful transfers and prosecutions of piracy suspects in Mauritius.

For example, the guidance specifies that the transfers of suspected pirates and property to Mauritius may be effected both by sea and by air. It also stipulates that the detention of suspected pirates must be immediately communicated to the Prime Minister’s Office (Home Affairs Division) of Mauritius whilst copying in the Director of Public Prosecutions if a request for transfer to Mauritius is being considered.

The standards and procedures encompassed in the Guidance must be complied with to ensure the strongest possible case for the prosecution of piracy suspects in Mauritius. The integrity of the evidence package against each suspected pirate must be maintained throughout the apprehension, detention and transfer processes, to safeguard realistic prospects of successful prosecutions. It is important to note that the failure to comply with the Guidance can result in Mauritius declining to accept the transfer of piracy suspects.

3. Evidence Package

As is often the case, pirates are apprehended by foreign naval forces. The arrest and initial actions taken by the arresting party are crucial for a successful prosecution. Problems will arise when the arresting or initial investigating officers is unfamiliar with the laws of the forum where the pirates will be tried. Moreover, the recording of statements from witnesses can be onerous considering that those witnesses are usually scattered throughout the world and cannot be easily reached for further enquiries.

The Guidance addresses those issues. For instance, the arresting procedure has clearly been spelt out. It further highlights the importance of assigning key tasks to specific officers and restricting witnesses to a minimum. It also emphasises the importance of recording initial statements as accurately and comprehensively as possible. Overall, if properly followed, the Guidance ensures that the evidence package is of satisfactory quality.

It is evident that the quality of the evidence will directly influence the strength of the case for the prosecution and is a cause for particular attention for arresting parties. Commenting on the quality of evidence packages, Alan Cole⁵ wrote:

It is noteworthy that the quality of the evidence packages passed to regional countries by foreign navies has improved dramatically since the early handovers in 2008, and the prosecutors and judges of regional states now routinely report to UNODC that the cases prepared by foreign navies are amongst the very best that they see in their courts.

A proper adherence to the Guidance is conducive to qualitative evidence packages. It will further ensure that evidence can be properly admitted, given due weight and contribute to a successful prosecution.

D. Trial and Evidential Issues

1. A New Statutory Exception to Hearsay

The judicial system in Mauritius is adversarial and relies on common law evidential rules. The burden of proving a case lies on the prosecution. Evidence will have to be given *viva voce* in court by witnesses. The initial statements given by witnesses are not admissible in Court. In other words, no witnesses no evidence.

The hearsay rule and its strict application would amount to a hurdle in piracy cases where the witnesses are most likely going be foreigners or persons usually at sea. It will not always be practical for a witness to travel to Mauritius for the purpose of the trial. The PMVA consequentially amended Section 188 of Courts Act which deals with the admissibility of evidence. The amendment relaxes the

⁵ Alan Cole, *Prosecuting Piracy: Challenges for the Police and the Courts*, found at <http://uaecounterpiracysummit.com/briefing_papers/Cole%20Prosecuting%20Piracy%20-%20Challenges%20for%20the%20Police%20and%20Courts.pdf>.

rule of hearsay in cases dealing with offences under PMVA. Oral evidence can now be adduced if the witness:

- (a) is dead;
- (b) is unfit to be a witness because of his bodily or mental condition;
- (c) is outside Mauritius and it is not reasonably practicable to secure his attendance;
- (d) cannot be found although such steps as is reasonably practicable to take to find him have been undertaken; or
- (e) through fear, does not give or does not continue to give oral evidence in the proceedings, either at all or in connection with the subject matter of the statement.

The above amendment is unprecedented in Mauritius and implies that the attendance of a witness would not been needed in the abovementioned scenarios. The court will decide on the weight to be attached to the evidence after considering the circumstances of the case and drawing any reasonable inference as to its accuracy. Sceptics will say that the amendment is unconstitutional and in contravention of Section 10 of the Constitution of Mauritius which guarantees a right to a fair trial and more particularly Section 10(2)(e) which provides for the examination of witnesses by a defendant.

Section 10 of the Constitution is akin to Article 6 of the European Convention on Human Rights. The validity of similar evidential provisions was questioned before the ECHR in *Al-Khawaja and Tahery v UK*⁶. The court held that:

...While, as the Court has now held, in assessing the fairness of the proceedings, the fact that a conviction is based solely or to a decisive extent on the statement of an absent witness is a very important factor to weigh in the scales and one which requires strong counterbalancing factors, including the existence of effective procedural safeguards, it should not automatically result in a breach of Article 6 § 1 of the Convention.

It follows from the above that if the oral evidence of an absent witness is the sole of decisive cause of the conviction of a pirate, same should have little evidential weight in the absence of counterbalancing factors. Consequently, the weight of such evidence is not comparable to that of a witness who has been confronted to cross-examination. Nevertheless, the evidence would still be admissible and would not automatically result in a breach of Article 6 of the European Convention on Human Rights or Section 10 of the Constitution of Mauritius.

2. *Deposition Through Cideo Link*

A further amendment to the Courts Act extends the use of video link to piracy cases. Indeed according to Section 161B of Courts Act, any witness in relation to an offence under PVMA will be able to depose through a live video or live

⁶ *Al-Khawaja and Tahery v UK*, [2011] ECHR 2127.

television link. In Mauritius, such provisions were previously restricted to the deposition of complainants in sexual offences.

The application of the provisions is however not automatic. A motion would have to be made by the Prosecution and the court will have to exercise its discretion while ensuring that there is a fair hearing. The use of this discretion has remained untested in Mauritius. The case of *R v Redbridge Youth Court; R v Bicester Youth Court*⁷, dealt with similar legislative provisions save that they applied to child witnesses. Nevertheless, the reasoning can be equally applied and extended to the Mauritian provisions. The Court observed:

... But the general legislative purpose of both Sections is the same, namely to provide, in relation to a child, conditions which are most conducive to ensuring that a child is able to give as full an account as possible of the events in question. The procedures are intended to provide a mechanism whereby a child witness who might otherwise be upset, intimidated or traumatised by appearing in court is not as a result inhibited from giving a full and proper account of the events of which he or she was a witness (see *R v McAndrew-Bingham* [1999] 1 WLR 1897). It follows that orders under either Section are appropriate where there is a real risk that the quality of the evidence given by that child would be so affected or that it might even be impossible to obtain any evidence from that child. Fairness to the defendant is achieved by enabling the defendant to see the witness giving evidence in interview, or by a television link, and having a full opportunity to cross-examine by way of the television link.

The Court further stated:

In the instant cases, the only prejudice suggested by the defendants to the criminal proceedings is that they would be deprived of the benefits of seeing and hearing the witnesses live in court. Whilst there is no doubt that this procedure has the advantage of enabling a defendant and the court to see directly the demeanour of the witness and the way in which his or her evidence is given, the court must bear in mind the fact that both the video recording and a television link provide an opportunity, albeit in an indirect form, to carry out that same exercise. The court should also bear in mind that although there may be disadvantages in the indirect method of giving evidence, they do not necessarily disadvantage only the defendant. The impact of evidence given directly to the court is likely to be greater whether it be in favour of the prosecution or the defence.

It follows that witnesses in relation to offences under PMVA will be able to depose where (i) there is a real risk that the quality of the evidence would be af-

⁷ *R v Redbridge Youth Court; R v Bicester Youth Court*, [2001] 4 All ER 411.

fecte d.e.g. out of fear for their own security, or (ii) where it would be impossible to obtain evidence from them otherwise e.g. if they are abroad or at sea.

It is unlikely that the reliance on those provisions will be allowed if same would entail a breach of the right to a fair trial of the defendant. However, the prejudice suffered by the defendant from not seeing or hearing the witnesses live in court is minimal and, in any case, equally detrimental for the prosecution. In the absence of any material prejudice, the reliance on live video or live television link will not affect the fairness of a trial.

II. Conclusion

The PMVA is a comprehensive legislation. Piratical acts have been criminalised irrespective of whether they occur on the high seas or territorial waters. The issues usually related to UNCLOS definition of Piracy have, to a certain extent, also been addressed. It is also important to note that in the fight against Piracy, international cooperation is key. The fact that piracy suspects are apprehended by the naval force of one country and prosecuted by the authorities of another is a vivid example of that.

The Mauritian Government has demonstrated its willingness to play its role in the fight against modern day piracy. The PMVA is ground breaking and innovates by changing the core evidential rules on hearsay in relation to piratic activities. The legislation further provides for special measures regarding the deposition of witnesses by relying on live video or live television links. Those new provisions even though not yet tested in Mauritius have been held to be in conformity with the right to a fair trial in the common law. The consequence of the PMVA and its provisions is that the investigative and prosecuting authorities in Mauritius are adequately equipped to deal with the pirates.

III

OTHER RISKS TO NAVIGATION

RECENT DEVELOPMENTS ON PIRACY AFFECTING THE SHIPPING INDUSTRY

Giannicola Forte*

I. Numbers and Facts on Piracy; II. Reactions of the International Community in the Gulf of Aden; III. The Industry Measures: Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia; IV. The Industry Counter Measures: Private Security Companies, Imo Guidelines and Guardcon Contract; V. The High Risk Area of the Gulf of Guinea: Facing New Challenges; VI. The Floating Armouries.

I. Numbers and Facts on Piracy

During the last years the international shipping industry is facing severe risks from piracy and armed robbery, particularly off the coasts of Somalia, in the Indian Ocean, and, to a various extent, in South-East Asia and in the Gulf of Guinea.

According to the International Maritime Bureau (office of the International Chamber of Commerce who established the Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia), only hijackings and unsuccessful attacks attributed to Somali pirates are from 22 in 2006 to 51 in 2007, 111 in 2008, 217 in 2009, 219 in 2010, and 237 in 2011. In any case, the worldwide resurgence in piracy incidents in the last ten years reports a large number of cases also occurred in the area of Indonesia, the Malacca Strait and Malaysia, followed by Bangladesh and India with an average of 56 reported incidents a year¹.

The West coast of Africa is the centre of a new pirates activities area and is becoming a new High Risk Area (territorial waters of Benin and Nigeria, Nigerian Exclusive Economic Zone north of latitude 3° N, Beninese Exclusive Economic Zones north of latitude 3° N). The increase of incidents is registered in the Gulf of Guinea, between Nigeria and Benin, which is an area with an high concentration of commercial traffics linked to the oil and commodities industries. During the end of 2012 and the beginning of 2013 the Gulf of Guinea, and Nigeria in particular, are experiencing a significant number of reported piracy attacks. While the hijackings aiming to theft of cargo appear to have become less common, in many case there were crew's kidnapping for ransom and also violent robberies, reporting the product tankers ad the most targeted ship type in the area.

These numbers lead to think of piracy as a predominant risk for the safety at

* Lawyer in Naples (Italy).

¹ NATO is monitoring the incidents and regularly updating a Pirate Attack Group (PAG) map, found at <<http://www.shipping.nato.int/>>.

sea of commercial ships but, unfortunately, everyone may be affected to different extent by maritime piracy, either directly as a seafarer (from 2006 to 2011 more than 4.000 seafarers were hostages of pirates) or as ship-owners, indirectly as a family member or friend of a hostage, as one of the military or civilian professionals responding to piracy, or (for most people) as a consumer of oil and goods carried by sea.

II. Reactions of the International Community in the Gulf of Aden

The international reaction has been realised by the ships of the EU's NAVFOR Task Force 'Operation Atalanta', by the Combined Maritime Task Force 151, by NATO's Operation Ocean Shield, and war ships of many countries acting independently. The noticeable effect within the Gulf of Aden has also been able to prevent some hijackings in the Indian Ocean. In March 2012, firstly NATO and then the EU announced to extend their naval operations off Somalia until December 2014, giving a clear message of a strong commitment to fight piracy off the Horn of Africa.

The High Risk Area² defines itself by where pirate activity and/or attacks have taken place but attacks have also taken place at most extremities to the South into the Mozambique Channel.

The International Maritime Organization³, is also trying to build up a long-term anti-piracy project, collaborating with the representatives of the countries where pirates are active, and organising regional seminars and workshops in order to set out regional agreements developing the cooperation in the repression of piracy and armed robbery against ships⁴.

During 2012 IMO have also issued many circulars and reports leading to the assessment and recognition of rules for the use of private armed guards on board of a commercial ship.

In April 2013 it has been established that the total cost of piracy during 2102 in the range of USD 5.7 bn. to USD 6.1 bn. Even if this is a reduction from the 2011 estimate of USD 7 bn., the costs remain extremely high in spite of the considerable reduction in attacks. The major factor of such an high levels of costs is the use of armed guards.

² High Risk Area (HRA), bounded by Suez and the Strait of Hormuz to the North, 10°S and 78°E.

³ The United Nations agency of this sector.

⁴ Previous experiences are the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP), concluded in 2004 by 16 countries in Asia; Djibouti Code of Conduct, enhanced on 2009 by IMO and the States of the Western Indian Ocean and the Gulf of Aden.

III. The Industry Measures: Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia

The sector associations are trying to develop procedures and measures for the protection and for the prevention from pirates attacks. It has been published a 'Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia'⁵, which suggests various measures as hiring security guards or the deviation of the vessels' routes (either around the Cape of Good Hope to avoid the Gulf of Aden and the western part of the Indian Ocean, or, now more frequently, sailing close to the west coast of India and through the North Arabian Sea)

Individual ship owners can not rely exclusively upon help from war ships, therefore the industry set up BPM enhancing counter-piracy measures taken by each ship in conjunction with the deployment of war ships.

Among companies' and ship master's planning, while entering in the High Risk Area, BMP suggests how to harden vessels against attack, by means of:

- Watch keeping and Enhanced Vigilance: additional lookouts for each watch, considering a shorter rotation of the watch period in order to maximise alertness of the lookouts, ensuring that there are sufficient binoculars for the enhanced bridge team; considering use of night vision optics; maintaining a careful radar watch.
- Bridge enhancements: bridge is usually the focus for any pirate attack, so far kevlar jackets and helmets (possibly in a non-military colour) would be available for the bridge team; further protection against flying glass with application of security glass film; steel/aluminium plates for the side and rear bridge windows and the bridge wing door windows, which may be rapidly secured in place in the event of an attack; sandbags protecting after part of both bridge wings; double layer of chain link fence on sides and rear of the bridge and bridge wings.
- Control of Access to Bridge, Accommodation and Machinery Spaces: deter or delay the pirates access to the accommodation and the bridge properly securing doors and hatches, blocking or lifting external ladders on the accommodation block; where possible, additional wire strops; may enhance hatch security; fitting of steel bars to portholes and windows; procedures for controlling access to accommodation, machinery spaces and store rooms should prior to entering the High Risk Area.
- Physical Barriers: increasing the height and difficulty of any climb for an attacking pirate; deploying razor wire (unclipped, spiral or Concertina) on various part, also outboard of the ship's structure; fixed metal grills topped with metal spikes as an effective barrier; electrified barriers (not recommended for hydrocarbon carrying vessels)

⁵ Currently updated BMP4 as set out by the International Shipping Associations, by the UKMTO and EU NAVFOR.

- Water Spray and Foam Monitors: water spray and/or foam monitors in deterring or delaying pirates attempting to board a vessel; fire hoses and foam monitors; using fire hoses in jet mode or water cannons; ballast pumps to flood the deck with water thus providing a water curtain over the ship's side, also by retrofitting pipe-work to allow flooding of the decks whilst in loaded condition; using a diffuser nozzle to produce steam– hot water; water spray rails.
- Alarms: ship's alarms/whistle inform the vessel's crew that a piracy attack has commenced and demonstrates that the ship is aware of the attack and is reacting to it; continuous sounding of the vessels foghorn/whistle; a piracy alarm different from other alarms; preparing crewmembers with each alarm and carry out exercises prior to entering the High Risk Area.
- Manoeuvring Practice: anti-piracy manoeuvres whilst maintaining the best possible speed.
- Closed Circuit Television (CCTV): monitoring of the progress of the attack, covering of vulnerable areas, as the poop deck, the rear of the bridge, the safe muster point/citadel; recorded CCTV may provide useful evidence after an attack.
- Upper Deck Lighting: weather deck lighting around the accommodation block and rear facing lighting on the poop deck; search lights for immediate use; navigation lights should not be switched off at night.
- Deny Use of Ship's Tools and Equipment: tools and equipment that may be used to gain entry into the vessel should be stored in a secure location.
- Protection of Equipment Stored on the Upper Deck: providing protection with sandbags or Kevlar blankets to gas bottles or containers of flammable liquids stored in these locations.
- Safe Muster Points / Citadels: planning to ensure the safety of the crew and vessel; establishing a safe muster point or secure citadel, which will provide ballistic protection, providing proper plan and organisation that any crew member is left outside before it is secured.
- Small hidden GPS transmitter, with a dedicated power source, unknown to crew members in order to avoid to potentially expose them to the risk of torture of pirates,
- Unarmed or Armed Private Maritime Security Contractors: the use of unarmed Private Maritime Security Contractors (PMSC) is a choice of the ship owners and the deployment onboard is subject to the national laws of the flag state.

The BMP4 is neutral regarding the use of private security contractors on ships, even though the Vessel Protection Detachments seems to be the best solution. Only after a proper risk assessment it is possible to make the option, always subject to the law of the approval of the ship's flag state. In any case, whether private or military guards are deployed, they should be in addition to and not instead of BMP4.

Unfortunately, it is not possible to guarantee the safety of a ship from hijacking and some of the above measures – such as armed private security guards – are disputable, not universally accepted, difficult to implement, implying various legal difficulties.

IV. The Industry Counter Measures: Private Security Companies, Imo Guidelines and Guardcon Contract

In light of the request of ship owners to receive the proper assistance against pirates attacks and, furthermore, to establish a good standing level of services as well as terms and conditions for the private sector of security companies, in March this year the BIMCO (Baltic and International Maritime Council, one of the most reliable ship owners and operators association of the shipping sector) issued a standard form of contract, the GUARDCON, for the deployment of armed guards on board vessels.

The GUARDCON has been improved to be a multi functional agreement which can be used for single transits or as a framework agreement for multiple transits in order to furnish to ship owners and to security maritime private contractors clear and universally recognized terms and condition for the delicate role of guards, armed or not, on board and the insurance policy covering the risks of this kind of activities.

As previously mentioned, the GUARDCON has been enhanced according to the IMO guidelines MSC.1 / Circ. 1405 / Rev.1 (combined with MSC.1 / Circ. 1406 / Rev.1 and MSC.1 /Circ. 1408; IMO 1405 – The standard by which owners may be judged IMO 1443 – Guidance to PMSC – 25 May 2012).

The contract establishes the terms of the relationships between the owners and private contractors, the master of the vessel and the guards on board, and the Rules for the Use of Force (RUF). In particular, clause no. 8 governs the Master's Authority and the Division of Responsibilities: the vessel's Master has the ultimate authority and the overall command, even when the guards team leader invokes the Rules for the Use of Force (IMO 1443 Section 5.6 recognizes that at all times the master remains in command and is the overriding authority on board). On this line, the responsibility and the indemnity provisions are based on knock for knock principles.

As to Rules for the Use of Force, IMO 1443 guideline address to PMSC the reasonable steps be taken to avoid the use of force and, if force is used, that force should be used as part of a graduated response plan, in particular including the strict implementation of the latest version of BMP.

The standardisation of contract was an urgent need for also for the insurance industry, involved in a unique situation where merchant vessels are having to employ armed guards (usually civilians) on board which are employed to potentially use lethal force.

In this way the ship owners and PMSC know exactly the terms being agreed upon: undertakings of the guards, uniform command regime protecting the master

from involvement in any shooting, clear and balanced liability regime based on knock for knock principle with the exception of the wrongful use of weapons, clear insurance requirements for PMSC, guidance to Rules for the Use of Force; last but not least, a contract acceptable to owner's P & I Clubs.

In any case the GUARDCON is not intended to be a substitute for the proper exercise of due diligence by ship owners as part of the pre-contractual process when selecting a security company to provide unarmed or armed guards for a ship.

There is no need to say that the employment of armed guards must be legal and any wrongful or unlawful employment would invalidate the insurance cover. Any wrongful employment may be criminal and, of course, there is no insurance cover against the consequences of committing a crime.

Firearms and other security-related equipment are to be part of the contracted plan, PMSC should insure their personnel to carry and use firearms on such voyages for accident, injury and damage arising from the use of firearms and liability for any claim that might arise from the carriage and/or negligent or intentional misuse of firearms.

A further extent of GUARDCON is the rule for a uniform PMSC's insurance requirements, imposing for the contractor: i) US\$ 5 million liability and professional indemnity cover, ii) US\$ 250,000 personal accident cover; iii) liability insurance and contractual indemnity insurance (liability Insurance only covers claims arising from contractors and their employees own fault – negligence while contractual indemnity covers contractor's undertaking in the contract to indemnify owners for claims made against them e.g. under knock for knock provisions).

As to legal Use of Force, according to IMO 1405 and 1443 Guidance, it should be approved by Flag State, it must be a graduated response, it must be proportionate and necessary even in case of self-defence. If the Rules for the Use of Force are inappropriate, insurance cover might be prejudice.

One of the most important issues is the licensing of the private contractors as well as the insurance for their activity risks and responsibilities concerning their services, as well as the permissions for legal carriage and storage of arms and weapons on board during the sea carriage. In this respect, when a ship owner is choosing a security company, their effective adoption of the international standards requirements for this matters has to be carefully examined (i.e. ISO 28007 Guidelines for Private Maritime Security Companies (PMSC), providing privately contracted armed security personnel (PCASP) on board ships).

V. The High Risk Area of the Gulf of Guinea: Facing New Challenges

The Gulf of Guinea is an important trade hub for commodities such as oil, gold, bauxite, iron ore and agricultural products. It is a very busy area for the transportation of this commodities and the increase of hijackings of ships, at-

tacks and attempted boardings is changing the focus of attention of the maritime industry and international community in this area. According to the International Maritime Bureau, in the first quarter of 2013 between Benin, Togo and Nigeria it has been experienced a significant increase of reported piracy attacks with kidnap of seafarers for ransom, incidents and violent robberies (15 incidents in the area of the Gulf of Guinea including 3 hijackings, 15 crew members being hostage; 3 incidents in Ivory Coast water, 31 crew members being hostage). It has been noted that the piracy attacks in West Africa do not occur on the high seas but predominantly in territorial waters, terminals and harbours. Due to the kind of business (Nigeria is the West African largest oil producer) many of the ships in this area are regular traders and may be targeted by pirates many time.

The International Community asked to West African States an effort to cooperate in securing the regional maritime security. UN Security Council has firstly deliberated the resolution no. 2018 (2011) outlining the matter, thus specifying in the resolution no. 2039 (2012) the request to the West African States to cooperate to 'implement transnational and regional maritime security coordination centres'. The attention to the area is also justified by the fact that the Gulf of Guinea countries produce more than 3 million barrels of oil per day, equal to the 4% of the global total, generally destined to Europe and the USA.

Following a first meeting in 2012 between the States members of the Economic Community Of West African States (ECOWAS) and the Economic Community of Central African States (ECCAS) in which it was discussed a Code of Conduct for the security of the maritime in the Gulf of Guinea, during June 2013 West and Central African leaders had a summit in Cameroon to deliberate on new proposals and joint actions to fight piracy and maritime criminality in the area. Among the offshore and local military defences, the African leaders invited the International Community to put in place in the Gulf of Guinea the same measures demonstrated in the Gulf of Aden, where the deployment of international naval forces has produced a reduction of the piracy. The point is that the Gulf of Guinea's pirates *modus operandi* is different and would be of obstacle to the deployment of International Military Forces or Vessel Protection Detachments as the Gulf of Aden convoys on the high sea and international water.

In the meantime, the new High Risk Areas currently includes the Gulf of Guinea, the Bight of Benin and the Bight of Bonny, the Nigerian and Beninese Exclusive Economic Zone latitude 3° N' and the territorial waters of Togo, Benin, and Nigeria. There has also been a recent expansion by suspected Nigerian pirates into Ivory Coast's territorial waters. On June 2013 the Joint War Committee (JWC) has added Togo and amended the Gulf of Guinea area including the waters of the Togolese, Beninese and Nigerian Exclusive Economic Zones north of Latitude 3° N'.

From the above analysis it was clear to the industry that the piracy in the Gulf of Guinea is completely different from that of Somalia and Horn of Africa and

that, so far, the counter-measures should have been implemented in respect of the same in the Gulf of Aden. On this line some of the most representative shipping associations as BIMCO, ICS, INTERCARGO and INTERTANKO, supported by NATO Shipping Centre, developed a document called 'Interim Guidelines for Owners, Operators and Masters for protection against piracy in the Gulf of Guinea region', integrating the advices contained in BMP4 in respect of the different situation in the Gulf of Guinea region.

On the same line, the solutions and the contracts developed for the use of PMSC armed guards on board, such as GUARDCON, could be inappropriate to face the different situation in the new High Risk Area of the Gulf of Guinea. The most important issue is that the domestic laws of the countries of this area prevent the use of PMSC with armed guards inside territorial waters of the coastal states in the region. In this respect, agreements as GUARDCON (or the less used MARSEC 2011), have to be customized in order to operate in the different circumstances the Gulf of Guinea,

As noted, the domestic laws require armed guards coming from local government security forces only, considering illegal for private maritime security companies to carry firearms in any West African territorial waters as well as the transit of arms through these countries. Only the military forces of the different countries can offer their services as armed security guards to ship owners and operators.

There are some solutions proposed by the worldwide PMSC which are providing their own advisers as a link between the ships and the local military guards; such services are usually offered on the form of the GUARDCON agreement, amended accordingly to the fact that the armed security is provided by local military forces. Furthermore, PMSC can help in ensuring that local guards authorised by national armed forces will respect the ship's Master's orders, and will comply with the Rules for the Use of Force, the issues of the BMP4. PMSC can also assist in the logistics of cross border transit. The main problem is that the private unarmed guards from a private security company may not be able to exercise an high level degree of control over local armed guards as with over their own personnel. When entering into a contract for the employment of the security guards, ship owners consent that services under such contract will be sub contracted to the local armed guards personnel. The main contractor might not be able to guarantee that local armed guards would obey to the lawful instructions of the Master, with reasonable skill and care and in accordance with the Rules for the Use of Force. Local armed guards can be requested by the Master or by the security company facilitating liaison with the Master to provide individual waivers.

The ship owners are therefore obliged to seek local expert legal and technical advice before entering into a contract to engage armed guards to protect their ships in West Africa.

VI. The Floating Armouries

Another particular issue is the floating armouries, which are ships (such as tugs, supply and research vessels) used as platforms for storing and transferring arms, ammunitions and weapons at sea, outside any country's territorial waters.

Usually these kind of ships are used by private security companies engaged in securing the commercial ships against Somali pirates to avoid arms smuggling laws when they dock in ports. It has been calculated that about twenty ships are around the Red Sea, the Gulf of Aden and the Indian Ocean. The issue is that carrying weapons into a country can be considered by the domestic laws a criminal offence as arms smuggling, using weapons without licence, breaching arms embargo. As well as in the Gulf of Guinea, some countries that permit ships to enter port with armed guards may not allow them to leave with their weapons.

According to International Maritime Bureau, during 2012 the pirate attacks off the coast of Somalia are reduced compared with the corresponding period in 2011 and this would be linked to the presence on board of armed guards. So far, the presence of the floating armouries in the area is facilitating the supplies of the armed guards on board of the vessel.

Unless a mechanism for international regulation, monitoring and inspection of these facilities is established, there is a genuine risk that they will eventually become a threat to regional peace and security, rather than being part of the solution.

TERRORISTS UNDER THE JOLLY ROGER? RECENT TREND ON PIRACY AND MARITIME TERRORISM

Gian Maria Farnelli*

I. Introductory Remarks; II. Maritime Piracy Definition; III. International Terrorism Definition; IV. Private Ends and Terrorist Intent; V. Pertinence of Maritime Piracy to Counter Terrorism Regulations; VI. Concluding Remarks.

I. Introductory Remarks

Maritime piracy has recently hit the headlines. The sheer number of piracy assault off the coast of Somalia, within the Gulf of Aden which is one of the most important maritime trade route of the world,¹ drove the UN Secretary General Ban Ki-moon to qualify piracy as a threat to international peace and security.² In fact, piracy effects maritime insurance costs³ so much so that it worries both State's Government and sectorial international organizations.⁴

* PhD candidate, Department of Law, University of Verona.

¹ See Xiaowen Fu, Adolf Ng, Yui-Yip Lau, "The Impacts of Maritime Piracy on Global Economic Development: the Case of Somalia", 37 *Maritime Policy and Management* (2010), 677.

² See "UN Deputy Secretary-General flags need for 'multi-dimensional' approach to combating piracy", 19 November 2012, available at <http://www.un.org/apps/news/story.asp?NewsID=43538#.UY4MIKKeO_Q>.

³ X. Fu, A. K. Y. Ng, Y. Lau, n. 1 above. The authors assert that the aggregate cost of piracy off the coast of Somalia should consider not only the maritime commerce *damnum emergens* and *lucrum cessans* components, but also the expenses incurred so as to maintain naval patrol in the area. Those costs are higher than the ones deemed necessary by the Secretary General to make regional judicial systems able to prosecute pirates *in loco*. See UN Secretary General's special report S/2012/50, data?. On the matter in point, see also Goffrey C. Rapp, "Salvage Awards in the Somali Coast: Who Pays for Public and Private Rescue Efforts in Piracy Crises?", 59 *American University Law Review* (2010), 1399: the author maintains that the aggregate cost should also consider ransoms. Others maintain that the one and only way to reduce piracy related costs is to entrust maritime security to private contractors. See Robert S. Jeffrey, "An Efficient Solution in a Time of Economic Hardship: The Right to Keep and Bear Arms in Self-Defense against Pirates", 41 *Journal of Maritime Law and Commerce* (2010), 507; Alice Priddy, Stuart Casey-Maslen, "Counter-piracy Operations by Private Maritime Security Contractors", 10 *Journal of International Criminal Justice* (2012), 839. *Contra*, see Christopher Spearin, "Private Military and Security Companies v. International Naval Endeavours v. Somali Pirates", 10 *Journal of International Criminal Justice* (2012), 823.

⁴ As an example, see the numerous analysis which Chatham House has been making since 2008, Ted Dagne's study on behalf of the US Congressional Research Service dated 4

The interest towards piracy off the coast of Somalia is also grounded on the specific geographic position of the phenomenon, not far from the shrines of international terrorism. Since pirates and terrorists have been brothers in arms for a long time, being both forms of non-State actors aggression, the fear that they could cooperate, even on a financial level, seems to be reasonably grounded.

For this reason, the question whether the feasibility to apply counter terrorism regulations to pirates and *vice versa* is relevant. Even if no general international law exists about maritime violence,⁵ national and international cases law points toward a gradual approach of the two types of offence. This paper will exactly deal with this trend.

At first, the study will analyse maritime piracy and international terrorism regulations. Afterwards, the possibility to apply both regulations to the same conduct will be called into question. By the close, the paper will deal with the concrete applicability of counter terrorism instruments to piracy off the coast of Somalia and in the Indian Ocean, pointing out pros and cons of the approaching of the two circumstances.

II. Maritime Piracy Definition

The history of maritime piracy regulation has been troubled since its very beginning in the XVII century.⁶ The legal concept of piracy was definitely codified only in article 15 of the 1958 Geneva Convention on the High Sea, a definition which was subsequently transposed in the 1982 Montego Bay United Nations Convention on the Law of the Sea ('UNCLOS').⁷ Its article 101⁸ provides a defi-

February 2010 or the interviews of Rear Admiral Branciforte at the Italian Parliament on the 15th June, 2011.

⁵ See Scott Davidson, "International Law and the Suppression of Maritime Violence", in R. Burchill, N. D. White, J. Morris (eds.), *International Conflict and Security Law. Essay in Memory of Hilaire McCoubrey* (2005), 265.

⁶ For an historical perspective, see Alfred P. Rubin, *The Law of Piracy* (2006).

⁷ United Nations Convention on the Law of the Sea (Montego Bay 10 December 1982, in force 16 November 1994). The UNCLOS is widely considered a codification of general international law on the matter at hand. See Ivan Shearer, "Piracy", in *Max Planck Encyclopedia of Public International Law*, Oxford, 2012. *Contra*, see Rubin, n. 6 above.

⁸ Art. 101 of the United Nation Convention on the Law of the Sea provides that: 'Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described

nition which imposes five different requirements so as to qualify an act of maritime violence as piratical in nature. First of all, violence or attempted violence by privates against another ship must be involved:⁹ as such, no government or public vessel could get involved in piracy.¹⁰ Furthermore, mutiny could not account to piracy.¹¹ Moreover, piracy could take place only on the high sea or in any place outside the jurisdiction of any State¹² and should be motivated by private ends.¹³ Whereas an article 101 piratical aggression occurs, article 105 UNCLOS provides the universality principle which allows every State to seize and exercise jurisdiction on pirates.¹⁴

The international law definition of piracy is rather narrow. As such, ‘[the] existing international law on piracy, as reflected in the 1982 UN Convention on the Law of the Sea [...] does not fully cover all acts of violence endangering the

in subparagraph (a) or (b)’.

⁹ On the concept of violence with regard to piracy, see, among the others, Bruce A. Elleman, “The Looting and Rape of Vietnamese Boat People”, in B. A. Elleman, A. Forbes, D. Rosenberg (eds.), *Piracy and Maritime Crime: Historical and Modern Case Studies* (2010), 97. Notwithstanding a wide literature on the matter in point, two recent US decisions rise some issues. See the *Said* and *Hassan* cases *infra*, paragraph IV.

¹⁰ See Article. 102 UNCLOS, which implicitly excludes the possibility. On the definition of warship and government ship, see articles 29-32 UNCLOS and Myron H. Nordquist (Eds.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Volume II (1993), 243.

¹¹ This is due to the so called ‘two ship criterion’. See Report of the International Law Commission to the General Assembly, 8th Session”, *Yearbook of the International Law Commission*, 1956, 253, 282. Pursuant to the literature, ‘in areas away from the high sea – outside the territories of all states – persons and property under attack by pirates need not to be aboard a ship or an aircraft’ (Yoram Dinstein, “Piracy Jure Gentium”, in C. Hestermeyer *at al.* (Eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum*, Volume II (2012), 1125, 1136) due to a contextual reading of paragraphs (a)(i) and (a)(ii).

¹² The ILC understood the phrase as any *terra nullius* areas (n. 11 above), but later literature assumed that also internationalized region could be considered as such. See Edward D. Brown, *The International Law of the Sea*, (1994), 302.

¹³ A deeper analysis of the piracy requirement is inconsistent with this paper. See Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Volume III (1995), 196. On the private ends concept, see *infra*, paragraph IV.

¹⁴ Article 105 UNCLOS reads as follow: ‘On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith’. Recent State practice has interpreted article 105 in such a way so as to allow the seizing State to transfer pirates to third States willing to prosecute them. In this regards, see the EU-Kenya agreement of 6 March 2009, *Official Journal of the European Union*, section L, 25 March 2009, 49.

safety of international navigation'.¹⁵ Therefore, recent State practice has developed alternative methods to prosecute pirates, both using different conventions¹⁶ or different definitions.¹⁷

III. International Terrorism Definition

Unlike maritime piracy, international terrorism has not been codified in international law so far. In fact, the very concept of terrorism is disputed in international law, due to its contiguity to the 'freedom fighter' concept.¹⁸ As such, State practice favours a sectorial approach to the terrorist's phenomenon, one which addresses specific conduct related to international terrorism as a whole.¹⁹

Notwithstanding the absence of a general definition, UN General Assembly tried to qualify the terrorist's intent in some relevant resolutions. As an example, in Resolution 49/60 of 1994, the General Assembly defined as terrorism any act aimed to:

[P]rovoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.²⁰

The following *Draft Comprehensive Convention on Terrorism*²¹ reads as follow:

1. Any person commits an offence within the meaning of this Convention if

¹⁵ Institut de Droit International, "Naples Declaration on Piracy", in *Annuaire de l'Institut de Droit International* (2009), 584.

¹⁶ This is the case of the *1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*; see *infra*, paragraph V.

¹⁷ This is the case of the *armed robbery at sea* definition provided by the International Maritime Organization in its official documents. See, among the other, article 1(2) of the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, entered into force on the 4 September 2006, and article 1(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*, signed in Djibouti on the 29 January 2009 by the Gulf of Aden regional States.

¹⁸ For some interesting consideration on the topic at hand, see Evan J. Wallach, "Partisans, Pirates and Pancho Villa: How International and National Law Handled Non-State Fighters in the 'Good Old Days' before 1949 and that Approach's Applicability to the 'War on Terror'", *24 Emory International Law Review* (2010), 549; Christian Walter, "Terrorism", *Max Planck Encyclopedia of Public International Law*, online edition available at <www.mpepil.com>.

¹⁹ For a comprehensive list of counter terrorism agreements as to the 27 July 2010, see *Measures to eliminate international terrorism* (UN Doc. A/65/175), 22.

²⁰ A/RES/49/60, 4 December 1994, paragraph I(2).

²¹ The Draft Comprehensive Convention is not entered into force, yet. See C. Walter, n. 18 above.

that person, by any means, unlawfully and intentionally, causes:

- (a) Death or serious body injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- (c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.²²

Lastly, the UN Security Council, acting under UN Charter Chapter VII, reiterated that the following acts can be regarded as terroristic in nature:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious body injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.²³

All of the abovementioned international documents, in particular the Security Council resolution, agrees on the fact that terrorism is characterized by a specific intent, which is one of ‘provoke a state of terror in a general public’ o a particular group of people. As such, even if no general definition is provided in international law, it is possible to say that piracy and terrorism are divided by different goals.²⁴ As a matter of fact, the mentioned difference is illusory.²⁵

²² “Draft Comprehensive Convention on Terrorism”, Article 2 (1), in *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996* (UN Doc. A/57/37, 11 February 2002), 6.

²³ UNSC Resolution S/RES/1536, 8 October 2004, paragraph 3.

²⁴ See Federica Graziani, *Il contrasto alla pirateria marittima nel diritto internazionale*, (2010), 84-87.

²⁵ Even if it is not strictly linked to the matter in point, it is noteworthy to mention that the the Special Tribunal for Lebanon affirmed in the *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* date 16 February 2011 that international terrorism has become an international crime under customary law. That decision is strongly criticized by literature: see, among the others, Ben Saul, “Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism”, 24 *Leiden Journal of International Law* (2011), 677.

IV. Private Ends and Terrorist Intent

The very definition of private ends was qualified at the beginning of the XX Century within those international documents which tried to tackle down the problem of maritime piracy.²⁶ Under that definition, the term ‘private’ would be opposed to ‘political’,²⁷ as implicitly stated by the International Law Commission (‘ILC’) in its commentary to article 15 of the 1958 High Sea Convention.

Nonetheless, an entire reading of the comments to article 15 gives further elements. In particular, the ILC Commentary states that ‘[t]he intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain’.²⁸ As long as hate and desire for revenge could be assimilated to ‘private ends’, it is possible to say that an individual assaulting a ship only on the basis of discriminatory reason, without any potential personal gain, could be qualified as a pirate. Under this interpretation, ‘private’ would be opposed to ‘public’, which means that actions taken by ships acting under State orders or directives could not amount to piracy. This approach would widen the scope of Article 101, without hindering Article 102²⁹ interpretation under a *magi valeat quam pereat* perspective.

The above mentioned interpretative approach is not only supported by literature,³⁰

²⁶ In particular, the Matsuda Report and the *Harvard Draft Convention Against Piracy*. Subsequently, the British Privy Council considered the private ends as a constitutive requirement of piracy in the 1934 *In Re Piracy Jure Gentium* case ([1934] A.C. 586). See Rubin, n. 6 above, 305-317.

²⁷ See, among the others, Patricia W. Birnie, “Piracy: Past, Present and Future”, 11 *Marine Policy* (1987), 163, 171; M. Nordquist, n. 10 above, at 200; Joseph M. Isanga, “Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes”, 59 *American University Law Review* (2010), 1267; Institut de Droit International, n. 15 above, 576 (declaration by Professor Ronzitti).

²⁸ Report of the International Law Commission, n. 11 above, 282, with specific regard to article 15. As the Vietnamese boat people case shows, private gain is no longer the main goal of pirates. See B. A. Elleman, n. 9 above.

²⁹ Article 102 UNCLOS reads as follow under the title ‘Piracy by a warship, government ship or government aircraft whose crew has mutinied’: ‘[t]he acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft’.

³⁰ See, among the others, Wolff H. von Heinegg, “Repressing Piracy and Armed Robbery At Sea: Towards a New International Law Regime?”, 40 *Israeli Yearbook of International Law* (2010), 219, at 224; David Guilfoyle, “The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?”, 11 *Melbourne Journal of International Law* (2010), 141, 149; Malvina Halberstam, “Terrorism on the High Sea; the Achille Lauro, Piracy and the IMO Convention on Maritime Safety”, 82 *American Journal of International Law* (1988), 269; Samuel Manefee, “Piracy, Terrorism and the Insurgent Passenger: a Historical and Legal Perspective”, N. Ronzitti (ed.), *Maritime Terrorism and International Law* (1990), 43. See also the Polish Government position during the *travaux préparatoires* of the 1958 Geneva Convention, as reproduced in UN Doc. A/CN.4/L.53, 6 May 1955,[1955].

but also by recent cases law. In the 1986 *Castle John* case,³¹ the Dutch Court of Cassation sentenced some Greenpeace activists for piracy, as they had assaulted, seized and damaged two private ships discharging toxic wastes in international waters. Since those acts were aimed to make environmental concerns hit the headlines, the activists were plainly motivated by political ends, which would place their actions outside the scope of article 101 UNCLOS as commonly interpreted. Nonetheless, the Dutch judges maintained that the declared goal of the activists was private in nature, inasmuch ‘purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective’.³²

The *Castle John* case was strongly and deeply criticized by literature.³³ In particular, an author maintained that:

The fundamental nature of international sea piracy law is no more and no less than a special ground to assert State jurisdiction over a foreign-flagged vessel, its cargo and offenders. [...] It is an exceptional legal authorisation for a State to exercise police and judicial functions over a foreign-flagged ship, cargo and persons, applying the standards of its own domestic law, on the assumption that a pirate is the enemy of the human race and as an ‘enemy of all’ he is liable to be punished by all.³⁴

An analogous interpretation was given by Japanese authorities with regard to stonewalling acts by environmentalists NGO against whaling. The declared goal of those actions was to prevent a further reduction of whales in the Pacific Ocean, that means an environmentalists aim which is clearly at least political in nature. As the Government of Japan proposed to the Japanese Parliament an act against those kind of actions, the possibility of applying the international maritime piracy regulations was debated. Even if the very same Government excluded that possibility,³⁵ the Special Rapporteur on the matter in point, Mr. Oba, stated that some acts of maritime piracy could amount to terrorism and *vice versa*, as the

³¹ *Castle John and Nederlandsee Stichting Sirius v. NV Nabeco and NV Parafin*, The Netherlands, Court of Cassation, 1986, reproduced in *International Law Report* (1994), 537.

³² *Ibid.*, 540. For a deep analysis of the case, see Samuel Manefee, “The Case of the Castle John, or Greenbeard the Pirate? Environmentalism, Piracy and the Development of International Law”, 24 *California Western International Law Journal* (1993-1994), 1.

³³ The main criticism was based on the *amici humani generis* of NGO, as opposed to the *hostes humani generi* nature of pirates. See Eric David, “Greenpeace: des pirates!”, 22 *Revue Belge de Droit International* (1989), 295, 300.

³⁴ José L. Jesus, “Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects”, in 18 *International Journal of Marine and Coastal Law* (2003), 363, 379.

³⁵ See the *Minutes of the Special Committee on Combating Piracy and Terrorism*, 171th Session n. 6, 22 April 2009, at 21, as reproduced in Makoto Seta, *Japan’s Country Report 2010*, at 12, available at <<http://cil.nus.edu.sg/>>. See also Jun Tsurata, “The Japanese Act on the Punishment of and Measures against Piracy”, 1 *Aegean Review of the Law of the Sea* (2011), 237.

‘private ends’ concept should be interpreted as any goal pursued by non-State actors,³⁶ an interpretation with which the Government agreed during the parliamentary debate. This interpretation of the requirement is consistent with the one proposed by the Dutch Court of Cassation and shows that not only judges, but also political bodies are considering the possibility of superimposing maritime piracy and maritime terrorism.

Other domestic judges recently debated on the conceptual approach between piracy and terrorism, too. In the *Topaz* case,³⁷ a group of Somali pirates assaulted a Seychellois coastguard vessel in the archipelagic State exclusive economic zone. The Seychellois Attorney General endorsed charges for piracy and terrorism, maintaining that the public nature of the targeted vessel allowed prosecution for both counts. The Supreme Court of Seychelles state that the terrorism charge could be applied only if:

[S]uch acts [were] being intended or by its very nature and context could be reasonably regarded as being intended to compel the Government of Seychelles to limit or to stop patrolling, controlling and monitoring its EEZ.³⁸

Afterward, the judges considered the actual feasibility of the assault: on the one hand, the *Topaz* was not scheduled to be in the area, a fact that involves that probably the Somali pirates did not recognize the ship as a public vessel,³⁹ on the other hand, the firepower used by the pirates was insufficient to damage a coastguard vessel, providing that ‘[n]ot every use or firing of rifles is taken as terrorism’.⁴⁰ Therefore, the Seychellois Supreme Court rejected the terrorism count on purely incidental grounds, without any consideration for the specific intent of the assumed pirates. As such, the Court probably consider the terrorist intent as subsumable under the private ends requirement. By the close of the sentence, the Court maintained also that:

[T]he offences of piracy have affected maritime business for many countries especially those coastal states along the Indian Ocean [...] [e]ach

³⁶ Minutes, n. 35 above, 7.

³⁷ Supreme Court of Seychelles, *Republic of Seychelles v. Mohamed Ahmed Dahir et al.* (judgement, Criminal side no. 51/2009), 26 July 2010. The importance of Seychelles in the fight against piracy is due to its geographical position, which leads the archipelagic State to be one of the most active country in prosecuting pirates, along with Yemen and Kenya. Their leading role has recently been recognized by the United Nations, which considered the possibility of establishing and *ad hoc* counter piracy tribunal on their territory. See UN Secretary General special report S/2010/394 of the 26th July 2010 and S/2012/50 of the 20th January 2012.

³⁸ *Republic of Seychelles v. Mohamed Ahmed Dahir et al.*, n. 37 above, par. 38.

³⁹ *Ibid.* paragraph 42.

⁴⁰ *Ibid.*, paragraph. 43.

country and organization has suffered in its own way which to some extent has been reflected in the kind of sentences meted out on those that have been convicted on piracy charges [...] [f]or Seychelles, an archipelago that almost entirely depends on the surrounding waters of the Indian Ocean, the effects of insecurity at sea are far reaching. There is no doubt that piracy activities in our waters have impacted adversely on a number of projects [...] [t]his therefore calls for a sentence that would deter other would-be offenders out there from committing similar offences.⁴¹

Even more recently, the judges qualified piratical assaults as ‘war-like act committed by non-state actors’,⁴² a sentence which *verbatim* recalls a common definition of terrorism.⁴³ All of the above elements, in particular the common reference to damages suffered by Seychelles due to piracy with specific regard to economic loss, show that piracy is withstanding a gradual shift from a ‘crime against property’ nature to a ‘crime against public order’ character in Seychellois cases law.

While the Seychellois Supreme Court ruled the *Topaz* case, the District Court of Virginia decided the *Said*⁴⁴ and *Hasan*⁴⁵ cases in a peculiar manner. First of all, it is noteworthy that US law provides that:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.⁴⁶

US domestic law plainly refers to international law, inasmuch that all of the abovementioned requirements⁴⁷ apply also to piracy under US law. Nonetheless, in the *Said* case the Court convicted the indicted for the conspiracy counts charged by the prosecutor,⁴⁸ even if the circumstances of the case were easily subsumable

⁴¹ Supreme Court of the Seychelles, *Republic of Seychelles v. Mohamed Ahmed Dahir et al.* (sentence, Criminal side no. 51/2009), 26 July 2010, p. 2. For similar statements, see Supreme Court of the Seychelles, *The Republic of Seychelles v. Mohamed A. Ise et al.* (sentence, Criminal Side no. 75 of 2010), 30 June 2011, par. 7 and Supreme Court of the Seychelles, *The Republic of Saychelles v. Abdugar Ahmed et al.* (sentence Criminal Side no. 21 of 2011), 14 July 2011, paragraphs 2-4.

⁴² Supreme Court of the Seychelles, *The Republic of Seychelles v. Abdugar Ahmed et al.* (judgement, Criminal Side no. 21/2011), 14 July 2011, paragraph. 21.

⁴³ See Richard Jackson, “An Argument on Terrorism”, 2 *Perspective on Terrorism* (2008), 25.

⁴⁴ Virginia District Court, *United States of America v. Mohamed Ali Said et al.* (judgement, Criminal No. 2:10cr57), 17 August 2010.

⁴⁵ Virginia District Court, *United States of America v. Mohammed Modin Hasan et al.* (judgement, Criminal No. 2:10cr56), 29 October 2010.

⁴⁶ United States Code Section 1651.

⁴⁷ See paragraph II above.

⁴⁸ Specifically, U.S.C. 2291(a)(9), “Conspiracy to Perform Acts of Violence against Persons

under the typical pirate assault.⁴⁹ In particular, US judges maintained that the failure to rob the passengers of the victim vessel precluded a sentence for piracy. As such, the Virginia court excluded the piracy count in favour of the conspiracy ones⁵⁰ for the absence of an assumed requirement which have not been requested by international law since the *In Re Piracy* case.⁵¹ Moreover, in the *Hasan* case the very same court, sentencing the indicted for piracy, made an *obiter dictum* on the private ends requirement. Even if the prosecutor did not charge the indicted with conspiracy, the American judges referred to literature which considers the terrorist intent subsumable under the UNCLOS ‘private ends’ requirement.⁵²

Even more recently, the Korean Busan District Court dealt with the *Samho Jewelry* case,⁵³ concerning the assault by Somali pirates of a freighter in international waters. It is noteworthy to mention how the Korean judges dealt with the fact that the pirates shot the coastguard vessel which was rescuing the *Samho Jewelry*. The Court stated that:

[S]ystematic attack upon Korean military ship dispatched under law to protect the safety of Korean ships and to participate in the international effort for international maritime security,[...] is an intolerable act towards a sovereign nation.⁵⁴ The judges referred to an aggressive intent by the pirates which is inconsistent with the common interpretation of the ‘private ends’ requirement.⁵⁵ Furthermore, it is noteworthy that the lexicon utilized by the Korean judges recalls the ‘war on terrorism’ declarations. As already mentioned with specific regard to Seychellois cases law, this statement contributes to the gradual shift in the criminal nature of piracy towards a public order crime.

on a Vessel”, U.S.C. 924(o), “Conspiracy Involving Firearms and an Act of Violence” e U.S.C. 1651, “Piracy under Law of Nations”.

⁴⁹ Which means a fast assault made by small ships, usually skiffs, followed by an as much fast retreat in the event of failure. For a brief description of the typical *modus operandi* of Somali pirates, see IMO *Best Management Practices for Protection against Somalia Based Piracy – BMP4*, Circular letter MSC.1/circ.1339, 14 September 2011, 9. For a commentary to the Virginia court decision, see Tara Helfman, “Marauders in the Courts: Why the Federal Courts Have got the Problem of Maritime Piracy (Partly) Wrong”, 62 *Syracuse Law Review* (2012), 53.

⁵⁰ On the similarities between piracy and conspiracy counts, see Rudi Fortson, “The Terrorism Acts and Conspiracy”, in W. Blair, R. Brent, Z. Douglas (eds.), *Banks and Financial Crime: the International Law of Tainted Money* (2008), 203.

⁵¹ The well-known case is a cornerstone for the international definition of piracy. See British Privy Council, *In Re Piracy Case*, [1934] A.C. 586, 26 July 1934.

⁵² *United States of America v. Mohammed Modin Hasan et al.*, n. 45 above, at 85.

⁵³ Busan District Court, *Samho Jewelry case* (2001 Go-Hap 93 Pangyeolmun, 26-27), 1 June 2011.

⁵⁴ *Ibid.*, 26. For a commentary, see Sun Lee, “Korea’s Trial of Somali Pirates”, in Korean Society of International Law, *Asian Engagements with International Law and Enduring Jurisdictional Disputes and Issues with Islands* (2011), 87.

⁵⁵ See P. Birnie, n. 27 above.

V. Pertinence of Maritime Piracy to Counter Terrorism Regulations

The gradual approach between piracy and international terrorism is highlighted by the practice of international organizations on the matter in point. Pirates *modus operandi*⁵⁶ leads literature,⁵⁷ international organizations⁵⁸ and the Security Council⁵⁹ to highlight the relevance of the 1988 Rome *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* ('SUA')⁶⁰ and the 1979 New York *International Convention Against the Taking of Hostages* ('CtH').⁶¹ It is noteworthy that neither the first nor the second are counter piracy convention, as shown by both preambles which point counter terrorism as the main focus of both instruments.⁶² Nonetheless, they specific focus on violence, as well as the fact that they are binding for almost every State of the Gulf of Aden area, make them relevant at first sight.

First of all, Article 3 SUA lists a series of intentional and unlawful act which endangers the safe navigation of a ship and involves some degree of violence.⁶³ These

⁵⁶ See Best Management Practice, n. 49 above.

⁵⁷ See among the others Maggie Gardner, "Piracy Prosecution in National Courts", 10 *Journal of International Criminal Justice* (2012), 797; Barry H. Dubner, Karen Greene, "On the Creation of a New Legal Regime to Try Sea Pirates", 41 *Journal of Maritime Law & Commerce* (2010), 439.

⁵⁸ In particular, the IMO. See Circular letter 3180 dated 17 May 2011.

⁵⁹ See S/RES/2020 (2011), Preamble and paragraph 23.

⁶⁰ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome 10 March 1988, in force 1 March 1992). For the circumstances that led to its conclusion, see Antonio Cassese, *Il caso Achille Lauro* (1987).

⁶¹ International Convention against the Taking of Hostages (New York 17 December 1979, in force 3 June 1983).

⁶² In particular, the SUA explicitly refers to General Assembly's Resolution 40/61 data?, titled 'Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes'.

⁶³ Article 3 SUA reads as follow: 'Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or (g) injures or kills any person, in connection with the commission or the attempted commission of any

are the so-called ‘SUA Offences’. It is noteworthy that most of the SUA Offences could be considered acts of piracy under the general terms provided by UNCLOS, too. As Article 3 SUA provides only a list of conduct with little other requirement apart from violence, a SUA Offence committed on the high sea from one ship to another could be easily considered as an act of piracy, and *vice versa*. Furthermore, the only intent mentioned in Article 3 is the one to endanger the safe navigation of a ship, which is the very reason for which pirates have been declared *hostes humani generis* for centuries.⁶⁴ Moreover, the SUA is compatible with the UNCLOS, as their subjective scope is the same: Article 2 of the Rome Convention excludes its applicability to warships and other vessels ‘owned or operated by a State when being used as a naval auxiliary or for customs or police purposes’, just like the UNCLOS ‘ships under governmental service’. Their jurisdictional provisions are complementary, too, as the SUA provides an *aut dedere aut iudicare* obligation which is considered the best way to actually prosecute pirates.⁶⁵ The abovementioned pertinence is further demonstrated by domestic case law.

In the *United States v. Shi* case,⁶⁶ the US Court of Appeal of the Ninth Circuit sentenced a Chinese citizen who seized a Taiwanese ship upon which he served as a cook for a ‘violence against maritime navigation’ count, as the case was plainly a mutiny one. It is noteworthy that Mr. Shi was charged with a US Code Section 2280 offence, which is the US implementation to Article 3 of the Rome Convention along with a piracy count.⁶⁷ As such, the US judge had no jurisdiction over the case neither under international law nor under domestic law.⁶⁸ Nonetheless, the Court applied the universality principle referring to Arti-

of the offences set forth in subparagraphs (a) to (f)’.

⁶⁴ Even if the Latin author of the motto, Cicero, meant something else. See Rubin, n. 6 above.

⁶⁵ Article 10 SUA reads as follow: ‘1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State. 2. Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 3 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the State in the territory of which he is present.’ As to the relevance of the *aut dedere aut iudicare* provisions in prosecuting pirates, see the IMO *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships*, reproduced in A.26/Res.1025 dated 18 January 2010, paragraphs 3.1 and 3.2.

⁶⁶ United States Court of Appeals for the Ninth Circuit, *United States v. Shi* (525 F.3d 709), 24 April 2008.

⁶⁷ This statement is hardly arguable, as Section 2280 is titled ‘Violence against maritime navigation’.

⁶⁸ As abovementioned, the ship was Taiwanese, while the author and the victims of the crime were Chinese.

cle 1, Section 8, Clause 10 of the US Constitution, the so-called ‘Offence clause’, which empowers the Congress to ‘define and punish Piracies and other Felonies committed on the high sea’,⁶⁹ and to the fact that ‘Sections 2280(a)(1)(A) and (B) prohibit interference with the safe navigation of a maritime vessel through the use or threat of force. [...] These are acts of piracy, and because such acts are universally condemned, due process does not require the same nexus between the offender and the United States’.⁷⁰ In other words, the Ninth Circuit Court considered Mr. Shi’s offences as piratical in nature. This conclusion is inconsistent with US domestic law, which explicitly refers to international law with regard to piracy.⁷¹ Therefore, the lack of the two-ships requirement should have excluded the applicability of piracy regulation in favour of typical SUA provisions,⁷² which would account to an extradite obligation as prosecution was not feasible.

The pertinence of the SUA to maritime piracy is further showed by a more recent case, the *United States v. Muse* litigation.⁷³ The Southern District of New York Court sentenced Mr. Muse for both counts for piracy and maritime violence, as he hijacked and seized with threat and use of force a US vessel, the *Maersk Alabama*, off the coast of Somalia. In particular, Mr. Muse was charged like Mr. Shi with a both US Code Section 1651⁷⁴ and Section 2280 counts.

The abovementioned trend found some supporters among European courts, too. In the *Samanyolu* case,⁷⁵ the Rotterdam District Court deemed the *aut dedere aut iudicare* obligation under article 10 SUA⁷⁶ as a State discretionary power. This interpretation is inconsistent with the wording of the Rome Convention, which imposes a clear-cut obligation of prosecuting or extraditing SUA offenders. Nonetheless, the Dutch Court put the *aut dedere aut iudicare* obligation

⁶⁹ United States Constitution, Article 1, Section 8, Clause 10.

⁷⁰ *United States v. Shi*, n. 66 above, par. 18.

⁷¹ See United States Code, n. 46 above.

⁷² See Eugene Kontorovich, “United States v. Shi. 525 F.3d 709, cert. denied, 129 S.Ct. 324 (2008) : United States Court of Appeals for the Ninth Circuit Opinion on Piracy as an Offense Within Universal Jurisdiction and on Application of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: United States Court of Appeals for the Ninth Circuit, April 24, 2008”, 103 *American Journal of International Law* (2009), 734.

⁷³ United States Southern district of New York Court, *United States v. Muse* (1:109-cr-00512-01-LAP), 21 April 2009.

⁷⁴ See United States Code, n. 46 above.

⁷⁵ Rotterdam District Court, *Samanyolu case* (BM8116), 17 June 2010.

⁷⁶ Article 10(1) SUA provides that ‘1. The State Party in the territory of which the offender or the alleged offender is found *shall*, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. [...]’ (emphasis added).

through an opportunity evaluation in light of article 105 UNCLOS.⁷⁷ Similar to the US judges in the *Shi* case, the Dutch judges overlaid the SUA provisions with UNCLOS piracy regulation.

Even more interesting is the reference to the CtH made by international organizations. Article 1(1) CtH provides that:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person [...] in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages [...] within the meaning of this Convention.⁷⁸

Therefore, the CtH regulation requires a terrorist intent, which could be reconciled with the majoritarian interpretation of the private ends requirement only in the event of a ransom request to a State which exclusive goal is private gain. Nonetheless, this possibility appears to be outside the scope of the CtH, since the fifth *considerando* of the Preamble provides that:

BEING CONVINCED that it is urgently necessary to develop international co-operation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism.⁷⁹

A contextual reading of the CtH leads to consider that the aim referred to in article 1 is the very above mentioned terrorist intent.⁸⁰ Therefore, the abovementioned reference made by international organization to the pertinence of CtH to acts of piracy further suggests the idea that the terrorist intent is subsumable under the private ends requirement.

VI. Concluding Remarks

The previous lines of reasoning allow to draw some conclusions. First of all, piracy off the coast of Somalia could fall within the scope of every mentioned

⁷⁷ For a deeper analysis of the case, see Kenneth Manusama, “Prosecuting Pirates in the Netherlands: the Case of the *MS Samanyolu*”, i48 *Revue de droit militaire et de droit de la guerre* (2010), 141.

⁷⁸ *International Convention Against the Taking of Hostages*, New York, 1979, Article 1.

⁷⁹ *Ibidem*, Preamble.

⁸⁰ Paragraph III above. See also Shael H. Wilder, “International Terrorism and Hostage-Taking: an Overview”, in 11 *Manitoba Law Journal* (1981), 367; Michel A. DeFeo, “Hostage Taking and Kidnapping as Forms of Terror Violence” in M. C. Bassiouni (ed.), *International Criminal Law*, 3^o ed. (2008), 751.

convention. As referred above,⁸¹ the typical *modus operandi* of Somali pirates calls for violent assault from one ship to another, followed by hostage-taking commonly considered as aimed to ransom, which purportedly means private gain.

Nonetheless, Somali pirates give a different reading of their actions. They show up as contemporary Robin Hood committed to protect Somali waters and natural resources from foreign multinational enterprises. As such, they benefit from a strong support from the Somali population.⁸² Even if that explanation is commonly considered specious,⁸³ its ‘public’ nature is indisputable and the proof of its groundlessness could be difficult before human rights oriented domestic judges.⁸⁴ Furthermore, acts of piracy provoke fear in a particular group of people, which is the so called ‘operator of the sea’ one. This statement is supported by various psychological studies as long as an increase of insurance fees.⁸⁵

All of the above elements proves that piracy can fall within the objective scope of counter terrorism regulations, with specific regards to the 1999 New York *International Convention for the Suppression of the Financing of Terrorism*⁸⁶ and UN Security Council Resolution 1373 dated 28 September 2001. Even if the applicability of the 1999 New York Convention would prevent ship owners from paying ransoms, the *pro* would reveal itself in the long term. Piracy would be deprived of its main financial support. The risk of piratical criminal organizations financing international terrorism would be prevented, too,⁸⁷ and the head

⁸¹ N. 49 above.

⁸² See Mahamudu Bawumia, Rashid Sumaila, “Fisheries, Ecosystems and Piracy: A Case Study of Somalia”, in 4 *Fisheries Center Working Paper* (2010), found at <http://fisheries.ubc.ca/sites/fisheries.ubc.ca/files/uploads/FCWP/2010/FCWP_2010-04_BawumiaSumaila.pdf>.

⁸³ See P. Pham, “Pondering Somali Piracy”, in *World Defense Review*, 23 April 2009, available at <<http://worlddefensereview.com/>>. Nonetheless, the Security Council started and enquiry on the pirates statement. See S/2011/661 of 25 October 2011.

⁸⁴ See Andreas Fischer-Lescano, Lena Kreck, “Piracy and Human Rights: Legal Issues in the Fight against Piracy within the Context of the *Europena ‘Operation Atalanta’*”, in 52 *German Yearbook of International Law* (2009), 525.

⁸⁵ See Jatin Dua, Ken Menkhaus, “The Context of Contemporary Piracy”, in 10 *Journal of International Criminal Justice* (2012), 749; Paul Slovic, Baruch Fischhoff, Sarah Lichtenstein, “Facts and fears: Understanding perceived risk”, in 2 *Policy and Practice in Health and Safety* (1979), 65; Paul Slovic, *The Perception of Risk* (2000); Michael S. Garfinkle, Craig L. Katz, Janaka Saratchandra, *The Psychological Impact of Piracy on Seafarers* (2012), available at <<http://www.seamenschurch.org>>; Michael H. Passman, “Interpreting Sea Piracy Clauses in Marine Insurance Contracts”, in 40 *Journal of Maritime Law and Commerce* (2009), 59; X. Fu, A. K. Y. Ng, Y. Lau, n. 1 above.

⁸⁶ International Convention for the Suppression of the Financing of Terrorism (New York 9 December 1999, in force 10 April 2002). On the pertinence of the convention, see Andreas S. Kolb, Tim R. Salomon, Julian Udich, “Paying Danegeld to Pirates: Humanitarian Necessity or Financing Jihadists”, in 15 *Max Planck Yearbook of United Nations Law* (2011), 105.

⁸⁷ See Christian Bueger, Jan Stockbruegger, Sascha Werthes, “Pirates, Fishermen and Peacebuilding: Options for Counter-Piracy Strategy in Somalia”, in 12 *Contemporary*

of those organizations could be subject to those targeted sanctions designated for terrorists, so to reduce the appeal of a ‘rover of the sea’ life.

Furthermore, the incorporation of one crime within the other could expand the scope of universal jurisdiction,⁸⁸ putting State interested in prosecuting terrorists in the best situation to do so within an established legal framework. This fact would desirably mean that interested State would not resort to illegal actions, such as extraordinary renditions, even if literature is not unanimous on the matter in point.⁸⁹ As such, this trend should be taken as a beneficial one.

By way of conclusion, the approach between international regulation concerning piracy and terrorism is strengthening itself. This trend could lead to progressing cross-fertilization between them, so as to develop a more systematic, consistent and flexible regulation on violence at sea.

Security and Policy (2011), 356; Mark T. Nance, Anja P. Jakobi, “Laudering Pirates? The Potential Role of Anti-money Laundering in Countering Maritime Piracy”, in 10 *Journal of International Criminal Justice* (2012), 857; *contra*, see Lawrence Rutkowski, Bruce G. Paulsen, Jonathan D. Stoian, “Mugged Twice?: Payment of Ransom on the High Seas”, in 59 *American University Law Review* (2009-2010), 1425.

⁸⁸ This possibility is widely analysed in literature. See Luz E. Nagle, “Should Terrorism Be Subject to Universal Jurisdiction”, in 8 *Santa Clara Journal of International Law* (2010), 87; Win C. Lee, “Terrorism and Universal Jurisdiction”, in S. Lee (ed.), *Intervention, Terrorism and Torture: Contemporary Challenge to Just War Theory* (2007), 203; Shivendra Singh, “Universal Jurisdiction over Terrorism: a Detailed Analysis”, in 42 *Civil and Military Journal on the Rule of Law, Military Jurisprudence, and Legal Aid* (2006), 109.

⁸⁹ Some authors argue against this line of reasoning, maintaining that a wide application of the universality principle would correspond to a wide ‘irresponsibility’ for prosecution non complying with human rights. See Eugene Kontorovich, “The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation”, 45 *Harvard International Law Journal* (2004), 183.

THE NEED FOR A COMMON SCHEME FOR PASSAGE AND PORTING IN THE ERA OF THE NEW ARMED MERCHANTMAN

*Adam Michael Birnbaum**

I. Introduction; II. The Historical Regime of Armed Merchant Vessels; III. The First Decline of Armed Merchant Vessels; IV. Firearms and Innocent Passage; V. Firearms and Calling at Port; VI. Role of Regulatory Regimes in Encouraging Consistent State Practices; VII. Recommendations and Conclusion.

I. Introduction

Before the recent emergence of piracy in the Indian Ocean, one of the few companies that formally armed its vessels was Pacific Nuclear Transport Limited (PNTL), which is engaged in the transport of fission by-products between Europe and Japan. These vessels are equipped with three 30 mm automatic cannon and have officers of the UK Nuclear Constabulary on board,¹ the main justifications being the highly attractive nature of the radiological cargo to terrorist organizations, and the high cost of Royal Navy escort over the long distances that the ships must cover.

After the close of World War II, the practice of arming merchant vessels for defence became less and less common. The great powers of the world greatly expanded their regular navies, especially during the Cold War, which left relatively few places in the world without adequate patrol. A general disapproval of the former rule that merchant vessels had the right to arm themselves for defence became common. In the presence of massive amounts of state-armed tonnage, and in the general absence of any pirate threat capable of taking large cargo vessels, the thinking went, it was unnecessary to take risks by arming merchant ships.

Whatever their genesis, the factors that initially lead to the disarming of merchant vessels are no longer in place. The fall of the Soviet Union led to a precipitous decline in both the quality and fitness of the Russian navy, which in 2002 was a mere one-quarter of its size in 1991.² While the fleet had to retire many

* Law Office of Adam Michael Birnbaum and Of Counsel Attorney, Selvarajah Law Firm

¹ Staff, 'UK British Nuclear Fuel Ships Armed', *BBC News* (8 July 1999). Found at: <http://news.bbc.co.uk/2/hi/uk_news/389545.stm>.

The current generation of PNTL ships uses an upgraded armament of unspecified type. See: <<http://www.pntl.co.uk/pntl-fleet/pntl-ships.asp>>.

² Anne Aldis, *Russian Military Reform, 1992-2002* (2003), 163.

ships which would have been decommissioned anyway, it also allowed relatively new warships to fall into disrepair because of a simple lack of funds with which to repair them. In 2007, the Russian Federation finished construction on its first new nuclear submarine, which was coincidentally the first Russian Federal keel laid since the collapse of the Soviet Union.³ Even this one vessel suffered from significant delays; it was under construction for nearly 15 years. While the Russian Federation plans to refit its navy and initiate new construction projects, the much-reduced state of the Russian Federation's vessels and the decline or collapse of much of the Soviet-era heavy industrial capacity needed to produce new ones mean that significant improvement of the situation is unlikely in the near future. There have been some signs of a minor resurgence of the Russian navy,⁴ but considering that the fleet of four warships Russia sent to visit Venezuela is the largest such detachment sent on a voyage of such length since the Cold War,⁵ we should not expect a return to Cold War-era patrol levels any time soon.

The decline in naval fire-power was not limited to the Russians. The United States too reduced the size of its navy in response to the end of the Cold War. The total number of active vessels declined from a peak of 549 in 1987 to 279 in 2007, the lowest number of active service naval ships since the 19th century.⁶ The reduction of the American navy was a sensible response to the collapse of the Soviet navy it was designed to counter. One by-product of Cold War vigilance – the near-omnipresence of American military might – also meant a corresponding decline in the ability of merchant vessels to depend on American military protection.

Other nations saw their own decline in total active ship numbers. The United Kingdom⁷ too has reduced the size of her navy significantly. The sole recent increase of note comes from the People's Republic of China, which significantly increased military spending across all categories in recent decades,⁸ but which still has a smaller (comparatively speaking) blue water fleet and, until very recently,

³ Staff, 'New Russian Most Powerful Submarine Emerges From Shipyard's Shed', *ITAR-TASS* (15 April 2007).

⁴ Staff, 'Russian Navy Fleet Arrives in Venezuela for Joint Maneuvers', *Xinhua News Agency* (China), (25 November 2008). Found at:

http://news.xinhuanet.com/english/2008-11/26/content_10413338.htm.

⁵ Staff, 'Russian Navy Ships Head to Venezuela', *CNN* (22 September 2008). Found at: <<http://www.cnn.com/2008/WORLD/americas/09/22/russia.venezuela.ap/index.html>>.

⁶ Naval Historical Center, 'U.S. Navy Active Ship Force Levels, 1917 -'. Found at: <<http://www.history.navy.mil/branches/org9-4.htm>>.

⁷ Michael Smith, 'Half of Royal Navy's ships in mothballs as defence cuts bite', *Times Online* (UK), December 31, 2006. Found at:

<<http://www.timesonline.co.uk/tol/news/uk/article1265414.ece>>.

⁸ Ronald O'Rourke, "China Naval Modernization", *Congressional Research Service (USA) Report RL33153* (October 8, 2008), 43.

not one operational aircraft carrier.⁹ Even this recently-commissioned PLAN *Li-aoxing* is unlikely to ever see service beyond training and test-bed roles.¹⁰

While the absolute number of ships deployed as part of national navies has declined, this has not prevented concerned littoral states from responding to the threat of piracy. Even states which have not traditionally operated their navies outside of their own waters, such as the People's Republic of China and Iran, have responded to the threat to maritime security in the Horn of Africa and launched patrols¹¹ in the area. The European Union, too, has through its own EUNAVFOR Operation Atalanta expanded the area of EU joint activity well away from Europe and into the Indian Ocean.¹²

The response has not been limited to nation-states, of course. Shipping companies have, especially after 2009, increasingly made use of so-called private maritime security companies (PMSCs) to protect their activities, by posting armed guards aboard container ships or, in some instances, by hiring armed escort vessels. This increasing use of arms and armed personnel in response to the piracy threat has not been without its own challenges. Flag states have been rapidly modifying or re-evaluating their laws and regulations with respect to the presence of private armed guards on their merchant fleets, with the most rapid changes occurring in 2011 and 2012.¹³ In contrast to many years of consistent advice and guidelines to shipping companies and masters that they not employ armed personnel or firearms as a means to deter attacks by pirates, even the International Maritime Organization has, in the same period, revised and (in some cases) reversed its recommendations to adjust to the new realities of piracy deterrence.

As older IMO Guidelines suggest,¹⁴ with the presence of firearms at sea comes the possibility of mistakes, and these can have grave consequences for all parties concerned. Some concerned governments believed that employing military personnel rather than private guards would reduce the flag state and shipping lines' liability for incidents in international waters. Recent events in India have proven, however, that things are not so straightforward;¹⁵ damages

⁹ Ibid.at 43. For the purposes of pirate interdiction, aircraft carriers are invaluable, considering the large patches of ocean that naval warships must necessarily patrol.

¹⁰ See e.g., Staff, 'China Launches Carrier, but Experts Doubt Its Worth', *New York Times* (26 September 2012).

¹¹ See, e.g., Report of the Secretary-General pursuant to Security Council resolution 1950 (2010), (UN Doc. S/2011/662, 25 October 2011), at paragraph 47.

¹² Council of the European Union Joint Action 2008/851/CFSP, 10 November 2008.

¹³ The United Kingdom changed its position regarding applicability of its general firearms legislative scheme to ship-board operations in October 2011. See Staff, 'Somali piracy: Armed guards to protect UK ships', *BBC News* (30 October 2011). Found at: <<http://www.bbc.co.uk/news/uk-15510467>>.

¹⁴ Discussed, *infra*.

¹⁵ The case in India against two Italian marines accused of murdering Indian nationals

caused by uniformed officers of a state military in foreign waters carry their own consequences. And while the presence of both professional guards and their firearms has once more become common on merchant ships, the regulatory regimes of port states have not universally kept pace. The question of whether port states will allow vessels armed for defence to make port calls, and under what conditions, is still not a settled affair.

II. The Historical Regime of Armed Merchant Vessels

It was not long ago that all merchant vessels were armed to at least some degree. In the 19th Century and earlier, the armed merchantman was the rule, not the exception, and some merchant fleets were powerful enough to not only scare off pirate ships but could engage in naval combat with ships of the line. A group of merchantmen belonging to the Dutch East India Company famously fought a naval battle against a British war fleet in Norwegian waters, and managed to drive the British Royal Navy flotilla into retreat.¹⁶

The legal basis for this practice was a commonly recognized international law principle that ships on the high seas had the right to defend themselves from belligerents, even against hostile regular navy vessels. Elizabeth I issued a proclamation in 1569 specifically excepting known merchant vessels from the ban against carriage of arms in British waters.¹⁷ A proclamation of George I created a system of rewards for private merchant vessels which captured pirate ships.¹⁸ Later, Charles II issued a decree that required merchant vessels travelling abroad to travel in a convoy, a measure toward concentrating military power on the high seas in the hands of the navy, yet even this act assumed that such merchant ships would be armed.¹⁹ Because the United Kingdom was frequently engaged in open hostilities with other European powers, it was absolutely necessary to the preservation of the Empire's economy that merchantmen be able to defend themselves against all sorts of threats, including not only piracy but also attacks from hostile foreign naval ships and privateers. Letters of marque were still in use into the 19th century,²⁰

while guarding the Italian vessel *Enrica Lexie* is still, as of this writing, pending in the Supreme Court of India. See, Staff, "Enrica Lexie case materials transferred to Supreme Court", *The Hindu* (India) (28 May 2013).

¹⁶ Gijs Rommelse, *The Second Anglo-Dutch War (1655-1667)*, (2006), 136.

¹⁷ Royal Proclamation (United Kingdom, 3 August 1569) (against the maintenance of pirates).

¹⁸ Royal Proclamation (United Kingdom, 5 September 1717) (suppressing of pirates).

¹⁹ Convoy Act (UK) 1798 (38 Geo 3 c 76).

²⁰ Not effectively abolished until the Declaration of Paris, Apr. 16, 1856, 1 *American Journal of International Law* Supp. 89 (1907). Many European powers stopped issuing letters in the 18th century, but the practice continued in the Americans until the end of the 19th century. See

and so merchant ships had to be able to defend themselves even in times of declared peace.

By the Hague Conference of 1915, the ongoing hostilities of World War I led the convened authorities to discuss the issue of armed merchantmen. Some countries began to re-arm merchant vessels to preserve their cargoes from belligerent predation. Some converted merchant vessels to full-fledged navy steamers, as anticipated in the Paris Declaration of 1856.²¹ The delegates were not concerned with the legality of defending a vessel using firearms, which they took to be a traditional right of all ocean-going vessels that remained unmodified by any subsequent agreement or law.²² Rather, the concern was that armed merchant vessels would become auxiliary navies. Especially during time of war, merchant vessels would, as a matter of course, encounter the same belligerents that flagged naval vessels would encounter. The risk was that the arming of these vessels would lead belligerents to view them as improperly marked warships, which would then subject them not merely to prize law (as any belligerent ship was during war time) but also to destruction, from which merchant vessels were at least protected.²³

Even so, the gathered delegates admitted that it was perfectly legal for a merchant vessel to resort to force to repel even an attempted capture by a naval vessel.²⁴ And it went without saying that pirates, as *hostis humani generis*, were not protected from attack by any party whatsoever. Neither the Paris Declaration nor the Hague Convention addressed the legality of arming merchant vessels *per se* – merely what formalities should accompany such arming when it rose to the level of creating a warship,²⁵ and whether such activity was advisable in the light of likely increased risk of attack from declared belligerents.

III. The First Decline of Armed Merchant Vessels

Three developments occurred starting in the 19th century and continuing through the mid-20th century that made shipboard defence of merchant vessels either unnecessary or impractical. The first was, as mentioned above, the massive

John Lehman, *On Seas of Glory: Heroic Men, Great Ships, and Epic Battles of the American Navy* (2001), 58.

²¹ The Declaration established that privateering, that is, the issuance of letters of marque to private vessels for the purpose of taking prizes from the merchant fleets of enemy states, is illegal.

²² International Law Association, “Reports of the Executive Council for 1913-1914 and 1914-1915, Embodying the Papers Prepared for the Conference Intended to Have been Held at The Hague in 1914”, (1915), 181.

²³ *Ibid.* 174-175.

²⁴ *Ibid.* 185-187. Under the former regime, a belligerent merchant vessel could even capture its assailant if it was so able!

²⁵ Conversion of Merchant Ships into War Ships, Hague Conventions on the Laws of War, Convention VII, signed 18 October 1907, in force 26 January 1910.

expansion of regular naval patrols of the world's oceans as part of the Cold War, which made such armaments unnecessary. The second was the decline of colonial empires. The Dutch government could take for granted the right of armed vessels to ply the trade routes between Amsterdam and Batavia, since it effectively controlled customs operations at both ends of the journey. Such is of course no longer the case today; what The Hague permits Jakarta may prohibit. The explosive increase in the number of sovereign states in the 20th century means that, practically speaking, a ship engaged in international trade faces a vast mosaic of domestic regimes, and therefore to delay bureaucratic delays shipping lines must meet the most restrictive requirements from among the states where the ship intends to call.²⁶

The last development, after World War II, was the invention of containerized shipping, which massively reduced the requirements for sailors on commercial vessels. A medium-sized East Indiaman of the late 18th century, like the *Lowjee Family*, had a crew of 125 and a gross tonnage of 'merely' 800 tons. By comparison, a modern super container ship like the OOCL Shenzhen has a gross tonnage of more than 89,097 but a crew of only nineteen.²⁷ While modern weaponry makes large gunnery crews as they existed in the 19th century mostly unnecessary, it would still be very difficult for such a small crew to adequately detect threats to, and repel attacks on, enormous container vessels.

Armed merchant vessels did not completely disappear at the dawn of the 20th century, of course. During both World Wars, the naval powers exploited commercial vessels both for the movement of materiel and for the harassment of enemy shipping.²⁸ But this differed from previous practice in a very important respect: while the hands of the vessels may have been merchant marine, the provision of security was achieved through the use of uniformed military personnel. This, as referenced above with respect to PNTL, is a situation which still persisted until recently; the ships may be privately owned, but the security details are manned by sworn police officers.

The situation with PMSCs is, while not precisely the same, analogous; for a variety of reasons, not least of which any preference of seafarers themselves,²⁹ it is

²⁶ While many forms of bureaucratic delay and national flag preferences have fallen away thanks to multilateral instruments such as, *inter alia*, the OECD Code of Liberalisation of Current Invisible Operations, with respect to the manner in which merchant ships may arm themselves for defence there is no such harmonization of practices.

²⁷ *OOCL Shenzhen Data Sheet*. Retrieved on 30 June 2013. Found at:

<<http://www.oocl.com/eng/ourservices/vessels/sxclass8063/ooclshenzhen.htm>>.

²⁸ Office of the Chief of Naval Operations, *History of the Armed Guard Afloat, World War II*. (1946), 1-15.

²⁹ Capt. M.J. Hight and CDR Mike Rodriguez, "Anti-Piracy Programs and the Use of Arms Aboard Ships: A Mariner's Perspective", *The Coast Guard (US) Journal of Safety and Security at Sea: Proceedings of the Marine Safety and Security Council* (Spring 2012), 22.

more practical to contract with trained specialists rather than to leave the defence of merchant ships against pirate attacks in the hands of the ship's crew. But whether arms are kept by the crew or by contracted security personnel, the legal and technical issues associated with their presence remain the same.

IV. Firearms and Innocent Passage

There are a variety of legal issues associated with private merchant vessels that are armed: questions of insurance, civil and criminal liability of the carrier and the flag state, labour law issues with respect to both the crew and the security personnel, etc. We deal here with only two: the right of such vessels to innocent passage through the territorial waters of littoral states, and the right of armed vessels to call at ports. The first of these issues, innocent passage, should be, despite some state protests to the contrary,³⁰ a fairly straightforward affair. The question of calling at port is, however, highly dependent on the domestic statutes of the port state.

The United Nations Convention on the Law of the Sea ('UNCLOS') mentions shipboard weapons only once. Article 19 specifies that:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State in any of the following activities:
[...]

(b) any exercise or practice with weapons of any kind;³¹

Even this bare mention is an improvement from the text from the Convention on the High Seas of 30 September 1962, which made no specific mention of arms carried on merchant vessels.

Both conventions agree, however, that states may not exercise criminal jurisdiction over vessels engaged in innocent passage through the territorial waters (or, with certain qualifications, the archipelagic waters) of the coastal state.³² Assertions that ship-board weapons not displayed or used during innocent passage would violate the coastal state's internal laws concerning the possession of firearms would certainly fall into this category. This attachment to the right of innocent passage is particularly important when we consider the 2005 statement of Malaysian For-

³⁰ See the discussion of Malaysia's protests, for example, below.

³¹ United Nations Convention on the Law of the Sea (UNCLOS III), Montego Bay, signed 10 December 1982, in force 16 November 1994, Article. 19.

³² Convention on the High Seas, Geneva, signed 29 April 1958, in force 30 September 1962, Article 19; UNCLOS III, Article. 27.

eign Minister Syed Hamid Albar asserting that Malaysia is “[...] against any private security companies giving security coverage to ships navigating through the Straights’.³³ This statement is one of policy, but it does not seem to be supported by Malaysia’s laws concerning firearms on vessels:

- (f) a member of the crew of ... any vessel or aircraft may, without holding an arms license or arms permit, have in his possession, custody or control, or carry or use arms and ammunition which are part of the ordinary armament or equipment of the vessel or aircraft, or which are in or upon the vessel or aircraft and required for the services thereof.³⁴

While the Malaysian government did not enunciate a coherent policy with regard to armed ship crews or security escort details the fact remains that the littoral states (Malaysia and Indonesia) view anti-piracy activity as entirely within the realm of *state* action.³⁵ But the confusion even within the official organs of coastal states will result in confusion for any ship’s master who is interested in arming his vessel against attack.

This attitude is not restricted to these states – the International Maritime Organization (‘IMO’) periodically updates its anti-piracy circulars for state parties and ship’s masters.³⁶ Under the section marked ‘Firearms,’ until 2009 the IMO simply advised against having any weapons aboard a merchant vessel:

45. The carrying and use of firearms for personal protection or protection of a ship is strongly discouraged.
46. Carriage of arms on board ship may encourage attackers to carry firearms thereby escalating an already dangerous situation, and any firearms on board may themselves become an attractive target for an attacker. The use of firearms requires special training and aptitudes and the risk of accidents with firearms carried on board ship is great. In some jurisdictions, killing a national may have unforeseen consequences even for a person who believes he has acted in self-defence.³⁷

This advice is reproduced verbatim from the prior revision of this circular.³⁸ The circular does not, strictly speaking, carry the force of law, but it does reflect a general distaste for private exercise of force, one that is mirrored in the regulations, discussed below. The IMO is certainly not alone in this belief – before the recent round of debates and negotiations at the IMO, the conventional wisdom was indeed that firearms may only exacerbate an already dangerous situation.³⁹

³³ Staff, ‘Malaysia, Indonesia, Singapore to meet over Malacca Strait Security’, *Agence France-Presse*, (May 14, 2005).

³⁴ 1960 Arms Act (Malaysia) Sec. 6 (2)(f), Kuala Lumpur: Legal Research Board, 1999.

³⁵ *Malaysia, Indonesia, Singapore to meet over Malacca Strait Security*, n. 33 above.

³⁶ International Maritime Organization MSC/Circ.623/Rev.3 (2002). This section remained undisturbed in MSC.1/Circ.1334, 23 June 2009.

³⁷ *Ibid.*

³⁸ International Maritime Organization MSC/Circ.623/Rev.2 (1999).

³⁹ See, Staff, ‘Armed guards not the answer to pirate threat: expert’, *ABC News* (Australia),

In one important respect, the IMO circulars discouraging the carrying of firearms are indisputably correct. The territorial sea is still subject to the jurisdiction of the coastal state,⁴⁰ and any action taken with respect to other vessels or persons while traversing the territorial sea, even if the ship in question arrived there only with the purpose of engaging in innocent passage, may subject the crew of the passing vessel to severe sanction.⁴¹ In littoral states which prohibit the ownership of firearms by private parties, the common-law right of self-defence (for example) may not operate as the sailor expects it to do. The vulnerability of a crew to prosecution, even when it engages in a seemingly legitimate response to a violent attack from a pirate boarding party, is in part exacerbated by the construction of ‘piracy’ in UNCLOS I and III, both of which restrict the definition of piracy to actions on the high seas or in places not under the jurisdiction of any state.⁴² Because much of the world’s piracy takes place within the territorial seas of various nations,⁴³ a crew engaged in self-defence against what it believes to be an armed boarding party which it assumes to be *hostis humani generis* may find itself charged with the murder of upstanding residents of the local fishing village.⁴⁴

What steps could the coastal state take to deal with unwanted firearms moving through its territorial sea? As mentioned above, the simple act of transporting these weapons in a defensive posture does not seemingly violate the terms of innocent passage. But there are several arguments that a coastal state might raise in response:

- In violation of UNCLOS III Art. 39(1)(b), the use of arms by private merchant vessels without any sort of authorization by the littoral state is a *per se* violation of the state’s sovereignty and the tranquillity of the coastal areas.
- A ship in a posture of open hostility to approaching vessels is not operating in a ‘normal mode’ as required by UNCLOS III Art. 39(1)(c).
- The carrying of arms by merchant vessels is outside of the boundaries for ‘generally accepted international regulations, procedures and practices for safety at sea.’⁴⁵
- A ship which appears ready to engage other vessels in combat lacks the intent to engage in passage that is ‘continuous and expeditious.’⁴⁶

19. November 2008.

Found at: <<http://www.abc.net.au/news/stories/2008/11/19/2423600.htm>>.

⁴⁰ UNCLOS III, Article 2.

⁴¹ See, Beth A. Leonard, *The Voyager’s Handbook* (1999), 134 for an account of how easily such misunderstandings can occur.

⁴² Convention on the High Seas, Geneva, signed 29 April 1958, in force 30 September 1962, Article 15; UNCLOS III, Article 102.

⁴³ See the *Live Piracy Map*, found at www.icc-ccs.org.

⁴⁴ The recent case of the *Enrica Lexie* is an example of such a situation turning very dangerous for everyone involved.

⁴⁵ UNCLOS III, Article 39(2)(a).

⁴⁶ *Ibid.*, at Art. 18(2).

Alas for the coastal state, these arguments are at best attempts to construct UNCLOS in a manner that the Conventions do not readily admit. The question of whether a ship is operating normally is in part dependent on applicable government regulations,⁴⁷ but also must include the ship's own standard practices,⁴⁸ which would include (presumably) any Ship Security Plan developed under SOLAS Chapter XI-2. The question of what security measures and training are appropriate for the crew, the vessel, and her cargo would be within the power of the Company Security Office to determine.⁴⁹ The determination of what security measures are appropriate at any one time would be made by the contracting state parties,⁵⁰ but this determination would itself be subjected to any *force majeure* the master of the vessel found. The remaining possible objections fall in a similar manner. UNCLOS III Art. 18(2) contains a provision allowing for emergency situations or rendering of aid to other vessels. The only one of these objections that is more difficult to dismiss is that the passage of arms through the territorial sea, in and of itself, disrupts the tranquillity of the coastal state. But even in this instance, the UNCLOS III regime provides little relief. The recourse of the coastal state in the absence of some sort of emergency giving it the right to intervene immediately is to report the suspected violation under UNCLOS Art. 94(6) to the vessel's flag state for appropriate investigation. If the armed merchant vessel is registered under a flag of convenience, or if the suspected behaviour is legal under the flag state's law, then such a complaint might result in no substantive action.

Putting aside the prohibition on armed exercises while passing through the territorial sea⁵¹ and other actions which are harmful to navigation and the environment, the primary binding law that crew members must observe on board their vessel while it is engaged in innocent passage with respect to the possession of firearms is that of the flag state.⁵² Here we encounter a huge range of possible controlling laws. Of course, the range of domestic regimes related to the possession and use of firearms runs the full gamut, from near-complete prohibition⁵³ to relative per-

⁴⁷ Including not only the regulations of the flag state but also those of any state through whose internal waters the ship was passing. See, e.g., Indonesian Government Regulation No. 37/2002 Article 4(4) (concerning exercise of weapons).

⁴⁸ This issue has been explored more fully with respect to the conduct of naval vessels engaged in innocent passage, see, e.g., San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, at 105.

⁴⁹ Julio Espin-Digon, et al., *Lloyd's MIU Handbook of Maritime Security* (2008), 90 -94.

⁵⁰ International Convention for the Safety of Life at Sea (SOLAS), London, signed 1 November 1974, in force 25 May 1980, as amended May 2011, Reg. 8.

⁵¹ UNCLOS III, Article 19(2)(b).

⁵² See, generally, UNCLOS III Articles 91 and 92.

⁵³ Perhaps most famously, Japan has a near-total prohibition on unlicensed individuals even holding part of a firearm, see 'Law Controlling the Possession of Firearms and Swords', Law No. 6 of 1958 (10 March 1958) (Japan), as amended by Law No. 72 of 2011 (22 June 2011).

missiveness.⁵⁴ Each state also has its own regime not only for the importation of firearms by foreign crew about foreign-flagged vessels, but for the re-importation of firearms by its own citizens, and additional restrictions on the ability of ships to call at home ports while in possession of weapons acquired abroad.

V. Firearms and Calling at Port

As soon as a vessel enters the territorial sea of a coastal state, there begins a balancing between the rights of the flag state to exercise jurisdiction over shipboard affairs and the interest of the coastal state in maintaining good order and public safety within its waters. While this balance may generally tilt in favour of the flag state as long as the vessel is merely transiting the territorial sea, the balance shifts to the coastal state when the vessel calls at a port. Ports are a part of the inland waters of the coastal state,⁵⁵ and because foreign vessels enjoy no right to innocent passage through the inland waters (and because their activities in commerce would disqualify them from such passage in any event) the coastal state is entitled to broader jurisdiction over the cargo and persons aboard merchant vessels.

The traditional rule of jurisdiction over ships at port was permissive by modern standards, and mirrored closely familiar rules from the law of conflicts: legal issues arising from conduct on board the ship will be governed by the laws of the flag state unless the subject behaviour affects the port state.⁵⁶ The jurisdiction of the coastal state, while it overlapped the flag state in theory, in practice was impotent as against that of the flag state except in cases of heinous crimes⁵⁷ that disrupted the peace of the port.

Modern customs practices have deviated from the former state of affairs, at least in regard to crimes of possession of contraband. Under the heading of customs control, the coastal state may now bar ships from carrying certain prohibited items into

⁵⁴ Several states have no specific rules or regulations concerning ship-board weapons as differentiated from their statutory schemes governing land-based firearms. Other states, such as The Bahamas, provide relatively straightforward licensing schemes for their use. See ‘The Bahamas Maritime Authority’, 128 *BMA Information Bulletin* (16 November 2011).

⁵⁵ UNCLOS III, Article. 11. An example of how this rule can play out with respect to the carriage of arms on seafaring vessels is the recent confusion over rules for ships transiting the Suez Canal. See, e.g., *Letter from Rear Admiral Hamed Hedaya to the Chairman of the Port Said Chamber of Shipping* (2012). Available (in translation) at:

<http://extranet.skuld.com/upload/INSIGHT/Piracy/Egypt%20-%20Armaments%20on%20board%20vessels.pdf>.

⁵⁶ Third Restatement of the Foreign Relations Law of the United States (1987), Section 512.

⁵⁷ See, e.g. Alexander Porter Morse, ‘Is There a Law of the Flag as Distinct From the Law of the Port In Respect to Merchant Vessels In Foreign Waters’, 42 *Albany Law Journal* 345 (1 November 1890). Even in cases of murder, some courts would refuse jurisdiction unless the effect of the murder tended to disrupt the peace of the port.

their inland waters, firearms included, irrespective of whether said items are legally permitted by the flag state or not. Rules concerning transportation of firearms into the internal waters often require no more than a written declaration and a bond,⁵⁸ but in some cases, such as the United States or Mexico, the coastal state may require advanced permission⁵⁹ before the vessel enters the state's territorial waters, or even ban such imports entirely,⁶⁰ with punishments including prison sentences for unwitting importation of weapons which might be legal both for possession on flagged vessels and within the territory of the flag state.⁶¹

VI. Role of Regulatory Regimes in Encouraging Consistent State Practices

The ISPS code, consistent with its scope and mission, proscribes no specific measures concerning the presence of firearms on ships at port. Rather, it discusses the development and implementation of port security facility plans which are consistent with both the regulations of the port and the laws of the state where the port is situated.⁶² The ISPS code grew up in response to external security threats to port facilities and vessels and is thus concerned in good part with controlling the admission of unauthorized persons and items into the facility. It might nonetheless be possible to insert content-neutral provisions into the Code which encourage the development of consistent, predictable practices.

The practice of establishing 'floating armouries' has already become a reality in some parts of the world.⁶³ The existence of such facilities has moved some states to consider adjusting their laws accordingly so that the practice may be regulated rather than kept in legal purgatory.⁶⁴ Adding guidance concerning how these developments may be treated, or how port states may structure their own procedures and laws to discourage resort to extra-legal measures, could aid in the progressive development of law concerning these increasingly-common measures.

⁵⁸ See Laws of Antigua and Barbuda, Chap. 171 'The Firearms Act' paragraph 33.

⁵⁹ Code of Federal Regulations (USA) 27 C.F.R. §§ 447.41, 447.42.

⁶⁰ US State Department Travel Advisory: Mexico. Found at:

<http://travel.state.gov/travel/cis_pa_tw/cis/cis_970.html>.

⁶¹ Ken Ellingwood, 'Mexico's Crackdown on Guns', *Los Angeles Times* (2 February 1999). The story details a private yachtsman's experience declaring a shotgun to Mexican customs agents upon entry to port. He was subsequently charged with weapons possession and jailed for 39 days.

⁶² ISPS Code (2003) Part B Sec. 16.3.1.

⁶³ Oscar Rickett, 'Piracy fears over ships laden with weapons in international waters', *Guardian* (UK) (10 January 2013). Found at:

<<http://www.guardian.co.uk/world/2013/jan/10/pirate-weapons-floating-armouries>>.

⁶⁴ See, Dean Wingrin, 'Armed guards on commercial ships a risky business', *Defence Web* (South Africa) (14 November 2012). Found at:

<http://www.defenceweb.co.za/index.php?option=com_content&task=view&id=28522>.

IMO guidance issued after the ISPS Code entered into force⁶⁵ already advises that rules and facilities for embarking, disembarking, storing, and inventorying armaments be devised as part of the process of retaining PMSCs. While these guidelines do not specify that such arrangements should be incorporated into the SSP, there is no reason why these guidelines or the recommendations set out in other Circulars⁶⁶ could not be so incorporated if this became a regular part of the ship's operations.

There are two areas within the existing Code which might admit provisions concerning the carriage of weapons on board vessels for defensive purposes. Code Part B Sections 4.37 – 4.41 might contain provisions on the grounds for refusing admission to port based on weapons complement and the handling and storage thereof. Sections 16.3 and 16.22 might see additions concerning harmonizing of stowage, and (in cases where the port state insists upon such measures) bonding and off-ship storage of defensive weaponry. While massive negotiations of course are involved in even minor revisions of the Code, placing guidance in Part B (not to mention the fact that changes in security arrangements are already happening irrespective of whether revisions take place) might make such passage more expedient.

There also exist some limited avenues for cooperation between Contracting Parties and states which are common bases of operations or training for PMSCs with respect to harmonized systems for securing, stowing, bonding weapons. Those states which are supplying the contractors and materiel are, naturally, best-placed to help establish common mechanisms and technical specifications in this area. Such agreements naturally fall outside of the purview of the ISPS but can be, at least in some cases, within its existing provisions for interstate cooperation and bilateral agreements.⁶⁷

VII. Recommendations and Conclusion

We now arrive at a serious problem for the merchant vessel. Without consistent international regulation concerning the duty to declare and/or bond firearms before entering port, the master of the vessel must make appropriate arrangements, perhaps weeks in advance, for the legal entry of whatever armament the ship carries as part of its regular equipment, if such entry is even possible. Here

⁶⁵ Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO Msc.1/Circ.1405/Rev.2 (25 May 2012), paragraph 5.12.

⁶⁶ Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO MSC.1/Circ.1443 (25 May 2012), 5.10.

⁶⁷ See, e.g., SOLAS Ch. XI-2 Regs. 11, 12, (1184 UNTS 2), as amended in MSC.194(80).

we run into a further difficulty – the firearms that are generally least regulated by domestic laws (small-gauge shotguns being the most obvious example⁶⁸) are also least appropriate for repulsion of a closing pirate vessel, especially from a container ship which may place its crew nearly 25 meters from the waterline. The most appropriate firearm for shipboard defence is one that is capable of rapid, accurate fire and that has a longer range than the weapons most commonly in the attackers' possession. Such a weapon would ideally be ill-suited to conversion to the wooden skiffs or other similar small vessels most commonly employed by pirates in case a ship carrying them should be taken. Even a relatively small, outdated automatic cannon would fulfil such a role. As an example chosen from a recent IMO report, the pirates off of the Somali coast were armed with rocket-propelled grenades (RPGs) and automatic weapons, most likely AK-47s.⁶⁹ These weapons, when fired from a moving platform similar to a zodiac, have an effective range of 950 m⁷⁰ and 350 m⁷¹, respectively. If the ship's watch were suitably alert and modern detection systems were in place, this would mean that even an outdated deck mounted weapon, such as an Oerlikon 20 mm cannon, would be able to fire convincing warning shots at a closing pirate well before the pirate's weapons could reach the merchant vessel. Even the 3"/50 calibre machine gun, used on American merchant ships equipped for self-defence in the years during and after World War II, would be a convincing armament in this capacity.

Of course, such a weapon obviously cannot be placed under bond, cannot be easily stowed, and would not qualify as standard ships' equipment in most jurisdictions. Even in jurisdictions where private ownership of such armaments would be legally possible, the headaches associated with actually laying hands on these items in the civilian market, not to mention problems securing service parts and ammunition, would be significant. Based on the experiences of Private Security Firms, the manpower to operate such a weapon seems to exist on the international security personnel market,⁷² and there would certainly be hands to operate such equipment if it were made available.

⁶⁸ See, e.g., 'Prohibited Firearms', Canadian circular (2012). Found at:

<http://www.rcmp-grc.gc.ca/cfp-pcaf/fs-fd/prohibited-prohibe-eng.htm>

or 'Home Office Firearms Law: Guidance to the Police', United Kingdom circular (2005).

Found at:

<http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/HO-Firearms-Guidance.pdf>.

⁶⁹ *Reports on Acts of Piracy and Armed Robbery Against Ships*, International Maritime Organization, MSC.4/Circ.125 (3 October 2008).

⁷⁰ Terry J. Gander and Ian V. Hogg (editors), *Jane's Infantry Weapons* (1995), 303-305.

⁷¹ *Manufacturer's Product Information Sheet* (2008) Found at:

<<http://www.izhmash.ru/eng/product/akm.shtml>>.

⁷² Carolin Liss, *Private Security Companies in the Fight Against Piracy in Asia* (2005), 8.

The problem remains, however, that a ship so equipped would simultaneously be well-defended and unable to port almost anywhere in the world. The fantasy solution would be a recognition of a neutral merchant ship's right to arm itself purely for defence, as recognized in the *Panama*, above, but rejected in the intervening one hundred and nine years since that case was decided and unprovided for in any of the modern instruments governing safe shipboard operations. It is unlikely, considering the hostility with which coastal states receive armed merchant vessels and pleasure craft, *supra*, that there would be widespread assent were such an article proposed as an annex to any of the treaties appended to the Montego Bay Convention. Another possibility is to encourage the development of incorporated locking mechanisms, removable and bondable firing pins, etc. to satisfy port states that these items posed no threat to port security. Again, however, given that there have been police responses even to conventional firearms securely stowed below-decks, the likelihood of any headway being made in this area is remote.

The ideal solution, of course, is to stop the pirates through the use of state resources, either with regularly constituted navies or by resolving the shore-based tumult that allows pirates to operate with impunity. As mentioned above, the littoral states on the Malacca Straights have had a great deal of success in reducing their own piracy problem, although it seems that it took the threat of armed private escort vessels in 2005 to force the states' hands the following year. Simple measures like agreements concerning the right of hot pursuit into neighbouring states' territorial waters, joint patrolling, and coordinated intelligence⁷³ can go a long way toward reducing what is frequently opportunistic behaviour by coastal residents.

But as the reader is of course aware, the hot spot for global piracy is no longer the Malaccas, but the East and West coasts of Africa. Somali pirates used Somalia's long coastline and proximity to major shipping lanes to cause substantial losses to global commerce.⁷⁴ These pirates are more inclined to assault, kidnapping, and seizure of entire ships for ransom than the previous generation of pirates. The arguments against firearms raised by the IMO and other security experts about commercial vessels made sense when the risk of assault or death was low, and when the perpetrators were in good part opportunists armed with knives who attempted to scale anchor chains to steal ship's stores and raid the ship's safe. This common fact pattern, repeated dozens of times in IMO monthly reports from the earlier in the previous decade,⁷⁵ almost always ends with the

⁷³ See, John F. Bradford, "Shifting the Tides against Piracy in Southeast Asian Waters", *Berkeley Asian Survey* (May/June 2008), 478.

⁷⁴ International Chamber of Commerce *Reported Piracy Incidents Rise Sharply in 2007*, (9 January 2008). Found at: <<http://www.iccwbo.org/iccbiedg/index.html>>.

⁷⁵ See, e.g., ICC IMB Live Piracy & Armed Robbery Reports: 108-13 (23 May 2013), and other reports concerning boarding parties armed with 'long knives', which are *passim* in

perpetrators jumping overboard on discovery. When the pirates are armed with automatic weapons instead of ‘long knives,’ and when their primary interest is taking the vessel and its crew for ransom, then the safety of not resisting becomes an open issue again.

The solution to Somalia’s anarchy may finally be on the horizon. The international maritime force currently patrolling the waters around the Gulf of Aden did not previously have a mandate to pursue pirates into Somalia’s territorial waters without the permission of the Interim Government,⁷⁶ (which in any case was impossible to obtain because Somalia for all practical purposes had no functioning government), but this situation has improved. The recent revisions in the EUNAVFOR mandate now authorize ‘hot pursuit’ into the territorial and internal waters of Somalia.⁷⁷ Revisions to Status of Forces Agreements and rules of engagement for flag states operating in the high risk area have to some degree mitigated the regime envisioned in UNCLOS, which acts against the interdiction forces by compelling them to conduct inspections of suspected pirate vessels⁷⁸ which may not be in keeping with the character of the ongoing conflict.

For now, a plausible conclusion is that reliance on national navies can only be one part of an overall strategy for defending high seas shipping from pirate attack. The best defence for ships seeking to repel pirates may be a type of firearm that has been in use since World War I, and which is now mostly confined to police vessels.⁷⁹ While the law of prizes and other rules pertaining to armed merchantmen may not be entirely anarchic, the basic principle from a bygone era that private ships are entitled to defend themselves from attack is a sound one, and is one worth examining anew. Not every company is PNTL; most private shipping lines do not have the wherewithal to ask for special dispensations from foreign governments to allow for the provision of automatic cannon and shipboard armed constables.⁸⁰ But if states acting on their own cannot stop piracy through the use of force or diplomacy, then it makes practical sense to establish cooperative agreements and regulatory systems which allow merchant vessels arm themselves in a manner proportional to the threats they face. While the ISPS Code may not be the most natural regulatory outlet for advancing this goal, it nonetheless can be used as a flexible template for states which decide to enact laws allowing the entry of certain kinds of weapons for defence.

the IMB reports.

⁷⁶ The Situation in Somalia (UNSC Resolution S/RES/1816, 2 June 2008).

⁷⁷ European Union Council Decision 2012/174/CFSP (23 March 2012).

⁷⁸ UNCLOS III, Article 100.

⁷⁹ Chris Bishop, *The Encyclopedia of Weapons of World War II* (2002), 161-162.

⁸⁰ Statement of the Honorable Mr. Battle, Hansard (Proceedings of the Parliament) (UK) (18 January 1999), 365.

MACROECONOMIC IMPLICATIONS AND STRATEGIES FOR DISRUPTING THE FINANCIAL PIRACY NETWORKS

Graziano Patriarca*

I. Introduction; II. Pirates or Entrepreneurs?; A. Peculiarities of the Somali Piracy Business Model; 1. Somali Piracy and State Failure; 2. Pirates as 'Utility Maximisers'; B. The Financial Cycle of Piracy; 1. Phases; 2. A Case Study: The MV "Victoria"; 3. Somali Piracy: Destructive Business or Resource? The Widespread Effects of Piracy on Somali Economy; 4. Kingpins as 'Power Brokers'; 5. When Benefits Outweigh the Risks: The Pirates' 'Way of Life'; 6. Piracy off the Coast of Somalia and Alternative IVTS; the 'Hawala System'; a) The Hawala System; b) Hawala and Ransoms Laundering in Somalia; III. Strategies to Disrupt the Pirate Business; A. Traditional Approach and New Strategies; 1. Disrupting the Piracy Business Model; 2. Disruption of Pirates' Logistics; 3. Economic Incentives to Replace Piracy.

I. Introduction

The Economic study of the Pirate Business Model, from the eighteenth century till today, is based on Nobel Prize-winning economist Gary Becker's initial ideas on 'the rational choice theory as applying to criminals'.¹ Following him, a number of other academics extended this logic to decision making in the context of organized piracy for ransom.

In his recent study of high seas piracy at the turn of the 18 the century, Peter T. Leeson uses piracy as 'a test case for the claim that rational choice economics is what motivates much of human behaviour'. The economist demonstrates that pirate life was an excellent example of 'the Adam Smith's invisible hand' in action.

Even with the differences in time, setting and degree of crime, Leeson's analysis reflects considerations relevant to present days. Indeed, as with *Golden Age buccaneers*, modern Somali pirates are driven by the same *profit-maximizing and cost-reduction logic*.

In other words, legality and statistics aside, 'piracy off the coast of Somalia is still a good business with a very successful model' since, as we will see, it still guarantees every participating element of its 'value chain' a defined share of the ransom money.

* Italian Financial Police.

¹ Peter T. Leeson, "The Invisible Hook: The Law and Economics of Pirate Tolerance", 4:2 *New York University Journal of Law and Liberty* (1997), 141.

II. Pirates or Entrepreneurs?

According to entrepreneurship literature, while productive activity is seen as a legal registered business, maritime piracy may be seen as ‘a prototypical form of unproductive or even destructive entrepreneurship with a high level of adaptability’.² This form of entrepreneurial behaviour is deemed to have a destructive role in economy insofar it attracts ‘new followers’.

Ample evidences exist of illegal enterprises thriving in failed and weak states or regions beset by anarchy where organized crime syndicates can, under some circumstances, even replace all or part of the lacking public institutions. It must be said, however, that for the piratical networks, more so than for other criminal organizations, ‘the differences in political and economic landscapes between failing and weak states, influence dramatically how pirates embed their operations across territories’, by adapting their business strategies, models and organizational structures accordingly; notably, because they do not have to worry about enforcement, ‘pirates in failed states can engage in time-intensive kidnappings for ransom, while only weak states provide the markets and transportation infrastructure necessary for operations where ships and cargo are seized and sold for profit’.³

This adaptability has emerged in many circumstances, also as the ability to respond to counter piracy strategies; Indeed, in order to adapt to new situations, ‘maritime piracy syndicates have become more flexible and better organized by undergoing innovative technological and organizational-institutional changes and by acquiring more modern weapons and communications’. For example, as a reaction to recent international naval interdiction operations, they have significantly widened their area of manoeuvre, by using ‘mother ships’ and taking hostages also on land.

A. Peculiarities of the Somali Piracy Business Model

Piracy off the coast of Somalia is ‘a crime based around the business model of kidnapping crews and hijacking ships and cargo for the purpose of extorting ransoms; the ransoms not only reward pirates for their crime, they also provide the main source of funds to support further piracy activity’.⁴

But how could Somali pirates have updated such an ancient criminal trade into a model of modern business? And, above all, what are the most important factors that make this business successful and profitable for the ‘pirate entrepreneurs’? In order to answer these questions it is necessary to profile the *Somali piracy business model* by extrapolating its characteristics, which are based on the

² Richards William J. Baumol, “Entrepreneurship: Productive, Unproductive, and Destructive”, 98:5(1) *The Journal of Political Economy* (1990), 893-921.

³ Justin V. Hastings, “Geographies of state failure and sophistication in maritime piracy hijackings”, 28:4 *Political Geography* (2009), 1, found at: <<http://www.elsevier.com/locate/polgeo>>.

⁴ FATF-GAFI, *Final report of the International Piracy Ransoms Task force* (2012).

following fundamental assumptions.⁵

- *First assumption*: ‘piracy off the coast of Somalia is intrinsically linked to the broader issue of pervasive insecurity and state failure’;
- *Second assumption*: ‘Individuals enlisting as pirates can be categorized as rational utility maximisers, faced with a severe dearth of alternative livelihoods and opportunities’;
- *Third assumption*: ‘Somali piracy is founded upon a sophisticated and disciplined business model, managed by kingpins that have become important power brokers’.

1. Somali Piracy and State Failure

Somalia exists only on paper. There is no central government to provide any resources or public services to the citizens. Paradoxically, this institutional deficit, that today is the greatest piracy’s enabler, is also the reason of its origin as pirates initially replaced lacking Somali public institutions to ensure essential security services. Piracy off the Somali coast, indeed, did not begin with a group of bandits looking for the best way to make money. It began when local fishermen took up arms in an attempt to protect their waters from the activities of foreign fishing fleets taking advantage of the instability in the country, dumping toxic waste and illegally fishing in the Somali waters.

The fishermen were compelled to take up arms because the country lacked any form of political stability or central government, resulting in no security agency in the form of navy or coast guards to patrol the waters and prevent these illegal activities from occurring. That is why some pirates considered themselves to be the “*national coast guards*”. Since its inception, maritime piracy has then evolved into a very lucrative business, while the lawlessness of the country has provided a perfect breeding area for pirates; however, it is the increase in ransom that today continues to serve as motivation for the unceasing practice of the “*business*”.⁶

2. Pirates as ‘Utility Maximisers’

Piracy is a well-organized criminal enterprise, and pirates’ profit-maximising strategies are fundamentally no different from those that legitimate firms pursue.

Since January 2005 to the beginning of 2013, Somali pirates have carried out 1,068 attacks. Of these, 218 resulted in successful hijackings with abduction of at least 3,741 crew members of 125 different nationalities; the amount of ransom paid is often kept as a commercial secret, and so assessments of the total income from piracy in Somalia vary widely, and are mostly vastly inflated; however, for the entire period

⁵ Edoardo Collevocchio, Piracy off the Horn of Africa: Shifting incentives to induce behavioural change (2011), found at: <<http://www.consultancyafrica.com/>>.

⁶ Joana AmaOsei-Tutu, “The root causes of the Somali piracy”, *KAIPTC Occasional Paper No. 31*(2011), 13.

2005–12, we can estimate payments of US\$315–385 million in ransoms.⁷

In the light of these figures we can affirm that piracy in Somalia has emerged as a *'parallel economy'* in its own right.

Ransoms for single pirate hijacks range broadly from tens to hundreds of thousands of US dollars; however, in 2008 this figure shot up to an average of half a million to an astonishing \$3.5m. These outrageous payments have made piracy in Somalia a very attractive business. Due to an increased naval presence in the Horn of Africa, ship seizures have dropped sharply since mid-2011 from a record of almost \$150 million in ransom to \$29.2 million in 2012. Nevertheless Somali piracy remains a viable 'business model' and it would be ingenuous to think that the current low-level of activity suggests that pirates have found something else to do. On the contrary, a recent report states that the number of pirates could double by 2016, increasing by 400 each year.⁸

Assuming there to be some 1,500 pirates operating off the coasts of Somalia, Yemen and Oman, on average a pirate could expect to earn between US\$33,000 and US\$79,000 a year, with potential lifetime earnings of US\$168,630 and US\$394,200 over a five-year career; supposing ransom profits are sustained over time, it equates to almost 150 times the country's national average wage!⁹

Analysis shows that, although pirates do reap considerable profits from their activities, the biggest winners in the piracy game are not pirates per se but 'the men on the top' (financiers and sponsors). Indeed, *piracy syndicates* are organized under several small pyramids gather under sheltering groups that:

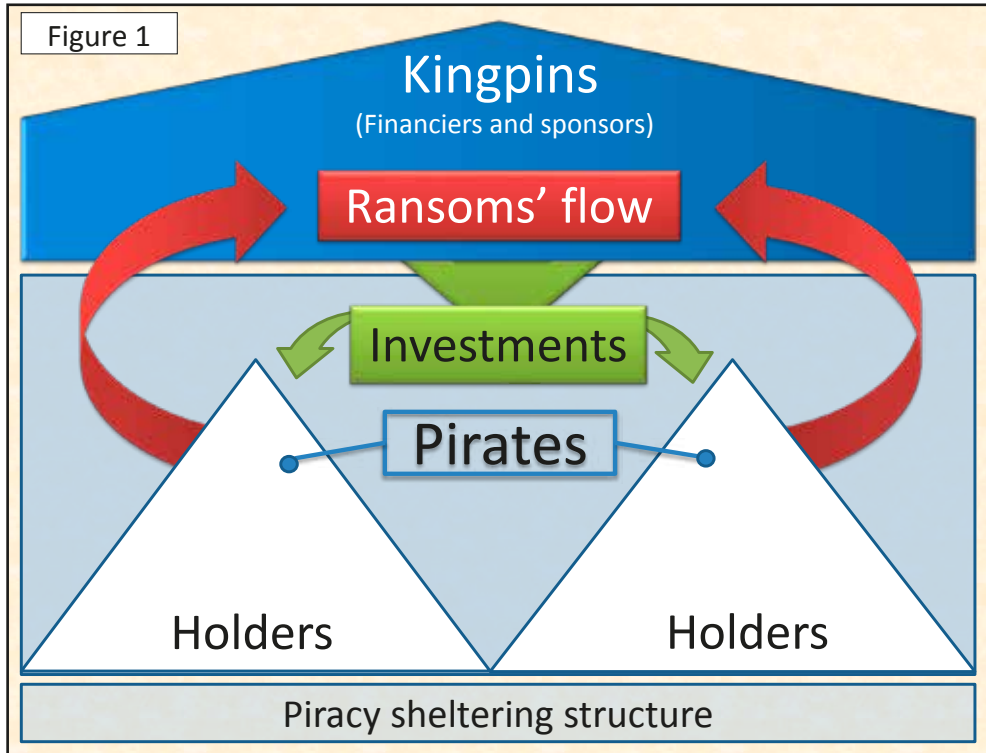
- manage supplies;
- obtain resources;
- create support structures;
- gather intelligence;

A seemingly legitimate business, under the umbrella of the sheltering organization, provides cover and financial resources for pirates (the pyramid organization) while denying all connection with illegal activity. As the members of a legitimate enterprise, pirates perform primary and support value-adding activities by converting the inputs (initial investments) into outputs (ransoms) to be distributed to the piracy network's members or reinvested in further illegal activities (see figure 1).

⁷ The World Bank-Regional Vice-Presidency for Africa, *The pirates of Somalia: Ending the Threat, Rebuilding a Nation* (2013), 7, found at: <<http://www.worldbank.org/africa/piratesofsomalia>>.

⁸ *Geopolitics Inc.* (2011).

⁹ Peter J. Middlebrook, "The Economics of Piracy: Who Wins? Who Loses?", white paper presented on behalf of the Conference *A Regional Response to Maritime Piracy: Enhancing Public-Private Partnerships and Strengthening Global Engagement* held in Dubai (2012), found at: <<http://www.counterpiracy.ae>>.



Various models have recently been developed and applied to the 'piracy business' in order for:

- better understanding of the activities through which this complex hierarchical structures generate profits;
- assessing the costs and benefits of piracy with the purpose of understanding 'who wins' (those who benefit) and 'who loses' (those who pay the costs) across what we call the 'Pirate-Value-Chain'.

The 'Geopolicy model', for the first time, provides a systematic approach for examining the sources of competitive advantage for the Somali pirates, their financiers and sponsors and counter piracy bodies across the 'pirate value chain', where 'the greatest rates of return on international counter pirate investment and policy are to be found'. Results have shown that, 'due to the income disparity between pirates and non-pirates, most of the benefits arising from the piracy activity accrue to non-pirates'.¹⁰

A recent UN report based on interviews in Eyl shows similar results by constructing a rough example of how the average 'take' of pirate's profits following the payment of a ransom is broken down:

- 20% to financiers and 30% to sponsors;

¹⁰ Geopolicy Inc., *The Economics of Piracy, Pirate Ransoms & Livelihoods off the Coast of Somalia* (2011).

- 30% to those involved in hijacking (the pirates, pirate commander, mothership crew and attack squads);
- 10% to the local communities (village elders);
- 10% to the ground militia that controls the area to protect hostages and
- vessels;

Interestingly, while the individuals who risk their lives on a piracy operation split 30% of the ransom money, the bankrollers end up with 50% of the take. It is still unclear where the main beneficiaries from piracy are located; however, *financiers* and *sponsors* of the business are often said to be based abroad where the revenue from pirate activity is mostly channelled. Some analyst concluded that, ‘if the whole amount of ransoms’ money was invested or spent in local businesses so as to create multiplier effects, it could have a substantial transforming effect on deprived coastal communities, impoverished by years of economic uncertainty and illegal and destructive overfishing’.¹¹

In order to gain a better understanding of how the financial flows associated with piracy for ransoms are generated, transferred and reinvested across piracy networks, we will introduce the concept of ‘financial cycle of piracy’.

B. The Financial Cycle of Piracy

The financial cycle of piracy can be defined as *the set of steps – each corresponding to a specific and separate phase of the pirate’s criminal scheme – through which the initial resources invested by piracy financiers and sponsors are converted into profits for pirates*; when part of these incomes are reinvested into further kidnappings the cycle restarts. The process takes place according to a regular and typical set of separate phases that we can describe as follows (see figure 2):

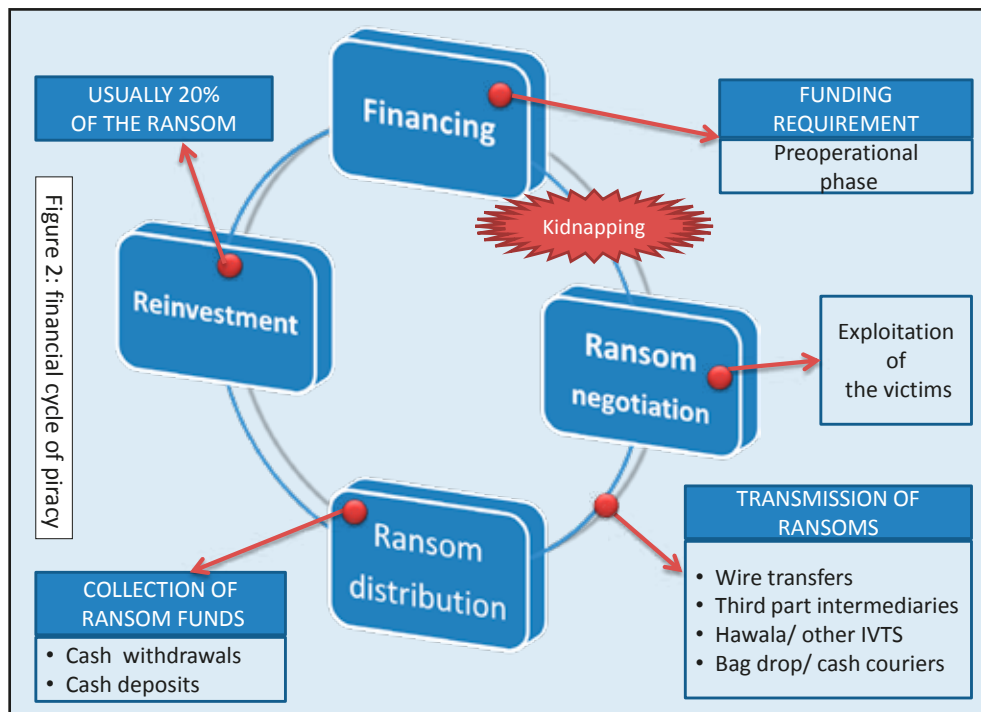
1. Phases

Phase I: Investment – financing

The piracy’s business cycle begins with the investor who uses his own money, usually never less than \$ 2,000 and no more than \$ 50,000, to finance the piracy network. The investor (or financier) can be a businessman, a fellow pirate or even a local official. He typically pays for the food, weapons, fuel and boats for at least eight pirates before the operation is launched. If the investor paid \$ 2,000 he will earn at least \$ 200,000 for every \$ 1 million of ransom. After the hijacking and during the waiting-for-ransom period, the investor pays for everything the pirates needs, including food, fuel and khat. In some cases, two investors are used. One finances the pre-hijacking activities while the second pays for the expenses during the waiting period after the hijacking.¹²

¹¹ Anja Shortland, “Robin Hook: The Developmental Effects of Somali Piracy”, *DIW Berlin Discussion Papers nr. 1155* (2011), 6.

¹² Jama Deperani, “Somali Pirate Rules and Regulations”, *Somalia Report*, found at:



Phase II: Ransom negotiation

After the vessel is seized, the negotiation with the ship owners or Management Company begins; it usually starts via telephone communication from the pirates. The pirates do not negotiate themselves; they hire third party intermediaries, someone they can trust (more often than not are relatives of these persons). Ransoms are usually negotiated via satellite phone or, less frequently, on the ship or in town. The amount requested and the negotiation length depends on the 'reference ransom' established by previous payments for a specific ship type; of course the bigger the captured vessel, the more complex the negotiation. Typically, the amount requested for ransom starts with hundreds of millions of dollars, but during the negotiating process it is reduced to a few million dollars. Pirates usually ask that the ransoms are to be paid in used dollar bills – normally \$50 or \$100 notes. The insurance company of the hijacked vessel then arranges for a cash payment; the cash is obtained from a financial institution, which may be the insurance company itself.

Ransom payments are often, but not always, paid in the form of physical cash. Airdrops into waters in the hijacked area appear to be the preferred means of delivering money but there has also been evidence that ransom payments

<<http://www.somaliareport.com/index.php/post/1706>>.

were transferred through banks, intermediaries, and alternative remittance systems such as *hawalas*. The vessel and its crew are usually released a short time after the ransom is paid.¹³

Phase III: distribution of ransom payments

When the ransom is received, all the pirates from the *first group* (who attacks and boards the ship), the *second group* (who holds the hostages), the translator and investors as well as a number of elders from the town, meet on the hijacked vessel. Subsequently, the hijacking and boarding crew group (attackers) are swapped for the guarding crew (holders); the first group typically receives some advance money which they then spend in neighbouring cities.¹⁴ An accountant will then accurately and fairly divide the ransom using records from the investors according to pre-arranged agreements.¹⁵

The spreading of ransoms in Somalia follows traditional patterns, involving:

- A considerable redistribution and investment in urban centres rather than coastal villages; indeed Pirates typically give a share of the ransom to the elders to be used for the local area.
- Moving out of the country a significant percentage of ransom proceeds – usually not less than 50% – through informal value transfer systems such as *Hawala* or *Hundi*, to make them reappear in Dubai and then the rest of the world as licit funds.
- Reinvesting part of the money into criminal activities that are not limited to piracy.

Phase IV: Partial reinvestment for future pirate missions

Financiers and sponsors usually ‘reinvest’ 20% of the ransom money to purchase new equipment and acquire new capabilities (such as GPS locators), to be used for more kidnappings and can rely on a diaspora network to provide intelligence about shipping movements’.¹⁶ These resources are often provided by the same shadowy kingpins who initially fronted the funds to put the gangs to sea (see figure 2).

2. A Case Study: The MV “Victoria”

On May 5, 2009 the Antigua and Barbuda-flagged 7,767 gross ton, 146-metre general cargo vessel MV Victoria, was hijacked by eight pirates in the Gulf of Aden as it was sailing for Jeddah with a shipment of rice. The crew of 11 Romanians then endured 75 days in captivity. After tense negotiations, the shipping

¹³ FATF-GAFI, Organized Maritime Piracy and Related Kidnapping for Ransom Report (2011), found at: <<http://search.fatf-gafi.org/search/C.view=default/results?q=piracy>>.

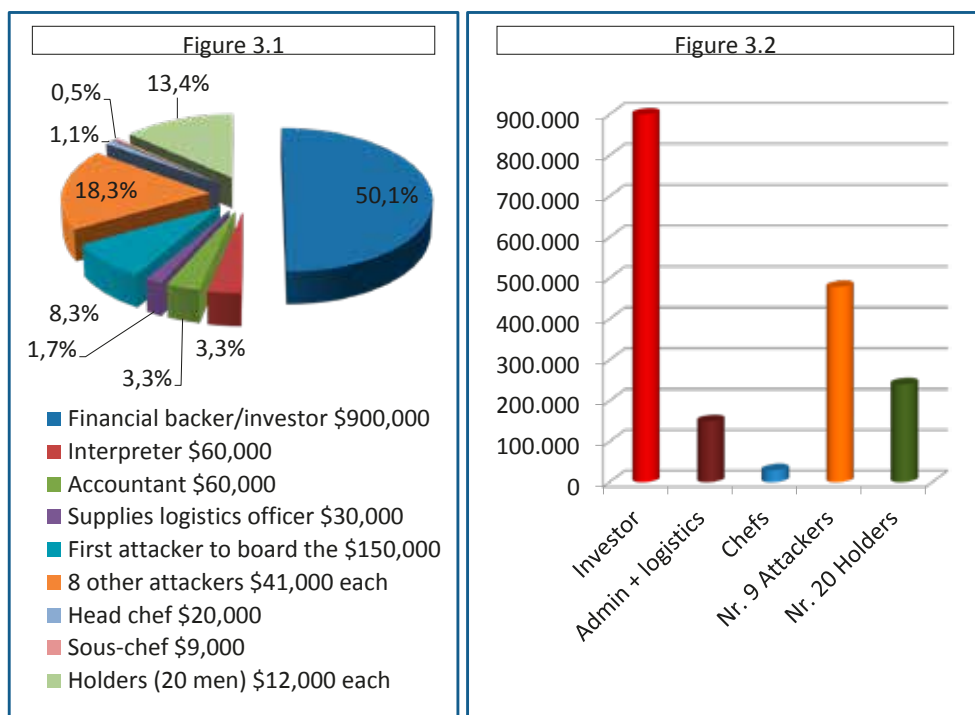
¹⁴ See Jama Deperani, n. 12 above.

¹⁵ Ibid.

¹⁶ Nikolas K. Gvosdev, Privateering the Pirates, The National Interest (2009), found at: <<http://nationalinterest.org/article/privateering-the-pirates-3082>>.

company agreed to pay a \$1.95 million ransom which was delivered by airdropping a package into the sea.

The financier responsible for supplying start-up capital worth roughly \$40,000, which went towards the attack boat, outboard motors, weapons, food and fuel, received half of the total ransom, or \$900,000. After subtracting the operating expenses of \$230,000 that the group incurred during the Victoria’s captivity in the Somalian port of Eyl, the financier’s return on investment would have been an enviable 1,600 per cent. The Eight others pirates, received \$41,000 each, except the first to board the Victoria, Mohamad Abdi, that received an additional *Land Cruiser bonus* of \$150,000. Each holder would have spent roughly two-thirds of his time, or 1,150 hours, on board the Victoria during its 72 days at Eyl’s port, earning an hourly wage of \$10.43. The head chef and sous-chef would have earned \$11.57 and \$5.21 an hour, respectively¹⁷ (see figures 3.1 and 3.2).



3. Somali Piracy: Destructive Business or Resource? The Widespread Effects of Piracy on Somali Economy

Some analysts demonstrated that ‘financial profits generated from piracy in Somalia may leverage the regional economy in so far as they are redistribut-

¹⁷ Jay Bahadur, ‘Pirates, Inc.’, *Financial Times* (23 June 2010).

ed to the local communities and invested in urban centres rather than canalized abroad'. Furthermore, it is deemed that, 'in the absence of a functioning state that has failed to defeat crime and terrorism, pirates may provide "local governance and stability"'. As a matter of fact, although each of the sources has significant weaknesses, statistics indicate that 'pirate incomes have widespread and significant positive impacts on the Somali economy particularly in the north of the country', where ransom asset is most concentrated and where has been seen increased investments in cattle and in commercial development; the flow of ransom payments has also helped to boost the local exchange rate, to raise real wages and to reduce inflation.

The authors of a recent survey studied satellite photos of different regions of Somalia. The photos show higher light emission in the cities of Garoowe and Bosaso; this demonstrates that the average use of electric appliances has significantly increased there. The two cities are the main centres in the region of Puntland, which became a stronghold of the Somali piracy. The aerial survey also shows that the urban areas have increased and their build-up environment has changed. The authors of the report conclude that 'income from piracy go to regional centres contributing to their development by boosting the economy of the Somali cities while coastal villages remain in decay'.¹⁸

The positive impact of piracy is also determined by the spin-off effect of those 'satellite economic activities' connected to piracy's logistics; for example, in 2010, the average hijacking ransom brought the equivalent in the export of 1,650 heads of cattle, while keeping hostages – 1,016 were captured in 2010 – provided jobs for local cooks, producers and traders¹⁹. It is indeed calculated that up to 100 people are needed to secure every hijacked ship. The experts also concluded that, 'due to this boosting effect of piracy for ransoms on the Somali economy, there would be a large group interested in its continuation' while, for the same reasons, regional authorities would deliberately hamper its development.

4. Kingpins as 'Power Brokers'

Apart from the conventional understanding as an isolated criminal act on the high seas, piracy is 'an organized crime perpetrated by a broad network of coordinated criminals'. Particularly in the context of Somali piracy, it is commonly known that there are '*kingpins*' who organise and finance many of the operations; these ringleaders, in turn, 'depend on a network of community financing that is in a large part perpetuated by a cycle of poverty and personal hardship'.²⁰

Somalia's pirates, as a matter of fact, treat every successful hijacking as 'a private venture in which businessmen from all over the country can invest by offering financial or material assistance, buying and selling shares'; the extent of

¹⁸ Anja Shortland, *Treasure Mapped: Using Satellite Imagery to Track the Developmental Effects of Somali Piracy* (2012).

¹⁹ Ibid.

²⁰ Jacob Dishion, "International Treaties and Tools Relevant to the Investigation and Freezing of the Proceeds of Piracy (2012), found at: <<http://law.case.edu/war-crimes-research-portal/>>.

these warlords and financiers' involvement has increased over time by 'enabling the purchase of more sophisticated equipment (satellite phones, Global Positioning System-GPS), newer weaponry, and disturbingly payments to obtain intelligence on shipping such as the type and value of cargo, the likelihood of ransom demands being met by the ship owners'.²¹

Yet, to date, 'there is limited accessible research that identifies key pirate financiers and their associated business investments; this represents a gaping hole in our counter-piracy approach, given that some pirate financiers have invested in what is now a thriving global business'.²²

5. *When Benefits Outweigh the Risks: The Pirates' 'Way of Life'*

Piracy is not about ideologies, but 'competing costs and benefits'; like any other profit-driven illegal business it can only be deterred by changing the cost-benefit analysis and removing the chances to commit the crimes. In allocating the costs and benefits across the 'piracy value chain' we noticed that individual pirates are, in many ways, the 'weakest-link' as they receive only a small percentage (2-4% each) of the total ransom paid. On the other side, while the economic costs of being a pirate are very low, even the higher pay-out earned by an "attacker" seems much less appealing when one considers the risks involved.

Statistics show that, the moment he steps into a pirate skiff, a pirate accepts a 1-2 per cent chance of being killed, a 0.5-1 per cent chance of being wounded and a 5-6 per cent chance of being captured and jailed abroad', while the financiers and sponsors of these attacks face comparatively few risks. By comparison, the deadliest civilian occupations in the western world, those related to fishing, have an on-the-job fatality rate of about 100-400 per 100,000, or 0.1-0.4 per cent.²³

Why, therefore, would someone want to be involved in such a dangerous 'business'? And, above all, is there any alternative to becoming a pirate in Somalia? We shall attempt to answer these questions by considering the extent of Somalia's youth chronic unemployment, resulting in a lack of prospects. Indeed, there are very few alternatives for young Somali men, other than having to choose between a future as a pirate or that of a fisherman by risking their life at sea in an attempt to earn a legitimate living, with the concrete possibility of being shot at by foreign fishermen, or pirates themselves with water cannons and firearms. It therefore seems clear why the lure of prosperity associated with piracy attracts so many young Somalis, by outweighed any other risk.

²¹ Australian Government – Department of Infrastructure, Transport, Regional Development and Local Government, *International Piracy and Armed Robbery at Sea Security Inquiry Report* (2010).

²² Rudolph Atallah, "Pirate Financing: Understanding and Combating a Complex System", white paper presented on behalf of the Conference *Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracy* held in Dubai (2011).

²³ Christian Schubert, "Fighting Maritime Piracy: Three Lessons from Pompeius Magnus", *6:17 Jena Economic Research Papers* (2012), 8.

6. Piracy off the Coast of Somalia and Alternative IVTS; the 'Hawala System'

Piracy, as an illegal activity, 'relies on traditional informal transfer systems to hide its illegal profits'; Informal Value Transfer Systems (IVTS) are terms that 'encompass the schemes, human networks, and mechanisms by which money is informally transferred from one individual and geographic region to another'.²⁴

These schemes are typically based on mutual trust between the transfer brokers, since 'the movement of funds is frequently accomplished using the personal resources of the individual operator'. IVTS comprise a significant 'grey economy' in the world financial market, accounting for tens of billions of dollars in transfers each year.²⁵

a) The Hawala System

Hawala is an informal system that allows its users to transfer money quickly, reliably, and inexpensively. One commonly used definition of the method is '*money transfer without money movement*' as it allows the handover of money or the purchase of property and goods in other countries without any actual direct transfer of funds. It is prevalent in countries where infrastructure is lacking and political corruption is widespread; In Somalia, for example, hawala is the only reliable way of moving money into the country, since it fills a gap in the offerings of formal banking institutions. Hence, it is used by members of the Somali diaspora to send remittances to their families, as well as by United Nations agencies and non-governmental organizations to get aid money to those in need.

A typical hawala transfer involves two operators, a person sending funds, and a recipient. The sender gives the desired amount to the operator in location A. The operator then contacts his counterpart in location B, indicating the amount received and providing a code to the other operator. This code must be provided by the recipient for disbursement of the funds. The sender then contacts the intended recipient and communicates the details of the arrangement, the identity of the other operator, and the code. Person B contacts this operator and receives the funds.²⁶

The accounts between the two hawala operators can be settled using a number of archetypal money laundering techniques, wire, transfers, or exchange of goods. In Somalia, where there is a tremendous demand for the services provided by IVTS, the numbers speak for themselves; \$100-300 billion passes through the hawala System annually.

b) Hawala and Ransoms Laundering in Somalia

Given how strongly entrenched hawala is in Somali society, the question arises as to what role it plays in the funding of Somali piracy and the laundering of its pro-

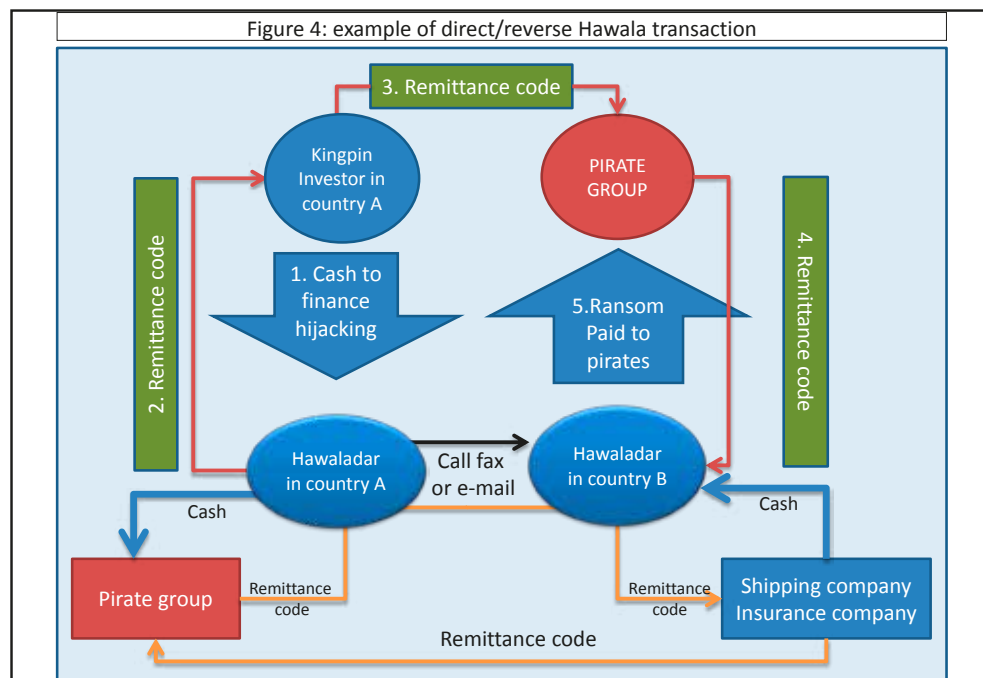
²⁴ Informal Value Transfer Systems, 33 *FinCEN Advisory* (2003), 1.

²⁵ U.S. Department of the Treasury, Online Resource Center on Hawala and Alternative Remittance Systems, found at: <<http://www.treasury.gov/resourceScenter/terrorist-illicit-finance/Pages/HawalaSandSAlternatives.aspx>>.

²⁶ See Jacob Dishon, n. 20 above, at 27.

ceeds. It is in fact alleged that ‘members of the Somali Diaspora are investing in pirate enterprises through hawala channels’; estimates suggest that ‘approximately 40-50% of ransom proceeds are moving out of the country using hawala, with the rest being reinvested back into the business and redistributed within the community’.²⁷

However there is scholarly disagreement about how hawala is relied on by pirates as there are empirical evidences of its use. In 2009, Somali pirates hijacked the Belgian vessel *Pompeii*. Ultimately, the Belgian government negotiated the ransom that was paid by the shipping company’s insurance carrier. However, while investigating the matter, Belgian authorities discovered bank account information, cell phone numbers, and Hotmail accounts that suggested that the ransom was transferred through Somalia, the United Arab Emirates, and Djibouti using hawala transactions.²⁸ It is indeed clear that these value transfer methods are an important opportunity for pirate groups to transfer funds swiftly around the globe (see figure 4).



²⁷ In 2010 a total of \$238 million was paid in ransoms off the coast of the country. Therefore, if 40% of this entire amount moved back through Somali hawala networks, it would account for roughly \$95 million. This amount is undoubtedly high as it is impossible to say what percentage of the ransom money actually enters the country. However, even funds that end up in neighboring nations are not precluded from movement through hawala, thanks to the network’s strong presence in these regions.

²⁸ See Jacob Dishon, n. 20 above.

III. Strategies to Disrupt the Pirate Business

Doing away completely with piracy off the coast of Somalia is an extremely difficult proposition since, despite the assaults on merchant ships have significantly fallen in 2012, there is actually quite a lot to suggest that *fire is still smouldering under the ashes*, as the scourge of piracy in the region could re-emerge anytime. Piracy networks are indeed capable to differentiate their criminal schemes within time and space by keeping intact their business model as they emulate the standard multinational corporate structure, along with its reactive adaptability.

Additionally, while piracy in Somalia has fallen sharply during the first half of 2012, West Africa has become a dangerous hotspot for international navigation since it has experienced a worrying increase in attacks; especially in the Gulf of Guinea, the gangs responsible appear to have increased both their operational sophistication and target selectivity; given the increased value of each operation and the small risk of punishment their crimes show no signs of disappearing. It is therefore vital to understand why the crime is decreasing in certain theatres, why it is expanding in others, and where it will spread to next?²⁹

A. Traditional Approach and New Strategies

Currently, most of the work of the international community to address the issue of piracy off the coast of Somalia has resulted in high-cost ex-post facto responses rather than on preventive actions where a fundamental gear shift is required. There are in fact a number of ways that the problem can be addressed more effectively; several of these inherently multinational and interdisciplinary approaches to counter-piracy.

From our perspective, there is a belief that military measures should go hand in hand with decisive actions aimed at disrupting pirates' financial networks and at fostering Somalia's self-sustaining economic growth; more specifically these assumptions can be summarized as follows:

- Firstly: it must be categorically stated that piracy cannot be stopped at sea. Developing a comprehensive land-based solution is essential.
- Secondly: It is vital to increase the 'risk/reward' ratio for those who benefit most from piracy and to damage the underlying business model – including by tracking and disrupting the financial flows.
- In the end, re-establishing the rule of law and economic development can reverse the perverse incentives of Somali piracy.

These statements need to be examined more deeply.

1. Disrupting the Piracy Business Model

Somali piracy has to be understood as 'an organized crime that is happening

²⁹ For further details see the release of the *International Maritime Bureau (IMB)'s 2012 piracy report*.

on land and at sea, with kidnapping crews and ships for ransom as the business model'.³⁰ The primary method to combat this illegal business is to disrupt its economic system; to this end, pressuring and interrupting the flow of finance to the pirates is essential.

Given the broad community involvement in piracy, distinguishing the flow of illicit capital out of a community or state from legitimate financial activity has, however, 'proven challenging and often fruitless for law enforcement officials'.³¹ Another major challenge in combatting piracy from a financial standpoint is 'the information deficit faced by authorities in understanding how piracy financial networks and organizations operate'.³² The first step toward this end should be 'a better tracking of financial flows and the setting up of a blacklist of institutions involved in laundering money from piracy'. Once tracked, the ransom money that may have been deposited in EU, USA or UAE banks must be traced and confiscated. It would be advisable for the International Community also 'to put a premium on identifying the key (Somali and non Somali) players that finance piracy, as well as conduct deep research to isolate and expose their investment patterns'.³³ A number of governments and institutions are currently focusing on monitoring the *hawalah systems* – through which individuals who receive ransom cash launder that money into 'legitimate businesses'. With proper research, 'profiting from piracy businesses that are using the *hawalah* can be identified and action can be taken to stop their expansion; this, will pressure pirate financiers by virtue of removing their financial security blankets'³⁴ (see figure 5 for an overview of the on-going proposed financial interdiction strategies).

2. Disruption of Pirates' Logistics

Piracy is only partially a sea-related problem since it is built on a land-based business model; identifying the areas where pirates buy their gear is therefore important. In order for pirates to be effective, they must purchase equipment and weapons to conduct their attacks.

Putting pressure on pirates' business model by destroying their boats and eliminating their fuel dumps will make life more difficult for the sponsors of piracy by denying pirates themselves impunity and a secure base to launch attacks at sea, thus increasing costs and decreasing their operational capability.³⁵

³⁰ European Union Naval Force Somalia Operation Atalanta, *Information Booklet*, found at: <http://eunavfor.eu/wp-content/uploads/2013/05/20130503_EU-Naval-Force-Information-Booklet.pdf>.

³¹ See Jacob Dishon, n. 20 above, at 9.

³² Mark T. Nance, "Laundering Pirates? The Potential Role of Anti money Laundering in Countering Maritime Piracy", 10 *Journal of International Criminal Justice* (2012), 857-858.

³³ Rudolph Atallah, n. 22 above, at 14.

³⁴ *Ibid.*, at 44.

³⁵ EUNAVFOR, *Operation Atalanta: Disruption of pirates' logistics in Somalia*,

3. *Economic Incentives to Replace Piracy*

As already stated, Piracy in Somalia has emerged as a parallel economy itself by boosting economic growth of the regional centres contributing to its development and by offering a financially attractive career for unemployed Somali young men; hence it has a large interest group behind its continuation. In order to reverse this perverse trend, ‘a plan must be developed and delivered that offers sufficient incentives to replace the lure of piracy with an acceptable alternative’; in other words, ‘once the piracy money stops flowing, it must be replaced with a carefully tailored social and economic alternative of sufficiently valuable perceived worth. Such an alternative must be crafted to fit within the social landscape of Somalia, and supported within a clan framework’.³⁶

(2012), found at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/130250.pdf>.

³⁶ Rudolph Atallah, n. 22 above.

Figure 5: overview of the current financial interdiction strategies to disrupt the piracy business model			
Agency	Strategies/goals		
	Financial investigation options/Interdiction strategies		
	Supporting tools		
INTERPOL EUROPOL	<ul style="list-style-type: none"> fighting maritime piracy through closer global cooperation in financial investigations; developing specialist training and promoting best-practice in financial investigations; gathering intelligence and creating databases; 	<ul style="list-style-type: none"> Research the entire ransom payment process. Financial investigations. Asset freezing. Confiscation. Asset recovery. 	<p>INTERPOL has created the Anti-Maritime Piracy Task Force, aimed at creating with a cross-sector platform for information-sharing and alerts on the financial aspects related to maritime piracy cases, and in particular to identify key money trails and networks.</p>
EESC European Economic and Social Committee	<ul style="list-style-type: none"> Better tracking of financial flows connected to piracy, particularly of those ransom monies that may have been deposited in EU banks. 	<ul style="list-style-type: none"> Setting up of an EU blacklist of institutions involved in laundering money from piracy. Asset freezing; restraint of property confiscation, assets recovery. 	<ul style="list-style-type: none"> Common investigation teams. Europol, Frontex.
UNODC International Monetary Fund	<ul style="list-style-type: none"> Promoting international cooperation and response in the fight against financing of piracy and the laundering of ransom money. Identifying the property to be seized, since legally only that property which is associated with the criminal enterprise can be confiscated. Research into IVTS (hawala and others) and ransom payment/laundrying process 	<ul style="list-style-type: none"> Monitoring the IVTS systems and ransom payment laundering process Receiving information on suspect transaction from the national FIUs 	<ul style="list-style-type: none"> International Convention for the Suppression of the Financing of Terrorism. The UNCAC Convention. Monitoring and reporting suspect transactions through the national FIUs.
CGPCS Contact Group on Piracy off the Coast of Somalia	<ul style="list-style-type: none"> Advancing information sharing internationally and between industry and government authorities to disrupt the pirate enterprise ashore; working with other key partners such as INTERPOL, national law enforcement/prosecution agencies currently pursuing piracy investigations/prosecution, and the World Bank to better understand how illicit financial flows associated with maritime piracy are moving in the area. Creating new opportunities for prosecutors and investigators to exchange information about and de-conflict their ongoing investigations and proactively target for arrest and prosecution the top organizers, financiers, and negotiators of Somali piracy. Focusing current mechanisms for funding of pirate activities and the various financial flows related to piracy. 		<ul style="list-style-type: none"> Working Group 5 (chaired by Italy)
FATF Financial Action Task Force World Bank	<ul style="list-style-type: none"> Encouraging regulatory and operational measures for tracking financial flows, combating money laundering, piracy financing and other related threats to the integrity of the international financial system.’ Tracking assets. 	<ul style="list-style-type: none"> Encouraging targeted financial sanctions to disrupt the financial flow associated with PFR; assets seizure Preventing pirates using international banking systems, prevent the use of cash carriers, and financial sanctions. Targeted sanctions on financiers and kingpins 	<ul style="list-style-type: none"> Sanctions are authorized under UN Security Council Resolution 1844 (2008). The US (Executive Order 13536) has established domestic capacity to target financiers of piracy associated with Somalia. In February 2012 the UNSC created a list which imposes sanctions on financiers and kingpins as authorized under UNCR 1844.

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This book brings together diverse legal opinions related to the definition of piracy, the interaction between domestic and international law and the allocation of responsibility between the European Union and Member States with particular regard to cases of piracy. The main aim of the volume is to analyse State's practice with respect to prevention and persecution of piracy, while demonstrating that the existing international legal framework does not contemplate adequate instruments to ensure security at sea and, in particular, to prevent and pursue maritime piracy and other risks to navigation. As a consequence, the increased threat to navigation by pirates had led to extensive use of guards and a marked expansion in the number of firms offering armed maritime security services for ships transiting seas at high risk.

This volume is addressed to legal advisers, academics, experts, decision-makers and other stakeholders to offer a wide-ranging analysis of the existing legal instruments – including international and national law and recent State practice – aimed at preventing and prosecuting piracy and other risks to navigation.



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