

TOWARDS UNIVERSALITY AND UNIFORMITY: COMBATING THE JURISDICTIONAL CHALLENGES FACING THE PROSECUTION OF SOMALI PIRATES IN LIGHT OF THE LEGAL VOID LEFT BY UNCLOS

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1. Introduction

The upsurge in piracy off the coast of Somalia, which began in 2008, was unprecedented. Jurisdictional provisions laid down in international and domestic law are proving to be insufficient. Consequently, piracy in the Gulf of Aden has necessitated innovative legal responses to a modern outbreak¹ of an old crime.

The international law on piracy is enshrined in Articles 14 – 21 of the 1958 Geneva Convention on the High Seas² (hereinafter ‘High Seas Convention’) and is substantially reproduced in Articles 100 – 107 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), a widely ratified treaty.³ The High Seas Convention and UNCLOS, while being a *de lege ferenda* exercise, has produced a definition of piracy with widespread international acceptance. This is evidenced by numerous codifications with identical notions, such as that found in The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (hereinafter ‘ReCAAP’)⁴ and the Code of conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden (hereinafter ‘Djibouti Code of Conduct’).⁵

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¹ The recent problem in Somalia was unprecedented, with pirates arming themselves with advanced technology. They have successfully captured many ships and crews and garnered a lot of money as ransom. States around the world are alarmed by the danger to navigation through a bottleneck of international traffic and the pirate attacks on ships carrying humanitarian supplies to the Somali population.

² Convention on the High Seas, adopted 29 April 1958, 450 UNTS 11.

³ 162 countries have ratified UNCLOS <http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 29 September 2012.

⁴ ReCAAP is a multilateral agreement between sixteen countries in Asia, concluded in November 2004. It defines piracy in the same manner as art 101 UNCLOS.

⁵ The Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden was adopted at a meeting convened by the International Maritime Organisation in Djibouti in January 2009. The twenty-one States bordering the western Indian

2. Legal voids?

The definitions of Article 101 and Article 105 UNCLOS are very narrow and do not cater for all the piratical incidents happening today. As per Article 101, piracy can only occur on the high seas⁶ and requires action undertaken by one ship against another ship. If piracy occurs within territorial waters it is usually termed 'armed robbery at sea' and falls within the jurisdiction of the coastal State.⁷ Furthermore, even if the latter fell under the definition of piracy, Article 105 would still not permit enforcement jurisdiction over pirates within territorial waters.

Attacks against ships off the Somali coast sometimes take place, in whole or in part, in territorial waters, which is outside the scope of Article 101 UNCLOS. To cater for this lacuna, the United Nations (hereinafter referred to as 'UN') and the International Maritime Organization (hereinafter 'IMO') have adopted numerous Resolutions⁸ since 2008 under the authority of Chapter VII of the Charter of the UN.⁹ It is not intended that these United Nations Security Council (hereinafter 'UNSC') Resolutions become customary law but are merely meant to tackle the problem in Somalia.¹⁰ These Resolutions are given further authorisation by the Somali Transitional Government (hereinafter 'TFG') as an exception to the exclusive rights of the flag State and the

Ocean and the Gulf of Aden are entitled to join the Djibouti Code of Conduct, and seventeen of them have done so as of February 2011. Some of its aims are ensuring that persons committing or suspected of committing such crimes are arrested and prosecuted; and facilitating proper care, treatment, and repatriation for victims of piracy or armed robbery against ships. It defines piracy in the same manner as art 101 UNCLOS.

⁶ The high seas is defined as all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. See art 86 UNCLOS.

⁷ See, *inter alia*, IMO, *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships*, Annex 2.2.1, IMO Assembly Res A 1025 (26) (2 December 2009) and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, arts 3-4, 10 March 1988, 1678 UNTS 221.

⁸ SC Res 1851, UN Doc S/RES/1851 (16 December 2008); SC Res 1846, UN Doc S/RES/1846 (2 December 2008); SC Res 1844, UN Doc S/RES/1844 (20 November 2008); SC Res 1838, UN Doc S/RES/1838 (7 October 2008); SC Res 1816, UN Doc S/RES/1816 (2 June 2008). The UNSC has passed an additional six Resolutions on Somali piracy after 2008. See SC Res 1897, UN Doc S/RES/1897 (30 November 2009); SC Res 1918, UN Doc S/RES/1918 (27 April 2010); SC Res 1950, UN Doc S/RES/1950 (23 November 2010); SC Res 1976, UN Doc S/RES/1976 (11 April 2011); SC Res 2015, UN Doc S/RES/2015 (24 October 2011); SC Res 2020, UN Doc S/RES/2020 (22 November 2011); SC Res 2067, UN Doc S/RES/2067 (18 September 2012); SC Res 2036, UN Doc S/RES/2036 (22 February 2012); SC Res 2067, UN Doc S/RES/2067 (18 September 2012); SC Res 2077, UN Doc S/RES/2077 (21 November 2012).

⁹ Charter of the United Nations, 26 June 1945, 59 Stat 1031, UNTS 993, 3 Bevans 1153. It entered into force on 24 October 1945.

¹⁰ This corresponds to concerns by representatives of developing states at the UNSC, who want to maintain the integrity of the United Nations Law of the Sea Convention. This is demonstrated in the non-binding Code of Conduct adopted on 29 January 2009 concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden.

principle of non-intervention. These UNSC Resolutions have modified existing international law rules with respect to Somalia and have contributed towards the success of anti-piracy operations. In the Gulf of Aden, 'the lack of capacity of the TFG to secure the waters off the coast of Somalia' in conjunction with the 'threat that piracy [...] pose[s] to international navigation and the safety of commercial maritime routes'¹¹ is the driving force behind recent UNSC Resolutions and the need for a legal framework that effectively combats piracy.

3. The jurisdiction to try captured pirates – universal jurisdiction

The doctrine of universal jurisdiction allows any State to try certain offenders who have committed international crimes even if the crime, the defendant and the victim have no nexus to the State carrying out the prosecution.¹²

A single pirate attack may affect a multitude of States because the ship may be flying the flag of one State but owned by a company incorporated in another State while the cargo on board may belong to the company of yet another State and be manned by crew and passengers of different nationalities. Add to this the presence of law enforcement officials (such as military forces to act as a Vessel Protection Detachment and private armed security guards)¹³ of third States and one may think that the end result is the concurrent jurisdiction of many States. However, the situation in Somalia is quite the opposite and universal jurisdiction is needed to counteract this situation. This is where UNSC Resolutions may be helpful.

UNSC Resolutions have reaffirmed the use of universal jurisdiction to prosecute piracy. For example, the UNSC unanimously adopted, with Somalia's consent, Resolution 1816 on 2 June 2008.¹⁴ UNSC Resolution 1816 extended the authorisation of States to enter

¹¹ SC Res 1851, UN Doc S/RES/1851 (December 16 2008) preambular para 5.

¹² See, e.g., Princeton University Program in Law and Public Affairs, *Princeton Principles on Universal Jurisdiction* (2001) <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf> accessed 19 February 2013. This text defines universal jurisdiction in Principle 1.1 as 'criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction'.

¹³ See the article on the BBC, 'Italy marines to face Indian law, says minister' (22 February 2012) <<http://www.bbc.co.uk/news/world-middle-east-18862480>> accessed 30 September 2012. This article describes an incident in which naval personnel on board USNS Rappahannoc killed two Indian fishermen, mistaking them for pirates. In such a scenario of a fatal shooting, the first question is which State has jurisdiction. By killing or injuring a foreign national aboard a foreign vessel in mistaken self-defence potentially subjects a person to the jurisdiction of: the flag State of the vessel from which one fired; the flag State of the vessel into which one fired; and the State of nationality of the person one killed or injured. The question of who prosecutes is settled in a practical way: the State that captures the accused first must either prosecute or extradite.

¹⁴ SC Res 1816, UN Doc S/RES/1816 (2 June 2008).

Somalia's territorial waters and to use 'all necessary means' to suppress piracy.¹⁵ The UNSC called upon all States to 'cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia [...] providing disposition and logistics assistance'.¹⁶ This, read together with the phrase 'all necessary means', seems to extend prescriptive and adjudicative universal jurisdiction to States beyond Somalia.¹⁷

Although States are usually unwilling to exercise universal jurisdiction, during this spike of Somali piracy one sees more prosecutions under this principle.¹⁸ The increase in piracy prosecutions under universal jurisdiction suggests that it may contain elements that make it less controversial than exercising universal jurisdiction for 'core' international crimes.¹⁹ This could be due to:

1. Abstaining State protection: Pirates act without any State sponsorship. They often act against the interest of their own State, thus waiving their State's protection. This explains the legal fiction of 'Statelessness' articulated by Blackstone²⁰ and subsequently by Chief Justice Marshall in *United States v Klintock*.²¹ The limitation of universal jurisdiction to pirates who act purely on their own private initiatives diminishes the chances of universal jurisdiction causing hostilities between nations and also means that universal jurisdiction can be exercised without much controversy.²² 'Core' international crimes invariably involve State action²³ and a high level of heinousness

¹⁵ *ibid* para 7(b). SC Res 1846, UN Doc S/RES/1846 (2 December 2008) para 10, extended the authorisation of other States to enter Somalia's territorial waters, as provided by SC Res 1816, UN Doc S/RES/1816 (2 June 2008), for another twelve months.

¹⁶ (n 14) preambular para 11.

¹⁷ Colin Warbrick, 'Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' (2008) Vol 57 ICLQ 696-697.

¹⁸ See, e.g., Nicholas Hellen, 'Private navy goes to war on Somali Pirates' *The Sunday Times* (London, 6 January 2013) 1.

¹⁹ The term 'core' international crimes primarily encompasses crimes of a certain gravity such as genocide, crimes against humanity and war crimes, as found in the Statutes of the International Criminal Court, and the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

²⁰ William Blackstone, *Commentaries On The Laws Of England* [Chicago 1879] (1769) 71. The latter explains that pirates are universally punishable because they 'renounced all the benefits of society and government'.

²¹ *United States v Klintock* (1820) 18 US 144.

²² For example, the Spanish indictment and request for extradition of General Augusto Pinochet, a senator and former dictator of Chile, strained relations between Santiago and Madrid and London, which faced the Spanish extradition request. See *Regina v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet and R v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17 (24 March 1999).

²³ Ian Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 230. Sir Ian Brownlie states that 'The essential feature of the definition [of piracy] is that the acts must be committed for private ends'.

not present in the crime of piracy.²⁴ As explained by Judge Moore in the *Lotus Case (France v Turkey)*:²⁵

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.²⁶

2. The *locus delicti*: Piracy that occurs on the high seas is not subject to any individual State's jurisdiction. Consequently, jurisdiction is awarded to any State who apprehends the pirate. Piracy can also occur 'in a place outside the jurisdiction of any State', which is a place constituting *terra nullius*.²⁷ Exercising universal jurisdiction over a crime committed on the high seas or on *terra nullius* is not as contentious as exercising universal jurisdiction over a crime that occurred in another State's territory.

4. Universal jurisdiction and UNCLOS

The exercise of universal jurisdiction is only uncontroversial²⁸ if it matches the definition in Article 105 UNCLOS:

²⁴ See the *Case Concerning the Arrest Warrant Judgment (Democratic Republic of Congo v Belgium)* 14 February 2002, ICJ Reports 2002 60-61. The latter pages deal with the Joint Separate Opinions of Judges Higgins, Kooijmans and Buergenthal, who emphasised that '[i]t is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community. Piracy is the classical example'. In the same case, on page 42, Judge Guillaume of the ICJ stated that 'international law knows only one true case of universal jurisdiction: piracy'.

²⁵ *The S.S. Lotus Case (France v Turkey)* PCIJ Ser A, No 10 (1927) 4.

²⁶ *ibid* 70. The 'Lotus principle' asserts that all things are permissible in international law as long as they are not expressly prohibited by conventional or customary law. This principle is frequently asserted by States in order to show that they have a lot authority in their actions. However, there is a strong argument that conventions such as UNCLOS proscribe any actions beyond their limits. Furthermore, in the *Lotus* case the PCIJ found that an offence commenced on a vessel of flag State A, which has fatal consequences aboard the vessel of flag State B, can be subject to the criminal law of both A and B. The only limitation seems to be the treaty law exception in art 97 UNCLOS, which was later created for the masters of vessels in respect of crimes resulting from collision and incidents of navigation. In such cases a master can only be prosecuted by his State of nationality or the license-issuing State.

²⁷ (n 21).

²⁸ This is affirmed by Judge Moore's dissenting opinion in the *Lotus* case: 'I say "piracy by law of nations", because the municipal laws of many States denominate and punish as "piracy" numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cogni[s]ance, so as to be punishable by all nations'. (n 25) Dissenting Opinion of Judge Moore, 2.

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.²⁹

What elements of piracy fall under Article 101 UNCLOS?

According to the definition found in Article 101 UNCLOS piracy consists of: (1) illegal acts committed on the high seas; (2) for private ends; (3) by the crew or passengers of one ship against the crew, passengers, or property onboard another ship. The requirement that the acts be motivated for private ends restricts this definition to attacks committed with the intent to rob and does not include politically motivated attacks.³⁰ Article 101 defines the international crime of piracy yet it is unclear whether it defines a substantive crime of an international nature on which a person accused of piracy may be charged. It therefore seems that States must turn to their municipal law to prosecute pirates. In fact, Article 14 of the 1932 Harvard Draft Convention on Piracy³¹ explicitly states that the crime of piracy derives from municipal law.

The definition of piracy in international law is not necessarily the same as piracy under the domestic law of States. Some States have defined piracy by relying on Article 101 UNCLOS, such as Section 26(1) of the Merchant Shipping and Maritime Security Act 1997 of the United Kingdom³² and Article 328N of Chapter 9 of the Laws of Malta.³³ On

²⁹ See also art 19 of the 1958 Convention on the High Seas.

³⁰ In fact, the Portuguese ship *Santa Maria* incident in 1961 and the incident of the Italian cruise ship *Achille Lauro* in 1985 were not considered to be acts of piracy because they did not fall within the definition of art 101 UNCLOS.

³¹ Joseph Bingham, 'Harvard Research in International Law: Draft Convention on Piracy' (1932) 26 AJIL Supp 739-747.

³² UK Merchant Shipping and Maritime Security Act 1997 <<http://www.dft.gov.uk/mca/mcga07-home/shipsandcargoes/mcga-shipsregsandguidance/regulations-acts.htm?docid=9F63EB6B7B39CAF6>> accessed 21 March 2013.

³³ Chapter 9 of the Laws of Malta, Criminal Code, art 328N(1):

For the purposes of this subtitle 'piracy' means 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 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 of the acts referred to in paragraph (a) committed by the crew or passengers of a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft;

(c) 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;

(d) any act of inciting or of knowingly facilitating an act described in paragraph (a) or (b) or (c).

the other hand, States like Kenya have expanded on the definition under Article 101 UNCLOS. This is seen in Section 369 on the Kenyan Merchant Shipping Act,³⁴ which removes the necessity of a piratical act being committed on the high seas. It is in this light that UNSC Resolution 1897³⁵ stresses ‘the need for States to criminali[s]e piracy under their domestic law and to favourably consider the prosecution, in appropriate cases, of suspected pirates, consistent with applicable international law’.³⁶ This was also addressed by the UNSC in Resolution 1918 (2010),³⁷ which calls on all States in the region to criminalise piracy under their domestic law and ‘favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia’.³⁸

***United States v Ali Mohamed Ali* (US District Court, District of Columbia, 13 July 2012)**

On 13 July 2012, the US Federal District Court for the District of Columbia³⁹ convicted Ali Mohamed Ali, a pirate negotiator, of those acts of piracy committed while he personally was on the high seas. This case is one of the few prosecutions in the world based on universal jurisdiction,⁴⁰ meaning that there are no US domestic ties involved; neither the ship nor the crew was American.

For the aiding and abetting part under UNCLOS Article 101(c) the Court found that Mr Ali’s charge could stand. However, the Court held that in this case universal jurisdiction over piracy only applies to the high seas. Conspiracy, however, is not found in the UNCLOS definition of piracy and the Court could not find a basis on which to permit the charge. It is evident that, in order to determine the boundaries of the crime of piracy, the Court⁴¹ turned to Article 101 UNCLOS and not to US Law (US Code, Title 18, Part I, Chapter 81, Section 1651 ‘Piracy under law of nations’).

³⁴ Kenya Merchant Shipping Act

<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_merchant_shipping_act.pdf> accessed 29 September 2012.

³⁵ SC Res 1897, UN Doc S/RES/1897 (30 November 2009).

³⁶ *ibid* preambular para 8.

³⁷ SC Res 1918, UN Doc S/RES/1918 (27 April 2010).

³⁸ *ibid* para 2.

³⁹ The Appellate Court Decision on 3 August 2012 ordered and adjudged that the District Court's 7/24/12 order releasing Ali Mohamed Ali to home confinement be reversed and the case remanded to the District Court for an order immediately returning Ali Mohamed Ali to the custody of the United States and detaining him pending trial. The US Marshal’s Service arrested Mr Ali and returned him to US custody the same day the order was issued (3 August 2012).

⁴⁰ Another case is *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (No 2). In this case Lord Millet held that the Torture Convention's provision on the *aut dedere aut judicare* principle ultimately gave Spain ‘pure’ universal jurisdiction to try Pinochet, especially since Chile refused to do so.

⁴¹ Since the Ali case is a national one, it is considered to be a subsidiary means of determining the law under art 38(1)(d) of the Statute of the International Court of Justice.

The above case could have utilised and interpreted Article 101 UNCLOS as follows:

Opponents of a high seas requirement argue that UNCLOS Article 101's definition of piracy makes it clear that the performance of piratical acts carries a high seas requirement while acts of inciting or intentionally facilitating piracy can be performed anywhere. To support this argument opponents cite Article 101(a)(i) UNCLOS, which states that piracy consists of 'acts of violence or detention [...] committed for private ends by the crew or the passengers of a private ship [...] and directed on the high seas, against another ship'.⁴² They contrast that section with the next part of the piracy definition, Article 101(c), which says 'any act of inciting or of intentionally facilitating an act described in subparagraph (a)' constitutes piracy.⁴³ Since UNCLOS announces a high seas requirement in subparagraph (a) and not in subparagraph (c), no such requirement exists for the facilitation of piracy.

Conversely, proponents of a high seas requirement cite various provisions of UNCLOS, namely Article 100⁴⁴ and Article 105, suggesting that universal jurisdiction over piracy only exists when the act takes place on the high seas. Article 100 UNCLOS limits a State's duty to cooperate in the repression of piracy and Article 105 restricts States' universal capturing and adjudicating authority over pirates to acts occurring on the high seas. Additionally, Article 86 explicitly states that Part VII of UNCLOS⁴⁵ only applies to the high seas and other areas outside the jurisdiction of any State.

Even if all of the aforementioned high seas references are operable and Article 86 limits the whole of Article 101, the drafters' inclusion of a high seas requirement in 101(a)(i) is superfluous if 101(b) and (c) already had an implicit high seas requirement. Indeed the United Nations Division for Ocean Affairs and the Law of the Sea (hereinafter 'DOALOS')⁴⁶ has observed in an IMO report that 'Subparagraphs (b) and (c) of Article 101 respectively on voluntary participation in the operation of a pirate ship or aircraft

⁴² Art 101(a)(i) UNCLOS.

⁴³ Art 101(c) UNCLOS.

⁴⁴ Art 100 UNCLOS imposes a duty on all States 'to cooperate to the fullest extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State'. The official commentary to the predecessor treaty (1958 High Seas Convention), stresses that 'any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law'. But it also asserted that States 'must be allowed a certain latitude as to the measures it should take to this end in any individual case'. See 'Articles Concerning the Law of the Sea with Commentaries', 1956 (II) YB ILC 282, art 38, comment 2. The SUA Convention makes the exercise of jurisdiction obligatory in some circumstances (see art 6, para 4), while UNCLOS does not oblige a State to prosecute.

⁴⁵ Part VII of UNCLOS is entitled 'High Seas'.

⁴⁶ The job of DOALOS is, in part, to facilitate a common understanding of the Convention.

and incitement and intentionally facilitating an act of piracy, do not explicitly set forth any particular geographic scope'.⁴⁷

Article 101 UNCLOS simply defines piracy while Article 105 UNCLOS affirms universal enforcement jurisdiction over it. The latter provision clearly only applies to piracy on the high seas (similarly, the international duty to repress piracy under Article 100 only speaks of piracy on the high seas). Even if one were to find that Article 101 (b) and (c) UNCLOS do not contain a high seas requirement, and universal jurisdiction is exercisable, States would still not be allowed to enter territorial waters or foreign territory without a State's consent (with the exception of Somalia, as permitted by the UNSC Resolutions⁴⁸) in order to apprehend a suspect.

What jurisdictional basis does Article 105 UNCLOS provide?

Major maritime nations have created patrolling fleets, which frequently sail through the Gulf of Aden and have succeeded in deterring several pirate attacks. Under international law, every State has the right to capture pirates on the high seas.⁴⁹ The capturing State also has the right, under UNCLOS, to prosecute pirates if it wishes to do so.⁵⁰ While many nations have been willing to capture pirates, most are not willing to prosecute them in their domestic courts. This had led, according to the Jack Lang⁵¹ Report,⁵² to a situation where more than ninety per cent of the pirates apprehended by capturing States are released without being prosecuted, resulting in a 'catch and release' practice. The prosecution of pirates in the domestic courts of the capturing State mostly occurs after pirates directly threaten the national interests of the prosecuting State by attempting to attack one of its vessels or to kidnap one of its nationals.⁵³ Piracy

⁴⁷ IMO Doc LEG 98/8/1, 4 [15] (Legal Committee).

⁴⁸ (n 11).

⁴⁹ Under international law, a State's territorial waters, which stretch out twelve nautical miles, are a sovereign part of the State, and no other State has the authority to enter the territorial sea. See, e.g., the 1982 United Nations Convention on the Law of the Sea arts 2 and 3. Art 2 of UNCLOS states that 'the sovereignty of a coastal State extends [...] to an adjacent belt of sea, described as the territorial sea'. Art 3 of UNCLOS limits the breadth of coastal States' territorial seas to 12 nautical miles. See also art 105 UNCLOS, '[o]n the high seas, or in any other place outside the jurisdiction of any State, every state may seize a pirate ship [...] and arrest the persons and seize the property on board'.

⁵⁰ Art 105 UNCLOS states that '[t]he 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'.

⁵¹ Jack Mathieu Émile Lang is a French politician and a professor of public law. In August 2010, Jack Lang became the special advisor on legal issues related to piracy off the coast of Somalia at the United Nations. He was appointed by the Secretary-General of the UN, Ban Ki-moon.

⁵² Jack Lang, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia' (Annex to document S/2011/30).

⁵³ For an examination of jurisdictional basis exercised over Somali pirates by different States see the article by Eugene Kontorovich & Steven Art, 'An Empirical Examination of Universal Jurisdiction for Piracy' (2010) 104:3 AJIL 436.

prosecutions based on true universal jurisdiction have been very rare.⁵⁴

UNCLOS does not seem to condone the right for capturing nations to transfer pirates to third States for the purpose of prosecution. The words ‘the State which carried out the seizure’ in Article 105 UNCLOS means that while every State may seize pirates, only the flag State who captured the pirates may prosecute them. It suggests that transferring pirates to other countries for prosecution is outside the permitted use of universal jurisdiction under UNCLOS. The commentary of the International Law Commission (hereinafter ‘ILC’) on the draft of Article 18 of the High Seas Convention, which is identical to the second sentence of Article 105 UNCLOS, reveals that this provision was intended to prohibit transfers to third party States.⁵⁵ Although Article 105 may refer to the concept of universal jurisdiction, it seems to limit its exercise to the high seas. This is seen in the Secretary-General’s recent report to the UNSC:

There is universal jurisdiction over acts of piracy on the high seas and in the exclusive economic zones of States. This means that any State may seize a pirate ship on the high seas or in the exclusive economic zone of any State, arrest the persons on board, and prosecute them.⁵⁶

Although recent UNSC Resolutions⁵⁷ seem to contemplate the transfer idea, a transfer to a third State for the prosecution of pirates could be obtained through:

1. Extradition: Although UNCLOS is silent on the matter, certain Conventions such as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation⁵⁸ (hereinafter ‘SUA Convention’) and the International Convention

⁵⁴ *ibid* 445 (concluding that universal jurisdiction prosecution rates were at only 1.47 per cent from 1998 to 2009).

⁵⁵ UN, *Report of the International Law Commission, Commentary on the Law of the Sea Draft Convention* (1955) vol II, YB ILC 26. Furthermore, see the ‘Yearbook of the International Law Commission’ (1956) vol II 283, which comments on art 43 of the Draft Convention ‘This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another State. The Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts’. The ILC Commentary on the same provision in the 1958 Convention (which the US has ratified) rejects the idea of transfer.

⁵⁶ 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, 11 [12] <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/425/07/PDF/N1042507.pdf?OpenElement>> accessed 29 September 2012.

⁵⁷ Such as (n 61) paras 7, 8, 16 and SC Res 2077, UN Doc S/RES/2077 (21 November 2012) preambular para 19.

⁵⁸ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, 1678 UNTS 221.

Against the Taking of Hostages⁵⁹ (hereinafter ‘Hostage Convention’) contain a ‘prosecute or extradite’ clause. The UNSC refers to deliveries under Article 8 of the SUA Convention in its various counter-piracy Resolutions, such as: UNSC Resolution 1846,⁶⁰ paragraph 15; UNSC Resolution 1851,⁶¹ preambular paragraph 9; and UNSC Resolution 1897,⁶² preambular paragraph 8. The Djibouti Code of Conduct reiterates the obligation to accept deliveries in its preambular paragraph 10. Moreover, prosecuting States should ensure that they have extradition treaties in place with a particular capturing State. Extradition treaties may be relevant in the post-prosecution detention paradigm as well. This would allow third States to still accomplish their prosecutorial function while outsourcing the post-conviction imprisonment. Article 100 UNCLOS⁶³ could also be a basis for the transfer or extradition of pirates to a State other than the State who captured the pirates.⁶⁴

2. Transfers and handovers: Pirate suspects are brought within the jurisdiction of States willing and able to prosecute through transfers⁶⁵ or hand overs.⁶⁶ It could range from *ad hoc* physical handovers by law enforcement officials to more legally framed transfers such as the Memorandum of Understanding signed between the European Union and Kenya (EU-Kenya Transfer Agreement).⁶⁷
3. Shipriders: It has been suggested in: UNSC Resolution 1851 (2008);⁶⁸ UNSC Resolution 1897 (2009);⁶⁹ and in the Djibouti Code of Conduct that shipriders could be used to collect evidence in accordance with the prosecuting State’s evidentiary

⁵⁹ International Convention Against the Taking of Hostages, GA Res 146 (XXXIV), UN GAOR, 34th Sess, Supp No 46 245, UN Doc A/34/46 (1979) 1316 UNTS 205. It entered into force on 3 June 1983.

⁶⁰ SC Res 1846, UN Doc S/RES/1846 (2 December 2008).

⁶¹ SC Res 1851, UN Doc S/RES/1851 (16 December 2008).

⁶² (n 35).

⁶³ Art 100 UNCLOS states that ‘All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’.

⁶⁴ The Exchange of Letters, concluded between the EU and Kenya for the transfer of suspected pirates, specifically mentions art 100 UNCLOS as the basis for the conclusion of such an agreement.

⁶⁵ This is the terminology used in art 12 of ‘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’.

⁶⁶ This is the terminology used in art 11 of the Djibouti Code of Conduct. Art 11 states that ‘In order to allow for the prosecution, conviction and punishment of those involved in piracy or armed robbery against ships, and to facilitate extradition or handing over when prosecution is not possible, each participant intends to review its national legislation with a view towards ensuring that there are national laws in place to criminali[s]e piracy and armed robbery against ships, and adequate guidelines for the exercise of jurisdiction, conduct of investigations, and prosecutions of alleged offenders’.

⁶⁷ ‘Exchange of Letters between the European Union and the Government of Kenya’ (2009) OJ L 79/49.

⁶⁸ (n 61) para 3. This UNSC Resolution invited all States fighting piracy off the coast of Somalia ‘to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials [shipriders] from the latter countries, in particular countries in the region’.

⁶⁹ (n 35).

rules. There is no official legal definition of shipriders but they could be considered as the law enforcement officers from a coastal State, embarked on a foreign naval ship. A shiprider arrangement would allow a law enforcement officer to arrest pirates in the name of their country and subsequently send them to their national court for prosecution and detention. If law enforcement authorities from States like Kenya, Tanzania and the Seychelles were to ride aboard warships in the international armada, and thereby effect the seizure of pirates themselves, pirate enforcement jurisdiction pursuant to Article 105 UNCLOS could become legitimate.

Could the SUA Convention address the ‘inadequacies’ of UNCLOS?

The situation in Somalia has renewed international interest⁷⁰ in using the SUA Convention. The Convention does not use the term ‘piracy’ but some core elements of the crimes under the 1988 SUA Convention can be elements of the crime of piracy as well. An example of a crime under the SUA Convention is when a person ‘seizes or exercises control over a ship by force or threat thereof or any other form of intimidation’ or ‘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’.⁷¹

The SUA Convention is not limited to acts on the high seas because Article 4 states that it applies to ships in all maritime waters, including the territorial sea, archipelagic waters and internal waters.⁷² The definition in the SUA Convention also includes public and political motives. Furthermore, there is no ‘two ship requirement’.⁷³

The SUA Convention is listed on the UN website as an anti-terrorist convention and was not designed for the law of piracy.⁷⁴ Piracy is like terrorism in certain manners: both are forms of organised crime, both exist on a supranational level and both seem to take place in lawless areas.⁷⁵ Therefore, some scholars argue that pirates are sea-terrorists

⁷⁰ See, *inter alia*, (n 61) para 5.

⁷¹ Art 3(1)(a) and (b) of the 1988 SUA Convention.

⁷² Art 4 of the SUA Convention maintains that ‘This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States’.

⁷³ Milena Sterio, ‘Fighting Piracy in Somalia (and Elsewhere): Why More is Needed’ (2009) Fordham ILJ, Cleveland-Marshall Legal Studies Paper No 09-178, 11-12.

⁷⁴ UN Treaty Collection, ‘Text and Status of the United Nations Conventions on Terrorism’ <http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTD_SG> accessed 21 March 2013.

⁷⁵ Adam J Young, ‘Contemporary Maritime Piracy in Southeast Asia: History, Causes, and Remedies’ (2007) IIAS/ISEAS Series on Maritime Issues and Piracy in Asia, Institute of Southeast Asian Studies, 20-23.

and should be treated that way.⁷⁶ In that case, States could rely on a variety of anti-terrorist Conventions⁷⁷ to justify the capture and prosecution of pirates.

5. Venues for the prosecution of pirates

The UNSC 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'.⁷⁸ States have called for new venues and possibilities in prosecuting persons suspected of having committed piracy. Two alternatives have been put forward: prosecuting Somali pirates in domestic courts in the region or seeking justice on the international level.⁷⁹

The 'root causes'⁸⁰ of Somali piracy need to be addressed. As UN Secretary-General Ban Ki-moon states, 'Although piracy manifests itself at sea, the roots of the problem are to be found ashore. [...] In essence, piracy is a criminal offence that is driven by economic hardship, and that flourishes in the absence of effective law enforcement'.⁸¹

Before the root causes are eliminated, the Secretary-General in his report of 26 July 2010 has identified seven options⁸² for consideration by the UNSC.⁸³ This idea has

⁷⁶ (n 74).

⁷⁷ (n 59); International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, 39 ILM 270 (2000); United Nations Convention Against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209.

⁷⁸ (n 37) para 1.

⁷⁹ See the Statement of the Danish Ambassador on UNSC Res 1851; and the Statement of former Secretary of State, Condoleezza Rice, on UNSC Res 1851 <<http://www.un.org/News/Press/docs/2008/sc9541>> accessed 20 March 2013.

⁸⁰ UNSC, *Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)* (S/2011/662) para 18.

⁸¹ UN Secretary-General Ban Ki-moon, 'Piracy: Orchestrating the Response' (London, 3 February 2011, SG/SM/13386).

⁸² Option 1: The enhancement of United Nations assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia;

Option 2: The establishment of a Somali court sitting in the territory of a third State in the region, either with or without United Nations participation;

Option 3: The establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation;

Option 4: The establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation;

Option 5: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation;

Option 6: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations;

Option 7: The establishment of an international tribunal by Security Council Resolution under Chapter VII of the Charter of the United Nations.

received some refinement in Jack Lang's recommendations⁸⁴ to the UNSC in January 2011.

Prosecution in Somalia

Somalia has jurisdiction to prosecute suspected pirates on the basis of territorial jurisdiction, if the pirate is captured on Somali land or territorial waters. Somalia also has active personality jurisdiction over its nationals suspected of committing piracy. If Somalia were a State party to the SUA Convention and the Hostage Convention it would be obliged to exercise territorial and passive personality jurisdiction under Article 3 of the SUA Convention and Article 5(1)(a) and (b) of the Hostage Convention. Since Somalia is not a State party to the latter Conventions it is not obliged to exercise such jurisdiction.

Most States do not see the prosecution of alleged pirates in Somalia as an option. The Minister for Foreign Affairs and International Cooperation of the TFG of Somalia acknowledged, during the Meeting adopting Resolution 1851 (2008),⁸⁵ that 'his country had no capacity to interdict or patrol its long coastline to ensure the security of the sea, but it had cooperated with the international community in that fight and it would continue to do so fully, now and in the future. That was why it supported Resolution 1851'. In April 2010, when Resolution 1918 (2010)⁸⁶ was adopted, the UNSC acknowledged that Somalia is not able to prosecute pirates and 'Stress[ed] the need to address the problems caused by the limited capacity of the judicial system of Somalia and other States in the region to effectively prosecute suspected pirates'.⁸⁷

There is also the concern of human rights abuses upon repatriation, which would conflict with the obligation of non-refoulement under international law, seen in the UN Convention Against Torture (hereinafter 'UNCAT'),⁸⁸ the International Covenant on Civil and Political Rights (hereinafter 'ICCPR'),⁸⁹ and the European Convention of Human Rights (hereinafter 'ECHR').⁹⁰ Article 3 of UNCAT,⁹¹ which enshrines the

⁸³ United Nations, Secretary-General Report Pursuant to SC Res 1918, 26 July 2010.

⁸⁴ France at the United Nations, *Somalia- report by Jack Lang on the legal issues related to piracy off the coast of Somalia statement by the spokesperson of the Ministry of Foreign and European affairs* (26 January 2011) <<http://www.franceonu.org/spip.php?Article5354>> accessed 20 February 2013.

⁸⁵ (n 61).

⁸⁶ (n 37).

⁸⁷ (n 37) preamble.

⁸⁸ UN, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly, 10 December 1984, art 3, para 1. Somalia has been a party to UNCAT since 24 January 1990.

⁸⁹ International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966) 999 UNTS 171. It entered into force on 23 March 1976.

⁹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, which entered into force on 3 September 1953, and amended by Protocols Nos 3, 5, 8, and 11. The latter

non-refoulement principle, prohibits sending pirates to States where it is likely that they will be abused.⁹²

UNSC Resolution 2067 (2012)⁹³ welcomes the end of the transition in Somalia and the creation of new institutions, including the Parliament. On 1 August 2012, delegates to the Somalia's National Constituent Assembly adopted a Provisional Constitution.⁹⁴ It has significant consequences for the prosecution of piracy. Article 140 of the Provisional Constitution requires the Somali Federal Government to respect all prior treaty obligations, which includes UNCLOS. In the event of any lacuna, Article 40 of the Provisional Constitution permits reference to Sharia Law, International Law and decisions of courts in other countries as persuasive authority. Therefore, reference may be made to recent piracy judgments in, *inter alia*, the US,⁹⁵ Kenya⁹⁶ and Germany.⁹⁷

Imprisonment

Convicted pirates could be transferred to United Nations Office on Drugs and Crime (hereinafter 'UNODC') prisons in Somalia, Hargeisa and Qardho, which have been built to international standards but are not yet in use.⁹⁸

Prosecution in the Flag State

Over one thousand pirates were held for prosecution or convicted as of June 2011, of

Protocols entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

⁹¹ Art 3 of UNCAT states the following: 'No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

⁹² See (n 88) art 3(1), which states that 'No State Party shall expel, return [refouler] or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. See also Fiona de Londras, 'Saadi v Italy: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases', ASIL Insights (May 13 2008) <http://www.asil.org/insights080513.cfm#_ednref3> accessed 5 September 2012.

⁹³ SC Res 2067, UN Doc S/RES/2067 (18 September 2012).

⁹⁴ *ibid* preambular para 4.

⁹⁵ For example, *United States v Ali Mohamed Ali* (D.D.C. 12 July 2012).

⁹⁶ For example, *inter alia*, Trial transcript, *Republic v Hasan Mohamud Ahmed* [and others], Chief Magistrate's Court at Mombasa, Criminal Case No 434 of 2006; and *Hassan M Ahmed v Republic*, Crim App No 198, 12 May 2009, High Court of Kenya at Mombasa.

⁹⁷ On 19 October 2012, a court of first instance in Hamburg sentenced ten Somalis, accused of piracy, to prison (the decision has not yet been released but for a comprehensive press release of the court in German <<http://justiz.hamburg.de/oberlandesgericht/3658808/pressemeldung-2012-10-19-olg-01.html>> accessed 20 February 2013).

⁹⁸ John Knott, 'United Kingdom: Piracy Off Somalia: Prosecutions, Procrastination And Progress' (Mondaq, 2010) <http://www.oodweynews.com/display_page.php?articleid=14118> accessed 2 September 2012.

which ninety-one per cent were held by regional countries and nine per cent were held by out of region countries, according to UNODC.⁹⁹ The nations patrolling the Gulf of Aden and those States with passive personality jurisdiction have chosen not to prosecute pirates because of:

1. The lack of political will:¹⁰⁰ States have proven to be unwilling to bring pirates to their domestic courts for prosecution.¹⁰¹ During a UNSC meeting adopting Resolution 1851 (2008),¹⁰² in December 2008, former US Secretary of State Condoleezza Rice emphasised this issue and told the UNSC that ‘the Convention on the Law of the Sea, Security Council Resolutions and other legal instruments formed a base of sufficient legal authority with which to apprehend and prosecute pirates, but sometimes political will and capacity was lacking’.¹⁰³

2. Asylum claims: Countries are reluctant to prosecute pirates because they fear that, due to human rights concerns, convicted pirates will take advantage of European Asylum Laws after serving a prison sentence. These pirates could claim that they would be subject to unfair trials, torture and extrajudicial killing if they were to be sent back to Somalia.¹⁰⁴

What can be done about this?

Capturing and prosecuting States should ensure that their national penal laws include the definition of piracy found in UNCLOS and the SUA Convention. It is important that in domestic law a legal framework exists as a foundation to carry out the arrest and prosecution of suspected Somali pirates, in order to prevent them from being released

⁹⁹ UNODC, *Counter-Piracy Programme* (Issue Six, 2011) <http://www.unodc.org/documents/Piracy/UNODC_Brochure_Issue_6_WV.pdf> accessed 21 March 2013.

¹⁰⁰ The German prosecution office notes ‘it has direction to prosecute non-German pirates and will only exercise that discretion if the German State has a particular, well-defined interest in the prosecution’. See Hamburg Public Prosecutor, *Prosecution of Acts of Piracy off Somali by German Prosecution Authorities* (6 March 2009) <<http://www.iflos.org/media/34039/brandt%20statement%20piracy%20maritime%20talks%202009.pdf>> accessed 1 September 2012. The same reasoning applies for the Netherlands, the US and France. This suggests that nations are only willing to prosecute pirates when it involves their direct interests and rarely prosecute under universal jurisdiction.

¹⁰¹ Eugene Kontorovich, ‘A Guantanamo on the Sea: The Difficulties of Prosecuting Pirates and Terrorists’ (2010) Volume 98 CLR 234, 255.

¹⁰² (n 61).

¹⁰³ (n 61) statement by Condoleezza Rice.

¹⁰⁴ For this reason Great Britain instructed its naval ships patrolling the Gulf of Aden not to capture pirates because they could claim asylum under European human rights law once the pirates were aboard a British ship and if the suspected pirates were brought to Britain for trial. See Kontorovich (n 101) 234, 267.

without facing justice. In April 2010, a UNSC Resolution¹⁰⁵ called on States to ‘criminali[s]e piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law’¹⁰⁶ and the UNSC commended the States that have already amended their domestic law.¹⁰⁷

Prosecution in third States - using and expanding prosecutorial venues beyond Kenya, the Seychelles and Mauritius

Another option is to enter into prosecution agreements (Memoranda of Understanding) with third States that are willing to prosecute pirates, encouraged by UNSC Resolutions 1816 (2008),¹⁰⁸ 1846 (2008)¹⁰⁹ and 1851 (2008).¹¹⁰ Those Resolutions call upon flag, port and coastal States to cooperate in ‘determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia’.¹¹¹

Kenya’s ability to prosecute the Somali pirates, even where there is no nexus to Kenya, is explained as an exercise of universal jurisdiction.¹¹² Jurisdiction is also based on bilateral agreements and Memoranda of Understanding that Kenya has signed.¹¹³

¹⁰⁵ (n 37).

¹⁰⁶ (n 37) para 2.

¹⁰⁷ (n 37) preambular para 13.

¹⁰⁸ (n 14).

¹⁰⁹ (n 60).

¹¹⁰ (n 61).

¹¹¹ (n 14) para 11; and (n 60) para 14.

¹¹² Trial transcript, *Republic v Hasan Mohamud Ahmed* [and others], Chief Magistrate’s Court at Mombasa, Criminal Case No 434 of 2006. The trial court found that piracy ‘is a crime against mankind which lies beyond the protection of any state’. See the single appellate decision from Kenya regarding the trial of a group of Somali’s delivered in 2006 by the US Responding to a jurisdictional challenge on appeal, the High Court of Kenya at Mombasa opined that, even if Kenya had not ratified UNCLOS and had not provided for the punishment of piracy in its criminal law, the lower court was ‘bound to apply international norms and Instruments since Kenya is a member of the civilised world and not expected to act in contradiction to expectations of member states of the United Nations’. See, *Hassan M Ahmed v Republic*, Crim App No 198, 12 May 2009, High Court of Kenya at Mombasa.

¹¹³ Kenya signed agreements with the USA, UK, EU, Canada, China and Denmark. In the USA Memorandum of Understanding (hereinafter referred to as ‘MOU’), Kenya agrees to ‘Accept custody of and finish appropriate storage of the remains of any person deceased as a result of or incident to a covered act [ie piracy or armed robbery against ships]’. Kenyan ports and airspace are also to be accessible to US warships, planes, and military personnel engaging in counter-piracy. Provision is made for ‘technical support, expertise, training and other assistance’. See ‘Memorandum of Understanding Between the United States of America and the Republic of Kenya Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea’ US-Kenya (16 January 2009). The latter was signed in Washington, DC, 16 January 2009. The EU agreement covers much of the same ground but is more emphatic and detailed as regards the process to which pirates will be subject. See ‘Exchange of Letters between the European Union and the Government

The Kenyan Merchant Shipping Act 2009 extends Kenyan jurisdiction over acts of piracy committed extraterritorially by non-nationals.¹¹⁴ By extending its jurisdiction over cases with no tangible ties to Kenya, the Merchant Shipping Act clearly overstepped the scope of UNCLOS and the SUA Convention, while paradoxically using these Conventions to justify itself.

The Seychelles has also offered itself as a venue to prosecute Somali pirates seized by foreign naval ships and has recently amended its Penal Code to enable it to prosecute pirates under universal jurisdiction. The transitional agreement with the EU relating to the prosecution of pirates was concluded on 30 October 2009.¹¹⁵ On 20 May 2010 Tanzania also agreed to prosecute Somali pirates.¹¹⁶

Prosecuting nations should show that they are law-abiding and that they respect human rights, otherwise capturing nations may refuse to enter into Memoranda of Understanding with prosecuting States.¹¹⁷

Kenya, the Seychelles and Mauritius may choose to move beyond UNCLOS so as to make the definition of piracy include attempts at piracy, the conspiracy to commit piracy, financing and enabling, and preparatory offences, such as the planning of a piratical attack.¹¹⁸ Furthermore, prosecuting States should conclude as many Memoranda of Understanding as possible with capturing States. This would hopefully result in a high deterrent effect and a decrease in the 'catch and release' practice.

of Kenya,' (2009) OJ L 79/49. For a discussion of the US use of MOUs and other non-treaty instruments, see Oona Hathaway 'Treaties' End: The Past, Present, and Future of International Lawmaking in the United States' (2008) Yale LJ 1236, 1249-1250. These MOUs stipulated that pirates captured by these foreign powers are to be brought to Kenya and tried in domestic Kenyan courts under Kenyan law.

¹¹⁴ Merchant Shipping Act 2009 (Kenya), Part XVI, para 370-371. Also see the article by James Thuo Gathii, 'Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law' (2009) 31 Loy LA Intl & Comp L 363, 364.

¹¹⁵ EU, 'Exchange of Letters Between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers From EUNAVFOR to the Republic of Seychelles and For Their Treatment After Such Transfer' (2009) OJ L 315/37 - OJ L 315/43.

¹¹⁶ Tanzania's Attorney General Werema said that 'the Parliament has already approved amendments to the penal code to ensure that Somali pirates can now be prosecuted in Tanzania'. <<http://af.reuters.com/article/topNews/idAFJ0E64J0E820100520>> accessed 1 September 2012.

¹¹⁷ The report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions showed that the Kenyan police and justice system systematically failed. See Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions - Mission to Kenya* (UN Doc A/HRC/11/2, 26 May 2009).

¹¹⁸ It should be noted that the new definition of piracy in the Seychelles' Penal Code includes the offence of conspiracy to commit piracy. However, none of the penal codes discussed above (Kenya, the Seychelles and Mauritius) criminalise preparatory offences. Thus, criminalising such preparatory offences may prove to be a powerful tool in piracy prosecutions in the future.

The prosecution of piracy in existing international fora

Prosecution at the International Criminal Court

Piracy is neither a crime against humanity nor a war crime and consequently does not fall within the International Criminal Court (hereinafter 'ICC')'s jurisdiction.¹¹⁹ However, it is theoretically possible to include the crime of piracy within the jurisdiction of the Court by amending the ICC Statute through amendment¹²⁰ or protocol. However, in May 2010, the Secretary-General convened a Review Conference to consider any amendments to the Statute.¹²¹ During this conference the incorporation of the crime of piracy into the ICC framework was not discussed¹²² and it has not been discussed again since.

Prosecution at the International Tribunal for the Law of the Sea

ITLOS has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of UNCLOS.¹²³ Article 288(1) UNCLOS shows that piracy¹²⁴ is within the ambit of the International Tribunal for the Law of the Sea (hereinafter 'ITLOS'). Moreover, Article 288(4) UNCLOS vests ITLOS with the authority to decide whether it does indeed have jurisdiction over any particular dispute.¹²⁵ Judge José Luis Jesus, the former President of ITLOS, has said that the Tribunal could handle pirate cases.¹²⁶

Is it time for an International Piracy Tribunal?

On 27 April 2010 the UNSC adopted Resolution 1918 (2010),¹²⁷ where the UNSC requested the Secretary-General to present:

¹¹⁹ Mahmoud Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers, 1999) 363-364.

¹²⁰ Any amendment to the Rome Statute requires the support of a two-thirds majority of the State parties and must be ratified by seven-eighths of the State parties. Amendments to the Rome Statute of the International Criminal Court must be proposed, adopted, and ratified in accordance with art 121 and art 122 of the Statute.

¹²¹ Rome Statute of the International Criminal Court (17 July 1998) art 123, para 1.

¹²² Elizabeth Andersen, Benjamin Brockman-Hawe and Patricia Goff, *Suppressing Maritime Piracy: Exploring the Options in International Law* (Expert Workshop Report, 16-17 October 2009) 7.

¹²³ UNCLOS art 288(2).

¹²⁴ UNCLOS art 100-107.

¹²⁵ UNCLOS art 288(4).

¹²⁶ _____, President of ITLOS, to the Meeting of the Sixth Committee of the General Assembly, 4 November 2009, 4.

¹²⁷ (n 37).

[...] Within [three] months a report 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 the resources necessary to achieve and sustain substantive results.¹²⁸

The report, pursuant to paragraph 16 of UNSC Resolution 2015 (2011)¹²⁹ of 24 October 2011, states that the Council decided to continue its consideration of the establishment of specialised anti-piracy courts in Somalia and other States in the region. The Council requested that the Secretary-General, together with the UNODC¹³⁰ and the United Nations Development Programme (hereinafter 'UNDP'), further consult with Somalia and regional States on the type of international assistance that would be required to help make such anti-piracy courts operational.¹³¹

An *ad hoc* piracy tribunal

The UNSC relied on Chapter VII of the UN Charter to create the International Criminal Tribunal for the Former Yugoslavia (hereinafter 'ICTY') and the International Criminal Tribunal for Rwanda (hereinafter 'ICTR').¹³² Before an *ad hoc* piracy tribunal can be established, piracy needs to constitute 'a threat to peace and security'. In UNSC Resolutions 1816 (2008),¹³³ 1838 (2008),¹³⁴ 1851 (2008),¹³⁵ and 1897 (2009)¹³⁶ the UNSC did not say that piracy is a threat to peace and security but said that:

¹²⁸ (n 37) para 4.

¹²⁹ SC Res 2015, UN Doc S/RES/2015 (24 October 2011).

¹³⁰ In partnership with the UNODC, the IMO is helping countries in the region develop the legal framework needed to prosecute pirates. The UNODC's Counter-Piracy Programme, based in Nairobi, Kenya, is assisting with efforts to deal with suspected pirates who have been apprehended in the region. There are three main objectives: fair and efficient trials and imprisonment in regional centres; humane and secure imprisonment in Somalia; and fair and efficient trials in Somalia.

¹³¹ In paragraph 17 of UNSC Res 2015 (2011) the Council underlined the importance for such courts to have jurisdiction over suspects captured at sea and also over anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organise, facilitate, or finance and profit from such attacks.

¹³² Andersen, Brockman-Hawe, Goff (n 122) 11.

¹³³ (n 14).

¹³⁴ SC Res 1838, UN Doc S/RES/1838 (7 October 2008).

¹³⁵ (n 61).

¹³⁶ (n 35).

[...] The incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region.¹³⁷

In Resolution 1918 (2010)¹³⁸ the UNSC expressed that it was ‘gravely concerned by the threat that piracy and armed robbery at sea against vessels pose to the situation in Somalia and other States in the region, as well as to international navigation and the safety of commercial maritime routes’¹³⁹ but did not explicitly say that piracy is a threat to international peace and security. If the UNSC would change its view and acknowledge that piracy off the Somali coast and in the Indian Ocean is a threat to international peace and security, the UNSC could establish an international piracy tribunal, similar to the ICTR and ICTY, under Chapter VII of the UN Charter.

The former Dutch Minister of Foreign Affairs, Maxime Verhagen, is a supporter of an ad hoc piracy tribunal.¹⁴⁰ An international tribunal could standardise substantive law and legal procedures, such as evidence gathering and witness procedures. There would also be more legal certainty for suspects. From the perspective of universality and uniformity, an ad hoc piracy tribunal is one of the best solutions. Additionally, an ad hoc piracy tribunal could fill the legal void left by UNCLOS by defining crimes in such a manner that prosecutors could bring multiple charges against a suspect.¹⁴¹

The establishment of a Somali court sitting in the territory of a third State in the region, either with or without United Nations participation

The Jack Lang Report recommended the creation of a Somali extra-territorial court.¹⁴² This court would apply Somali law and behave like a Somali court but its headquarters and, possibly, its prisons, would be located outside of Somalia but somewhere in the region, like Tanzania. While this solution initially appeared attractive, it has faced

¹³⁷ (n 14) preamble; (n 134) preamble; (n 61) preamble; and (n 35) preamble.

¹³⁸ (n 37).

¹³⁹ (n 37) para 2.

¹⁴⁰ See the speech by the Minister of Foreign Affairs Maxime Verhagen at the Expert Seminar, *Pioneering for solutions against piracy: focusing on a geopolitical analysis, counter-piracy initiatives and policy solutions* (Clingendael, 8 July 2009) <<http://www.government.nl/issues/international-peace-and-security/documents-andpublications/speeches/2009/07/08/pioneering-for-solutions-against-piracy-focusing-on-a-geopolitical-analysis-counter-piracy-initiatives-and-policy-solutions.html>> accessed 11 September 2012.

¹⁴¹ Andersen, Brockman-Hawe and Goff (n 122) 12.

¹⁴² UN, *Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts* (2011) S/2011/360, para 1.

resistance from Somalia and from powerful maritime nations such as the United States of America and the United Kingdom.¹⁴³

The creation of a Hybrid Tribunal

A special piracy court similar to that for Sierra Leone could be established to prosecute suspected Somali pirates by an agreement between the UN and Kenya or the TFG. A hybrid court combines elements of a domestic court and an international tribunal. During a Contact Group on Piracy off the Coast of Somalia¹⁴⁴ (hereinafter 'CGPCS') meeting in August 2009, Portugal proposed the establishment of a Somali hybrid court for the prosecution of piracy related crimes off the coast of Somalia.¹⁴⁵ The applicable law could be international law (UNCLOS or the SUA Convention) and domestic Somali or Kenyan law.

In terms of capacity building, the creation of a special piracy tribunal within a State in the region could strengthen regional justice systems and local capacity to bring pirates to justice.

6. Towards universality and uniformity

Attacks against ships off the coast of Somalia have brought piracy to the forefront of international attention, particularly to that of the UNSC. Given the diverging definitions of piracy in international and municipal legal systems, greater uniformity in the law is required in order to contribute to successful piracy prosecutions.¹⁴⁶ This could be done by a widening of UNCLOS' adjudicative and enforcement jurisdiction under Article 101 and Article 105 respectively. The said provisions do not impose on UNCLOS State parties the specific obligation to extradite or prosecute pirates, or even to criminalise acts of piracy under their domestic law. States could use the definition of piracy, and the universal jurisdiction provisions, of other Conventions such as the SUA Convention. This could be followed by their widespread uniform implementation in the domestic law of

¹⁴³ Foreign Affairs Committee, *Tenth Report, Piracy off the coast of Somalia* (5 January 2012 § 89, 92) <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmcaff/1318/131802.htm>> accessed 2 September 2012. The Report notes the continuous US and British opposition to the idea of establishing a Somali extra-territorial court.

¹⁴⁴ The CGPCS is an international forum established as an outcome of UNSC Resolution 1851 (2008), later recalled and replaced with UNSC Resolution 1918 (2010), to facilitate the discussion and coordination of actions among states and organisations to suppress piracy off the coast of Somalia.

¹⁴⁵ CGPCS, '3rd Meeting of Working Group 2 on Legal Issues, Chairman's Conclusions' (Copenhagen, 26 – 27 August 2009) <<http://www.docstoc.com/docs/99801149/19-May-2011-DOCUMENTS-ON-COUNTERING-PIRACY-OFF-THE-COAST-OF>> accessed 2 September 2012.

¹⁴⁶ Lucas Bento, 'Toward An International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) 29 Berkeley J Intl Law 399.

States. Finally, setting up national, regional and international courts with the jurisdiction to prosecute piracy could ultimately rectify the void left by UNCLOS.