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# Maritime Piracy: A Critical Analysis of its Development and Legal Regulation

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## Dedication

Dedicated to my family and especially Henry Ndegwa through whose generosity and tireless effort my studies were made possible.

**Declaration**

I, **MATHITA CHRISTINE KATHAMBI** declare that this dissertation is my original work and has not been submitted for the award of a degree in any other university.

Signed
Date 8/11/2012
Mathita Christine Kathambi

This Project has been submitted for examination with my approval as a University Supervisor.

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## Abstract

Piracy constitutes a phenomenon that has existed as long as maritime trade and has taken a more outstanding proportion in the last two decades. It is considered a breach to the most fundamental principles of modern civilization. Nations are trying to control this crime individually and collectively but the problem is still persists. Lots of international and national laws and conventions are held in this regard to control it.

Despite the vast research that has been done on regulation of piracy, little has been done on how the current laws have failed in meeting the very purpose they were enacted for. What is even worse, some states that are highly affected by piracy have not done much to domesticate laws that would see the universality principle come to reality since all states are under an obligation to punish piracy notwithstanding who are where the crime took place. This is indicative of the laxity states have had in regard to piracy. Being one of the most hideous crimes in international law, piracy is considered a crime to which criminal responsibility is allocated to the person committing the crime, as distinct from the usual case of allocation of state responsibility under international law

This study has discussed the historical development of piracy and reasons why piracy generally occurs. It has also endeavored to bring out the historical development of how laws that are meant to regulate piracy have developed. The study has discussed in detail the provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) on piracy and the shortcomings with the law as it is. There are also challenges that have made cooperation under the UNCLOS piracy regime become difficult in suppressing the vice. The study has formed a basis for further study on what requires to be done in order to reduce or even alleviate the negative effects of piracy and will contribute to future research on similar topics.

# CHAPTER 1

## Introduction to the Study

### 1.0 Introduction

As the sea become world's largest source to trade between the nations during the last few decades of course there are lots of problems in this regards when we are using the sea on such a large scale. The problem of piracy is one of the most dangerous problems, among all problems of the sea. Nations are trying to control this crime individually and collectively but the problem still persists. Lots of international and national laws and conventions have been enacted to control it.[1]

The 1982 United Nations Convention on the Law of the Sea ("the Convention" or "UNCLOS") to which some 160 nations are parties, is the most comprehensive attempt at creating a unified regime for governance of the rights of nations with respect to the world's oceans.[2] The treaty addresses a number of topics including navigational rights, economic rights, pollution of the seas, conservation of marine life, scientific exploration, piracy and more, and is considered to be reflective of customary international law. The treaty, one of the longest in history, comprises of 320 articles and 9 annexes, representing the codification of customary international law and its progressive development. This study will provide a comprehensive analysis of the provisions of the Convention on piracy as covered in Articles 100-107. Piracy constitutes a phenomenon that has existed as long as maritime trade and it is a breach to the most

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[1] Muhammad Tahir Hanif *Sea Piracy And Law of the Sea*, Master Thesis For the Degree of Masters of The Law Of the Sea, University Of Tromso, Norway (2010) p. 6

[2] http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm

fundamental principles of modern civilization.[3] Piracy has been described as a war-like act committed by non-state actors (private parties not affiliated with any government) against other parties at sea, and especially acts of robbery or criminal violence at sea. People who engage in these acts are called pirates.[4]

Piracy can include acts committed on land, in the air, or in other major bodies of water or on a shore. For purposes of this study, piracy shall be deemed to be maritime piracy. This study focuses on the definition of piracy and the legal issues arising from it. By critically analyzing these issues, the study implicitly questions the possibility of a blueprint towards an effective global address of piracy. It has been realized that the UNCLOS, being the primary law governing the law of the sea, has inconsistencies, inherent weaknesses in definition, interpretation and enforcement that have made it easy to abuse and rendered it a failure in curbing piracy. This study will seek to identify, explore and address these weaknesses.

Piracy is considered one of the most hideous crimes in international law, in relation to which criminal responsibility is allocated to the person committing the crime, as distinct from the usual case of allocation of state responsibility under international law. Piracy poses a potential threat to international trade, 80 per cent of which involves ocean transit. While the contemporary problem of piracy has yet to reach levels significant enough to directly threaten freedom of movement of cargo on the world's oceans, as it sometimes did in previous centuries, it has sometimes caused significant increases in insurance premiums for those engaged in maritime trade, in addition to direct losses from hijacked and stolen goods. A resurgence of maritime

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[3] Neakoh Raissa Timben, *Piracy: A Critical Examination of the Definition and Scope of Piracy and the Issues Arising therefrom that affect the Legal Address of the Crime Globally*: Thesis for Masters of Laws in Law of the Sea – University of Troms (2011) p. 3

[4] Ibid

piracy raises concerns beyond the direct threat to international trade. Terrorist organizations for example may adopt methods used by, or ally themselves with pirates to strike at the economic order that nations seek to promote and pursue.

## 1.1 Statement of the Research Problem

The overall research problem addressed in this study is that despite there being an international convention that is meant to address the menace of piracy, there is still an increase in the number of piracy attacks which indicates a weakness in the United Nations maritime law that makes piracy illegal throughout the world. The UNCLOS defines piracy as any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft.[5] This definition is deficient as it suggests that acts of piracy can only be committed for private ends.

Further, the convention restricts commission of piracy to the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft[6]. This geographical limitation of areas where piracy may be committed to high seas only is itself problematical as piracy may at times be committed in the territorial waters or in other instances, the pirates may after commission of the crime run into the territorial waters where arrests may not be effected. Clearly, the convention did not consider the emergence of failed states and neglected to address the question of what happens if a pirate attack takes place not on the high seas, but within a country's territorial waters or in its neighbour's waters.

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[5] Article 101 (a) UNCLOS
[6] Article 101 (a) (i) UNCLOS

The other problem is the issue of hot pursuit under the convention.[7] Article 111 of the UNCLOS stipulates that the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state. The question is what happens to the criminals thereafter since they cannot be arrested? Due to this problem, some states has been aiding and abetting and harbouring persons who allegedly have committed international crimes and also poses significant challenges to international order and stability. With these challenges, the question to be answered is how best piracy can be addressed amidst the inadequacies and limitations inherent in the relevant legal texts (UNCLOS) and its application.

## 1.2. Objectives

The objectives of this study are:

a) To highlight the history and development of piracy *vis a vis* the law enacted to control it
b) To identify the provisions of the UNCLOS that need amendments and the extent of the same.
c) To identify and highlight the inadequacies that exist in the current laws more specifically UNCLOS *vis a vis* piracy.

## 1.3 Literature Review

The focus of this study is on the definition of piracy and the legal issues arising from it. By critically analyzing these issues, the study implicitly questions the possibility of a blueprint towards an effective global address of piracy by the UNCLOS. This study will obtain

information from what has been published on this topic by scholars, jurists, publicists and researchers' vast resources in its quest to expound on the problem in question.

Pirate attacks are largely confined to four major areas: the Gulf of Aden, near Somalia and the southern entrance to the Red Sea; the Gulf of Guinea, near Nigeria and the Niger River delta; the Malacca Strait between Indonesia and Malaysia; and off the Indian subcontinent, particularly between India and Sri Lanka.[8] Today's breed of pirates are not those that may be described as the colorful cut throats painted by the history books. Unlike the images from yesteryears, they can be local seamen looking for a quick score, highly trained guerrillas, rogue military units or former seafarers recruited by sophisticated crime organizations.[9] Armed with machetes, assault rifles, and grenade launchers, they steal out in speedboats and fishing boats in search of supertankers, cargo ships, passenger ferries, cruise ships, and yachts, attacking them at port, on the open seas, and in international waters. Entire ships, cargo, and crews simply vanish, hijacked by pirates working for multinational crime syndicates.

Barry Hart Dubner argues that there is need for definition of piracy to include both private and politically motivated acts.[10] In view of the exclusion of politically inspired acts UNCLOS may not be said to be well defined as such acts may be organized and executed by the governments of enemy states. The argument on whether criminal acts of piracy can occur on the territorial waters or only on the high sea. Traditionally, piracy *jure gentium* has been regarded as a customary international crime with commonly held acknowledgment of universal jurisdiction under which all states can take action independent of where the piracy occurred or the nationality

[8] Christopher Alessi and Stephanie Hanson, *Combating Maritime Piracy*, (Virginia, Paradigm Publishers, 2003) p. 34

[9] Burnett S. John, *Dangerous Waters: Modern Piracy and Terror on the High Seas* (USA, Penguin Group Incorporated, 2003) p. 21

[10] Barry H. Dubner, *The Law of International Sea Piracy* (The Hague: Martinus Nijhoff Publishers, 1980) p. 8

of the pirates and their victims subject to the provision of international customary law that piracy *jure gentium* can take place only on the high seas or other area outside national jurisdiction. Such jurisdiction in relation to piracy has been incorporated into both the Geneva Convention on the High Seas 1958 and the United Nations Convention on the Law of the Sea 1982. For such proponents as Albert H. Garretson his concern is about the traditional area of the law of nations, where he argues that states have failed to protect states from acts of piracy occurring in waters other than the high seas.[11] This gap was left in the hope that the domestic legislation would cover the territorial waters.

All countries have prosecutorial powers and jurisdiction to try and sentence pirates. Piracy is an international crime that falls under every state's jurisdiction under customary international law.[12] Universal jurisdiction endows every state with the right to prosecute and punish piracy regardless of where the attack occurs.[13] Articles 100 to 107 of UNCLOS govern the provisions relating to the definition, jurisdiction, and obligations of member states seeking to pursue, capture, and prosecute maritime pirates. Because of universal jurisdiction, each state has the responsibility to prosecute pirates under its own domestic laws irrespective of a pirate's original nationality, the registry of the ship, or the destination of the cargo.[14] Under the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, a state has jurisdiction over an offense only if it is committed against a ship flying that state's flag, in that state's territory, or committed against a national of that state.[15]

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[11] Ibid, The Preface to the book
[12] David J. Bederman, *International Law Framework, 2nd Ed.* (New York: Foundation Press, 2006) p. 76
[13] Lawrence Azubuike, *International Law Regime Against Piracy, Annual Survey of International & Comparative Law*: Vol. 15 2009) pp. 43- 44
[14] Martin N. Murphy, *Small Boats, Weak States, Dirty Money: The Challenge of Piracy* (2009); pg 12

[15] Article 4, SUA

In terms of its applicability, purpose and modern viability, the universality principle is a matter of much debate. Typically, the principle is defined as purporting that certain crimes are so heinous and so universally recognized and abhorred, that a state is entitled or even obliged to undertake legal proceedings without regard to where the crime was committed or the nationality of the perpetrators or the victims.[16]. Under the existing legal framework, piracy is uniquely situated in international law. When a pirate is captured on the high seas outside the territory of a particular state, the municipal laws of the capturing state, not international laws, determine how the pirate will be punished.[17] This reliance on municipal enforcement has led to notable failures, one being the rarity in which piracy cases are actually brought in municipal courts.

According to Kontorovich, international law is sufficient in addressing the concerns on prosecution of piracy cases and avers that such concerns are unfounded. He argues that:

> These concerns are unfounded and misleading. International law provides an ample basis for prosecuting pirates. To the extent nations suggest otherwise, they are deflecting attention from their political unwillingness to use the robust prosecutorial options international law clearly affords. Unfortunately, their lack of willingness is quite predictable. With the resolution by the UN Security Council passed to reinforce UNCLOS in 2008 the Law should currently address the piracy menace sufficiently but has faced socio political hurdles[18]

UNCLOS also reaffirms the idea of universal jurisdiction because it gives every state jurisdiction to seize and prosecute pirates according to that state's domestic laws.[19] However, the convention gives coastal states certain exclusive rights as far as 200 miles out. Because the international law of piracy only applies on the high seas, the question of jurisdiction to prosecute pirates in East Africa is determined by municipal laws of individual states in the region. Kenya's bid to try

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[16] Stephen Macedo, Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law (4th ed) (University of Pennsylvania Press 2006)pp 68-69

[17] Article 105 of UNCLOS

[18] Kontorovich Eugene, *Piracy and International Law*, (Northwestern University law school, 1998) p. 18

[19] Article 105 UNCLOS

pirates was dealt a blow after the High Court sitting in Mombasa declared the accused persons as vulnerable persons and wards of the court who need protection and acquitted them.[20] This ruling was based on Article 89 of UNCLOS which provides that no state may validly purport to subject any part of the High seas to its sovereignty. Kenya has yet to pass relevant laws regarding piracy.

On the issue of the area where piracy may occur, the UNCLOS provides that acts of piracy may only take place in the high seas.[21] Because the international law of piracy only applies on the high seas, the UNCLOS has the unintended effect of reducing the area where piracy can be internationally policed.[22] This presents an opportunity for pirates to take advantage of the territorial waters of weak or failed states. This can have an important effect in gulfs, straits, and archipelagoes, where international shipping must transit through or close to sovereign waters.[23] This helps explain why the two leading piracy problem areas of the Gulf of Aden and the Straits of Malacca, both choke-points for international shipping. The international law on piracy assumes that individual states would assume the responsibility of policing and patrolling their own waters and to prosecute those caught in the act of piracy. However, not all states have the resources and capacity to ensure maritime security within their waters. This is now being highlighted by the piracy problem in Somalia, which after 20 years is still trying to establish a functioning government. The piracy problem is likely to continue unless Somalia achieves political stability. Attempts to tackle piracy through international law are being hampered by the lack of a consistent definition. The legal definitions that exist concern economic gain resulting

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[20] Misc Application No. 434 of 2009.
[21] Article 101 (a) (i) UNCLOS
[22] Martin Murphy, *Piracy and UNCLOS in* Violence at *Sea: Piracy In The Age Of Global Terrorism*, (United Kingdom, Routledge Publishers, 2007) pp 161-63

[23] Neakoh Raissa Timben, *Piracy: A Critical Examination of the Definition and Scope of Piracy and the Issues Arising therefrom that affect the Legal Address of the Crime Globally*: Thesis for Masters of Laws in Law of the Sea - University of Troms (2011); p. 3

from acts of violence at sea. Somali pirates have relied instead on UN Security Council resolutions and the warships patrolling the Gulf of Aden and the Indian Ocean are doing so under the guise of Security Council resolutions which states that piracy can take place only "on the high seas" or "outside the jurisdiction of any state", which excludes the territorial waters of states, including the coastal areas of Somalia. It is clear that the convention clearly did not consider the emergence of failed states like Somalia and neglected to address the question of what happens if a pirate attack takes place not on the high seas but within a country's territorial waters or in its neighbour's waters.

The international community retains its rights of regulation and enforcement of traditional acts of piracy on the high seas. In the developments in the law of the sea and maritime crimes, very little true high seas piracy actually takes place. The vast majority of global pirate attacks take place within relatively enclosed waters within the territorial sea of the adjacent coastal state, and therefore within the responsibility of the relevant coastal state..

Effective anti-piracy efforts require uniformity of law, such that legal solutions suppress piracy internationally rather than treat its symptoms in an ad hoc local or regional fashion. Until now, states and international legal institutions have addressed the piracy problem through a series of conventions, treaties, resolutions, codes, and regional and bilateral agreements. Without a uniform, comprehensive legal framework to rely on, state, commercial and private actors have attempted to tackle piracy as best they can. These limited approaches highlight the deficiencies of international anti-piracy instruments. Now that piracy is growing at an alarming rate, there is a great need for a definitive[24] international body of law to systematically govern this field.[25]

[24] Heller-Roazen, *The Enemy Of All: Piracy And The Law Of Nations* (2009) p. 31
[25] Martin Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?, in* Violence At Sea: Piracy in the Age of Terrorism (2007) p. 163

## 1.4 Theoretical Framework

Throughout the evolution of international law governing the oceans, two theories have fought for mastery. The first is the notion that the sea is common to all humankind and open to navigational uses by all. Therefore, no person or nation may validly seek to restrict others from such use by laying a claim of proprietorship over the sea. This notion is borne out by the belief that the geophysical nature of the ocean itself resists any claim of ownership over it.[26] Freedom of navigation is the mantra of this notion. The second notion seeks to restrict the use of the sea by positing that the sea is amenable to ownership by persons or states. Thus, whoever may bring any part of the oceans under his dominion may validly restrict its use by others. The middle path of the interaction between these two forces is the principle of innocent passage. The right of innocent passage is the essence of marine navigation and at present no one would seem to disclaim it. The maritime states cherish it as one of the cornerstones of the law of the sea and the coastal states admit it as an unavoidable limitation to coastal state competence.[27]

Innocent passage implies that such passage is at the sufferance of the state through whose coastal waters the right is exercised. It may also be said that there can be no talk of innocence if passage is not subject to the sovereignty of the state whose shores are adjacent to the body of water in which the right is exercised. For where no sovereignty is exercised by any state over the body of water in question, passage through the same would be passage simpliciter, with no

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[26] Kissi Agyebeng, *Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea,* Cornell Law Student Papers (2005) p. 2

[27] Hakapaa K. and E.J. Molenaar, Marine Policy, *Innocent Passage – Past and Present,* Vol. 23, No. 2, (1999) pp. 131-145

consideration of its offensiveness. For instance, there is nothing like innocent passage on the high seas since no state may validly claim to exercise jurisdiction over this body of water.

These claims have not gone without challenge, for a counterclaim has been maintained of the possibility of appropriation of portions of the sea and hence its uncommonness. The origins of this opposing view may be traced to the theory of the Glossators (commentators or annotators of the Roman law) who espoused the canon law of Rome.[28] This is based upon the sovereign rights vested over the sea in the Roman Emperor.[29] It was reasserted that the sea existed for free access to all men.[30] It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there.[31]

Grotius's approach to the freedom of the seas is essentially based upon the conceptualisation of the sea as *res communis* and accordingly not subject to territorial appropriation. Although the expression *res communis* implies common property, the concept is essentially a negativeone. *Res communis* is in fact *res nullius.* To say that something belongs to everybody in the same way means exactly the same as saying that it belongs to nobody. It is in this regard that the freedom of navigation was originally conceived as a principle of jus gentium of a negative kind, that of no man's sea.[32] At the time of Grotius this doctrine was peacefully accepted because the sea in itself was not seen as a source of economic wealth. Freedom of the sea could not mean freedom to exploit the sea's resources, in particular the seabed because this was by definition an impossible task. Freedom at sea in Grotius's times could only mean freedom of navigation. The principle of non appropriation of the seas only meant that coastal

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[28] Percy Thomas Fenn, Jr., *Origins of the Theory of Territorial Waters* (New York, HGS Publishers, 1926) pp. 465-467
[29] Ibid
[30] Ibid
[31] Pirtle E. Charles, *Military Uses of Ocean Space and the Law of the Sea in the New Millennium,* (2000) p. 13
[32] Ibid p. 18

States were not entitled to intercept foreign ships on the basis that they were entering appropriated territory.

As regards this study, I will use the theory espoused by the Glossators as it espouses that the sea exists for free access to all men. In the same way, if all the states have access rights to the sea, then such rights should have concomitant responsibilities to ensure that parties do not abuse the privileges they have. Therefore, this theoretical framework will help in analyzing my debate on the amendments that if effected to the UNCLOS would see a better shipping experience for the member states.

## 1.5. Hypotheses

The following hypotheses will be tested in the study:

a) Piracy has greatly evolved since the early times and various international laws have been enacted to curb the menace.
b) There are provisions on piracy under the UNCLOS (Articles 100-107) require amendments to reflect the changing operation of piracy in the world oceans.
c) There are inadequacies that exist in the current laws of the sea more specifically UNCLOS as regards piracy.

## 1.6 Methodology

The research design I will use in this study will be descriptive survey. This will serve to describe the state of affairs as it exists currently and in so doing, I will use secondary data. Such data intended to be used will be both published data and unpublished data. Published data will be from various publications of different states mostly affected by piracy. These will be various

publications of foreign governments and international organizations. The data will also be collected from journals, books, magazines and newspapers, reports and publications of various organizations connected with business and industry of sea transporting, reports prepared by research scholars from various universities, historical documents and other sources of published information. The sources of unpublished data will be unpublished works of scholars and research workers, trade associations and other public/private individuals and organizations.

The major source of the data will be that obtained from the International Maritime Bureau (IMB) Piracy Reporting Center's website. Such data will go a long way in illustrating the intensity and frequency of piracy in certain parts of the world seas. The data will also serve to illustrate how piracy trends have been since coming to force of the UNCLOS. The conclusion expected to be made is on whether there being the 1982 Convention has helped in reducing piracy incidences or they have increased. Such data will also explain what the motivating factor is for the piratical actions leading to the interpretation and reporting of the same in this study.

I also will use library research especially in Chapter two of this study in order to analyse the historical records of piracy and documents pertaining to the same. Such material will come from academic journals and government reports. Internet as a source of the data will also come in handy especially for data concerning historical aspect of piracy and how it has developed throughout the years. This will be important especially in chapter three which discusses how the UNCLOS has harmonized the laws of the sea. Due precaution will however be applied in the use of the secondary data available. I will consider the reliability, suitability, adequacy and authenticity of the data intended to be used.

## 1.8 Chapter Outline

Chapter 1 shall introduce the topic of my study by first setting the broad context of the research, the statement of the problem, justification, theoretical framework, literature review, hypotheses and the methodology of the study.

Chapter 2 will be a general discussion on history of piracy including its historic development, reasons for and types of piracy and the principle under guarding the law of the sea.

Chapter 3 will be an overview of how the law of the sea was codified and the state of the customary international law as codified in the UNCLOS and a brief discussion on other treaties that have filled the perceived gaps in the UNCLOS.

Chapter 4 will a discussion on the provisions of piracy in the UNCLOS and the new maritime developments in terms of the increasing piratical menace

Chapter 5 will provide conclusions of the study.

## CHAPTER 2

## History of Piracy

The term piracy has been used throughout history to refer to raids across land borders by non-state agents. Originally, the word 'pirate' derives from the Greek and Latin words 'peirates' and 'pirata' and refers to an adventurer who attacked a ship.[1] Piracy is the name of a specific crime under customary international law and also the name of a number of crimes under the municipal law of a number of States. It has been argued that piracy has been in existence for as long as the oceans were plied for commerce and is far from gone. Piracy is one of the oldest international crimes. From the 6th century, Thracian pirates of the Mediterranean to the 13th century Japanese Woku, pirates have threatened the interests of seafaring nations wherever and whenever the oceans have been used for commercial purposes.[2] Because of its nature and long history, piracy has become an international crime based on customary law between the nations of the world. Piracy has long held a place in international law. This chapter will first map out the historical emplacement of pirates in early capitalism, including their practice, and then discuss the reasons for piracy and types of piracy.

Piracy was a problem thousands of years before the Spanish began to bring gold, silver, and other treasures from the New World back to Spain. Men sailed the seas as pirates when countries began to cross the oceans and seas to trade goods with each other. There were powerful pirates that sailed the Aegean and Mediterranean seas. These pirates set up a large

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[1] Johnson D .and Valencia M.J., *'Piracy in Southeast Asia: Status, Issues, and Responses*, (Series on Maritime Issues and Piracy in Asia, Institute of Southeast Asian Studies, 2005) p. 10
[2] Andersen Elizabeth, Benjamin Brockman-Hawe, Patricia Goff *Suppressing Maritime Piracy: Exploring the Options in International Law*, (California, One Earth Future2012) pp 1-2

pirate nation in Cilicia.[3] Barbary corsairs controlled the western part of the Mediterranean. Vikings were brave and strong pirates. They sailed all over the Atlantic Ocean, but especially terrorized the European coastlines. Piracy was also active in the waters surrounding Asia. As ships were built bigger and better and men became braver, piracy began to spread into the New World.[4]

There are periods of history when pirates controlled much of the world's oceans, while in other eras pirate activity was almost nonexistent. About 2,000 years ago, pirates controlled the eastern Mediterranean Sea until a Roman naval fleet tracked down and destroyed all significant pirate ships and strongholds. The Mediterranean Sea was relatively pirate-free for hundreds of years after the Roman victory.[5] The most famous pirates of the medieval period were perhaps the Vikings, who ravaged Europe from about 700 to 1050. Unlike other raiders who only assaulted coastal towns, Vikings used rivers to ambush settlements far inland. Their exploits brought them all over Europe, the Mediterranean Sea, North Africa, and to the coasts of North America.[6]

These pirates sailed from many different countries that bordered the Mediterranean Sea. Some of these pirates had an agreement with their home countries to share any treasure that they captured. In return, they would not be arrested. Some pirates were not loyal to any country and lived on the Barbary Coast which was along the North African coast. These pirates were known as the Barbary pirates and they were very cruel and took a lot of goods from any ship that passed their way. The merchants became tired of having their goods taken and asked their governments

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[3] Cilicia is now part of the country of Turkey

[4] Angus Konstam, *Piracy: The Complete History*, (United Kingdom, Osprey Publishers, 2008) pg 55

[5] Mark Hughes, *Pirate History: Thousands of years of ambushes, raids, hijackings*, (West Indies, Histop Publishers, 2000) p. 126

[6] Allen, E.W., *Freedom of the Seas, American Journal of International Law* vol. 60 (1966) p. 814

to help stop the pirates. England and France offered to forgive the pirates of their bad deeds if they would stop piracy. Some pirates accepted this forgiveness, but most just laughed and kept on stealing and capturing ships. Finally these pirates were chased out of the Mediterranean Sea by the French and went to live in the Caribbean on the island of Hispaniola.[7]

Many pirates had served in merchant or naval ships prior to turning to piracy. Life on a pirate ship appeared more attractive as they were independent of national laws, the crew were treated much better than normal sailors and prize money was shared out equally. Most seamen became pirates as they hoped to become rich on plunders of treasure and cargo ships. When pirate ships captured merchant ships, the pirate captain would ask for volunteers to serve under him. Many of the crew would volunteer, as life on a merchant ship was harsh and conditions awful.[8]

Pirates used flags to frighten passing ships into surrendering without a fight. The original pirate flags were blood red, and this signaled that no mercy would be shown once the pirates boarded and battle ensued. As piracy developed, more flags were used, and pirates often had their own flags. The Jolly Roger, (a skull and cross bone) is the most famous pirate flag. The symbol had been appropriated from the symbol used in ships' logs, where it represented death on board. It was first used as pirate flag around 1700 and quickly became popular with pirates, who designed their own version of the flag. For example, a skull and crossed swords. Pirates required ships that were fast, powerful, and had as shallow a depth below the water as possible.[9] This was because surprise was vital to a pirate attack, and they needed to be able to navigate in shallow

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[7] Ibid

[8] Robert Haywood and Roberta Spivak, *Maritime Piracy,* (United Kingdom, Routledge Publishers, 2012) p. 9

[9] Ibid

coastal waters and hide in secluded coves and inlets. It was a reign of fear that lasted two long years. Pirates terrorized sailors on the Atlantic Ocean and Caribbean Sea from 1716 through 1718. They ambushed ships carrying passengers and cargo in the dim light of dawn and dusk when the pirates' ship was hard to see.

Another example would occur when armed men and/or women seize a ship for purposes other than financial gain. They do so to further some political agenda as in the case of the Achille Lauro in October 1985 when Palestinian guerrillas hijacked the Italian cruise ship while in Egyptian territorial waters. They demanded the release of 50 countrymen held by the Israelis before they would release the hostages. This made them terrorists rather than pirates, and they were eventually convicted of offenses related to the hijacking and murder of an American passenger rather than acts of piracy.[10]

The deed may be done for financial purposes, but governments are not private citizens. One nation that seemed to condone such acts is China. In 1994, uniformed men in boats bearing governmental markings seized the *Alicia Star* in international waters, alleging that the ship was involved in smuggling.[11] When the ship docked at the port, they confiscated the cargo and held the crew captive until the owners paid a huge fine. Two years later, patrol boats carrying members of the Somali military armed with automatic rifles stopped a tugboat also in international waters. They took the master and an officer as hostages and stole ten thousand US dollars and some supplies. In 1999 members of the Somali Salvation Democratic Front used a speedboat to take four hostages from a yacht. They held the German tourists in a village until a fifty thousand US dollars ransom was paid. Militiamen also seized an Italian fishing boat

[10] Ormerod A. Henry, *Piracy in the Ancient World* (Baltimore, The Johns Hopkins University Press 1997) p.68
[11] Ibid, p. 72

demanding payment of a five hundred thousand US dollars fine before they released the ship and its crew of 33.

Pirates were also involved in the lucrative slave trade. They found that by selling the ships' crew, slaves or demanding a ransom for them was more profitable than the ship's cargo.[12] During the seventeenth and eighteenth centuries, when the slave trade was a lucrative business, the profits from slavery attracted many pirates. Some became slavers, whilst others sold cargoes of slaves captured from the merchant ships bound for the American colonies or from raids on the West African slave ports. Thus many pirates became a combination of slaver, privateer and pirate and by the 1830s the term picaroon had come to mean both pirate and slaver.

While a great deal of piracy occurred in areas where lawlessness reigned, governments also used piracy as a weapon of war against other states. In the 1500s, England and Denmark sponsored privateers[13] to harass Spanish vessels carrying gold in the Caribbean Sea. Privateer ships and their captains, such as Francis Drake, were heroes to the English and Danes, but were viewed as outlaws and pirates to the Spanish. Tales of hostility between European powers in the Caribbean formed the backdrop to popular tales, such as the Pirates of the Caribbean films. Between the sixteenth and eighteenth centuries governments issued 'letters of marque' which were licensing these sailors to plunder alien ships. This was to prevent privateers from being charged with piracy, which was an offence punishable by death.[14]

As contemporary international trade routes developed throughout the Seventeenth century, slow moving undefended ships were an easy target for pirates set on looting and

[12] Michael W. Williams, *Piracy: A brief history of piracy* (United Kingdom, London Press, 2002) p. 6

[14] Ibid, p. 15

plunder.[15] The Golden Age of Piracy was often associated with the time period stretching from the 1650s until 1720s. Between 1715 and 1725, the years witnessed the most dramatic increase in the number of pirates operating throughout the Caribbean, the American coast, the Indian Ocean and the western coast of Africa. It was also within this period that modern interpretations of the term "piracy" became embedded into our current society and civilization. Piracy later became a subject that brings forward everybody's attention and interests towards learning more about it.

There were many factors causing a sudden bloom in the number of Europeans and colonial American sailors and privateers becoming pirates during the early 18th century. It was believed that one of the main reasons was mostly connected to high level of unemployment happening during that time.[16] Other contributing factors included the higher number of vessels transporting valuable goods across countries using the sea that led to the robbing in the high sea as it was seen as a lucrative activity. Reduction in the size of European navies was also another point to consider as this has resulted in the large pool of experienced navy personnel (especially those in Royal navy) readily available to be recruited to become pirates. Finally, the emergence of Golden age of Piracy was also partly the result of lack of good governance in European oversea colonies and that attracted people to engage in piracy in order to avoid hardship.

According to historians, the year that marked the beginning of golden age of piracy happened around 1650, after the wars of religion ended and this encouraged European country to go back to their olden ways of expanding their colonial empires. As all of these took place, it made sense now that piracy is looked upon as a much faster way to get rich with the increased

[15] Rothwell R. Donald, *Maritime Piracy and International Law*, (Unpublished, 2009) pg 1

[16] Andrews, Kenneth R. *Ships, Money and Politics: Seafaring and Naval Enterprise in the Reign of Charles I* (Cambridge: Cambridge University Press, 1991) p. 114

seaborne trades, more money to steal and grab and furthermore all these are actually transported onboard ships.

The history of piracy reached its peak in the year 1713, and the most significant event or turning point that contributed to this is the signing of peace treaty known as the "Treaty of Utrecht", which ended the War of the Spanish Succession (also called 'Queen Anne's War').[17] This has led to a lot of navy servicemen including Britain's paramilitary privateers, who have nothing and nowhere to turn to after they were relieved of their military duties. The result has left a large pool of qualified and well-trained sailors ready to be recruited to become pirates and all these happened at the time when the cross-Atlantic colonial shipping trade was beginning to flourish. In addition, those Europeans who were originally involved in slavery were now more enthusiastic to join the more lucrative pirating activities and ship captains also never have any problem searching for the right men to become their crew members.

The high number of trade traffics taking place between Africa, the Caribbean and Europe began to increase significantly in the 18th century and the model was widely known as triangular trade, which was a rich target for pirates.[18] The most lucrative trading activities at that time were those involving sales of goods and weapons from European countries in exchange for African slaves. After these were completed, the trader would then set sail to the Caribbean islands to sell off the slaves and then returning back again to European countries with all the needed goods such as sugar, tobacco and cocoa. Another type of popular trading activity involved ships carrying raw materials, preserved cod and rum from Africa to Europe whereby part of the cargoes would then be sold for manufactured goods. Along with the remainder of the original

[17] Ormerod A. Henry, *Piracy in the Ancient World* (Baltimore, The Johns Hopkins University Press 1997) pg 76
[18] Ibid

load plus the newly acquired manufactured goods, these would then be transported to the Caribbean for exchanges of sugar and molasses. The ships would then set sail for their next stop, New England. In other words, every stop was bound to generate returns and income from the trading activities.

As part of the agreement that led to the end of War of the Spanish Succession, the British were given asiento, a Spanish government contracts, to supply slaves to Spain's New World colonies. This provided more open opportunities because traders and smugglers can now penetrate directly into the Spanish markets in America, which was previously closed to outside traders.[19] This was also part of the reasons why piracy became even more rampant across the Atlantic at that time. Trades and shipping volume increased tremendously during the Golden age of Piracy and with the readily available pool of skilled mariners this caused merchant traders to take advantage of the situation to underpay their sailors, and at the same time ignore the terrible conditions that existed onboard their vessels. Because of these, servicemen suffered high death rates due to breakout of disease and shockingly based on historical analysis done by Rediker, 2004, the condition was even worse compared to transportation of slaves.[20]

The decline of piracy was only seen happening during the early 1700s. While the excess supply of trained sailors did provide a room for piracy to expand, the higher number of ships getting attacked and robbed of their valuable goods increased proportionately as well, up to a level whereby the governments saw it as a worrying threat. As it goes on, this has again called for the need to recruit back the sailors and increase navy size to fight piracy. European nations especially took steps to bolster the strength of their navy fleet in order to protect their trade

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[19] Kelsey Harry, *Sir Francis Drake, The Queen's Pirate*, (New Haven, Yale University Press, 1998) p. 98
[20] Gosse, Philip, *The Pirates' Who's Who* (Washington, Plain Label Books, 2007). p. 251

interests and to ensure that nothing would be jeopardized. All these efforts eventually led to the decline in piracy and it was not long after the years, which finally caused the decline of the golden age of piracy.[21]

There are certain factors that are believed to have led to the ancient fall in piracy incidences. The first being technology. The increased size and speed of merchant vessels in the 18th & 19th centuries severely disadvantaged pursuing pirates. Second, there was increased naval presence. The 19th and 20th centuries saw an ever increasing level of international naval patrols along most ocean highways & particularly in support of colonial networks. There was also an increased government administration. The 19th and 20th Centuries were marked by the regular administration of most islands and land areas by colonies or nations which took a direct interest in protecting their merchant fleets. The ancient fall of piracy was also contributed by the emerging uniform regulation. There was a general recognition of piracy as a serious international offense which would not be tolerated by countries determined to protect their national fleets and able to do so.[22]

Following World War II however, these four self enforcing barriers to high seas piracy began to erode. The four factors have now actually begun to encourage the activity. The four factors discussed herein above have reversed themselves in recent years. In terms of the technological advancement, the protection once afforded to merchant vessels by their modern size and speed is now offset by further technical advances which have reduced crew size as well as a vessel's ability to defend itself. On the other side of the coin, there has been a bumper crop of

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[21] Ibid

[22] McDaniel S. Michael, *Modern High Seas Piracy*, the presentation before the Propeller Club of the United States at the Port of Chicago on November 20, 2000

technological advances which improve the pirate chief's weapons of speed, shock, surprise, fire power and rapid escape. There has been a reduced naval presence in which the trend is for smaller world navies which dramatically decreased international ocean patrols and have left merchant vessels virtually unprotected on the sea frontier.

Governmental administration has also been disrupted. These are decisions by former colonies not to maintain ties with their home countries and the financial inability of some governments to afford effective naval assets, a factor that has encouraged pirate attacks. Lack of regulation too led to the upsurge of piracy. In some quarters there has been erosion of the view that piracy is a serious international crime, or even a crime of which anyone should take notice. With most of the world's 64 million gross tonnage fleet under flags of convenience such as Panama, Honduras and Liberia, there is no political will to smash high seas piracy.[23]

In the recent years, maritime piracy has returned as a major concern of international security. While armed robbery and hostage and ransom taking at sea has always been part of the history of seafaring and maritime trade, until recently piracy was no longer considered a problem demanding major political action.[24] Up to the late1990s piracy was approached as a historical concern, or eventually an issue that can be addressed by better port regulations and maritime safety standards. Since a decade this evaluation of piracy has considerably changed. Navies worldwide see the fight against piracy as one of their crucial missions. The UN Security Council, NATO, and the EU recognize piracy as a major problem of international security. Numerous international and regional organizations, including the International Maritime Organization (IMO), the United Nations Office of Drugs and Crime (UNODC), the African Union (AU) or the

[23] Ibid
[24] Azubuike, Lawrence, *International Law Regime against Piracy, Annual Survey of International & Comparative Law*: Vol. 15: Iss. 1, Article 4, (2009) pp. 15-16

International Governmental Authority for Development (IGAD) are developing and implementing counter-piracy plans and programmes.[25] It is largely three geographical areas which have become zones of concern. Piracy in South East Asia, notably the Strait of Malacca and the South China Sea has been seen as problematic from the 1990sonwards. The coast of Somalia and the Horn of Africa achieves increasing attention since 2007. Piracy in West Africa, notably the Gulf of Benin, has become the third major recognized trouble spot since 2011. In all cases major international shipping routes are concerned and fairly extensive regional and international actions have addressed piracy.[26]

A total of 1,845 actual or attempted acts of piracy were registered around the world between 2003 and the end of 2008, which equates to an average annual rate of around 352.[27] The true figure is undoubtedly greater because in many cases (possibly as many as 50 percent) ship owners are reluctant to report attacks against their vessels out of concern that this will merely lead to increases in maritime insurance premiums and result in lengthy and costly post-incident investigations.

The concentration of piracy is greatest around the Horn of Africa and the Gulf of Aden, which accounted for roughly 37 percent of all attacks reported in 2008 (111 out of 293). Other high-risk zones include Nigeria/Gulf of Guinea, Indonesia, India, Bangladesh and Tanzania, which collectively accounted for 59 percent of all non-Horn of Africa/Gulf of Aden incidents last year.

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[25] Bueger Christian, *Piracy Studies – Academic Responses to the Return of an Ancient Menace*, Draft of a Review Essay, Cardiff University (1999) p. 1

[26] Kraska, James, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea*. Santa Barbara, Cal.: Praeger Publishers, (2011), pp 253-254

[27] Peter Chalk, *Maritime Piracy: Reasons, Dangers and Solutions*, (Rand Corporation, 2009) p. 2

The scale and sophistication of piracy has jumped markedly in recent years, especially in the waters off East Africa. Gangs now routinely hijack large ocean-going vessels and have exhibited a proven capacity to operate as far as 500 nautical miles from shore. There has also been a discernible spike in hostage-takings. In 2008 889 crew members were abducted, the highest figure on record and a significant 207 percent increase on the total for 2007. Currently Somali pirates are thought to be holding 11 vessels and 210 crew for ransom.

Near present-day Malaysia and Sumatra, an island that is part of Indonesia, lies a narrow waterway called the Strait of Malacca. From at least the 1400s to the modern day, the strait has been a prime location for pirates to capture vessels. Nations like China occasionally had a naval force that confronted the pirates, but it was not strong enough to drive them out permanently. By the mid-19th century, after years of increasing contact and trade in East Asia, three European powers: England, Denmark and Norway were able to control local pirate bands, and instances of piracy remained low through the 19th and well into the 20th century. By the end of the 20th century and the beginning of the 21st, however, piracy was on the upswing again with sea robbers emerging from war-torn and economically depressed nations such as Somalia in Africa. Over the years, there has been a shift towards more advanced, sophisticated and professional forms of piracy.[28] Modern day pirates carry satellite phones, global positioning systems and are armed with automatic weapons, antitank missiles and grenades.[29]

### Reasons for Piracy

Some of the reasons why piracy occurs are political corruption, economics of the third world, willingness of shippers to pay the costs of piracy rather than higher insurance premiums and to

[28] Pak H., *'The Law of the Sea and Northeast Asia: a Challenge for Cooperation'*, Publications on Ocean Development, Volume 35,(The Hague, Martinus Nijhoff Publishers, 2000) p. 106.
[29] Luft G. and Korin A.,*Terrorism Goes to Sea*, *Foreign Affairs*, Vol. 83, No. 6 (2004) p. 61

avoid the political risks associated with reporting attacks and the failure to develop international protection agency and today's small crews working on vessels as a consequence of cost saving tactics. Therefore pirates can come on board without ever being seen. In the crucial geographic areas, at the local level, no serious effort is made to prevent or to respond to piracy, due to the corruption of officials and simply insufficient resources, police and military forces. In last decade, there was an increase in the level of violence, use of weapons, technological equipment and launching speedboats from mother ships. Piracy reporting centre created more awareness to governments and they were forced to take action.[30]

The causes and facilitators of piracy can be said to be: first, piracy has a financial gain motive.[31] Easy and low-risk profit making is the main reason for people to become a pirate. However, the amount of reported pirate attacks is different per region which proofs evidence, that there are more variables which have to take into account as an explanation for piracy. Busy sea routes and suitable geography do facilitate piracy as well. Ships which have to pass straits, islands or so called choke-points have to reduce speed and are therefore an easy target. These surroundings are also perfect hide-outs for pirates and their boats. Furthermore, conflict, disorder, poverty together with a weak security sector provides a breeding ground for piracy. On the one hand, when facing poverty and continuous disorder, people quite easily slide into illegality as a way to survive. Moreover, fishing-disputes are also a reason for piracy. Besides that, piracy is also tied up ashore. There is a constant need of information about which vessel passes where and when, how large the crew is and what type of cargo is loaded.

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[30] Leonard Remondus van der Meijden, *The Influence of Modern Piracy on Maritime Commercial Transport*, Thesis MSc Degree in Urban, Port and Transport Economics (2008) p. 8

[31] Petretto, K. *Weak States Off-shore: Piracy in Modern Times. German Institute for International and Security Affairs*, Discussion Paper (2008) p. 3

Secondly, accessibility of shores or anchorages has to be provided. Therefore, well guarded ports with strong security forces are not really an option. Thirdly, especially when vessel-, cargo- or oil theft is involved, pirates do not only need buyers for the stolen goods but also able persons to falsify official documents. The last factor links piracy to international organized crime. Pirates can therefore be considered as the tip of the iceberg within a complex network of organized criminal activities all over the world.

### Types of Piracy

According to the International Chamber of Shipping (ICS), piracy can be classified into three basic categories. First, there is 'low level armed robbery' which contains an attack with the intention of stealing.[32] Whatever there can be carried from the deck and hold would be stolen. Pirates looking for money, crew belongings, cigarettes, alcohol, stores, ropes and mooring. Violence only occurs when the crew tries to stop them. Usually, the duration of such an attack lies between thirty and forty minutes. The second form is called 'medium level armed assault and robbery' or 'armed assault with violence or threats of violence'.[33] Pirates usually come on board unnoticed and force the crew to hand over their cash and valuables. Cargo would also be stolen if possible. Each raid is over in less than an hour. The financial loss is usually in the order between US $10.000 and US $20.000. The last category is called 'major criminal hijack' which is defined by the ICS as carefully planned theft of the entire cargo. Pirates often know every detail of the cargo and the ship's steaming plan. While some of the pirates hold the crew captive, others

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[32] Harm Dotinga and Barbara Kwiatkowska, *International Organizations and the Law of the Sea: Documentary Yearbook* (The Hague, Martinus Nijhoff Publishers, 1999) pp 516-518

[33] Ibid

transfer the cargo to another ship. When the attack is over, the ship drift in the ocean with the bridge unmanned. This type of attack usually results in a million dollar loss.

The other classification is by Abhyankar who divides piracy into five specific forms, varying according to different regions.[34] First, there is what can be called 'Asian piracy'. Ships are boarded by pirates, sometimes disguised as coast guards or harbour police, and then cash and valuables are stolen from the safe and the crew with minimum violence.[35] The ship's safe often contain large amounts of cash which is needed for payroll and port fees. These attacks are not on the high seas as all the waters in the region are within the territory of the various countries. This form of piracy is characterized by night attacks, the high degree of skill that is used to come on board of the ship and the fact that violence is only used when detected or getting resistance.

The second form is 'South American' or 'West African piracy'. More violent attacks will happen where ships are berthed or at anchor. Targets are cash, cargo, equipment or anything which can be moved and carried. The high degree of violence, pre-planning and value and the lack of competence or willingness to respond on the part of law enforcement are the characteristics of this kind of piracy.[36] Just as the first form, pirates come alongside in small craft and mount high-sided ships with remarkable skills. 'Piracy with military or political feature' is the third form of piracy. These are likely incidental incidents. Hijacking a ship, overpowering the crew and stealing the entire cargo can be stated as the fourth variation.

Finally, the last form that can be diversified is called 'phantom- or ghost-ship'. The pirates force the crew off the ship and then sail it to a port in order to repaint it and to give it a new identity

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[34] Abhyankar, J., *Piracy and maritime violence: A continuing threat to maritime industry* (2002)

[35] Ibid

[36] Ibid

through false papers. According to Macqueen, to register a vessel can easily be done in Belize, Honduras or Panama.[37] These governments do not ask the origin of the ship.[38] The objective of this kind of piracy is to use the ship to commit cargo frauds. The turnaround time for a phantom ship operation lies around the ninety days. Such ships can manage three or four voyages a year. It is a huge profitable business. The life time of a phantom ship is about two and a half years. After that, the ships which are not maintained very well will be abandoned by the pirates.

Another new trend in piracy is characterized by the fact that pirates attacked and kidnapped crew members and demanding ransom for their safe return. Modern pirates make use of the newest technology. They use mobile phones, modern speedboats, assault rifles, shotguns, pistols, mounted machine guns, and even rocket-propelled grenade and grenade launchers. In spite of that, more primitive weapons such as knives, batons, or boat-hooks are also often used.

The problem of piracy is ongoing and ever changing problem.[39] Each area has their own features and requires their own solution for their specific situation. Reasons for a regional increase in piracy are different per region. Pirates are organized in different ways. Individuals, gangs, separatist groups, organized criminal gangs or pirates posing local military forces. However, there are also some similarities between these regions. First, where piracy is concerned, regional growth trends are always directly related to economic crises and inadequate legal and security systems. Second, pirates often operate in regions of developing or struggling countries with smaller navies and large trade routes. Socio-economic issues arise in regions where maritime trade meets poverty, social instabilities and an absence of effective law.[40] The

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[37] Macqueen, J. *The Great Deception*. Lloyd's Shipping Economist, (2004) p. 2

[38] Ibid

[39] Keith Reynard, *Aslib Directory of Information Sources in the United Kingdom*, (United Kingdom, Routledge Publishers, 2003) pp 1124-1126

[40] Marine Log, *Sizing Up the Piracy Triangle*. Marine Log, Vol. 122, (2007) pg 56

financial gain creates a breeding ground for piracy. Facilitators of the piracy development are maritime bottle necks, fishing fleet for camouflage, adequate boat facilities, existence of black markets and money laundering. The most piracy prone waters can be divided into three areas: a) South East Asia and the Indian Sub Continent (Bangladesh, India, Indonesia, Malacca straits, Singapore Straits, Africa and Red Sea); b) Gulf of Aden and Southern Red Sea (Somali waters, West Africa) c) South and Central America and the Caribbean waters (Brazil, Haiti, Dominican Republic, Jamaica, Peru).

**Freedom of the Sea as a Principle that under guard the Law of the Sea**

Freedom of the seas is a principle in the international law and law of the sea. It stresses freedom to navigate the oceans. It also disapproves of war fought in water. The freedom is to be breached only in a necessary international agreement. This principle was one of U.S. President Woodrow Wilson's Fourteen Points proposed during the First World War. In his speech to the Congress, the president said:

> Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

The United States' allies Britain and France were opposed to this point, as France was also a considerable naval power at the time. As with Wilson's other points, freedom of the seas was rejected by the German government.

In international law, the principle that outside its territorial waters a state may not claim sovereignty over the seas, except with respect to its own vessels. This principle gives to all nations in time of peace unrestricted use of the seas for naval and commercial navigation, for

fishing, and for the laying of submarine cables. From the late 15th to the early 19th century, Spain, Portugal, and Great Britain attempted to exclude commercial rivals from parts of the open sea. Protests by other nations led to a revived acceptance of freedom of the seas. One of its strongest advocates was the United States, especially in its dispute with Great Britain preceding the War of 1812.[41] In time of peace, freedom of the seas cannot be restricted lawfully except by international agreements, such as those regulating fisheries or the right of visit and search.

During war, however, belligerents often assert limitations of the principle in order to facilitate the more effective conduct of hostilities, and it is then that the sharpest disagreements arise, for example, the case of the Lusitania in World War I. Subjects of contention between neutrals and belligerents include the right to seize neutral property and persons aboard an enemy ship, the mining of sea lanes, and the exclusion of neutral vessels from enemy ports by blockade.

The Law of the Sea Treaty establishes a 12-mile (19-kilometer) territorial limit for coastal nations and establishes an international authority to regulate seabed mining, among other provisions. Today, the concept of "freedom of the seas" can be found in the United Nations Convention on the Law of the Sea" under Article 87(1) which states: "the high seas are open to all states, whether coastal or land-locked." It gives a non-exhaustive list of freedoms including navigation, over flight, the laying of submarine cables, building artificial islands, fishing and scientific research.[42]

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[41] Hill C. J., *Introduction to the Carriage of Goods By Sea* (1974)
[42] Article 87(1) (a) to (f)

The freedom of the seas concept is a sacrosanct principle and calls instead for a governing the notion where the primary goal is the protection of ecological vitality.[43] The tendency to see the world ocean as a place distinguished by the absence of constraint, 'a road that leads everywhere' leads to its being considered a flow resource for transportation and unhindered movement not just a stock resource (from which fish and other marine resources can be extracted). Nowadays, the movement of manufactured goods and commodities free from hindrance in the shape of pirate attack, terrorism, criminal behaviour and political interference is regarded as the basis for the health of the world's economic system, its prosperity and its security.

It is the free movement and operation of warships, rather than in merchant shipping that the contention arises. The issue though is that most navies regard the protection of trade from anything that might threaten it, either at sea or from the land, as second only in their priorities to the defence of national territory and its population. This in turn means that ideally they should have the capacity to go, and to operate, wherever merchant ships are to be found. For this reason, even where the much more strictly enclosed and controlled 12 mile Territorial Sea is concerned, the natural tendency is for the maritime powers to insist on their rights for innocent and transit passage, for the 'right of assistance' to go to the rescue of sinking or distressed merchant vessels wherever they are and to seek agreement for the hot pursuit of drugs smugglers and pirates into

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[43] Jon M. Van Dyke, Durwood Zaelke and Grant Hewison, *Freedom for the Seas in the 21st Century: Ocean Governance And Environmental Harmon,*

the territorial sea of other countries.[44] For this reason, they insist on the right of warships to behave as normal in the Exclusive Economic Zone provided they do not interfere with the economic rights of the coastal state, nor threaten its security, the latter caveat being equally true under the UN Charter of their behaviour on the high seas.[45]

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[44] Geoffrey Till, *The Freedom of the Seas: Why it matters,* (Corbett Centre, King's College London, 2011) p. 114

[45] O'Connell D.P. and I.A. Shearer I.A. *The International Law of the Sea* (Oxford University Press, Oxford, 1985) p. 108

CHAPTER 3

# Regulation of Piracy

This chapter will explain the history of codification of the rules regarding piracy in international laws. It was found necessary for the international community to combat piracy effectively as it seriously threatened shipping traffic and the safety of people and goods. Efforts to stem piracy began during ancient times in Crete, Athens, and the island of Rhodes. The Rhodians were the first to include piracy in their maritime laws. During the middle ages, pirates were one of several thorns in trade between countries. To address this and other issues northern cities in Germany and German merchants in the Netherlands, Belgium, Luxembourg, England, and the Baltic banded together to form the Hanseatic League.[1] Eventually, some countries established admiralty courts to enforce maritime laws. To Sir Charles Hedges, a judge of the British Admiralty Court during the late 1600s, pirates were robbers who seized a ship and/or its cargo through violent means upon the sea.[2] In spite of these legal attempts to deal with piracy, though, an internationally accepted definition of piracy didn't exist prior to 1958.

Throughout the Nineteenth century a legal regime developed in response to the threat of piracy and customary international law evolved which made piracy in effect the first universal crime over which all states had the capacity to arrest and prosecute. These developments in custom found their way into the modern law of the sea as it developed throughout the Twentieth century. The 1958 Geneva Convention on the High Seas and then the 1982 United Nations Convention on the Law of the Sea (UNCLOS) ("the Convention") both outlined an international regime for the

[1] Keith Reynard, *Aslib Directory of Information Sources in the United Kingdom*, (United Kingdom, Routledge Publishers, 2003) pp. 987-989
[2] Geoffrey Till, *The Freedom of the Seas: Why it matters*, (Corbett Centre, King's College London, 2011) p. 89

repression of piracy and effectively recognised universal jurisdiction on the part of all states to suppress pirate acts. The Convention which now has 157 State parties – is generally considered to be reflective of customary international law.[3]

Article 15 of the 1958 Geneva Convention of the High Seas and Article 101 of the 1982 UN Convention on the Law of the Sea define piracy as a violent seizure on the high seas of a private ship or the illegal detainment of persons or property aboard said ship for the purpose of private gain. Seems simple, but in reality there are problems with this definition. First, it limits piracy to crimes committed against private property or citizens. Second, the act must occur in international waters. Third, greed must be the motivating factor behind the crime.

What the law fails to address are acts of piracy committed by governments, within territorial waters, for political purposes. For example, in 1997 the *Libra Buenos Aires* was at anchor in Rio de Janeiro's harbor. Around midnight, ten armed pirates boarded the cargo ship and threatened to kill the crew. They beat the ship's master until he opened the safe then searched the cabins for valuables and stole some cargo. Although authorities were notified and help was requested, none arrived.[4] That same year the *Petrobulk Racer* anchored off Jakarta. A small boat approached the tanker's bow. While the crew kept watch on it, a lone pirate boarded the vessel elsewhere and held a knife against an officer's neck while his fellow pirates came aboard. When another crewmember sounded an alarm, the pirates jumped ship. It was the third time that year that pirates had targeted the tanker while in Jakarta.[5]

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[3] Ibid

[4] Silvia Ciotti Galletti, *Piracy and Maritime Terrorism: Logistics, Strategies, Scenarios*, (Lansdale IOS Press, 2012) pp. 79-81

[5] Ibid

Before 1958, a nation's borders extended three nautical miles beyond its shoreline. Since then, that limit was extended a further nine miles. That means that if a crime occurs within that twelve-mile limitation, then legally it is not an act of piracy. Some countries, like the United States, have national laws against piracy or the crime may fall under a different classification such as murder, kidnapping, or robbery. Since most acts of piracy today occur within territorial waters rather than the high seas, the International Maritime Bureau (IMB) would like to see the legal definition of piracy broadened.[6] The boarding of any ship, whether to steal or commit some other crime, and the actual or implied use of force by the perpetrators would constitute an act of piracy. The International Maritime Organization (IMO) also seeks to solve the jurisdictional problem by focusing on the danger to navigational safety rather than the location of the crime. The 1988 Rome Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation prevents pirates from seeking sanctuary in countries whose judicial system is ill equipped to prosecute them and forces nations to institute laws against piracy. So far only 43 countries have ratified it.

The issue of piracy was one of the most important issues which were presented to the League of Nations. It prepared a commission for the progressive codification of the work of one of its subcommittee about piracy.[7] That report of piracy had some ambiguities, as it restricted piracy in the high seas, but excluded the acts of the state controlled vessels and acts for political purposes. There were some solutions presented in that report but those are not recognized

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[6] Graham Gerard Ong, Piracy, Maritime Terrorism and Securing the Malacca Straits (Mumbai, Institute of Southeast Asian Studies, 2006) p. 25

[7] James Kraska, Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea (Virginia,ABC-CLIO Publishers 2001) p. 116

universally at all. The reaction of the states about that report was not good because some of the states thought that this problem was not on high level in the world. The League of Nations assembly decided on the basis of that report to put the issue of piracy in its codification conference.[8]

The international law of the sea comprises all the legal norms pertaining to the sea and applicable to relations between states. It contains rules on the delimitation and exploitation of maritime areas and provisions on the protection and exploration of the oceans.[9] The mid-20th century, the seas became an increasing focus of interest as a source of natural resources such as oil and gas. Many coastal states therefore attempted to extend their national jurisdiction over ever-larger areas of the sea and the seabed. Some laid claim to a 200 nautical mile zone. The concept of *mare liberum* appeared to have been consigned to history. After an initial attempt to regulate the maximum permissible extent of the territorial sea in an international treaty failed in 1930, the four Geneva Conventions were finally adopted under United Nations auspices in 1958. The aim of these international agreements was to prevent the sea from being divided up once and for all between various countries. However, this aim was not achieved in full.

### 3.1 Codification of Laws Related to Piracy

The idea of developing international law through the restatement of existing rules or through the formulation of new rules is not of recent origin. In the last quarter of the eighteenth century Jeremy Bentham proposed a codification of the whole of international law, though in a utopian spirit. Since his time, numerous attempts at codification have been made by private

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[8] Ibid

[9] Barry H. Dubner, *The Law of International Sea Piracy* (The Hague: Martinus Nijhoff Publishers, 1980) p. 59

individuals, by learned societies and by Governments. Enthusiasm for the "codification movement" the name given to such attempts generally stemmed from the belief that written international law would remove the uncertainties of customary international law by filling existing gaps in the law, as well as by giving precision to abstract general principles whose practical application is not settled. While it is true that only concrete texts accepted by Governments can directly constitute a body of written international law, private codification efforts, that is, the research and proposals put forward by various societies, institutions and individual writers, have also had a considerable effect on the development of international law. Particularly noteworthy are the various draft codes and proposals prepared by the *Institut de Droit International*, the International Law Association (both founded in 1873) and the Harvard Research in International Law (established in 1927), which have facilitated the work of various diplomatic conferences convened to adopt general multilateral conventions of a law-making nature[10]

The issue of piracy was one of the most important issues which are presented in League of Nation. It prepared a commission for the progressive codification of the work of one of its subcommittee about piracy. That report of piracy had some ambiguities, as for it restricted piracy in the high seas, but excluded the acts of the state controlled vessels and acts for political purposes.[11] There was also some solutions presented in that report but those are not recognized universally at all. The reaction of the states about that report was not good because some of the states think that this problem is not on high level in the world. The League of Nations assembly decided on the basis of that report to put the issue of piracy in its codification conference. In a

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[10] *The Work of the International Law Commission, 7th ed., vol. 1,* (2007) pp 14-18

[11] Eugene, *Piracy and International Law*, (Northwestern University Law School, 1998) p. 113

report of the sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, it was stated that in their view, it would be preferable for the committee to adopt a clear definition of piracy applicable to all states by virtue of international law in general.[12]

The Harvard Research Draft 1932 was presented by the Harvard Research Group (the Group) and was the first ever draft to make some customary laws. It recognizes the competence of individual states over the offense, as for each state have the jurisdiction over piracy. This draft provides some extra powers to the states which are not available under the league's Draft. One of the principal objects of the Group was to show the diversity of opinion with respect to what should have been fundamental or traditional matters such as a definition of piracy; the meaning and justification inherent in the view expressed by various legal publicists and municipal laws that piracy was an offense or a crime against the law of nations; and whether there existed a jurisdiction that was common to all nations in the international community.[13]

Having presented the opinions of numerous highly regarded jurists and publicists[14], the Group then had to permit the reader to appreciate the fact that the characteristics of the crime of piracy under municipal law can vary and be composed of different crimes, any one of which can lead to conviction of the greater or lesser crime of piracy, depending on the wording of the legislation. On the other hand, it will be observed that since there are many different countries which together constitute the world community, as opposed to one large governing body, the

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[12] Report of the sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (1926) p. 119.

[13] Barry Hart Dubner, *The Law of International Sea Piracy: Developments in International Law*, (The Hague, Martinus Nijjoff ,1980) p. 39

[14] Dikinson A. Ellis, *Is the Crime of Piracy Obsolete*, (USA,Harvard University Press 1985) p. 334, Kennedy, L.J. in *Bolivia vs. Indemnity Mutual Marine Assurance Co. Ltd*, [1909]

municipal laws of each country can vary and the remaining areas are truly sovereign in their own right.[15]

Their draft convention was closely followed by the International Law Commission and later by the Conference states.[16] The International Law Commission which was created in 1949 chose for political reasons, to modify, bypass or exclude many ideas because of the practicalities confronting the commission when attempting to prepare draft articles which they thought would include traditional forms of piracy acceptable to the conference states. These fundamental or traditional views led to conclusions which covered such subjects as the permissible areas, methods and effects of seizures of pirates.

Their first area of departure is one involving the exploration of the divergence of opinion among the international community regarding the definition of acts of piracy. There were differing opinions concerning the differences between piracy in the international law sense and piracy under municipal legislation. Under the municipal laws, nations defined acts of piracy in order to meet their different needs with the result that various municipal laws regarding piracy differ in definition and extent of coverage.[17]

There was no uniformity of definition in the municipal legislation of different states. The municipal legislation will cover areas within which the particular state has jurisdictional competence to legislate. For example, the state's right to prescribe and enforce its domestic laws. Thus, the characteristics of the definition of acts of piracy varied.[18] It would therefore appear that the international law of piracy must, under the traditional thinking, apply outside the territorial

[15] Barry Hart Dubner, *The Law of International Sea Piracy: Developments in International Law*, (The Hague, Martinus Nijjoff ,1980) p. 41
[16] Report of the International Law Commission, Comment to Article 13 (1956)
[17] Harvard Draft Convention, Great Britain, pp. 889-1013
[18] Harvard Draft Convention, Great Britain, pp 909 – 950, Norway, pg 996

waters and jurisdiction over which a sovereign state may legislate.[19] The Group was desirous of drafting a convention which would include the creation of a special basis of common jurisdiction. It drew upon various source materials in order to discuss this fundamental problem of differing characteristics. What created confusion were the attempts to apply a variety of municipal laws to create a uniform enactment which could apply in these international zones. The Group set forth the variety of views expressed by legal publicists at the time of its study.

At its first session, in 1949, the International Law Commission selected both the regime of the territorial waters and that of the high seas as topics for codification, and included the latter in the list of topics to be given priority. Following a recommendation by the General,[20] the topic of territorial waters was added to the list of prioritized topics in 1951. The mandate of the appointed Special Rapporteur[21] for the topic of the high seas in 1949, was extended to include also the topic of the territorial sea. The topics were considered by the Commission at its second to eighth sessions, from 1950 to 1956 respectively, on the basis of the reports of the Special Rapporteur, information provided by Governments and International Organizations, as well as documents prepared by the Secretariat. Final drafts with regard to the continental shelf, fisheries and the contiguous zone were submitted by the Commission to the General Assembly at its fifth session, in 1953. The General Assembly decided, however,[22] to defer all action until the problems relating to both the high seas and territorial waters had been studied by the Commission. The question of the continental shelf was brought before the General Assembly by ten Member States at the sixth session, in 1954, but the Assembly again deferred all action in resolution 899 (IX) of 14 December 1954, and requested the Commission to submit its final

[19] The emphasis on territorial jurisdiction becomes apparent on examination of the 1958 Convention on the High Seas, Articles 14, 15(1)(b), 19, 22 and 23(7)
[20] Resolution 374 (IV) of 6 December 1949,
[21] Mr. François
[22] Resolution 798 (VII) of 7 December 1953

report on the regime of the high seas, the regime of territorial waters and all related problems to the Assembly by its eleventh session, in 1956 when the Commission adopted its final report on the territorial sea. At the same session, all the draft articles concerning the law of the sea were included in a single systematic body as to constitute a final draft on the law of the sea. The draft was submitted to the General Assembly with a recommendation to convene a conference of plenipotentiaries.[23]

It was only in the final report submitted to the General Assembly in 1956 that all provisions were systematically ordered as one body of draft articles covering the whole of the law of the sea. The United Nations held its first Conference on the Law of the Sea (UNCLOS I) at Geneva, Switzerland in 1956. UNCLOS I resulted in four treaties concluded in 1958: Convention on the Territorial Sea and Contiguous Zone,[24] Convention on the Continental Shelf,[25] Convention on the High Seas[26] and Convention on Fishing and Conservation of Living Resources of the High Seas.[27] Although UNCLOS I was considered a success, it left open the important issue of breadth of territorial waters.[28]

The Convention on the High Seas defines the high seas as all parts of the sea not included in the territorial sea and internal waters. It deals specifically with: the freedoms of the high seas; the right of a State to have ships flying its flag under conditions fixed by it, stating the controversial requirement of the existence a "genuine link"; the rights and obligations of the flag State; piracy; the right of visit; hot pursuit; and the laying of submarine cables and pipelines. It

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[23] Report of the International Law Commission on the work of its eighth session, A/CN.4/104).
[24] Entry into force: 10 September 1964
[25] Entry into force: 10 June 1964
[26] Entry into force: 30 September 1962
[27] Entry into force: 20 March 1966
[28] Wikipedia, last updated on 26th August, 2012

also contains two early and pioneering provisions on pollution by the discharge of oil and of radio-active wastes.

The importance of the Geneva Conventions is mostly historical as an expression of the traditional law of the sea, namely, the law prevailing before the transformations in the international community. Many provisions of the Geneva Conventions, at the time of their adoption, corresponded to customary international law. This seems particularly true as regards the CHS, most of which has been transported into the 1982 Convention, and whose preamble explicitly specifies that its purpose is "to codify the rules of international law relating to the high sea". This provision is not repeated in the other Geneva Conventions. Still, a number of provisions in the CTS are set out in the 1982 Convention and can be seen as corresponding to customary law. Moreover, the basic provisions of the CCS, as remarked above, have been indicated as contributing to the "crystallization" of the customary notion of the continental shelf and still correspond to customary law.

This final report was to be the main basis for the work of the 1958 Geneva Conference. It is important to note that the Harvard research draft formed the basis, after the Second World War, for the International Law Commission's work on piracy for inclusion in the UN's 1958 Geneva Convention on the high seas. There were some states in the world which were not satisfied by the Geneva Convention, so in the third meeting of UN, the conference states tried to make such a rule regarding piracy which should be acceptable by the all states overall. [29]

Being one of the oldest problems for the shipping industry and the international community as well, piracy was first defined and discussed in detail at Geneva Convention 1958.

[29] Geoffrey Till, *The Freedom of the Seas: Why it matters,* (Corbett Centre, King's College London, 2011) p. 111

The definition of acts of piracy under the 1958 Convention may be considered nothing more than one or more separate crimes grouped together under on heading.[30] If this were to be left as the case, then there is really no uniform offense or crime of piracy. So it seems it was deemed wise, therefore to avoid reopening old controversies by merely repeating verbatim the relevant articles on piracy from the 1958 Convention.

The Conference, whose task was to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate[31] The unity of the law of the sea, painstakingly reached at the final stages of the work of the ILC was lost. Such unity was to be one of the main objectives pursued and reached in the 1982 United Nations Convention on the Law of the Sea.

The 1958 United Nations Conference on the High Seas of which eight articles (the 1958 Articles) relate to piracy may give the impression that the significant issues in the law of international sea piracy had been resolved but incidents occurring after the adoption of the convention demonstrate that sensitive issues were bypassed in the 1958 Articles.[32]

In 1960, the United Nations held the second Conference on the Law of the Sea ("UNCLOS II"); however, the six-week Geneva conference did not result in any new agreements. Generally speaking, developing nations and third world countries participated only

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[30] Ibid, note 3 pg 39.

[31] Resolution 1105 (XI) did not succeed in keeping the provisions on the law of the sea in one instrument

[32] Dubner Barry Hart, *Law of International Sea Piracy*, (The Hague: Martinus Nijhoff Publishers, 1980) pg 471

as clients, allies, or dependents of United States or the Soviet Union, with no significant voice of their own.[33]

By 1967, only 25 nations used the old three-mile limit, while 66 nations had set a 12-mile territorial limit and eight had set a 200-mile limit. The issue of varying claims of territorial waters was raised in the UN in 1967 by Arvid Pardo, of Malta, and in 1973 the Third United Nations Conference on the Law of the Sea was convened in New York.[34] In an attempt to reduce the possibility of groups of nation-states dominating the negotiations, the conference used a consensus process rather than majority vote. With more than 160 nations participating, the conference lasted until 1982. The resulting convention came into force on November 16, 1994, one year after the sixtieth state, Guyana, ratified the treaty. The subject matter of all four Geneva Conventions of 1958 was under discussion at the Conference.[35]. These conventions have all been incorporated into the 1982 Convention, with varying degrees of change and amendment for improvement and to make them more consistent with each other and the further provisions. For states parties to the 1982 Convention, the later Convention prevails over those of 1958.[36]

The convention introduced a number of provisions. The most significant issues covered were setting limits, navigation, archipelagic status and transit regimes, Exclusive Economic Zones (EEZs), continental shelf jurisdiction, deep seabed mining, the exploitation regime, protection of the marine environment, scientific research, and settlement of disputes. The convention set the limit of various areas, measured from a carefully defined baseline. Normally, a sea baseline follows the low-water line, but when the coastline is deeply indented, has fringing

[33] Ibid
[34] Ibid
[35] Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 Naval Law Review (2008) pp. 16-19

[36] Art 311, Para. 1

islands or is highly unstable, straight baselines may be used. Aside from its provisions defining ocean boundaries, the convention establishes general obligations for safeguarding the marine environment and protecting freedom of scientific research on the high seas, and also creates an innovative legal regime for controlling mineral resource exploitation in deep seabed areas beyond national jurisdiction, through an International Seabed Authority and the Common heritage of mankind principle. Landlocked states are given a right of access to and from the sea, without taxation of traffic through transit states.

However, the UNCLOS has not been adequate in addressing problems arising out of the use of the sea leading to other treaties coming in to fill the gaps that are not adequately covered in the UNCLOS. For example, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) came into effect and was adopted in Rome in 1988. The main purpose of the SUA Convention was to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force, acts of violence against persons on board ships and the placing of devices on board a ship which are likely to destroy or damage it.[37] The convention obliges Contracting Governments either to extradite or prosecute alleged offenders. A later Protocol of the SUA convention against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, extended the provisions of the convention to unlawful acts against fixed platforms too. The two instruments entered into force on March 1, 1992. Another protocol known as the 2005 Protocol to SUA Convention has added more to the original SUA Convention.

[37] Neakoh Raissa Timben, *Piracy: A Critical Examination Of The Definition And Scope Of Piracy And The Issues Arising Therefrom That Affect The Legal Address Of The Crime Globally,* Master's Thesis Masters of Laws in Law of the Sea University of Tromso Faculty of Law Fall (2011) pp 14-15

Recognizing the narrow scope of the piracy definition under UNCLOS, they attempted to come up with a broader definition of illegal violence at sea, which would capture acts such as the *Achille Lauro* hijacking.[38] Under the SUA Convention, an act can qualify as "piracy" even though it is not committed on the high seas.[39] In the same way, an act can qualify as piracy even though only one vessel (the victim ship) may be involved. In fact, under SUA, any person who "seize or exercises control over a ship by force or threat thereof or any other form of intimidation" would violate the convention.[40] The SUA Convention, however, does not use the term "piracy" at all[41] and is listed on the U.N. website as an anti-terrorist convention.

Thus the principal reasons the SUA Convention was seen as necessary were first, as noted above, the law of piracy did not cover internal hijacking of vessels and second, that while there existed treaties concerning the hijacking and sabotage of airplanes[42] no similar conventions yet existed for the shipping industry. It is not surprising then, that the SUA Convention is closely modeled on the conventions concerning offences aboard or against aircraft. The sponsors' explicit aim was to devise a comprehensive convention that would cover all forms of violence against shipping. Article 3 of the SUA Convention creates a number of offences. Most relevant for present purposes is Article 3(1)(a), stating that:

> "Any person commits an offence if that person unlawfully and intentionally ... seizes or exercises control over a ship by force or threat thereof or any other form of intimidation".

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[38] In the 1980s, an Italian cruise ship, the Achille Lauro, was overtaken and the act did not constitute piracy under UNCLOS because the aggressors had boarded the ship in its last port; thus, no aggressor vessel was ever involved and the UNCLOS conditions were not satisfied

[39] Article 4 of SUA Convention, and also Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, (55 NAVAL L. REV. 73, 87 (2008) p. 94

[40] Article 3 of SUA Convention

[41] Nicolas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, (Unpublished, 2006) p. 23

[42] Convention for the Suppression of Unlawful Seizure of Aircraft 1970, and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971.

There is no requirement that the seizure be internal or be politically motivated. Thus any pirate seizure of a vessel off Somalia will clearly fall within this definition. Attempting, abetting and threatening such an offence are equally crimes under the Convention (Article 3(2). The only case in which the Convention would not apply is where the offence was committed solely within a single State's territorial sea and the vessel was not scheduled to navigate beyond that territorial sea and the suspected offender was subsequently found within that coastal State's territory. This follows from Article 4, which states that the Convention applies either 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, or when the offender or the alleged offender is found in the territory of [another] State Party. For example, the piracy attacks of Somalia are generally committed far outside territorial waters, Article 4 is no obstacle to the SUA Convention's application.[43]

It is perhaps important to note that the SUA Convention does not expressly cover the crime of piracy and that its offences are not coterminous with the crime of piracy as defined under UNCLOS. The SUA Convention creates a separate offence as among state parties. However, the type of piracy commonly committed off Somalia involves both an attack from one vessel against another and acts of violence intended to seize control of a ship.[44] Such acts can clearly constitute both piracy and an offence under the SUA Convention. Not all piracy will fall within the SUA Convention. An act of theft that does not endanger the safety of a vessel and was committed by one vessel against another, could be an example of piracy which would not be a SUA Convention offence. Conversely, as noted, the internal hijacking of a vessel would be a SUA Convention offence but not piracy. The crimes are distinct but may overlap on some sets of

[43] Lawrence Azubuike, *International Law Regime Against Piracy*, (15 Annual. Survey, 2009) p. 16
[44] Ibid, pg 17

facts. Thus, it is questionable whether the SUA Convention actually alters the definition of piracy. The United Nation Convention of 1982 has eight articles related to the problem of piracy (Article100-107). The old errors and weaknesses are not only still available in this convention but also increase the problem because of some of its zonal provisions. This UN convention never pays any kind of attention to the report of International Law Association of 1970. Now this convention is applicable to the whole world regarding piracy but of course it has much weakness in it at all which demand to restore them for the better result of this convention. The framework of the law of the sea is provided in article 100-107 in UNCLOS 1982. These articles replicate the articles 14-21 of High seas Convention 1958.

# CHAPTER 4

## Analysis of the Provisions of the 1982 United Nations Convention on the Law of the Sea on Piracy

The United Nations Convention on the Law of the Sea (UNCLOS) is a comprehensive political and legal work which includes directives for international politics, international relations, and international law. It is the international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which took place from 1973 through 1982.[1] The Law of the Sea Convention defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. It is said to be the international order for the oceans of the world, which make up five-sevenths of the planet's surface. The Convention was opened for signature[2] from December 10, 1982 to December 9, 1984[3] 119 states signed the Convention on the opening day for signature at Montego Bay/Jamaica.

The UNCLOS codified the customary international law on piracy in Articles 100 to 107 and Article 110.[4] The fact that many countries, including the United States, have yet to ratify the UNCLOS treaty does not prevent it from being binding international law. Generally, a treaty does not create obligations or rights for a third state without that state's consent.[5] However, failure to sign a self-executing treaty or failure to ratify a non-self-executing one does not

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[1] Wikipedia
[2] Art. 305, Para. 1
[3] . Art. 305, Para. 2
[4] United Nations Convention on the Law of the Sea arts. 100–107, Dec. 10, 1982
[5] Article 34 of the Vienna Convention on the Law of Treaties

preclude liability under customary international law.[6] Customary international law is a body of law comprised of the traditionally accepted standards of conduct among states and therefore continues to develop. Treaties reflect the conduct of states and therefore have a significant impact on the development of customary international law. It is generally accepted that UNCLOS is the statement of the international law of the sea and binds even states that have not ratified the treaty.[7]

The signing of the Convention between 1982 and 1984 had two effects for the signatory states: first, the states are put under an obligation not to act in a manner which would defeat the object and purpose of the Convention unless the state makes clear that it does not intend to become a party to the treaty. Second, the signatory states obtained the right to participate as full members in the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea and under certain circumstances commence preparatory work for deep sea mining before the Convention enters into force. States which signed only the Final Act acted as observers but they were not entitled to participate in the taking of decisions.[8] The Preparatory Commission was to begin its work when fifty states had signed the Convention, which was the case on December 10, 1982.

As earlier discussed, the articles pertaining to piracy within the UNCLOS derive from the terms of the 1958 High Seas Convention.[9] Articles 100–107 of UNCLOS contain both broad philosophy and a specific mandate concerning maritime piracy. The convention provides the

[6] Ibid, Article 38
[7] Ian Brownlie, *Principles of Public International Law*, (Oxford University Press 2008) pp 5-7
[8] Bernaerts' Guide To The 1982 United Nations Convention On The Law Of The Sea (1988) p. 15

[9] Beck Pemberton, Pirate Jurisdiction□: *Fact, Fiction, and Fragmentation in International Law*, (One Earth Future Foundation, 2001) p. 13

legal basis for nations to take action against pirates in international waters and areas outside the legal jurisdiction of any other state. Essentially, UNCLOS III allows every state to apprehend, arrest, and prosecute pirates and seize their property. Pirates so arrested are effectively subject to the laws of the nations that seized them.

Article 100 establishes the duty of all states to cooperate in the repression of piracy. This article restates the duty on all states to cooperate to the fullest extent possible on the high seas or in any other place outside the jurisdiction of any state. However, there is no requirement for a jurisdictional link to the flag state. Any nation may exercise jurisdiction over pirates, which are considered the "enemy of all mankind". Piracy occurs in any waters beyond the 12-nautical mile territorial sea. Inside the territorial sea, the crime is "armed robbery at sea," and is the sole responsibility of the coastal state Piracy is viewed as a crime of universal enforcement jurisdiction. In general, states enact legislation on piracy primarily in the deterrence, disruption and prevention of acts of piracy, and in the bringing of pirates to justice.

Piracy is an international crime that falls under every state's jurisdiction under customary international law. Universal jurisdiction endows every state with the right to prosecute and punish piracy regardless of where the attack occurs because nations have deemed pirates to be *hostis humani generis* (enemies of all mankind). Because of universal jurisdiction, each state has the responsibility to prosecute pirates under its own domestic laws irrespective of a pirate's original nationality, the registry of the ship, or the destination of the cargo.[10]

[10] Martin N. Murphy, Small Boats, *Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* (2009) p. 12

Piracy under the law of nations *(jure gentium)* may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed. Under the principle of international law known as the "universality principle", a government may "exercise jurisdiction over conduct outside its territory if that conduct is universally dangerous to states and their nationals.[11] The rationale behind the universality principle is that states will punish certain acts wherever they may occur as a means of protecting the global community as a whole, even absent a link between the state and the parties or the acts in question. Under this principle, the concept of universal jurisdiction applies to the crime of piracy.[12] But piracy created by municipal (domestic, state) statute can only be tried by that state within whose territorial jurisdiction, and on board of whose vessels, the offence created was committed.

Under the "universality principle", a government may "exercise jurisdiction over conduct outside its territory if that conduct is universally dangerous to states and their nationals."[13] The rationale behind the universality principle is that states will punish certain acts "wherever they may occur as a means of protecting the global community as a whole, even absent a link between the state and the parties or the acts in question." Under this principle, the concept of "universal jurisdiction" applies to the crime of piracy.[14]

As defined under the UNCLOS, piracy is a criminal act and the vast majority of nations are party to it. It even contains a provision which, at least in theory, requires nations to prosecute piratical acts. Nevertheless, as a tool for combating piracy, UNCLOS is lacking in several respects. First,

[11] Thomas Buergenthal & Sean D. Murphy, *Public International Law in a Nutshell*, p. 211, West Group (3d ed. 2002) p. 210

[12] Ibid pp 211-212

[13] Thomas Buergenthal & Sean D. Murphy, *Public International Law in a Nutshell*, West Group (3d ed. 2002) p. 211.

[14] Ibid, pg 112

notwithstanding that the Convention requires nations to cooperate in repressing piracy, there is no mechanism to enforce this duty. An essential step required to permit nations to prosecute acts of piracy is legislation which incorporates UNCLOS provisions into domestic law. Yet, few states have apparently implemented domestic legislation incorporating UNCLOS's provisions relating to the repression of piracy.[15] Moreover, only one major case has been brought using the piracy provisions of UNCLOS: a Belgian prosecution against Greenpeace.[16]

According to the UNCLOS, piracy is defined as consisting of any of the following acts:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[17]

From the definition, there are four essential elements to the definition of piracy: 1) an illegal act involving violence, detention, or depredation 2) committed for private ends 3) on the high seas 4) involving at least two ships.

Article 101 is a general definition under public international law and applies to acts committed by individuals for private ends against a private ship or aircraft. The definition also extends to participation in an act of piracy, as well as to inciting or intentionally facilitating such acts.[18]

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[15] Peter Chalk, *The Maritime Dimension Of International Security: Terrorism, Piracy, and Challenges for the United States* (Unpublished 2008) p. 13
[16] Carlo Tiribelli, *Time To Update The 1988 Rome Convention for the Suppression of Unlawful Acts Against The Safety Of Maritime Navigation,* (2006) pp. 133-136
[17] Article 101 UNCLOS

However, the words "any illegal acts of violence or detention, or any act of depredation" introduce ambiguity in Article 101(a). One could ask under what system of law acts must be "illegal"; or whether there is a meaningful difference between the use of the words "acts of violence" The ordinary meaning, object and purpose of these words would suggest a broad approach should be taken. Piracy has always been an international crime enforced by national laws, the exact terms of which have varied between jurisdictions. It may be difficult to give these words the kind of clear and precise meaning that would accord with modern expectations that criminal offences should be precisely drafted in advance. It is perhaps better to consider Article 101(a)(i) as setting out the jurisdiction of all States to first, prescribe and enforce a national criminal law of piracy and secondly, to take action to suppress and prosecute piratical acts of violence on the high seas.

The convention also distinguishes piracy from simple hijacking in two respects: first, an act of piracy requires that two vessels are involved in the incident. This suggests that for an act to be deemed piracy, two ships must be involved. Article 101(a)(i) defines acts of piracy to include those illegal acts committed by the crew or passengers of a ship "against *another* ship." It therefore does not cover the seizure of a vessel from within by passengers, stowaways or its own crew.[19] Therefore, any act that fulfills the legal requirements of piracy must involve two vessels: the victim vessel and the aggressor vessel.[20] Thus, if pirates board the victim vessel on shore and

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[18] Nandan N. Satya and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: Commentary*, Vol. III, (Martinus Nijhoff Publishers, The Hague/London/Bondon, 1995) p. 197

[19] Neakoh Raissa Timben, *Piracy: A Critical Examination of the Definition and Scope of Piracy and the Issues Arising Therefrom That Affect the Legal Address of the Crime Globally*, Masters Thesis, University of Tromso, 2011, p. 12

[20] Ibid

overtake it during the victim vessel's voyage on the high seas, such an act would not qualify as piracy because no aggressor vessel was involved. Although Article 101(a)(ii) does not include this same wording to define an act of piracy, the question is whether piracy under the Convention includes internal seizures, violence by the crew, or passengers of one ship against that same ship.[21] If two ships are required, however, then potential pirates need only to pose as passengers or crew and thereafter hold the ship ransom in order to avoid being defined as pirates under UNCLOS.

An act of piracy requires that the crime has to be undertaken for private, not political, purposes.[22] Under the UNCLOS an act is not piracy unless that act is committed for "private ends." Accordingly, politically motivated acts of terrorism committed against ships and their crew members on the high seas may not be included within the definition of piracy under UNCLOS. While commentators differ on whether this is the case,[23] the presence of the "private ends" language may make prosecuting certain ship attacks difficult or impossible under UNCLOS. Indeed, perpetrators may seize upon the language as providing an opportunity to claim their acts were politically motivated, thus requiring the prosecution and courts to address this additional evidentiary and legal issue. This in effect means that any act of violence on the high seas not attributable to or sanctioned by a State (a public act) is piracy (a private act). It also implies that a public vessel cannot commit piracy whereas there are some modern case-law indicating that politically motivated acts of protest can constitute piracy.[24] For example, in the

[21] Samuel Pyeatt Menefee, *The New Jamaica Discipline: Problems With Piracy, Maritime Terrorism And the 1982 Convention On The Law Of The Sea*, pp 127-144
[22] McDaniel, 2000 quoted in Shane, J.M. and Lieberman, C.A., *Criminological theories and the problems of modern piracy* (Unpublished, 2009) p. 2

[23] Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, (Unpublished, 2007) pp 1-11
[24] Castle John v. NV Mabeco, (Belgium, Court of Cassation, 1986) 77 International Law Reports 537

Somali context seizing private vessels in order to demand large ransoms from private companies - without any claim to be acting on behalf of a government or making demands of any government can only be an act "for private ends". Third, if a piracy-like act is committed by a group with links to a specific state, the state action character of the act would defeat the purely private aims requirement of UNCLOS because of the alleged link between piracy and state action.[25]

Article 101 contains no limitation on the nationality of persons who may become pirates. Its geographic scope of application is limited to the high seas, exclusive economic zones (by operation of article 58(2)) and to a place outside the jurisdiction of any state. The definition of piracy under the convention includes only those acts that occur on the high seas or outside the territory of any state.[26] This means that piracy may be committed anywhere seaward of the territorial sea of a State. However, most acts of piracy today occur more often than not in territorial waters and ports, rather than in international waters, meaning that UNCLOS does not provide a jurisdictional basis to prosecute those acts. A nation's territorial waters may extend twelve miles from its coastline, and it is only that nation which has jurisdiction to prosecute wrongful acts occurring in its sovereign territory.[27] In addition, island states like Indonesia and the Philippines may claim within their territory all waters between the outermost points of their outermost islands.[28] Therefore, attacks occurring within the straits, gulfs, and archipelagos where international ships must pass and at ports where they must dock are not subject to UNCLOS.

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[25] Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 Naval Law Review. 73, 87 (2008) p. 92
[26] Article 34 of the Vienna Convention on the Law of Treaties
[27] Article 2 UNCLOS
[28] Articles 46-48, 52-53

For those attacks against ships in ports, in internal waters, in the territorial sea, in straits used for international or in the archipelagic waters (i.e., in maritime zones under the sovereignty of the coastal State) are not considered acts of piracy governed by the *UNCLOS* regime but are defined by the International Maritime Organization (IMO) as "armed robbery against ships":

> "any illegal act of violence or detention, or any act of depredation, or threat thereof, other than an act of "piracy" committed for private ends and directed against a ship, or against persons or property onboard such ship, within a State's internal waters, archipelagic waters and territorial sea"[29]

The distinction between piracy and armed robbery against ships is very important because it limits the types of cooperative measures which can be taken to enhance the security of sea lanes and combat attacks against vessels. This is considered the most significant limitation is that the UNCLOS provisions are only concerned with piracy on the high seas or in an Exclusive Economic Zone (EEZ) and they do not address piracy in territorial, coastal or inland waters.[30] The majority of piracy incidents in the world take place in territorial or coastal waters, but they are legally speaking no acts of piracy at all.[31] However, article 58(2) of UNCLOS provides that articles 101-107 also apply in the EEZ. In other words, the piracy provisions apply in the EEZ as well as on the high seas, that is, to attacks on ships any place seaward of the outer limit of the territorial sea of any State.

Article 102 defines the circumstances when a warship commits piracy. If the crew of a warship, government ship or government aircraft has mutinied and taken control of the ship or aircraft, and commit acts of piracy as defined in article 101, the acts are assimilated to acts committed by a private ship or aircraft. UNCLOS makes it quite clear that government vessels

[29] International Maritime Organization, Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, IMO Assembly Resolution A. 1025 (26) (adopted 18 December 2009)
[30] Lehr P., *Violence at Sea: Piracy in the Age of Global Terrorism*, Routledge, (2007) p. 155.
[31] Anderson, D. R. de Wijk, S. Haines and J. Stevenson, *'Somalia and the Pirates'*, Working Paper No. 33, European Security Forum, December (2009) p. 10.

cannot commit piracy, unless the crew mutinies and uses the vessel to carry out acts of violence against other ships.[32] Outside of mutiny any unlawful acts of violence by a government vessel against another craft are a matter of State responsibility, not the law of piracy.[33]

Article 103 defines a pirate ship or aircraft. A ship or aircraft is considered a "pirate ship or aircraft" if it is intended by the persons in dominant control to be used for the purpose of committing a piratical act as defined in article 101. The same rule applies if the ship or aircraft has been used to commit a piratical act, but only so long as it remains under the control of the persons "guilty" of that act. The consequences of being or becoming "a pirate ship or aircraft" are set out in articles 104 and 105. This article may be relevant to definitions of offenses such as attempts and conspiracy (participation) under Article 101 and the circumstances for interdiction.

Article 104 provides the possibility for retention or loss of nationality of pirate ship or aircraft. This article implies that a pirate ship or aircraft does not automatically lose its nationality, even though it may be boarded by a foreign warship or government ship or aircraft without express permission of the flag State. Article 104 states that it is for the flag State to decide the matter by law.

Article 105 provides who and where a pirate ship or aircraft may be seized. This article authorizes every State to seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, arrest the persons on board, and seize the property on board. The ship or aircraft must be on the high seas, exclusive economic zone (pursuant to article 58(2)), or "in any other place outside the jurisdiction of any State." This article does not limit the right of States to cooperate in the boarding, seizure, disposition and prosecution of suspect pirates.

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[32] Thomas Buergenthal & Sean D. Murphy, *Public International Law in a Nutshell*, p. 211, West Group (3d ed. 2002) p. 13

[33] Ibid

The requirement that the piratical act occur on the high seas or outside the jurisdiction of any state is particularly important. Acts of maritime violence within territorial waters are not technically acts of piracy under international law. However, maritime violence within territorial waters may constitute piracy under the state's domestic law. States have exclusive jurisdiction over their own territorial waters and can punish criminal activity within that zone. Therefore, a pirate does not violate international law if the piratical activity occurs within the territorial waters of a state. Numerous states have reportedly captured pirates only to release them because adequate means to prosecute were lacking.[34] Although any state has jurisdiction to prosecute piratical acts occurring on the high seas, states cannot enter the territorial waters of another state to capture a pirate, and offenders often use evasive maneuvers into territorial waters to avoid prosecution under international law. Moreover, piracy violates international law, but with no international tribunal to try pirates, states must prosecute them in domestic courts. Therefore a pirate will not face prosecution in a state that has no specific domestic legislation against acts of piracy or that lacks the means to prosecute.

Article 105 is permissive. Its exercise depends on national authorities, which may not require legislation. National legislation should permit full range of international cooperation in suppressing and prosecuting piracy. As far as the action to be taken is concerned, under Article 105 the flag state of the seizing ship enjoys very broad powers.[35] These consist of the right to arrest persons and to seize property, and, through the abovementioned rights, to decide upon penalties and on action to be taken with regard to the ship, aircraft and property, the right to

[34] Jon U. Thomas and Marie Woolf, *Navy Releases Somali Pirates Caught Red-Handed*, The Sunday Times, Nov. 29, 2009, *available at* http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece.

[35] Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, The European Journal of International Law Vol. 20 no. 2, EJIL (2009), p. 402

submit the persons arrested and the property seized to judicial proceedings.[36] The rule in Article 105 does not, however, establish the exclusive jurisdiction of the seizing state's courts. Courts of other states are not precluded from exercising jurisdiction under conditions which they establish. Thus the international law rules on action to be taken against pirates permit action, but are far from ensuring that such action is effectively taken.

Problems arise if, through the use of ship riders, a pirate or armed robber at sea is brought under the jurisdiction of a state to which a transfer or extradition would not be possible without violating the prohibition of refoulment. The outcome is the same whether a pirate or armed robber at sea is captured by a patrolling naval state and then transferred to a regional state in direct violation of the principle of non-refoulment or whether a ship rider from a regional state is employed in order to bring arrested offenders directly, without, without the necessity of subsequent transfer into the regional state's jurisdiction. This would amount to a circumvention of the non-refoulment principle.[37]

Article 106 addresses liability for seizure without adequate grounds. This article deals with the situation where a seizure on suspicion of piracy has been effected "without adequate grounds". In such instances, the seizing State is held liable to the seized ship's flag State for any loss or damage caused and/or suffered by the seizure.

Article 107 establishes what ships and aircraft are entitled to seize on account of piracy. Article 107 limits the categories of ships and aircraft entitled to seize a ship or aircraft on account of piracy to warships, military aircraft or "other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect." This article does not inhibit the right of all ships to act in self-defense against pirates.

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[36] Ibid

[37] Robin Geib and Petrig Anna, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, (Oxford University Press, 2011) p. 93

Article 110 describes when a foreign warship may board a foreign flag ship on the high seas by exercising the "right of visit". This article is said to be complementing article 101 as it gives the right to a warship to board a ship where there is a reasonable ground to suspect that it is engaged in an act of piracy.[38] Article 110 describes exceptions to the principle of exclusive flag state jurisdiction set out in article 92(1). This is based on the theory that pirates are the enemies of all mankind, article 110 authorizes a warship to board a foreign flag vessel not entitled to sovereign immunity without the express permission of the flag State when there are reasonable grounds to suspect that it is, *inter alia*, engaged in piracy.

**Challenges to Cooperation under UNCLOS Piracy Regime**

The piracy regime in UNCLOS provides the legal basis for States to cooperate to suppress piracy. It provides a legal basis for the warships of any State to board pirate ships and arrest pirates when they are on the high seas or in an Exclusive Economic Zone (EEZ). It is generally accepted that the piracy regime in UNCLOS is binding on all States under customary international law.

There is a weakness in using the UNCLOS piracy regime as a basis for suppressing piracy. For example, the attacks by Somali pirates in the Gulf of Aden and the Indian Ocean have resulted in an unprecedented effort by members of the international community to cooperate to suppress piracy in accordance with the UNCLOS piracy regime. However, the efforts to suppress Somali piracy have made it clear that there are many problems that States may encounter when using the piracy regime provided for in UNCLOS as a basis for combating piracy. The fact that the

[38] Ibid, note 12, p.10

UNCLOS piracy regime only applies to attacks on the high seas and in the EEZ was recognized as a major obstacle to combating Somali piracy, as pirates could seek refuge in the territorial sea of Somalia. Therefore, the United Nations Security Council exercised its powers under Chapter VII of the United Nations Charter and made an express exception to the UNCLOS regime on Government of Somalia could arrest pirates in the territorial sea of Somalia. In effect, it extended the UNCLOS piracy regime to the territorial sea of Somalia.[39]

The efforts of the international community to cooperate to suppress Somali piracy have highlighted other problems in using the UNCLOS piracy regime as a legal basis to suppress piracy.[40] First, article 101 of UNCLOS provides a definition of piracy, but it imposes no obligation on State parties to enact national legislation making piracy, as defined in UNCLOS, a criminal offence with appropriate penalties. Second, article 101 in effect gives States the right to extend their criminal jurisdiction to include acts of piracy committed on the high seas by foreign nationals against foreign ships. However, UNCLOS does not impose an obligation on States to establish universal criminal jurisdiction for acts of piracy on the high seas. Third, the piracy provisions apply only in areas outside of territorial sovereignty, or seaward of the outer limit of the territorial sea of any State. In some jurisdictions like Southeast Asia, most attacks on ships are not piracy because they take place on ships in port, in archipelagic waters or in the territorial sea.

[39] Robert Beckman and Sanjay Palakrishnan, *Regional Cooperation to Combat Piracy and International Maritime Crimes: The Importance of Ratification and Implementation of Global Conventions* (2012) p. 4

[40] Ibid

Fourth, article 105 of UNCLOS gives every State the right, in areas outside the territorial sovereignty of any State, to seize pirate ships and the property on board and to arrest the pirates. However, it imposes no obligation on States to exercise such powers.

Fifth, article 105 of UNCLOS gives the courts of the State which has seized a pirate ship and arrested the pirates the power to exercise jurisdiction by trying the pirates and imposing a penalty. However, it imposes no obligation on States to make the necessary changes within their domestic legal system to give their courts such jurisdiction. It also imposes no obligation on States to prosecute any suspected pirates in their custody.

Sixth, article 100 of UNCLOS imposes a general obligation on States to cooperate to the fullest possible extent in the repression of piracy. It does not impose an obligation on States to take any alleged offenders present in their territory into custody. It does not impose an obligation on States to either prosecute or extradite alleged offenders present in their territory. Further, there is no obligation imposed on States to give one another mutual legal assistance in connection with the criminal proceedings of persons charged with the offence of piracy.

Failure of States to update their national legislation on piracy is the underlying theme in all the weakness listed above because many States which became parties to the UNCLOS failed to review their national legislation on piracy to ensure that they had established universal jurisdiction over acts of piracy and that their government institutions had the power and authority to take the actions necessary to fully cooperate with other States in order to suppress piracy. There is a wide divergence in the practice of States globally and in the Asian region on the extent to which they have exercised the permissive prescriptive and enforcement jurisdiction provided for in the UNCLOS provisions on piracy.[41] States are not able to fully cooperate to suppress piracy unless they have passed the necessary legislation to: make acts of piracy by foreign

[41] Ibid, p. 5

nationals on foreign vessels outside the territorial sea of any State an offence under their laws, to empower their naval or coast guard vessels and personnel to board and seize pirate ships and arrest the pirates and to provide that their courts have jurisdiction to try the offenders. Many States do not have the national legislation in place to enable them to fully cooperate to suppress piracy.

The other major problem posed by the UNCLOS is on handling arrested pirates. Most of those arrested are released by the navies who arrest them at the sea. The problem begins with this action of navies with the pirates. There are also some reasons behind that act of navies. There is confusion on where the arrested ship should be taken for prosecution and for investigation. This brings jurisdictional problems. There are cases that may involve many states in a single piracy act as to include passengers of a different nationality from that of the flag state. But the international law of the sea provides a power to all the states to arrest the pirates and to try them in their courts.[42]

To try a case of piracy, it is necessary first of all that the trial state has the necessary domestic legislation. States must always keep in mind the instructions provided by the UNCLOS and SUA convention. The International Maritime Organization assembly's resolution also provides some guideline as regards trial of arrested pirates. The other major problem is the willingness of the trial state to try the pirates. Many western countries have not agreed to try pirates. The main reason is that these pirates demand asylum after the trial and create problems in those states. The other issue is the fact that pirates may destroy the evidence that they are pirates and in a bid to do so, they try to alleviate any proof before they are arrested. This is so

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[42] Azubuike, Lawrence, *International Law Regime Against Piracy, Annual Survey of International & Comparative Law*: Vol. 15: Iss. 1, Article 4, (2009) pp 11-20

and especially since the trial and investigations take place in two totally different areas leading to confusion.[43]

It also becomes problematic when it comes to issues of the crew. Many of them are supposed to be witnesses in the trial of the pirates. In many cases, some crew members die in the attack and especially in cases where their relatives are asked for a ransom which they cannot raise whereas others are badly injured in the ordeal.[44]

To end this study, it is clear that the objectives outlined under chapter one have been met in that: I have clearly highlighted the history and development of piracy and related the same to the international laws that have so far been employed in a bid to curb the menace. I have further identified and highlighted the inadequacies in the United Nations Convention on the Law of the Sea and identified the specific provisions of the same that require amendments or additions to the existing articles to ensure the problem of piracy is put under control.

Piracy being an international problem that affects all states whether members to or not to the United Nations Convention on the Law of the Sea, should be taken with the seriousness it deserves. Its effects are clear and above all, the effect it is likely to have on international trade carried out by sea transport. It is now left to the states to cooperate and put in place measures to curb the menace. This war will not be successfully fought by the states alone, but the players and the state holders in the sea transport have also got to have a hand in the reporting of the incidences and helping in prosecuting of the alleged offenders by participating as witnesses where needed.

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[43]Ibid p. 22

[44]Africa program and international law conference report- Piracy and legal issue: reconciling public and private interests (2009) p. 16

# CHAPTER 5

## Conclusion

In concluding this study, it is clear that that piracy has been an international problem for many years. In the earlier eras of piracy, piracy was relatively a simple action which has over the years come to be sophisticated in the use of more modern ships and tactics to attack. The act, prevention, and prosecution of piracy have evolved over the past few centuries due to the advent of globalization and new technologies. Efforts that have been put in place by the international community through the League of Nations and subsequently the United Nations have not borne much fruit in curbing the menace. So what next for this vice that has remained in the midst of our daily lives, yet a silent killer with all its negative effects? Is the universal jurisdiction bestowed upon all states in cooperation against piracy being over looked? Who bears the final burden in bringing piracy to an end?

The laws meant to regulate sea piracy are not satisfactory at the moment. All the present laws are just to fill up the gap of law of piracy but not able to defeat piracy at all. As for the UNCLOS 1982 which is applicable at the moment, it is not any different from the provisions regarding piracy in the High Seas convention 1958. It has been observed in this study that the definition and scope of piracy as prescribed by international law, gives rise to numerous issues of dispute and global concern. It is clear that according to the definitions of the UNCLOS 1982, it is difficult to prove the offense of piracy against any person. It has a lot of ambiguities in it. These issues which qualify as limitations towards the successful and effective implementation of a legal regime against piracy globally also demonstrate the inadequacies in the application of

international laws at national and international levels. It is clear that this law, as it is, is not sufficient to defeat the problem of piracy today.

Several international instruments now exist that have been construed to handle these limitations and add value to already existing legislation. Nevertheless, these issues are sometimes very complex and will require more than just constitutional modifications and improvements. When placed alongside the national legislations of states, then there is the obvious enigma of interests. It then becomes a question of limitations or rules of priority and how these are balanced or compromised determines the success of the global anti-piracy regime. The key solution however, towards achieving global success and an effective legal address to piracy lies in the willingness of states to cooperate without restrictions towards the eradication of this crime globally. As such, there is bound to be compromise and sacrifice of national interests for the satisfaction of the general good (global interest) and the developed nations must lead in this regard, supporting the underdeveloped nations as much as possible wherever such assistance is necessary and required. Otherwise, when is there ever going to be a unanimous rallying point for all states signatories or not at the international level? Such required cooperation must go beyond institutionalizing piracy to world standards

No state is duty bound according to the law to take part in actions against the pirates. It is left to the states' own will to do decide whether to cooperate or not and do whatever they want despite these states having full authority to prosecute these pirates under their local laws. What these states fail to realize is that piracy is a much more serious problem than they and many international institutions will want to believe. It is a possible that some piracy gangs are linked to terrorist groups which have in some cases either posed as pirates or used the strategy of pirates to advance their courses. The already serious problem of piracy is compounded by the pursuit of

individualistic interests and the lack of unity in the global effort to deal with it. There exists no unanimously united front for dealing with global piracy.

Because of corruption and political matters it becomes impossible to punish the real offender. There being no international courts with the jurisdiction to deal with the piracy, the matter is left to all the states' right to prosecute these criminals. This poses yet another main problem to control this crime. International co-operation is needed to bring successful prosecutions. Universal jurisdiction should be invoked only as a last resort. To assert it unnecessarily or even arbitrarily in some cases only cheapens a doctrine that should be reserved for the gravest offenses evidenced through exceptional cruelty or large numbers of victims.

Sharing of information is also very important. There are problems regarding the collection of evidence by the capturing authority for prosecution in another country. Whenever a case comes to trial, there has been a problem in securing oral statements from witnesses and it involves huge costs and the time for crew to attend trial. The shipping industry has not been very supportive in the process of prosecuting the arrested pirates. They should do so by encouraging the attendance of witnesses who may be masters or crew. Detailed information should continue to be made available regarding the evidentiary and procedural requirements of the law of the differing prosecuting authorities and the naval and police forces must act in strict compliance with them.

There has been a further problem in facilitating liaison between the different personnel involved in transfer of suspects and investigation and prosecution. Identification of appropriately qualified and empowered national leads for collaboration in investigations and prosecutions has proved a problem in itself. There are no common rules or guidelines which would facilitate the

collection of evidence by one authority for prosecution in another. An attempt should be made to develop a blueprint or common standards that are internationally agreed to fight piracy.

Prosecution of piracy has also been rendered a nullity because there is no international support in doing so for the countries that seek to try the suspected pirates. For example, Somali pirates cannot be tried in Kenya without full international support. There needs to be a long term commitment by the international community to give support for trials and capacity building in relevant regional states. There needs to be intelligent assistance given to these national criminal justice systems. More so, western states cannot absolve themselves of their responsibility to mount prosecutions themselves. They have legal responsibilities under the SUA Convention, for example, to prosecute where they do not extradite persons within their jurisdiction. But all in all, my opinion is that prosecution is just a way of addressing a symptom rather than a cause. More focus should be placed on prevention methods as well as solutions on the ground. The efforts made so far in dealing with the problem of piracy have often missed the mark because they fail to carefully consider and deal with the most fundamental and underlying causes of piracy in the context of the areas or regions where the crime is rampant. These will include such issues as socio-political and economic issues evident in the case of Somalia

Nevertheless, efforts are constantly being and should be intensified to redress this situation and counteract the upsurge of piracy globally, which is an organized crime at sea. The tides may be turning on piracy and we may sooner than later witness a more unified and potent battle to eradicate piracy through a joint effort of naval powers of all the members of the United Nations.

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