



HOWARD COLLEGE SCHOOL OF LAW
Unit of Maritime Law and Maritime Studies

Maritime Piracy: A critical analysis of current prosecutorial challenges and shortcomings of international and domestic law.

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ABSTRACT

Modern maritime piracy is cause for major concern around the world. Although there have been preventative measures deployed by maritime nations to counter the crime, there is a need to develop an efficient regime to prosecute pirates. The general *modus operandi* that is employed by arresting-vessels is a 'catch-and-release' procedure, which means that there are no further steps taken to bring these pirates to account for their crimes.

The purpose of this dissertation is to analyse the main challenges that face domestic judicial systems in prosecuting pirates of the high seas.

Chapter 1 of this Dissertation sets out the parameters of the study, followed by Chapter 2 which will detail current international instruments that specifically relate to the crime of maritime piracy. This would include an examination of the successes and shortcomings of the piracy provisions of UNCLOS Articles 100 – 107, the recent UNSC Resolutions, SUA, and the IMO as well as discuss the IMB PRC and other Regional Agreements in place to counter piracy and provide for the successful prosecution of suspected pirates.

Chapter 3 will focus on the prosecutorial problems dealing with the crime of piracy that face judicial bodies around the world. The Chapter will highlight and discuss the various political and human rights issues that have discouraged the majority of states from prosecuting suspected offenders of this crime, as well as their reluctance to exercise universal jurisdiction over piracy. In addition, the recent Kenyan *ad hoc* piracy tribunal decisions will be discussed in order to assess the lack of uniformity in the interpretation and application of international law piracy provisions as against domestic law.

Chapter 4 examines the South African Law and Policies in place that counter-piracy, and also considers whether South Africa could exercise jurisdiction over piratical matters.

Thereafter, Chapter 5 proposes recommendations that may be employed in order to bring about a much needed uniform approach to the successful

prosecution of suspected pirates. Lastly, Chapter 6, shall comment and conclude on the findings of the previous chapters.

DECLARATION

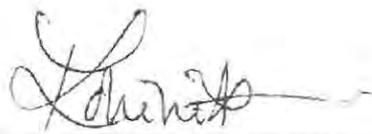
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TABLE OF STATUTES AND CASES

International Conventions and Statutes

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. (Rome, 10 March 1988)

Convention on the International Maritime Organization, Geneva (6 March 1948)

Geneva Convention On The High Seas (April 29 1958)

International Maritime Organization Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005)

UN General Assembly, 'International Covenant on Civil and Political Rights' (16 December 1966) United Nations, Treaty Series, vol. 999, p. 171

UN General Assembly, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 December 1984) United Nations Treaty Series, vol. 1465, p. 85

UN General Assembly, 'Convention Relating to the Status of Refugees' (28 July 1951)

UN General Assembly, 'Protocol Relating to the Status of Refugees' (31 January 1967)

UN General Assembly, 'Rome Statute of the International Criminal Court' (last amended 2010), 17 July 1998

United Nations Convention on the Law of the Sea of 10 December 1982

South African Legislation

Criminal Procedure Act 1977 (Act No. 51 of 1977)

Defence Act No.42 of 2002

Protection of Constitutional Democracy Against Terrorist and Related Activities Act No.33 of 2004 (POCDATARA)

Implementation of The Rome Statute of The International Criminal Court Act 27 of 2002

Kenyan Tribunal Cases

In Re Mohamud Mohamed Dashi & 8 Others [2009] eKLR

Attorney General v Mohamud Mohammed Hashi & 8 Others [2012] eKLR

Kenyan Legislation

Kenyan Penal Code (1967) Cap.63

Kenyan Merchant Shipping Act of 2009

Tanzanian Legislation

Penal Code (1981) Chapter 16 of the Laws (Revised)

LIST OF ABBREVIATIONS

IMB	International Maritime Bureau
IMO	International Maritime Organization
ITLOS	International Tribunal for Law of the Sea
MOU	Memorandum of Understanding
POCDATARA	Protection of Constitutional Democracy Against Terrorist and Related Activities Act No.33 of 2004
PRC	Piracy Reporting Centre
DA	Defence Act No.42 of 2002
SUA	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. (Rome, 10 March 1988)
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea of 10 December 1982
UNHRC	United Nations Human Rights Commission
UNSC	United Nations Security Council

This Dissertation is dedicated to my beloved late Grandmothers,

Mrs D. Chetty & Mrs C. Pillay

CHAPTER 1: INTRODUCTION

Over the past decade, piracy on the high seas and off the coast of Somalia has been on the rise.¹ “Pirates” have long been described as *hostis humani generis* (enemies of all humankind).² The general *modus operandi* of these armed pirates is to target merchant vessels and force the captured crew to navigate the vessel as a pirate vessel, towards other unsuspecting vessels in order to capture them.³ Since 1991, Somalia has experienced a State of civil war,⁴ which has prompted many Somali pirates to commit a predominant number of piratical seizures around the Gulf of Aden.⁵ As such, the international defensive methods employed at sea are weak due to the lack of government accountability in Somalia where these pirates commence their expeditions.⁶ The purpose of this study is to examine the existing legal regime to combat piracy with specific reference to the persisting challenges facing the courts across the world in prosecuting pirates of the high seas.

The United Nations Convention on the Law of the Sea (UNCLOS)⁷ contains various provisions dealing with piracy.⁸ However, the UNCLOS Articles dealing

¹ The International Maritime Bureau “Piracy And Armed Robbery Against Ships” *Annual Report for the Period 1 January 2010 – 31 December 2010* available at <http://www.simsi.com/Loss-Prevention-and-Safety-Training/IMBPiracyReport2010.htm> accessed on 22 August 2012, 23

² P. Campbell ‘A Modern History of The International Legal Definition of Piracy’ in B.A. Elleman et al *Naval War College Newport Papers 35: Piracy and Maritime Crime – Historical and Modern Case Studies* (2010), 21

³ The International Maritime Bureau *op cit.* note 1

⁴ V.P. Nanda, ‘*Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?*’ (2011) Volume 39 (No. 2) *Denver Journal of International Law and Policy* 177, 178

⁵ *Id.*

⁶ The International Maritime Bureau *op cit.* note 1

⁷ *United Nations Convention on the Law of the Sea* of 10 December 1982

⁸ *Ibid.* Part VII. High Seas, Articles 100-107

with piracy contain some prevalent weaknesses.⁹ A more in-depth analysis of the relevant provisions of UNCLOS will be covered Chapter 2. The advent of numerous Resolutions¹⁰ passed by the United Nations Security Council conferred on nations the power to patrol and pursue pirates into Somali territorial waters, and land.¹¹ These Resolutions transformed current international law regarding Somalia, and have aided in combating the crime of piracy.¹² Chapter 2 will also critically analyse the effectiveness of various Resolutions passed by the United Nations dealing with piracy.

The United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA),¹³ will also be discussed in Chapter 2. The SUA deals primarily with the crime of maritime terrorism; however, there are certain provisions in SUA which are applicable to the crime of piracy. The

⁹ R.C. Beckman 'The Piracy Regime under *UNCLOS*: Problems and Prospects for Cooperation' *CIL Workshop on International Maritime Crimes: National University of Singapore* (2011), 17

¹⁰ UN Security Council, Security Council Resolution 1816 (2008) [*on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia*], 2 June 2008, S/RES/1816 (2008), available at <http://www.unhcr.org/refworld/docid/48464c622.html>, accessed on 15 October 2012; UN Security Council, Security Council Resolution 1846 (2008) [*on repressing acts of piracy and armed robbery at sea off the coast of Somalia*], 2 December 2008, S/RES/1846 (2008), available at <http://www.unhcr.org/refworld/docid/493e3f852.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1851 (2008) [*on fight against piracy and armed robbery at sea off the coast of Somalia*], 16 December 2008, S/RES/1851 (2008), available at <http://www.unhcr.org/refworld/docid/4952044e2.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1897 (2009) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 30 November 2009, S/RES/1897 (2009), available at <http://www.unhcr.org/refworld/docid/4b18cff1d.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1918 (2010) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 27 April 2010, S/RES/1918 (2010), available at <http://www.unhcr.org/refworld/docid/4bea70cc2.html>, accessed on 17 October 2012; UN Security Council, Security Council Resolution 1950 (2010) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 23 November 2010, S/RES/1950(2010), available at <http://www.unhcr.org/refworld/docid/4cf763c92.html>, accessed on 17 October 2012; UN Security Council, Security Council Resolution 2015 (2011) [*on acts of piracy and armed robbery at sea off the coast of Somalia*], 24 October 2011, S/RES/2015(2011), available at <http://www.unhcr.org/refworld/docid/4ec4eb3c2.html>, accessed on 17 October 2012

¹¹ M. Sterio 'Piracy off the Coast of Somalia' (2012) Volume 4 *Amsterdam Law Forum* 104, 108

¹² *Id.*

¹³ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*. (Rome, 10 March 1988)

provisions of SUA to some extent enhance the provisions of UNCLOS, in widening the ambit of maritime piracy and also providing measures that could be employed in order to bring about the successful prosecution of suspected pirates.¹⁴

In addition the International Maritime Organization (IMO)¹⁵ has also produced various legal papers to assist nations in deterring the commission of the crime as well as prosecuting suspected pirates. Chapter 2 will provide a detailed examination of the IMO legal committee papers,¹⁶ including the discussion of, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP)¹⁷ and the Djibouti Code of Conduct (DCoC)¹⁸ which are both intended to bring about a more efficient system in curbing the crime of piracy. The IMB and PRC are other institutions that have also contributed to the combating of piracy at sea, and it is suggested that these facilities will assist arresting vessels to track and intervene in potential piratical incidents.

The prosecution of pirates is problematic and there are several difficulties facing national courts.¹⁹ Broadly speaking, these problems are both political and

¹⁴ D. Chang 'Piracy Laws & The Effective Prosecution of Pirates' (2010) Volume 33 *Boston College International & Comparative Law Review* 273, 275

¹⁵ Convention on the International Maritime Organization, Geneva (6 March 1948)

¹⁶ LEG 98/8/1 Piracy: Elements Of National Legislation Pursuant To The United Nations Convention On The Law Of The Sea, 18 February 2011; LEG 98/8/3 Piracy: Elements Of National Legislation Pursuant To The United Nations Convention On The Law Of The Sea, 18 February 2011; LEG 98/8/2 Piracy: Establishment of a legislative framework to allow for effective and efficient piracy prosecutions, 18 February 2011; LEG 98/8/4 Piracy: Establishment of legislative framework to allow for effective and efficient piracy prosecutions, 25 February 2011

¹⁷ Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) 2398 U.N.T.S. 199; 44 I.L.M. 829 (2005)

¹⁸ IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Annex, IMO Council Doc. C102/14 (Apr. 3, 2009), available at <http://www.asil.org/files/DjiboutiCodeofConduct.pdf>, accessed on 18 October 2012

¹⁹ L. Bento "Toward An International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" (2011) Volume 29, issue 2 *Berkeley Journal of International Law* 399, 430

procedural in nature.²⁰ Some of the underlying concerns are that (i) various prosecuting States may grant asylum to detained pirates; (ii) detained pirates may seek relief via the law of human rights, which creates further difficulties; (iii) and there is a lack of clarity in domestic legislation regarding the procedure for dealing with expatriated pirates.²¹ These challenges call for a uniform body of international piracy law to better enable national courts the world over to successfully prosecute pirates.²²

Chapter 3 will highlight the efforts of foreign courts in attempting to prosecute pirates and also set out the challenges that were experienced. A prime example of the judicial challenges that are evident in prosecuting pirates can be found in Kenya. This is because in recent years, the Kenyan national court exercised universal jurisdiction to prosecute pirates on behalf of the international community.²³ Kenya had received monetary support from various countries around the world in pursuit of combating maritime piracy.²⁴ However, the High Court Decision in *In re Mohamud Mohamed Dashi & 8 Others*²⁵ held that Kenyan courts did not have jurisdiction to preside over piracy offences. The Court of Appeal, however, reversed this decision, which be analysed further in Chapter 3. Similarly other courts have proven incapable of continuing prosecutions regarding piracy, as these States require a nexus between the piratical attack and a national interest in order to adjudicate the matter. This has resulted in a major problem in effectively countering this international maritime

²⁰ *Id.*

²¹ *Ibid.* at 431

²² *Id.*

²³ D. Akande 'Anti-Piracy Court Opens in Kenya' 28 June 2010 available at <http://www.ejiltalk.org/anti-piracy-court-opens-in-kenya/>, accessed 5 October 2012.

²⁴ Y.M. Dutton 'Bringing Pirates to Justice: A Case For Including Piracy Within The Jurisdiction of The International Criminal Court' (2010) One Earth Future Foundation Discussion Paper available at http://www.oneearthfuture.org/siteadmin/images/files/file_52.pdf, accessed 5 October 2012.

²⁵ *In Re Mohamud Mohamed Dashi & 8 Others* [2010] eKLR

crime. One of the main problems that will be investigated in this Chapter is the lack of uniformity in successfully prosecuting the crime of piracy.

The dissertation will also look at South African legislation and policies in determining their adequacy to successfully combat piracy. The study also seeks to determine whether the local laws and the role of the State is adequate to effectively prosecute arrested pirates. Chapter 4 will focus on the South African Defence Act, relevant provisions of UNCLOS and the tri-lateral Memorandum of Understanding (MOU) entered into with Tanzania and Mozambique. In addition, Chapter 4 will discuss South Africa's position on prosecuting suspected pirates.

Chapter 5 will provide recommendations that may be employed in order to bring about a uniform approach in successfully prosecuting pirates. Finally, Chapter 6 will conclude the findings of the study.

CHAPTER 2: INTERNATIONAL LAWS AND POLICIES

‘Piracy’ is defined in several International Conventions, which outline the requirements and circumstances under which a country may seize and detain pirates.¹ This Chapter examines relevant international Conventions and policies that relate to piracy. The most notable Conventions that address the matter of piracy at sea include the Geneva Convention on the High Seas (Geneva Convention),² the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA),³ and the Convention on the Law of the Sea (UNCLOS).⁴ However there are several organisations that supplement the international Conventions, such as the International Maritime Organization (IMO) and the Piracy Reporting Centre (PRC). In addition, instruments dealing with piracy are found in the United Nations Security Council Resolutions (UNSC Resolutions),⁵ the provisions of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)⁶ and, specifically relevant to Africa, the Djibouti Code of Conduct

¹ M. Sterio ‘Fighting Piracy in Somalia (and Elsewhere): Why more is needed’ (2009-2010) Volume 33 *Fordham International Journal* 372, 385

² *Geneva Convention On The High Seas* (April 29 1958)

³ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*. (Rome, 10 March 1988)

⁴ United Nations *Convention on the Law of the Sea* (10 December 1982)

⁵ UN Security Council, *Security Council Resolution* 1816 (2008), 2 June 2008, S/RES/1816 (2008); UN Security Council, *Security Council Resolution* 1838 (2008), 7 October 2008, S/RES/1838 (2008); UN Security Council, *Security Council Resolution* 1846 (2008), 2 December 2008, S/RES/1846 (2008); UN Security Council, *Security Council Resolution* 1851 (2008), 16 December 2008, S/RES/1851 (2008); UN Security Council, *Security Council Resolution* 1897 (2009), 30 November 2009, S/RES/1897 (2009); UN Security Council, *Security Council Resolution* 1918 (2010), 27 April 2010, S/RES/1918 (2010); UN Security Council, *Security Council Resolution* 1950 (2010), 23 November 2010, S/RES/1950 (2010); UN Security Council, *Security Council Resolution* 1976 (2011), 11 April 2011, S/RES/1976 (2011); UN Security Council, *Security Council Resolution* 2015 (2011), 24 October 2011, S/RES/2015 (2011); UN Security Council, *Security Council Resolution* 2020 (2011), 22 November 2011, S/RES/2020 (2011)

⁶ Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) 2398 United Nations Treaty Series 199 (2005)

(DCoC) will be examined.⁷

2.1. United Nations Convention on the Law of the Sea

In 1958, Eight articles addressing piracy were codified and adopted in the Geneva Convention.⁸ Subsequently, these articles were included in UNCLOS.⁹ South Africa has ratified the Convention.¹⁰ Its provisions are widely accepted as binding on all nations.¹¹ The piracy provisions under UNCLOS confer on States the power to exercise universal jurisdiction over the crime of piracy at sea.¹² UNCLOS also stipulates an exception to the rule of exclusive flag-State jurisdiction over piracy.¹³ This exception confers power to any State to search and seize a suspected pirate vessel, cargo, and/or detain, prosecute and punish offenders irrespective of their nationality.¹⁴

Articles 100 to 111 of UNCLOS specifically deal with the crime of piracy at sea. However, the UNCLOS Articles dealing with piracy contain some inherent

⁷ IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct), Annex, IMO Council Doc. C102/14 (Apr. 3, 2009), available at <http://www.asil.org/files/DjiboutiCodeofConduct.pdf>, accessed on 18 October 2012

⁸ M. Sterio *op cit.* note 1

⁹ *Id.*

¹⁰ 'United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter' available at

http://www.un.org/Depts/los/Convention_agreements/Convention_declarations.htm accessed 9 October 2012, South Africa signed the Convention on 5 December 1984 and ratified the Convention on 23 December 1997.

¹¹ M. Sterio *op cit.* note 1

¹² J.L. Jesus 'Foreword' (2009-2010) Volume 59 *American University Law Review* 1213, 1214

¹³ *Id.*

¹⁴ *Id.*

weaknesses.¹⁵ This will be explained further in this chapter. An additional shortcoming of UNCLOS is that some countries choose not to follow the Convention's procedures concerning piracy due to political and or other reasons relating to human rights and the potential invocation of the principles of non-refoulement.¹⁶ This has led to a predominant hesitancy to prosecute suspected pirates in their domestic courts and as a result, they have referred the matters to other countries¹⁷ such as Kenya for prosecution. The extradition of pirates to other countries for prosecution has been met with legal difficulties.¹⁸ This will be discussed further in Chapter 4.

Article 100 of UNCLOS provides for the 'Duty to cooperate in the repression of piracy'.¹⁹ There is, however, neither an express requirement enforced on signatory States of UNCLOS to prosecute or extradite pirates in their custody nor is there a duty to provide mutual legal assistance in prosecutions.²⁰ In addition, this narrows the scope of the legal duty imposed on States to acts of piracy committed on the high seas.²¹ This, firstly, means that piracy may only occur on the high seas, including the exclusive economic zones,²² and secondly, that an act of piracy ceases to exist once a pirate vessel enters the territorial waters of a State.²³ This exclusion of territorial waters from the crime

¹⁵ R.C. Beckman "The Piracy Regime under *UNCLOS*: Problems and Prospects for Cooperation" *CIL Workshop on International Maritime Crimes: National University of Singapore* (2011), 17

¹⁶ J.L. Jesus *op cit.* note 12 at 1216

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ UNCLOS *supra* note 4; Article 100 provides that all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

²⁰ *Id.*

²¹ *Ibid.* at 1215

²² UNCLOS *supra* note 4; Article 58(2) provides that Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part

of piracy is fundamentally detrimental to the regime under UNCLOS as it implicitly allows a way for pirates to escape seizure from foreign naval vessels.²⁴

Article 101 of UNCLOS defines piracy as follows:

‘(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... and directed:

- i. On the high seas, against another ship... or against persons or property on board such ship...
- ii. Against a ship...persons or property in a place outside the jurisdiction of any State;

(b) Any act of voluntary participation in the operation of a ship... with knowledge of facts making it a pirate ship...

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

From this provision it is clear there are several shortcomings. The narrow definition of piracy contained in this Convention fails to include the various elements that are evident in modern day piratical seizures, such as the fact that many of piratical occurrences occur within territorial waters and not exclusively on the high seas.²⁵ There is no obligation on signatory States to enact national

²³ *Id.*; Despite the narrow description in UNCLOS, it is possible for domestic legislation to be promulgated to include territorial waters within the scope of the crime of piracy

²⁴ *Id.*

²⁵ R. Collins and D. Hassan ‘Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective’ (2009) Volume 40 *Journal of Maritime Law & Commerce* 89, 95-96; ICC Commercial Crime Services ‘Piracy & Armed Robbery Prone Areas and Warnings’ available at <http://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings>, accessed on 1 December 2012

legislation asserting piracy to be a punishable crime nor does the Article compel such States to declare acts of piracy beyond territorial sovereignty, an offence.²⁶

Article 101 of UNCLOS is problematic in light of the fact that it only recognizes acts of piracy to occur 'outside the jurisdiction of any State' on the high seas.²⁷ Thus the crime is geographically restricted to the high seas.²⁸ This is supported by **Article 86** of UNCLOS which states that piracy occurs in 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea, or in the internal waters of a State.' This minimizes the scope of piracy as it is defined in international law to the extent that piratical transgressions that occur within the sovereignty of a State are excluded from its ambit.²⁹ In addition to this, the Convention also requires domestic law enforcement to stop pursuing suspected pirate vessels once they have entered into the territorial waters of another State, which also includes the territorial waters of the pirates' country of origin.³⁰ Another shortcoming of this Article is that for an act to qualify as 'piracy,' it must be committed for 'private ends' on the high seas.³¹ Although this shortcoming has been remedied in SUA, it is important to note that the latter Convention is only applicable to its signatories as it has not received the status of customary international law like UNCLOS. **Article 101** of UNCLOS excludes acts that are committed for public purpose from qualifying as piracy, for example, politically prompted acts, or acts of terrorism.³² It also requires that for piracy to occur there must be two ships involved.³³ This brings about an

²⁶ R.C. Beckman *op cit.* note 15, at 18

²⁷ R. Olson 'International Piracy Law and the Birth of Maritime Terrorism' (2006 - 2007) Volume 1, Issue 2 *Maritime Law Bulletin, Charleston School of Law* 15, 17-18

²⁸ R. Collins and D. Hassan *op cit.* note 25 at 97

²⁹ R. Olson *op cit.* note 27

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ R. Collins and D. Hassan *op cit.* note 25 at 100

interpretative problem because if a situation arises where there is an internal seizure of an unsuspecting vessel these actions will not qualify as piracy in accordance with the Convention as it more akin to the crime of mutiny.³⁴

Article 103 of UNCLOS provides the definition of a pirate ship or aircraft,³⁵ which further compounds the interpretational problem when defining piracy because of its reference to **Article 101** of UNCLOS.³⁶ **Article 103** fails to set out when a ship may be construed as 'intended ... for the purpose of committing' an act of piracy.³⁷ This leads to practical difficulties in discerning a suspected pirate vessel from one that is merely armed by the crew on board.³⁸ Therefore, the wording of **Article 103** of UNCLOS confines the identification process to a situation where the suspected vessel is actively engaged in an act of piracy.³⁹ In addition, **Article 106** of UNCLOS provides for relief in circumstances of incorrect seizure of a suspected pirate vessel. Furthermore, the burden of proof during the court process in this regard, is beyond a reasonable doubt. As such it may be difficult for an arresting State to prove that they had reasonable grounds⁴⁰ to arrest the suspects in circumstances where

³⁴ *Id.*; 'Mutiny' available at <http://legal-dictionary.thefreedictionary.com/mutiny>, accessed on 10 December 2012, The general definition of mutiny is the unlawful resistance of a superior officer, or the raising of commotions and disturbances on board of a ship against the authority of its commander, or in the army in opposition to the authority of the officers; a sedition; (q.v.) a revolt. (q.v.)

³⁵ UNCLOS *supra* note 4, Article 103 of UNCLOS States that 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 one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

³⁶ R. Geiß and A. Petrig *Piracy and Armed Robbery at Sea, The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), 64-66

³⁷ *Id.*

³⁸ *Id.*; Merchant Vessels around the world have recently employed private security guards to ensure the safety of their cargo, crew and vessel and to reduce the risk of falling victim to a piratical attack. However, whether such security guards may arrest suspected pirates, remains blurred in terms of international laws.

³⁹ *Id.*

⁴⁰ UNCLOS *supra* note 4; Article 106 relates to Article 110 which requires that when arresting a suspected pirate vessel, it has to be on reasonable grounds

that arresting State has mistakenly captured a vessel.⁴¹

The provisions of **Article 105** which relate to the seizure of a pirate ship or aircraft⁴² do not oblige signatory States to seize pirate vessels, merchandise or arrest pirates beyond its territorial waters.⁴³ Furthermore, there is no express obligation upon States to develop their domestic laws to provide for jurisdiction in order to prosecute persons who have engaged in piracy on the high seas.⁴⁴ In general terms, the UNCLOS does not authorize States to establish universal jurisdiction over piracy committed by foreigners against foreign vessels where the transgression occurred in the territorial waters of a State with no *nexus* to that incident.⁴⁵ **Article 105** may be interpreted to mean that a State has the discretionary power to choose whether detained suspected pirates should be prosecuted or not.⁴⁶ The main deficiency of **Article 105** of UNCLOS appears to be the absence of an express obligation for the capturing State to commence proceedings in their relevant domestic courts to prosecute suspected pirates.⁴⁷ However, the general principles of customary international law confer the power to any State to exercise universal jurisdiction⁴⁸ in relation to piratical matters

⁴¹ R. Geiß and A. Petrig *op cit.* note 36

⁴² UNCLOS *supra* note 4, Article 105 States that on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

⁴³ R. Olson *op cit.* note 27 at 19

⁴⁴ *Id.*

⁴⁵ *Ibid.* at 20

⁴⁶ D. Guilfoyle *Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes* (unpublished notes, Copenhagen 2009), 5-6

⁴⁷ *Id.*

⁴⁸ Geneva Convention *op cit.* note 2, Article 19 states that on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the

that have no connection to that prosecuting State.⁴⁹ A prime example of this in practice is when capturing States referred piratical matters to Kenya for prosecution.⁵⁰

Apart from this, **Article 107** of UNCLOS,⁵¹ which provides for ships and aircraft that are entitled to seize the vessel on account of piracy, is problematic as it fails to acknowledge or include seizure by privately owned or commercial vessels within its ambit.⁵² Although it is not a common practice, some owners of merchant vessels have resorted to hiring private security guards to reduce the risk of being attacked by pirates.⁵³ **Article 107** is silent on whether a merchant vessel acting in self-defence against a threat of piracy, and subsequently detains the suspected pirates is lawful.⁵⁴

There are other deficiencies in the piracy provisions in UNCLOS. On the wording of these provisions, it is clear that the Convention requires a joint inter-State effort in eradicating piracy on the high seas.⁵⁵ However, the literal interpretation of this position is that: (a) the duty of co-operation ends when a pirate vessel enters territorial waters, and exclusive economic zones of any of

action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith

⁴⁹ *Id.*

⁵⁰ In Re Mohamud Mohamed Dashi & 8 Others [2009] eKLR

⁵¹ UNCLOS *supra* note 4, Article 107 States that a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

⁵² L. Havemann 'Unchartered Waters' (2012) available at <http://www.havemanninc.com/wp-content/uploads/2012/04/Ship-Year.pdf>, accessed on 12 October 2012

⁵³ B. Rinehard 'Armed Guards on Merchant Vessels' (2011) available at https://www.cimicweb.org/Documents/CFC%20Anti-Piracy%20Thematic%20Papers/CFC_Anti-Piracy_Report_Armed%20Guards%20October%202011_Final_rmb.pdf, accessed 12 October 2012

⁵⁴ *Id.*

⁵⁵ L. Bento 'Toward an International Law of Piracy *Sui Generis*: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) Volume 29, issue 2 *Berkeley Journal of International Law* 399, 423

the signatory States; (b) there is also ambiguity as to whether an attempted piratical seizure would constitute an offence as per UNCLOS;⁵⁶ and (c) it is further implied that the authorized seizure of pirates may only occur once the pirates are actively committing the offence.⁵⁷ In addition, **Article 110** of UNCLOS expressly stipulates that military vessels may seize suspected pirates upon ‘reasonable grounds.’ Therefore, this leads to a plethora of independent domestic court interpretations of what constitutes as ‘reasonable grounds’, which is problematic as there is a potential lack of uniformity in the application of the relevant provision of the Convention.⁵⁸

It may be concluded that the Articles of UNCLOS dealing with the crime of piracy are ambiguous and perhaps obsolete in its approach. This is supported by the change of trends and methods in committing piracy since the adoption of the treaty.⁵⁹ Over the last decade the surge of piracy, particularly in the Gulf of Aden has become insentiently alarming.⁶⁰ Thus, it may be appropriate to revisit and update the piracy provisions of the Convention to bring it in line with recent trends of the crime.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ ICC-IMB ‘Piracy And Armed Robbery Against Ships Report for the Period of 1 January- 30 June 2012’, 25-30; There are disproportionate increases of piracy incidents observed around the world during the first six months of 2012. However, it has been observed that there is a decrease of the piratical attacks in Somalia, compared to 2011, which is primarily due to the inter-governmental naval vessels deployed to intervene such piratical threats. This kind of co-operative effort was encouraged by the UNSC Resolutions, and not necessarily due to the provisions of International Conventions. In addition, it is noted that Privately Armed Security Personnel have also assisted in intervening instances of piracy at sea, but it is not provided for within the ambit of UNCLOS that such persons are authorised to do so. Nevertheless, it is observed that attention needs to be paid to other piracy-prone areas, such as Nigeria, New Guinea, and Indonesia.

⁶⁰ The International Maritime Bureau “Piracy And Armed Robbery Against Ships” *Annual Report for the Period 1 January 2010 – 31 December 2010* available at <http://www.simsl.com/Loss-Prevention-and-Safety-Training/IMBPiracyReport2010.htm> accessed on 12 October 2012, 23

2.2. *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*

SUA was adopted in response to the *Achille Lauro* incident of 1985,⁶¹ where Palestinian terrorists hijacked an Italian cruise liner and killed an elderly American national.⁶² The main purpose of this Convention is to address matters of terrorism.⁶³ On the face of it, SUA proposed a positive step in combating international crimes such as terrorism and maritime piracy.⁶⁴ However, there are certain provisions within the treaty that address matters relating to piracy that UNCLOS was deficient in, such as expanding the definition of piracy.⁶⁵

SUA has not achieved the status of customary international law and as such is only binding on its signatory States.⁶⁶ However, the definition of piracy as it appears in UNCLOS seemed to be broader in SUA as it does not require the 'two-ship' or 'private ends' requirements to be fulfilled as the former Convention does.⁶⁷ In addition, SUA does not distinguish between the different maritime zones as UNCLOS does.⁶⁸

The 2005 Protocol to the Convention,⁶⁹ updated the original SUA to include a new **Article 3** (see Annexure 'A') which provides circumstances where a person

⁶¹ Y.M. Dutton 'Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?' (2011-2012) *Volume 86 Tulane Law Review* 1111, 1126

⁶² V.P. Nanda 'Maritime Piracy: How Can International Law and Policy Address this Growing Global Menace?' (2011) *Volume 39 (No.2) Denver Journal of International Law and Policy* 177, 182

⁶³ SUA *supra* note 3

⁶⁴ L. Bento *op cit.* note 55 at 424

⁶⁵ D. Chang 'Piracy Laws & The Effective Prosecution of Pirates' (2010) *Volume 33 Boston College International & Comparative Law Review* 273, 275; SUA *supra* note 3, Article 3

⁶⁶ V.P. Nanda *op cit.* note 62

⁶⁷ *Id.*

⁶⁸ *Ibid.* at 183

⁶⁹ International Maritime Organization Protocol of 2005 To The Convention For the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005)

unlawfully and intentionally commits an offence within the meaning of the SUA. In addition, **Article 8** of the 2005 Protocol stipulates procedures to be followed for requesting authorisation to board and search a suspected pirate vessel that bears the flag of another State party.⁷⁰ This provision allows the requesting signatory State to intercept piratical seizures on reasonable grounds of suspicion, and thereafter, determine whether the actions of the suspects, constitute as an offence.⁷¹

One of the deficiencies in SUA is that it does not confer the power to signatory States to exercise universal jurisdiction over the crime of maritime piracy. The Convention sets out specific requirements that must be met in order for a party-State to exercise jurisdiction over a matter. One of the main requirements is that there must be a *nexus* between the arresting State and the violation which occurred at sea. These requirements are listed in **Article 6** of SUA (see Annexure 'A')

The provisions of **Article 6** of SUA, suggest that once a State has established the jurisdictional requirements over a crime that is listed in **Article 3** of SUA;⁷² that State may, in terms of the extradition and prosecution provisions, have discretionary power to extradite captured offenders for prosecution. The shortcoming of such discretion is that pirates and maritime terrorists may be released without punishment.⁷³ Such a policy would inevitably leave the victim of such offences without a course of redress.⁷⁴ Another ambiguity in the construction of the above-mentioned provisions in SUA is that where a citizen of a country, which is not a member State, commits a crime at sea, they cannot be

⁷⁰ *Id.*

⁷¹ V.P. Nanda *op cit.* note 62 at 183

⁷² Y.M. Dutton *op cit.* note 61 at 1127

⁷³ C. Tiribelli 'The Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' (2006) Volume 18 *Sri Lanka Journal of International Law* 149, 162

⁷⁴ *Id.*

seized and prosecuted by a signatory State.⁷⁵

SUA does not contain express provisions that relating to maritime piracy.⁷⁶ It is thus deduced that SUA depends on its signatory States' domestic legal structures to counter piracy at sea.⁷⁷ It is also implied from the provisions of the Convention, that if a capturing State is unable to establish jurisdiction over the matter, the capturing State may extradite the accused to a State that can establish and exercise the necessary jurisdiction over the matter.⁷⁸

In essence, SUA broadens the circumstances of which, suspected pirates may be prosecuted, but, simultaneously, confines the jurisdictional requirements that need to be met for legal action to be taken.⁷⁹ SUA does not contain express provisions criminalizing piracy, but it stipulates situations analogous thereto.⁸⁰ Therefore, it may be concluded that the lack of support for the Convention is one of its major shortfalls in effectively addressing the problem of piracy at sea.⁸¹ In addition, although the 2005 Protocol amends the 1988 SUA Convention in order to evolve with the developments and changes in trends and methods of committing offences at sea, the Convention is still lacking in specifying effective ways of remedying the jurisdictional burdens and prosecutorial problems that party States endure.⁸²

⁷⁵ *Id.*

⁷⁶ L. Bento *op cit.* note 55 at 425

⁷⁷ *Id.*

⁷⁸ D. Chang *op cit.* note 65

⁷⁹ SUA *op cit.* note 3, Article 6

⁸⁰ L. Bento *op cit.* note 55 at 425

⁸¹ R. Olson *op cit.* note 27 at 19

⁸² *Ibid.* at 18

2.3. United Nations Security Council Resolutions

Due to the surge of piratical attacks off the coast of Somalia in 2008,⁸³ numerous Resolutions were passed by the United Nations Security Council (UNSC) addressing the crime of maritime piracy in the region.⁸⁴

In accordance with Chapter VII of the United Nations Charter, the Resolutions are designed to provide short-term solutions to the various limitations and shortcomings of piracy provisions in international instruments such as UNCLOS, which were discussed above.⁸⁵

The terms set out in the Resolutions have the potential for forming the basis on which a codified, uniform body of International piracy law may be drafted.⁸⁶ However, these Resolutions do not currently form part of Customary International Law. Furthermore, the Resolutions are binding upon the United

⁸³ UN Security Council, Security Council Resolution 1816 (2008) [*on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia*], 2 June 2008, S/RES/1816 (2008), available at <http://www.unhcr.org/refworld/docid/48464c622.html>, accessed on 15 October 2012

⁸⁴ UN Security Council, Security Council Resolution 1846 (2008) [*on repressing acts of piracy and armed robbery at sea off the coast of Somalia*], 2 December 2008, S/RES/1846 (2008), available at <http://www.unhcr.org/refworld/docid/493e3f852.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1851 (2008) [*on fight against piracy and armed robbery at sea off the coast of Somalia*], 16 December 2008, S/RES/1851 (2008), available at <http://www.unhcr.org/refworld/docid/4952044e2.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1897 (2009) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 30 November 2009, S/RES/1897 (2009), available at <http://www.unhcr.org/refworld/docid/4b18cff1d.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1918 (2010) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 27 April 2010, S/RES/1918 (2010), available at <http://www.unhcr.org/refworld/docid/4bea70cc2.html>, accessed on 17 October 2012; UN Security Council, Security Council Resolution 1950 (2010) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 23 November 2010, S/RES/1950(2010), available at <http://www.unhcr.org/refworld/docid/4cf763c92.html>, accessed on 17 October 2012; UN Security Council, Security Council Resolution 2015 (2011) [*on acts of piracy and armed robbery at sea off the coast of Somalia*], 24 October 2011, S/RES/2015(2011), available at <http://www.unhcr.org/refworld/docid/4ec4eb3c2.html>, accessed on 17 October 2012

⁸⁵ T. Treves 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' Volume 20 No.2 *The European Journal of International Law* (2009) 399, 402

⁸⁶ L. Bento *op cit.* note 55 at 428

Nations member States,⁸⁷ since they were passed in terms of Chapter VII of the United Nations Charter.⁸⁸ However, the Resolutions endorsed by the UNSC are specifically directed towards a particular geographical area of concern.⁸⁹ An example of this is the plethora of Resolutions passed by the UNSC concerning piracy off the coast of Somalia from 2008.⁹⁰

Resolution 1816⁹¹ encouraged member States to cooperate with Somalia's Transitional Federal Government (TFG) in combating piracy in the region.⁹² The Resolution urged a collaborative contribution by all member States in determining the jurisdiction and potential prosecution of pirates.⁹³ One of the main reasons behind the passing of this Resolution was to address the lack of uniformity and impetus to successfully prosecute pirates and provide relief to the victims of piratical attacks.⁹⁴ **Resolution 1816**,⁹⁵ in paragraph 7, extended the power to member States to intervene in piratical attacks as well as capture

⁸⁷ 'Frequently Asked Questions on International Law Aspects of Countering Terrorism' available at <http://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf>, accessed on 15 October 2012, 14

⁸⁸ J. Kraska and B. Wilson 'Piracy Repression, Partnering and the Law' (2009) Volume 40, No.1 *Journal of Maritime Law & Commerce* 43, 50

⁸⁹ L. Bento *op cit.* note 55 at 428

⁹⁰ V.P. Nanda *op cit.* note 62 at 183

⁹¹ UN Security Council, Security Council Resolution 1816 *supra* note 83

⁹² *Ibid.* at 184

⁹³ UN Security Council, Security Council Resolution 1816 *supra* note 83, at para 11

⁹⁴ J. Kraska and B. Wilson *op cit.* note 8, 51

⁹⁵ UN Security Council, Security Council Resolution 1816 *supra* note 83, para 7 states that 'for a period of six months from the date of this Resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may: (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.'

suspected pirates in Somalia's territorial waters, for a period of six months.⁹⁶ **Resolution 1816**⁹⁷ was an important development because many piratical attacks occur in territorial zones, which previously, did not allow law enforcement vessels from other countries to pursue suspected pirates from the high seas into territorial waters.⁹⁸ This was an essential feature of Resolution as it extended the problematic definition of piracy in UNCLOS.⁹⁹ The period of six months was subsequently extended for a year under **Resolutions 1846**¹⁰⁰ and **1851**¹⁰¹. Thereafter **Resolution 1897**¹⁰² further enhanced the definition of piracy as it included land-based operations on the Somali mainland.

Resolution 1897¹⁰³ is particularly significant as the UNSC noted the problems that arresting nations are faced with when it comes to prosecuting pirates. The Resolution encourages signatories to perform their duties under SUA and UNCLOS.¹⁰⁴ One such duty is the responsibility of member States to 'create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation.'¹⁰⁵ However, the SUA provision is challenging in that it does not form a part of customary international law, and therefore is only binding between the signatory States of that

⁹⁶ T. Treves *op cit.* note 85 at 403

⁹⁷ UN Security Council, Security Council Resolution 1816 *supra* note 83

⁹⁸ V.P. Nanda *op cit.* note 62 at 83

⁹⁹ *Id.*

¹⁰⁰ UN Security Council, Security Council Resolution 1846 *supra* note 84

¹⁰¹ UN Security Council, Security Council Resolution 1851 (2008) *supra* note 84

¹⁰² UN Security Council, Security Council Resolution 1897 (2009) *supra* note 84

¹⁰³ *id.*

¹⁰⁴ UN Security Council, Security Council Resolution 1897 (2009) *supra* note 84, para 14

¹⁰⁵ *ibid.* at 2

Convention.¹⁰⁶ Nevertheless, the Resolution further highlighted the urgency of States developing their domestic laws dealing with the crime of maritime piracy so that they would conform to international laws to create a uniform system to successfully prosecute pirates of the sea.¹⁰⁷ The UNSC also praised the efforts made in prosecuting pirates in Kenya at the time.¹⁰⁸ It can be seen from this that successful prosecution and sentencing of pirates is possible,¹⁰⁹ even though Kenya has since ceased to prosecute the crime of maritime piracy, which will be discussed further in Chapter 3.

Paragraph 6 of **Resolution 1897** also encouraged the member States to work together in deterring piracy in the region of Somalia. The paragraph provides for the facilitation of:

‘...the investigation and prosecution of persons detained as result of operations conducted under this Resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG [Transitional Federal Government] is obtained for the exercise of third State jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention.’¹¹⁰

Resolution 1918¹¹¹ recognized the efforts made by some member States to develop their domestic legislation in accordance with international law and human rights, regarding the criminalization of piracy in order to successfully prosecute suspected pirates.¹¹² However, there are still many States that have

¹⁰⁶ V.P. Nanda *op cit.* note 62

¹⁰⁷ UN Security Council, Security Council Resolution 1897 (2009) *supra* note 84

¹⁰⁸ *id.*

¹⁰⁹ *id.*

¹¹⁰ *id.*

¹¹¹ UN Security Council, Security Council Resolution 1918 (2010) *supra* note 84

¹¹² *ibid.* at 2

not revised their domestic laws to include procedural provisions in order to prosecute offenders of the crime of piracy.¹¹³

It is imperative for a uniform approach to be adopted by all member States in order to successfully deter the commission of the crime of piracy. In addition, the UNSC in this Resolution has alluded to the importance of prosecuting pirates and that failure to do so, hampers the efforts made to successfully combat the crime.¹¹⁴ Thus, although the positive steps taken by those countries which have developed their domestic laws regarding the crime are acknowledged, it remains unclear whether these countries would be competent to convict pirates, or if they would be hindered by issues such as non-refoulement, granting asylum and the possibility that a convicted pirate, who is sent back to his country of origin to serve his sentence, could be tortured, which ultimately would infringe upon his fundamental human rights.¹¹⁵

Moreover, this Resolution importantly proposes ‘options for creating special domestic chambers possibly with international components, a regional tribunal, or an international tribunal and corresponding imprisonment arrangements...necessary to achieve and sustain substantive results.’¹¹⁶ This suggestion was further emphasized in **Resolutions 1950**¹¹⁷ and **2015**¹¹⁸, where

¹¹³ *id.*; R.C. Beckman & S. Palakrishnan *Regional Cooperation to Combat Piracy and International Maritime Crimes: The Importance of Ratification and Implementation of Global Conventions* (unpublished paper, National Taiwan Normal University, 2012) at 6,- several former British colonies (Brunei, India, Malaysia and Myanmar) have no provisions on piracy in their criminal code. This is because the Indian Penal Code was adopted by the British as the basic criminal law in those countries, and it contains no provision making piracy an offence. India recognized that it should have a specific offence on piracy after it had difficulty prosecuting several Somali pirates that its navy had arrested in the Indian Ocean in 2010.

¹¹⁴ *Id.*

¹¹⁵ Y.M. Dutton ‘Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice’ (2011) Volume 34, Issue 2 *Fordham International Law Journal* 236, 241

¹¹⁶ *ibid.* at 3

¹¹⁷ UN Security Council, Security Council Resolution 1950 (2010) *supra* note 84

¹¹⁸ UN Security Council, Security Council Resolution 2015 (2011) *supra* note 84

the UNSC expressed: (i) the urgency for States to update their domestic legislation to criminalise the offence of piracy; (ii) the importance of the IMO guidelines and Legal Committee papers to be followed by States to bring about successful deterrence and prosecution of the crime; and (iii) encouragement of different levels of international participation required to hold suspected pirates accountable for their actions.

Although the Resolutions passed by the UNSC appear to be a progressive step in deterring piracy in the region of the coast of Somalia, several shortcomings are evident. One of these weaknesses is that the Resolutions only confer authority to pursue pirates in Somalia's territorial waters for a restricted period of time. It is only upon regular progress reports that the time limitation is extended. Apart from this, the crime of piracy is a global threat, but these Resolutions are only directed to the region of Somalia because it is a more defined threat to peace and stability in that area. Furthermore, the Resolutions address the paramount importance in prosecuting suspected pirates; however, despite their expressed urgency in requesting States to promulgate domestic law to regulate the crime, the challenge of promulgating law and successfully prosecuting suspected pirate still remains.

However, there has been a decline in the number of piratical attacks in the region since the UNSC passed these Resolutions, which demonstrates the positive effect that these Resolutions have made.¹¹⁹

2.4. The International Maritime Organisation

The IMO is an international body that was created and officially recognized by the Convention on the International Maritime Organization,¹²⁰ to encourage the

¹¹⁹ ICC-IMB *op cit.* note 59 at 5

¹²⁰ Convention on the International Maritime Organization, Geneva (6 March 1948)

efficiency of maritime safety.¹²¹ However, the organization only gained impetus once the United Nations was instituted.¹²²

In 1983, Sweden submitted a paper to the Maritime Safety Committee indicating the widespread prevalence of piracy.¹²³ As a result the IMO drafted the **Resolution A.545 (13)**.¹²⁴ The Resolution alluded to the seriousness of the piratical activity on the seas, and as a consequence of such events, urged all States to prioritize their efforts in deterring the crime.¹²⁵ Since the adoption of this Resolution, the IMO has played a significant pro-active role in fighting the crime of maritime piracy.

In 2011, the IMO published a series of Legal Committee papers which are directed at assisting States in developing domestic legal frameworks that will encourage the prosecution of pirates. More importantly, these papers provide States with guidance in interpreting the international instruments, such as UNCLOS, when they are in the process of reviewing or updating their current domestic laws regulating piracy.¹²⁶ The Legal Committee paper **LEG 98/8/1**¹²⁷ is to be read with **LEG 98/8/3**.¹²⁸ In essence these papers provide an

¹²¹ 'Brief History of IMO' available at <http://www.imo.org/About/Pages/Default.aspx>, accessed on 17 October 2012

¹²² *Id.*

¹²³ IMO 'Measures to Prevent Acts of Piracy and Armed Robbery Against Ships' IMO Assembly Res.A.545(13) (November 17 1983)

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 'Legal Committee (LEG) – 98th session, 4-8 April 2011' available at <http://www.imo.org/MediaCentre/MeetingSummaries/Legal/Pages/LEG-98th-session.aspx>, accessed on 20 November 2012

¹²⁷ LEG 98/8/1 Piracy: Elements of National Legislation Pursuant to The United Nations Convention on The Law Of The Sea, 18 February 2011

¹²⁸ LEG 98/8/3 Piracy: Elements of National Legislation Pursuant to the United Nations Convention on the Law of the Sea, 18 February 2011

interpretation of the Articles of UNCLOS which deal with piracy.¹²⁹ **LEG 98/8/1** provides that in accordance with **Article 105** of UNCLOS, States may, 'subject to the rights of third parties acting in good faith,' determine what action is to be taken against seized pirates and property.¹³⁰ Furthermore, **LEG 98/8/3**, extends the duty to co-operate as described in **Article 100** of UNCLOS, in that States are conferred a discretionary power to include in their local laws additional provisions dealing with 'mutual assistance in criminal matters, extradition and transfer of suspect, detained and convicted pirates.'¹³¹ This appears to be a positive step in ensuring a uniform collaborative effort in successfully prosecuting pirates is achieved.

LEG 98/8/2,¹³² highlights important legal substantive and procedural elements relating to the successful prosecution of pirates. This paper explains that a State should classify the offence of piracy in its domestic legislation and provide penalties that may be imposed against such offenders, which is in keeping with the provisions of UNCLOS and any other International instrument that a State is party to, for example, SUA.¹³³ In addition, the paper encourages States to provide for jurisdiction over the crime of piracy in order to prosecute the offence in their domestic courts.¹³⁴ Despite UNCLOS conferring the authority on States to exercise universal jurisdiction relating to the crime of piracy, States maintain the discretion to decide whether to assume jurisdiction over such matters.¹³⁵ Thus it is imperative for those States that elect to prosecute offenders of the

¹²⁹ *Id.*; LEG 98/8/1 *op cit.* note 126

¹³⁰ *ibid.* at 6

¹³¹ LEG 98/8/3 *op cit.* note 127 at 4

¹³² LEG 98/8/2 Piracy: Establishment of a legislative framework to allow for effective and efficient piracy prosecutions, 18 February 2011

¹³³ *Ibid.* at 2

¹³⁴ *Ibid.* at 3

¹³⁵ *Id.*

crime of maritime piracy, to specify the jurisdiction they would exercise over piracy within their domestic laws.¹³⁶

LEG 98/8/2 also makes mention that most of the recent prosecutions of piracy in regional States, occurred due to the arrest and transfer of pirates by another State.¹³⁷ As such, there are potential time delays that may arise during such transfer of pirates to a prosecuting State.¹³⁸ This may be problematic as the procedural laws of the majority of States necessitate an arrested offender to be brought before a relevant court within a short timeframe.¹³⁹ Thus it is suggested in **LEG 98/8/2** that States revise and where necessary adjust their procedural rules to afford a 'reasonable period of time' in which an arrested suspected pirate would appear before the court.¹⁴⁰

LEG 98/8/4,¹⁴¹ which was submitted by the Ukraine, importantly identified that in order for the above-mentioned objects contained in **LEG 98/8/2** to be efficient; an international treaty is required in order to regulate a uniform system of prosecuting pirates, which would form the basis upon which States may enact their own domestic legislation in this regard.¹⁴² As such, this paper, recommended two options from which a uniform approach to prosecuting pirates may be employed by States.¹⁴³ These options are as follows:

¹³⁶ *Id.*

¹³⁷ *Ibid.* at 4

¹³⁸ *Ibid.* at 5

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ LEG 98/8/4 Piracy: Establishment of legislative framework to allow for effective and efficient piracy prosecutions, 25 February 2011

¹⁴² *Ibid.* at 2

¹⁴³ *Id.*

‘Option A: development of a multilateral instrument which will meet the need to combat piracy in a specific region. In the case of piracy off the coast of Somalia, such an instrument may be developed within the framework of implementation of the Djibouti Code of Conduct. The instrument should envisage the possibility for participation of the States outside the region (those providing naval forces, flag States...

Option B: development of model legislation which addresses the relevant subjects.’¹⁴⁴

‘Option A’ primarily deals with a uniform approach to deter piracy via legislation. However, one of the ways in which this approach may be amplified to address the prosecutorial challenges, is to include the services of specialised crime fighting units such as the ‘Hawks’ to obtain evidence, which may be linked to the suspected pirates that are arrested during such operations described. This is explained in more detail in Chapter 4. Such a process may be included in legislation as suggested in ‘Option B,’ which may cover a variety of other challenges that arise in intervening piratical attacks, but also ‘iron-out’ some of the procedural issues that pertain to successfully prosecuting suspected pirates.

2.5. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia

One of the accomplishments of the IMO is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP).¹⁴⁵ ReCAAP was specifically designed to prevent and suppress piracy and armed robbery in the Straits of Malacca and Singapore. This prompted the member States thereof to cooperate with each other in terms of communicating information concerning piracy in the region, as well as arranging armed responses to piratical attacks.

¹⁴⁴ *Id.*

¹⁴⁵ ReCAAP *supra* note 6

ReCAAP also urged member States to formulate better methods to deter the crime of piracy; this was achieved by pooling their research, and arranging workshops to improve their anti-piracy capabilities.¹⁴⁶

ReCAAP had very effective outcomes in their combat against maritime piracy.¹⁴⁷ As a consequence of this, **Resolution 1851**,¹⁴⁸ advised the States in the West Indian Ocean to conclude a similar agreement in order to deter piracy in the Gulf of Aden.¹⁴⁹ This culminated into the Djibouti Code of Conduct (DCoC).¹⁵⁰

ReCAAP does not specifically address the issue of prosecuting pirates. However, **Article 13 thereof** emphasises the need for ‘mutual legal assistance,’ which appears to refer to the initial procedures that may be employed prior to the commencement of piratical prosecutions. This would include the processes of obtaining evidence in a uniform, collaborative way that would ultimately ensure the successful prosecution of suspected pirates.¹⁵¹ Moreover, **Article 12** advocates a formal procedure to be adopted by States in order to extradite suspected pirates. This provision would appear to deviate from the EU’s preferred method of concluding transfer agreements with the regional courts of Kenya, Mauritius and the Seychelles. Nonetheless, ReCAAP has gained much respect in the maritime community in providing useful methods to successfully

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ UN Security Council, Security Council Resolution 1851 (2008) *supra* note 84

¹⁴⁹ J. Kraska and B. Wilson ‘The Pirates of the Gulf of Aden: The Coalition Is The Strategy’ (2009) Volume 45 *Stanford Journal of International Law* 241, 272

¹⁵⁰ IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Annex, IMO Council Doc. C102/14 (Apr. 3, 2009), available at <http://www.asil.org/files/DjiboutiCodeofConduct.pdf>, accessed on 18 October 2012

¹⁵¹ A. Lee ‘Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law Through the Rocks and Shoals’ (2010) One Earth Future Foundation Working Paper available at

<http://oneearthfuture.org/images/imagefiles/Hybrid%20Tribunals-Andrew%20Lee%20.pdf>, accessed on 1 December 2012, 17

combat the crime of maritime piracy, to the extent that the DCoC was modelled on it.¹⁵²

2.6. The Djibouti Code of Conduct

The DCoC is a multilateral agreement between the West African and Arab States. **Article 2** of the DCoC sets out the mandate that the participating States should adhere to.¹⁵³

Article 2 in conjunction with **Article 4** empowers the participants of the DCoC to seize, arrest, investigate, and prosecute pirates or suspected pirates, as well as rescue ships or persons in distress at sea.¹⁵⁴ The significance of the provisions of the DCoC is that it extends the definition of piracy to include hot pursuit of pirate vessels into the territorial waters of another participating State.¹⁵⁵ The provisions also stipulate that the participant responsible for capturing pirates, consistent with international law is vested with the discretionary power to decide what penalties should be imposed upon them.¹⁵⁶

The DCoC can be seen as a positive instrument that will adequately answer the problem of piracy in the region. In addition, the DCoC is a comprehensive agreement that includes a systematic view as to how to deter and repress piracy as it covers a range of issues that will help aid participant countries in

¹⁵² *id.*

¹⁵³ IMO Djibouti Code of Conduct (2009) *supra* note 7, Article 2 provides that (a) Sharing and reporting relevant information; (b) Interdicting ships and/or aircraft suspected of engaging in piracy or armed robbery against ships; (c) Ensuring that persons committing or attempting to commit piracy or armed robbery against ships are apprehended and prosecuted; and (d) Facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to piracy or armed robbery against ships, particularly those who have been subjected to violence.”

¹⁵⁴ IMO Djibouti Code of Conduct (2009) *supra* note 7, Article 4

¹⁵⁵ *id.*

¹⁵⁶ *id.*

dealing with the crime of piracy in the Gulf of Aden. The DCoC expands on the piracy provisions of ReCAAP, yet it is not classified as a formal agreement.¹⁵⁷

2.7. The International Maritime Bureau and Piracy Reporting Centre

Another, contributing institution that has assisted in combating piracy is the International Maritime Bureau (IMB). The IMB was established by the International Chamber of Commerce (ICC) in 1981¹⁵⁸ to assist the shipping community in countering “all types of maritime crime and malpractice.”¹⁵⁹ Due to the steady incline in piratical seizures around the world, the IMB has focused a lot of its efforts on combating piracy. The IMB is a highly specialized branch of the ICC as they are mandated to eradicate all types of maritime crimes.¹⁶⁰ The IMB is not only a leader in recognizing and investigating crimes such as fraud and theft, it is also a keen expert in pinpointing criminal trends, methods and threats that exist within the shipping trade.¹⁶¹ The IMB is also proactive in crime prevention, as they provide various training courses and make available information to enlighten the broader public, which has proven to have significant merit.¹⁶² In recent decades, due to the radical increase in piratical seizures, the IMB Piracy Reporting Centre (IMB PRC) was established in 1992 in

¹⁵⁷ *Id.*, Article 15(a) states that nothing in this Code of conduct is intended to create or establish a binding agreement, except as noted in Article 13 which states the intention to develop the Code to attain a status of a formal agreement

¹⁵⁸ ICC Commercial Crime Services “International Maritime Bureau” available at <http://www.ICC-ccs.org/ICC/IMB> accessed on 6 May 2012

¹⁵⁹ The *International Maritime Bureau* “Piracy And Armed Robbery Against Ships” Report for the Period 1 January 2011 – 30 September 2011 available at http://www.denizticaretodasi.org/DetoPortal/Portals/Documents/2011_IMB_p_report.pdf, accessed on 6 May 2012

¹⁶⁰ ICC Commercial Crime Services *op cit.* note 157

¹⁶¹ *Id.*

¹⁶² *Id.*

Malaysia.¹⁶³ The IMB PRC has been effective in patrolling shipping lanes, issuing warnings relating to pirate ‘hotspots’ as well as reporting pirate attacks.¹⁶⁴

The IMB PRC also follows the IMO’s definition of Armed Robbery as per **Resolution A.1025 (26)** ‘Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships’ which reads:¹⁶⁵

“‘Armed robbery against ships’ means any of the following acts:

- (1) 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 on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;
- (2) any act of inciting or of intentionally facilitating an act described above.”

The main purpose of the IMB PRC is to firstly, be the only point of contact for ship Masters globally who are under piratical attack¹⁶⁶. Secondly, the data received from the Masters is instantly communicated to the local law enforcement agencies requesting assistance, and is also broadcast to all vessels in the region signalling the danger to others en route to the area of danger¹⁶⁷. Thus the imparting of such information is a positive step to reduce and hopefully eradicate piratical seizures on the seas¹⁶⁸. The IMB PRC is a 24 hour manned operation which has proved to be quite successful in alerting the shipping industry of piratical waters and also assisting those who are at the

¹⁶³ ICC Commercial Crime Services “IMB Piracy Reporting Centre” available at <http://www.ICC-ccs.org/piracy-reporting-centre> accessed on 6 May 2012

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ ICC Commercial Crime Services note 163

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

mercy of pirates¹⁶⁹. The IMB also publishes a quarterly and annual piracy and armed robbery report, which is an in-depth document highlighting the various areas of risk, trends, observations and news updates¹⁷⁰. The IMB PRC services also include investigating piratical incidents. This may be useful as the evidence obtained from such investigations may be utilised to ensure the successful prosecution of accused pirates.

2.8. Comment

In view of the International laws and policies currently implemented to counter the crime of piracy on the seas, it is clear that there are many progressive steps being made to empower States to seize pirates. However, there is still a certain amount of ambiguity as to how these pirates or suspected pirates are to be prosecuted. Although some of the international instruments briefly touch on the importance of prosecuting pirates, there is an underlying implication that it is the duty of a sovereign State, in keeping with international law, to develop its domestic legislation to provide for procedures and potential sanctions for the crime. In addition, it is evident that although some countries have made efforts to develop their domestic law in this regard, which would allow them to successfully prosecute suspected pirates, it is also suggested that more countries should follow suit in order to remedy the vast problems regarding the prosecution of suspected pirates.

In addition, the interpretational shortfalls of the provisions of UNCLOS appear to be resolved in SUA, UNSC Resolutions, ReCAAP, and the DCoC. However, it is important to note that these instruments are only applicable to their signatory States and do not form part of customary international law principles.

¹⁶⁹ *Id.*

¹⁷⁰ The International Maritime Bureau “Piracy And Armed Robbery Against Ships” Annual Report for the Period 1 January 2010 – 31 December 2010 at 20, 23-24, 34 available at <http://www.simsl.com/Loss-Prevention-and-Safety-Training/IMBPiracyReport2010.htm> accessed on 6 May 2012

Furthermore, the UNSC Resolutions, ReCAAP and the DCoC are only directed at specific regions of the world, which does not provide sufficient governance to acts of piracy in other parts of the world. However, the IMB PRC appears to provide an efficient service to those in distress at sea the world over, which is a positive step towards a uniform approach in combating the crime of piracy. In addition, the Legal Committee papers produced by the IMO, provide several guidelines which States may use to assist them in revising, or legislating new laws that ensure the successful prosecution of maritime pirates.

CHAPTER 3: PROSECUTORIAL PROBLEMS

It is evident from the international instruments discussed in the previous Chapter, that the successful prosecution of pirates is fundamentally dependent on sovereign States developing their domestic legislation. This Chapter examines the substantive and procedural difficulties that many judicial systems around the world are faced with in successfully prosecuting suspected pirates.

The crime of maritime piracy does not have an exclusive specialized international forum wherein suspected pirates may be prosecuted and punished for their offence.¹ As such, the burden of prosecution and punishment rests on the domestic laws and courts of a State.²

In addition, customary international law principles in accordance with UNCLOS, confer universal jurisdiction on States in respect of piracy.³ However, this power is discretionary, and as a result some States have narrowed the scope of jurisdiction over piratical matters. In certain instances, States have unilaterally restricted the parameters of jurisdiction to cases where there is a direct interest between that State and the crime.⁴ Others have refrained from exercising jurisdiction over matters of piracy because of political and/or procedural issues.⁵ The existing political issues revolve around the notion that suspected pirates may seek asylum in another State, which may lead to the prosecuting State facing the challenge of having the accused pirates extradited to their

¹ L. Bento 'Towards an International Law of Piracy *Sui Generis*: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) Volume 29, issue 2 *Berkeley Journal of International Law* 399, 429

² *Id.*

³ D. Guilfoyle *Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes* (unpublished notes, Copenhagen 2009), 5-6

⁴ Y.M. Dutton 'Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?' (2011-2012) Volume 86 *Tulane Law Review* 1111, 1136; The United States of America, Germany, and Denmark are some of the countries that have only proceeded to prosecute maritime pirates where such offences were committed either against nationals or *res* of these respective countries.

⁵ L. Bento *op cit.* note 1 at 430

jurisdiction.⁶ Furthermore, there is also a potential procedural issue, which extends to the lack of domestic laws adequately dealing with the situation of expatriated pirates.⁷ In addition, a further problem exists in avoiding the possible infringement of the arrested pirates' human rights.⁸

3.1. Non-Refoulement: The Preservation of Human Rights & Granting Asylum to Suspected and Convicted Pirates

It is imperative that the human rights of detained suspected pirates are upheld pursuant to international instruments such as The International Covenant on Civil and Political Rights (ICCPR),⁹ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Torture Convention),¹⁰ and relevant Human Rights Conventions. The United Nations Human Rights Committee published **General Comment No. 31**¹¹ which was designed to supplement the provisions of the ICCPR. The Comment alludes to the following:

[The] rights [under the ICCPR] is not limited to citizens of State Parties but must also be available to all individuals, regardless of nationality or Statelessness, such as asylum seekers, refugees, migrant workers and other

⁶ *Id.*

⁷ *Ibid.* 431

⁸ *Id.*

⁹ UN General Assembly 'International Covenant on Civil and Political Rights' (16 December 1966) United Nations, Treaty Series, vol. 999, 171

¹⁰ UN General Assembly, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 December 1984) United Nations, Treaty Series, vol. 1465, 85 [hereinafter referred to as the Torture Convention]; Article 2(1) 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.'

¹¹ UN Human Rights Committee (HRC), 'General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13 available at <http://www.unhcr.org/refworld/docid/478b26ae2.html>, accessed 22 November 2012

persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.'

The significance of the above-mentioned provision is that it obliges arresting and prosecuting States to protect and preserve the human rights of suspected pirates. Many States fear that suspected pirates may seek asylum in terms of the principle of non-refoulement.¹² The circumstances under which asylum may be granted is narrow. These circumstances are therefore particularly relevant to establish whether suspected pirates can seek asylum.¹³

The origin of the principle of non-refoulement is found in refugee law.¹⁴ As such, it is regulated by the Refugee Convention¹⁵ and Protocol of 1967.¹⁶ It is improbable that suspected pirates may be granted such protection because the Refugee Convention States the following in **Article 1(F)**:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: ...he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee...'

The generally accepted definition of the crime of maritime piracy excludes politically motivated attacks from qualifying under it.¹⁷ Therefore on the face of

¹² Y.M. Dutton 'Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice' (2011) Volume 34, Issue 2 *Fordham International Law Journal* 236, 254; UN High Commissioner for Refugees '*UNHCR Note on the Principle of Non-Refoulement*' (1997) available at <http://www.unhcr.org/refworld/docid/438c6d972.html>, accessed 21 November 2012; The principle of *non-refoulement* is the cornerstone of asylum and of international refugee law pursuant to Article 14 of the Universal Declaration of Human Rights .

¹³ *Id.*

¹⁴ *Id.*

¹⁵ UN General Assembly Convention Relating to the Status of Refugees (28 July 1951)

¹⁶ UN General Assembly, Protocol Relating to the Status of Refugees (31 January 1967)

¹⁷ United Nations *Convention on the Law of the Sea* (10 December 1982); Article 101 of UNCLOS provides the definition of piracy. The key phrase of the provision is 'committed for private ends,' which excludes politically motivated attacks from the ambit of piracy. This requirement is relevant as it prevents the distinction between the crimes of terrorism and piracy from being blurred.

the provisions of the Refugee Convention, it appears that suspected pirates ought not to be granted refugee status.¹⁸ However, in practice, prosecuting countries may find deporting suspected or convicted pirates back to their homeland problematic.¹⁹ This is possibly due to the fact that the **Article 3** of the Torture Convention²⁰ prevents the State in which the offender has sought protection, from deporting that offender back to his country or origin because of a *prima facie* risk of him being tortured.²¹ Thus the protection offered under the Torture Convention to pirates is two-fold, in that it, firstly, implores signatory States to refrain from torturing captured suspected pirates, and, secondly, obliges signatory States to ensure that they will not transfer suspected pirates to regions where there is a subjective or objective risk of them being tortured.²²

Apart from this, many arresting nations have chosen to transfer the prosecution of captured pirates in the region, such as Kenya.²³ This situation generally occurs where there is no *nexus* or national interest between the piratical incident and the State that carried out the seizure.²⁴ The United States of America is one of the many countries that have extradited pirates to be prosecuted in Kenya where it does not bear a national interest in the matter, although, it has proceeded against pirates that have attacked its citizens on the

¹⁸ S. de Bont 'Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective' (2010) *One Earth Foundation Working Paper* available at http://oceansbeyondpiracy.org/sites/default/files/human_rights_law_-_saoirse_de_bont.pdf, accessed on 22 November 2012, 24

¹⁹ *Id.*

²⁰ The Torture Convention *supra* note 10; Article 3 (See Annexure 'B')

²¹ M. Nowak 'Torture and Enforced Disappearance' in C. Krause & M. Scheinin (ed) *International Protection of Human Rights: A Textbook* (2009), 160

²² *Id.*; S.A. Vignos 'Pirate Trials: An Examination of The United States Non-Refoulement Duties Pursuant to the United Nations Convention Against Torture' (2011) Volume 17 *U.C. Davis Journal of International Law & Policy* 193, 202

²³ M. Sterio 'Fighting Piracy in Somalia (And Elsewhere): Why More Is Needed' (2009-2010) Volume 33 *Fordham International Journal* 372, 394

²⁴ *Id.*

high seas.²⁵ However, arresting nations have further favoured transferring the prosecution of pirates to other countries in order to evade additional financial expenses that arresting nations may incur.²⁶

3.2. The Ad Hoc Tribunals in Kenya

Kenya has entered into several Memoranda of Understanding (MOU) with the European Union,²⁷ the United States of America,²⁸ and the United Kingdom²⁹ that allows for the extradition of pirates to Kenya. Furthermore, since 2009, the United Nations Office on Drugs and Crime (UNODC) has assisted Kenya through financial means,³⁰ as well as encouraging the efficient prosecution of suspected pirates via its Counter-piracy Programme,³¹ taking the importance of upholding international law and human rights into careful consideration.³² The

²⁵ *Id.*

²⁶ *Ibid.* at 395

²⁷ 'Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer' (2009) *Official Journal of the European Union*, 49-59

²⁸ 'Extradition treaty between the United States and the United Kingdom' (Applicable to Kenya, June 24, 1935) 1931 U.S.T. Lexis 60; 'Agreement to continue in force between the United States and Kenya the extradition treaty of December 22, 1931, between the United States and the United Kingdom' (Entered into force, August 19, 1965) 16 U.S.T. 1866

²⁹ *Id.*

³⁰ A. Lee 'Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law Through the Rocks and Shoals' (2010) *One Earth Future Foundation Working Paper* available at <http://oneearthfuture.org/images/imagefiles/Hybrid%20Tribunals-Andrew%20Lee%20.pdf>, accessed on 21 November 2012, 4

³¹ 'Counter Piracy Programme Support to the Trial and Related Treatment of Piracy Suspects' (2012) Issue 9 available at http://www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_9_Final_webversion.pdf, accessed on 21 November 2012

³² 'UNODC and Piracy' available at <http://www.unodc.org/easternafrika/en/piracy/index.html>, accessed on 21 November 2012; The UNODC has provided similar support to other piracy prosecuting States e.g. Seychelles, Mauritius, Tanzania, Maldives and Somalia. This support stretches to judicial, prosecutorial

purpose of latter programme is to provide support to the Regional piracy prosecutions, to ensure (i) fair and efficient trials occur; (ii) humane and secure prisons are established and maintained; and (iii) to further develop current piracy transfer and trial programmes.³³

In the recent Kenyan case *In Re Mohamud Mohamed Dashi & 8 Others*,³⁴ the Chief Magistrate's Court at Mombasa charged the suspected pirates with the offence of piracy as per **section 69** of the Kenyan Penal Code.³⁵ The court found that it did not have jurisdiction to try pirates that had been detained on the high seas, therefore, the suspects in this matter were released. In reaching its decision the court referred to **section 5** of the Kenyan Penal Code, states that:

‘The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.’

Thus, Judge Ibrahim concluded that because the piratical incident did not occur within Kenya, or the territorial waters of the State, they did not have jurisdiction to adjudicate the matter.³⁶ Furthermore the court alluded to **section 69** of the Kenyan Penal Code, provides that:

‘(1) Any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of piracy’³⁷

and policing sectors, as well as supplying office equipment, law books and specialist coast guard equipment.

³³ *Id.*

³⁴ *In Re Mohamud Mohamed Dashi & 8 Others* [2009] eKLR

³⁵ Penal Code (1967) Chapter 63 of the Laws of Kenya, Section 69; Section 69(1) of the Penal Code, which provides that any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of piracy. Under Section 69(3) of the Penal Code, life imprisonment is prescribed as the sentence for the offence of piracy.

³⁶ *In Re Mohamud Mohamed Dashi supra* note 34 at 17

³⁷ Repealed by Section 454(1) of the Merchant Shipping Act of 2009

The court *in casu* acknowledged that the above section includes that the transgression of piracy occurs on the high seas, but maintained that the inconsistency between **sections 5 and 69** necessitated the interpretation that **section 5** supersedes **section 69**.³⁸ Judge Ibrahim went further on this point to conclude that the jurisdictional extension reflected in **section 69** was a legislative error, and thus the favoured judicial interpretation of the jurisdiction should be confined to **section 5** of the Kenyan Penal Code.³⁹ On this point he noted that Section 5 'is the defining provision with regard to jurisdiction of the Kenyan Courts in so far as the [Penal] Code is concerned.'⁴⁰ However, Judge Ibrahim also Stated that the inconsistency between the above-mentioned sections would not affect prosecutions that concern piratical incidents within the territorial waters of Kenya.⁴¹ As such, he stated that the parliamentary error was specifically directed at the inclusion of piratical incidents on the High Seas within the court's jurisdictional ambit.⁴²

Essentially, Judge Ibrahim's decision prevents future prosecutions of pirates from being adjudicated in Kenya unless the piratical attack occurred within the territorial waters of the State.⁴³ This had the adverse repercussion of precluding arresting States from transferring detained suspected pirates to Kenya.⁴⁴ The main criticism of this judgment is that it ignores the definition of piracy as per customary international law, which confers universal jurisdiction to any State

³⁸ In Re Mohamud Mohamed Dashi *supra* note 34 at 18

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ M. Sterio 'Piracy Off the Coast of Somalia' (2012) Volume 4 *Amsterdam Law Forum* 104, 114

⁴⁴ *Id.*

over piratical matters.⁴⁵ Another criticism of this judgment is that the court should not have based its decision to exclude the High Seas from the ambit of the jurisdiction it could exercise on the anomaly reflected between sections 5 and 69 of the Kenyan Penal Code. The court in this regard should have interpreted its domestic provisions to conform to UNCLOS.

However, the Court of Appeal⁴⁶ subsequently reversed Judge Ibrahim's decision in the High Court in 2012. Maraga JA's judgment in the Appeal Court dealt with the concepts of piracy *jure gentium* and universal jurisdiction separately.

In reaching his decision on piracy *jure gentium*, Maraga JA critically analysed the concept against the backdrop of the Kenyan Penal Code, scholarly articles, the principles of customary international law, the provisions of UNCLOS and SUA⁴⁷ and the implications of the Merchant Shipping Act of 2009 respectively. In this regard, he observed the following:

'...it is clear that piracy *jure gentium* is an assault on vessels sailing upon the high seas whether or not such an assault is accompanied by robbery or attempted robbery'⁴⁸

As a result, the Court of Appeal held that Ibrahim J had incorrectly interpreted that Kenya did not have jurisdiction over piratical matters that occurred outside the territorial realm of the State.⁴⁹ Furthermore, the Court of Appeal held that

⁴⁵ K.M. Brown 'Memorandum for the Mombasa Law Court of Kenya Re: Piracy Trials Issue: Potential Procedural Problems with Applying International Standards in Domestic Kenyan Courts' (2010) available at <http://dx.doi.org/10.2139/ssrn.1870908>, accessed on 21 November 2012, 4

⁴⁶ Attorney General v Mohamud Mohammed Hashi & 8 Others [2012] eKLR

⁴⁷ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*. (Rome, 10 March 1988)

⁴⁸ *Ibid.* at 18

⁴⁹ *Ibid* at 19; Maraga JA: Where he (Ibrahim J) erred, in my view, is in subordinating **Section 69** of the Penal Code to Section 5 thereof; in his interpretation of Sections 369 and 371 of the Merchant Shipping Act of 2009; on Kenyan courts' jurisdiction to try piratical offences committed on the high seas; and most

there was no foundation for the High Court to find that **section 5** of the Kenyan Penal Code should override **section 69** of the above-mentioned Code.⁵⁰ This is because **section 69** of the Kenyan Penal Code does not deal with the issue of jurisdiction.⁵¹ In addition, Maraga JA determined that the High Court's reliance on the repeal of **section 69** of the Kenyan Penal Code that ousted the notion of piracy *jure gentium* was incorrect.⁵² Section 69 was repealed and replaced in 2009 by section 369 of the Merchant Shipping Act primarily because the former section was inconsistent with the piracy provisions of UNCLOS. Moreover, it was held that **section 369** of the Merchant Shipping Act is similar to the repealed **section 69** provision, therefore retaining the definition that piracy may occur on the high seas beyond the territorial zone of the State.⁵³

The second concept that the Court of Appeal examined was universal jurisdiction. On this point, Maraga JA relied on scholarly opinions⁵⁴ which stated that piracy is an international crime which may 'occur across borders or on open seas, (thus) no one State can establish the usual basis for jurisdiction by the *nexus* between its territory and the crime.' Therefore, customary international law confers on nations the power to exercise universal jurisdiction against suspected pirates.⁵⁵ In addition, Maraga JA made mention of the fact that the Articles of UNCLOS and the piracy Resolutions passed by the UNSC reflect

importantly in his failure to appreciate the applicability of the doctrine of universal jurisdiction in reference to the case at hand.

⁵⁰ *Ibid.* at 20

⁵¹ *Id.*

⁵² *Ibid.* at 21

⁵³ *Ibid.* at 23

⁵⁴ *Ibid.* at 27; referred to I. Brownlie *Principles of Public International Law* 5th Edition (1998) , 301

⁵⁵ *Ibid.* at 28; Maraga JA: All States are therefore obliged to act as guardians of international law and on behalf of the international community to prosecute international crimes regardless of the place of commission of crime, or the nationality of the author or of the victim

that piracy is an offence that adversely affects the interests of all nations.⁵⁶ This further supports the decision that Kenya does in fact have jurisdiction to adjudicate piratical matters that occur on the high seas.⁵⁷ Another concern emerged in 2010 when Kenya terminated their participation in prosecuting pirates as per its MOU.⁵⁸ It appeared that Kenya had become disgruntled at the volume of piracy cases that had backlogged its courts, and consequently the additional costs incurred.⁵⁹

Sterio is of the view that the Kenyan Government was suspected of corruption as it was believed that the funds donated to Kenya for the purpose of prosecuting pirates had been exploited for different purposes within the State.⁶⁰ However, the Kenyan government expressed that it may resume prosecuting transferred suspected pirates in the future if the State received further financial assistance.⁶¹ As such, later in 2010, the government of Kenya announced that it would continue to exercise jurisdiction over piratical matters after the European Union had agreed to donate additional funds.⁶²

In light of the above, it appears that there are several anomalies that have arisen in the High Court of Kenya in prosecuting the crime of piracy. What is curious is that the High Court judgment of *In Re Mohamud Mohamed Dashi* which ousted jurisdiction over piratical matters that occurred outside the territorial realm of Kenya, was handed down during the same time period as

⁵⁶ *In Re Mohamud Mohamed Dashi supra* note 34 at 36

⁵⁷ *Ibid.* at 39

⁵⁸ L. Leposo 'Kenya Ends Agreement With EU to Prosecute Suspected Somali Pirates' (2010) available at http://articles.cnn.com/2010-10-04/world/kenya.eu.pirates_1_somali-pirates-kenyan-authorities-kenya-s-ministry?_s=PM:WORLD, accessed on 21 November 2012

⁵⁹ M. Sterio *op cit.* note 43

⁶⁰ *Ibid.* at 113

⁶¹ L. Leposo *op cit.* note 58

⁶² M. Sterio *op cit.* note 43

when Kenya announced that it would no longer participate in the piracy programme to prosecute pirates. Despite the fact that both the High Court and government decisions were rescinded thereafter, there still remains the possibility that similar stances may be favoured by other Regional courts where they are dissatisfied with the financial burdens in their exercise of universal jurisdiction, and essentially demand financial assistance from arresting States in order for Kenya to facilitate further piratical prosecutions.

3.3. Arresting States' reluctance to prosecute suspected pirates unless there is a direct national interest

The general *modus operandi* of arresting States is that they operate on a 'catch-and-release' procedure. Despite the fact that universal jurisdiction is conferred to every State by UNCLOS, it appears that arresting States prefer not to prosecute suspected pirates themselves, where there is no direct *nexus* between the piratical attack and that arresting State.⁶³ Therefore, there is one of two possibilities that arresting States generally invoke; firstly, the arresting State releases the suspected pirates without bringing them to trial, or secondly, the arresting State transfers the suspected pirate to be prosecuted in a Regional tribunal.

There have been some successful prosecutions held in arresting States.⁶⁴ However, such prosecutions only occurred in the jurisdiction of the arresting State because of the existence of a national interest in the matter.⁶⁵ The existing challenge in this regard is compounded by the notion that principles of

⁶³ E. Kontorovich 'The Role of International Law: Justice and the Legal Challenge' available at <http://www.counterpiracy.ae/upload/Briefing/Eugene%20Kontorovich-Essay-Eng-2.pdf>, accessed on 22 November 2012, 2

⁶⁴ 'Q&A: What do you do with a captured pirate?' available at <http://www.bbc.co.uk/news/world-africa-11813168>, accessed on 10 December 2012, Some of the arresting States that have adjudicated upon piratical matters include Yemen, France, Netherlands, Denmark and The United States of America

⁶⁵ M. Sterio *op cit.* note 43 at 111

customary international law as well as the provisions of UNCLOS and SUA are discretionary upon signatory States to exercise.⁶⁶ Therefore there are no express obligations outlined in the said international instruments that oblige signatory States to exercise universal jurisdiction.⁶⁷ In addition, there is no absolute obligation upon arresting States to extradite captured suspected pirates to an appropriate forum to be prosecuted.⁶⁸ Therefore the 'catch-and-release' procedure of suspected pirates appears to be a widely accepted practice amongst arresting States.

One of the only recent piratical judgments where an arresting State exercised universal jurisdiction, was held in India in the matter of the *Alondra Rainbow* in 1999.⁶⁹ The *Alondra Rainbow* was attacked and seized off the Indonesian coast in 1999.⁷⁰ The vessel was owned by a Japanese corporation. In 2000, the Indian Navy captured the vessel despite the fact that India had no *nexus* between the incident and national interest. India then proceeded to prosecute and convict the 14 pirates that they had arrested. The pirates were charged in terms of India's domestic legislation relating to armed robbery and attempted murder as opposed to the provisions of customary international law as well as relevant international Conventions, such as UNCLOS. In 2003, the Mumbai Sessions Court accepted the charges and sentenced the pirates to seven years in prison.⁷¹ However, the Mumbai High Court in 2005 overruled this decision due to what they implied to be jurisdictional grounds.⁷² At the time, India had not

⁶⁶ A. Thorp 'Preventing and Prosecuting Piracy at Sea: Legal Issues' (2012) SN/IA/6237 *House of Commons Library*, 13

⁶⁷ *Id.*

⁶⁸ *Ibid.* at 14

⁶⁹ W. Langewiesche *The Outlaw Sea: A World of Freedom, Chaos, and Crime* (2004), 71-80

⁷⁰ J.D. Pepetti 'Building The Global Maritime Security Network: A Multinational Legal Structure To Combat Transnational Threats' (2008) Volume 55 *Naval Law Review* 73, 108

⁷¹ V. Sakhuja 'Maritime Legal Conundrum' (29 June 2005) available at http://www.ipcs.org/article_details.php?articleNo=1778, accessed on 22 November 2012

⁷² *Id.*

incorporated the provisions of UNCLOS into its domestic laws. As such, the Indian Penal Code, which was the law applied in this case, failed to address the crime of piracy.⁷³ In addition, at the time that proceedings had commenced, India was not a signatory to SUA.⁷⁴ This curtailed the courts options significantly in adjudicating the piratical matter.

In light of the above case, it may be argued that although it is commendable that an arresting State has engaged in prosecutorial proceedings exercising universal jurisdiction, it is unfortunate that India's failure to accede and ratify international instruments relating to piracy led to the outcome of the pirates being released in that scenario. Furthermore there appears to be an underlying fear growing amongst arresting nations of exercising universal jurisdiction over piratical matters because they do not want to be burdened with imprisoning foreign nationals in their country. Another implicit fear that is shared amongst arresting nations is that if they were to sentence pirates in their exercise of universal jurisdiction, such offenders may be dubbed as 'stateless people' which would mean that the arresting nation would not be able to deport them back to their country of origin.⁷⁵ In addition, other arresting States have refrained from prosecuting pirates because of the potential additional expenses that the arresting States may incur, which is why these States prefer to transfer such matters to Regional tribunals.⁷⁶

⁷³ J. Abhyankar 'Piracy, Armed Robbery and Terrorism at Sea: A Global and Regional Outlook' in G.G. Ong-Webb (ed.) *Piracy, Maritime Terrorism and Securing the Malacca Straits* (2006), 6

⁷⁴ *Id.*

⁷⁵ S. de Bont *op cit.* note 18 at 5

⁷⁶ A. Thorp *op cit.* note 68 at 15; The United Kingdom in its capacity as an arresting State, prefers to provide financial assistance and transfer suspected pirates to the Regional States in order to be prosecuted.

CHAPTER 4: SOUTH AFRICAN LAWS AND POLICIES

South Africa, as a member State of the United Nations, and in adherence to the recent Resolutions adopted by the UNSC, has incorporated international law into its national laws to criminalize piracy and provide for procedures under which its national forces may pursue suspected pirate vessels. This Chapter explores South Africa's domestic laws and policies that relate to the crime of piracy, and discusses the Republic's position on prosecuting suspected pirates within its jurisdiction. South Africa's piracy regime is provided in the Defence Act (DA),¹ which incorporates the crime of piracy as defined in UNCLOS.² The Republic has also signed the Durban Resolution,³ as well as the DCoC, which are both directed at ensuring a uniform approach to maritime safety in Africa. Apart from the positive steps taken by South Africa on a legislative point of view, it has also engaged in pro-active methods of deterring the crime of piracy on the seas such as its Trilateral Memorandum of Understanding (MOU) with Tanzania and Mozambique,⁴ which details the effective patrolling of the East Coast of Southern African Indian Ocean.

4.1. Defence Act

Chapter 4 of the DA is relevant to the crime of piracy at sea. It provides for 'law enforcement powers of South African National Defence Force at sea.'⁵ The

¹ Defence Act No.42 of 2002

² United Nations Convention on the Law of the Sea [UNCLOS] (10 December 1982), Article 101

³ Au/Mt/Min/Draft/Res. (II): Durban Resolution On Maritime Safety, Maritime Security And Protection Of The Marine Environment In Africa (2009) available at http://www.au.int/pages/sites/default/files/Durban%20Resolution_1.pdf, accessed on 2 December 2012

⁴ K.P. Mashamaite "Minister Sisulu signs *Memorandum of Understanding (MOU)* on Maritime Security Cooperation with Tanzania and Mozambique" 16 February 2012 available at http://www.dod.mil.za/news/news2012/february/mar_sec_coop_tan_moz.htm accessed on 6 May 2012

⁵ Act No. 68 of 1995 *supra* ss21-29

provisions thereof are analysed below.

Section 21(3)(a) of DA identifies that law enforcement operations may not take place outside the territorial realm of South Africa, or within the territorial realm of a foreign State, unless such enforcement occurs on a vessel of the Republic, or in keeping with a law enforcement agreement of co-operation with that foreign State. However, **Section 21(3)(b)** of DA provides an exception to this rule, which permits the Republic to enforce the law against foreign vessels, or persons on board, if the principles of international law are satisfied. From this, it appears that the relevant section takes an adapted view of **Article 100** of UNCLOS,⁶ which limits the scope of where unlawful activities of the sea may occur.

In addition to this, **Section 24** of the DA which defines piracy, firstly provides a replication of **Article 101** of UNCLOS, and thereafter stipulates additional terms that specifically apply to the Republic. The shortcoming of this section is that the definition of piracy is limited to the High Seas or 'any place outside the jurisdiction' of a State.

It is submitted that UNCLOS has not evolved with the trends of modern day piracy, which in turn renders its provisions dealing with piracy outdated. This is largely due to the change in methods undertaken by pirates in attacking 'innocent vessels.' Many piratical attacks do not take place on the High Seas (but occur within territorial zones). UNCLOS also requires that the act of piracy be committed for 'private ends' and that there are 'two ships' involved in the incident,⁷ which are not always evident in such cases. Thus, since the DA approach to piracy is modelled from UNCLOS, it leads to the assumption that the piracy provisions detailed in the aforementioned Act are outdated. However, **Section 24(2)** extends its definition of piracy to include circumstances of mutiny

⁶ UNCLOS *supra* note 2, Article 100 States that all States shall cooperate to the fullest possible extent in the repression of piracy on the High Seas or in any other place outside the jurisdiction of any State.

⁷ UNCLOS *supra* note 2, Article 101

and control of a government ship by the crew of a private ship. This is a significant, yet necessary departure from the UNCLOS definition as **Section 24(2)** appears to adapt to recent and current trends of the commission of piracy.

In addition **Section 24(3)** provides:

‘Any person who commits an act of piracy is guilty of an offence, which may be tried in any court in the Republic designated by the Director of Public Prosecutions and, upon conviction, is liable to a fine or to imprisonment for any period, including life imprisonment.’

On the face of it, the provision is progressive in that it confers jurisdictional power to the domestic courts of South Africa to prosecute pirates. However, the subsection is deficient in that it excludes inchoate pirates from its ambit. In simple terms, this means that if persons were intercepted by naval vessels before they actually committed an act of piracy, such persons would be exempt from prosecution.

Section 25, specifies that the seizure of a pirate vessel must be conducted in keeping with the provisions of **Article 105** and **Article 107** of UNCLOS. In addition, the DA has provided some clarity with regard to interpretative problems that exist in the latter articles of UNCLOS (discussed in Chapter 2). This is evidenced in **Sections 25(2)** and **(3)**, where it identifies a member of the Defence Force as a peace officer when engaging in operations to intervene or seize pirates and furthermore, it explains that once an offender is captured by the Defence Force, the Minister of Foreign Affairs has the discretion to determine how to proceed with the matter. If it is decided that the captured pirates are to be dealt with within the Republic, it is implied that South Africa is in favour of prosecuting the maritime crime, which is a progressive step in deterring piracy at sea.

Section 25(3) is also read with **Section 26(2)**. **Section 26(2)**, stipulates that if it is proved that there are ‘reasonable grounds’⁸ of suspicion evident, then the Defence Force may seize a vessel or arrest a person who is suspected of engaging in criminal activity. As such, ‘reasonable grounds’ is cast in wide terms; thus, reasonable suspicion is left open to the discretion of the Defence Force and the circumstantial factors of each incident.

In addition, **Section 29** (See Annexure ‘C’) of the DA is of particular importance as it outlines the Defence Force’s obligations regarding foreign States. It may be interpreted from this Section that, when South Africa has entered into an agreement with a another sovereign State on the ‘co-operation in law enforcement at sea’, such as an MOU, the Defence Force will be entitled to exercise their law enforcement powers in respect of situations that are in keeping with the terms of the inter-State agreement. However, this is not an unlimited power, as subsection (1) of the relevant Section lists the enforcement measures that may be employed in such situations.

Thus, **Chapter 4** of the DA seems to draw heavily from the Articles of UNCLOS, whilst, at the same time, being supplemented with South Africa’s own domestic enforcement procedures. Although there are several drawbacks in UNCLOS, the DA, as a South African piece of legislation, seems to fill some of the loopholes that are contained in the Convention. Thus the DA is a positive step on South Africa’s part in combating the maritime crime of piracy.

4.2. The Djibouti Code of Conduct and the Memorandum of Understanding

South Africa signed the **Durban Resolution** in 2009 in which the Republic, as a signatory, agreed, in collaboration with other States to: (i) assist in deterring the crime of maritime piracy, especially in the region of Somalia; (ii) promulgate

⁸ UNCLOS *supra* note 2 Article 110

domestic legislation addressing maritime safety and security; (iii) implement the DCoC.⁹

As a result, earlier in 2012, South Africa signed the DCoC, which later led to the conclusion of a Trilateral MOU with Tanzania and Mozambique.¹⁰ The DCoC allows signatories, such as South Africa to investigate, arrest and prosecute acts of piracy. The objective of this agreement is to bring about a co-operative effort in securing territorial waters of each of the signatory States. The MOU obliges each State to collaborate in looking for and interdicting pirates as well as investigating other maritime crimes in the territorial waters.¹¹ The MOU also extends a right to South Africa, Tanzania and Mozambique to patrol, search, arrest, seize and engage in hot pursuit in respect of any maritime crime suspect.¹²

An example of the implementation of the MOU occurred in April 2012, where an anti-piracy operation took place in the Southern Africa Development Community region.¹³ The South African Navy vessel, called the *SAS Drakensberg* was patrolling the Mozambique Channel for a missing yacht.¹⁴ In the interim, a suspected pirate mother ship was seen near the Tanzanian Coast by a French aircraft.¹⁵ The Tanzanian Navy in accordance with the MOU granted the *SAS Drakensberg* the authority to interdict the piratical activity occurring within its territorial waters.¹⁶ Due to a collaborative effort of navies of different

⁹ Durban Resolution *supra* note 3 at 3

¹⁰ K.P. Mashamaite *op cit.* note 4

¹¹ *Id.*

¹² *Id.*

¹³ Ministry Defence and Military Veterans 'The Official Statement, Advisory and Speech by the Ministry of Defence and Military Veterans' (21 April 2012) available at http://www.dod.mil.za/ministry/media_Statements/2012/apr/anti-piracy.htm, accessed on 9 May 2012

¹⁴ *Id.*

¹⁵ *Id.*

nationalities, many of the pirates have been arrested and transferred to Tanzanian authorities to be prosecuted.¹⁷

In 2010, Tanzania updated its domestic Penal Code¹⁸ to include that the crime of piracy may occur on the High Seas.¹⁹ This has led to the EU negotiating a transfer agreement with Tanzania which would allow for arresting States to transfer suspected pirates to Tanzania to be prosecuted and sentenced.²⁰ However, due to the terms of the Trilateral MOU, South Africa was able to transfer the suspected pirates to Tanzania.

It is understood from the provisions of the DA and **Section 10** of The Protection of Constitutional Democracy Against Terrorist and Related Activities Act (POCDATARA)²¹ that when the Defence Force captures pirates, they may be entitled to bring the offenders back to the Republic to face prosecution in accordance with South African law. It is also evident that the MOU between South Africa, Tanzania and Mozambique as well as the assistance of Defence Force is having a positive outcome in safeguarding the sea lanes of the Indian Ocean.²² Thus, South Africa seems to be engaging in efforts not only on par with International standards of combating piracy, but it is also apparent that they are pro-active in its undertaking.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Penal Code (1981) Chapter 16 of The Laws (Revised)

¹⁹ *Ibid.* at Section 6

²⁰ S. Domasa 'Pirate Transfer Agreement' (24 April 2012) available at <http://www.marsecreview.com/2012/04/pirate-transfer-agreement/>, accessed on 2 December 2012

²¹ Protection of Constitutional Democracy Against Terrorist and Related Activities Act No.33 of 2004 (POCDATARA); **Section 10** (Annexure 'D')

²² Ministry Defence and Military Veterans *op cit.* note 13

In addition, the 'Hawks' crime fighting unit recently participated in an anti-piracy training programme.²³ The significance of the Hawks involvement in such an exercise is that when incidents of piracy occur, either in the region around the Republic, or elsewhere around the world, the Hawks may be called upon to investigate the matter. Such investigations would ensure that sufficient evidence is obtained, that links the suspected pirates to the offence, which would assist in avoiding procedural difficulties when the matter goes to trial. By way of illustration, the Hawks in KwaZulu-Natal assisted Interpol by investigating the *Irene SL*, an oil tanker, which had been seized by Somali pirates and subsequently released.²⁴ The *Irene SL* was thereafter anchored within the Republic's territorial waters, where the Hawks investigated the vessel and discovered significant amounts of evidence such as DNA samples to assist in criminal proceedings.²⁵ Furthermore, if South Africa were to exercise jurisdiction over a piratical matter, it would have the advantage of utilizing such a crime fighting unit to ensure that sufficient and adequate evidence is obtained to minimise potential procedural difficulties that may be encountered during a trial.

4.3. South Africa's Position On Prosecuting Suspected Pirates

South Africa has ratified the provisions of UNCLOS in a variety of its domestic legislation. Since the Republic became a signatory State to the DCoC in 2012, it has made headway in deterring the threat of piracy in the region by concluding a trilateral MOU with Tanzania and Mozambique.²⁶ The European Union (EU) has suggested its intention to enter into negotiations with South Africa to

²³ L. Rondganger 'Hawks to Take on Sea Pirates' (July 19 2012) available at <http://www.iol.co.za/news/crime-courts/hawks-to-take-on-sea-pirates-1.1345138#.ULqfHINhBdl>, accessed on 2 December 2012

²⁴ *Id.*

²⁵ *Id.*

²⁶ K.P. Mashamaite *op cit.* note 4

conclude a Transfer Agreement.²⁷ In essence, an EU Transfer Agreement establishes a platform on which the EU's military forces may assist in not only arresting suspected pirates in the region of the contracting State, but also transfer such offenders to an appropriate signatory State to be prosecuted.²⁸

However, the question remains whether South Africa, as an arresting State, would prosecute suspected pirates. South Africa, like every other State, enjoys the discretionary power to exercise universal jurisdiction over piratical matters owing to the principles of customary international law. Jurisdiction, in respect of the criminal offence of piracy, is embodied in **Sections 10 and 15** of POCDATARA.

Section 15 of POCDATARA (See Annexure 'D'), provides for jurisdiction in relation to offences, which includes the crime of piracy (Section 10). **Section 15(1)(a)** provides that a court in the Republic may exercise jurisdiction over an offence if the accused was arrested within the territory of the State, or was on board a South African vessel. Furthermore **subsection (1)(b)** implies that such an offence must have a *nexus* to a national interest, for example, the offence is committed against a citizen of South Africa or against the government itself. In terms of the crime of maritime piracy, it appears that on the face of the latter provision that the Republic has taken a similar stance to that of the United Kingdom, and United States of America.²⁹ Both of these countries have

²⁷ 'European Union Common Security and Defence Policy' (2010) available at http://www.consilium.europa.eu/uedocs/cmsUpload/100201%20Factsheet%20EU%20NAVFOR%20Somalia%20-%20version%2014_EN.pdf, accessed on 23 November 2012; EU Transfer Agreements are negotiated pursuant to the EU's military operation, the EUNAVFOR Somalia – Operation ATALANTA, which was launched in response to the various Resolutions passed by the UNSC calling for urgent cooperation in deterring the crime of maritime piracy

²⁸ *Ibid.* at 2

²⁹ M. Sterio 'Fighting Piracy in Somalia (And Elsewhere): Why More Is Needed' (2009-2010) Volume 33 *Fordham International Journal* 372, 394

preferred to exercise jurisdiction over piracy only if there is a national interest relative to the matter.³⁰

However, **Section 15(1)(c)** of POCDATARA implies that a court in the Republic may further exercise jurisdiction over ‘any specified offence,’ if ‘evidence reveals any other (legal) basis,’ which could be interpreted to include universal jurisdiction. Therefore, the latter would pave the way for South Africa to prosecute suspected pirates without necessarily having a national interest attached to the matter.

In addition, **Section 15(2)** provides for the exercise of jurisdiction over offences committed by foreigners outside the territory of the Republic. **Subsection 2(c)** appears to be relevant to the crime of piracy, in that it applies to persons that have not been extradited to another jurisdiction to be prosecuted. This further emphasises that South Africa retains the discretion to prosecute suspected pirates where there is no *nexus* between the offence and a national interest.

Sections 15(5)-15(9) may be interpreted to mean that where the National Commissioner has received information from a foreign State concerning a suspected/convicted person that is in the Republic, and the offence in question is provided for in POCDATARA, which affords a domestic/foreign court jurisdiction over the matter, the National Commissioner may authorise further investigations. Once these investigations are carried out, and if ‘reasonable grounds’ are evident, the National Commissioner may exercise his discretionary power to either extradite the offender to a foreign jurisdiction, or to commence criminal proceedings as per **Section 40(1)** of the Criminal Procedure Act.³¹ In addition, the National Commissioner must make his decision in writing to the UN Secretary General, who will then forward that decision to the relevant foreign State.

³⁰ *Id.*

³¹ Criminal Procedure Act 1977 (Act No. 51 of 1977)

The above-mentioned provision foster piracy prosecution as it allows South Africa to reserve the right to exercise jurisdiction over a piratical matter. It is also implied that South Africa may, in some instances, choose to exercise universal jurisdiction over a matter instead of transferring suspected/convicted pirates to another jurisdiction. This resembles the discretionary power to establish a *forum non conveniens*. In addition, it is deduced that 'reasonable grounds' would extend to issues such as the proximity of witnesses, and availability of evidence in order to fully assess whether the Republic is a convenient location in which proceedings may commence.

Apart from this, it is evident that the Republic is genuinely concerned about the threat of maritime piracy occurring on the East Coast of Africa, since the Republic and the Transitional Federal Government of Somalia have recently concluded official diplomatic relations with each other.³² It appears that South Africa could assist Somalia in a number of ways, but most significantly, in its law-making. Furthermore South Africa encouraged that

'Somali institutions be strengthened to enable them to play their role in the prosecution of piracy. South Africa would consider rendering assistance in capacity building for Somalis in the fields of justice and correctional services to support this.'³³

Having said that, it remains the responsibility of the international community to not only combat the crime of piracy, but also successfully prosecute suspected pirates. As such, South Africa can be said to be a leading example in its pro-activeness demonstrated by intervening piratical attacks, as well as the incorporation of international instruments dealing with the crime into its domestic laws, and its diplomatic efforts with the TFG of Somalia. There is very little evidence to suggest that the Republic will decline to exercise jurisdiction

³² SASA 'South Africa, Somalia Established Diplomatic Ties' (2012) available at <http://www.somaliassociation.org/news/node/531>, accessed on 23 November 2012

³³ *Id.*

over piratical matters. However, South Africa as an arresting State, may share the same or similar reservations as other arresting States have in respect of the principle of non-refoulement; no direct *nexus* between the piratical attack and a national interest; the exercise of universal jurisdiction, the possibility that upon conviction of a pirate, that pirate attains a 'Stateless' status, which would create further difficulties for the prosecuting State.

CHAPTER 5: RECOMMENDATIONS

Although headway has been made through the *ad hoc* regional tribunals, there is still a need to develop a uniform approach in prosecuting pirates in order to encourage other States to exercise jurisdiction over piratical matters. As explained in Chapter 3, there are several factors that have discouraged arresting States from prosecuting pirates themselves, and as a result, such arresting States have preferred to transfer suspected pirates to the Regional Tribunals to be tried instead. The United Nations Resolutions and the IMO papers provide States with necessary guidance in going about the arrest, prosecution and imprisonment procedures that may be employed.¹ However, the main issue that requires attention is the promulgation of a uniform legal framework which may be adopted by every State.² This Chapter proposes recommendations that may be employed in order to develop a consistent and uniform approach to the prosecution of suspected pirates.

5.1. *Promulgating an International Maritime Piracy Convention*

It is submitted that in order to remedy many of the interpretational challenges that exist in the current UNCLOS piracy provisions,³ an international treaty should be drafted to specifically regulate the crime of maritime piracy. The provisions of **Article 101** of UNCLOS, which defines piracy, has been academically criticised as restrictive and essentially outdated. As such, this is the first aspect that should be revised and modified to relate better to the current trends in the commission of the crime of piracy. It is submitted that a new definition of piracy should be developed to accommodate the evolving

¹ V.P. Nanda 'Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?' (2010-2011) Volume 39 *Denver Journal of International Law and Policy* 177, 203

² *Ibid.*

³ United Nations *Convention on the Law of the Sea* (10 December 1982), Articles 100-107

nature of the crime. Furthermore, Bento suggests that a new definition of piracy should broaden the geographical jurisdiction in which the crime as described in international law can occur, such as in territorial waters.⁴ He further recommends that the inclusion of territorial waters within the ambit of the crime should be 'under a limited set of conditions'⁵ in order to maintain the sovereignty of States. In addition, the 'two-ship' requirement as provided in UNCLOS, should be removed⁶ as it causes confusion in instances where pirates stow away on board a vessel, and later, take control of the 'innocent' ship. It is also advised that the proposed treaty should detail provisions about the procedures States should follow to successfully prosecute suspected pirates.⁷

However, this recommendation is a time-consuming process because of the drafting process and the time taken by States to ratify and incorporate the proposed treaty into their domestic legal system.⁸ Furthermore, currently, there are some States that have not adopted domestic laws effecting the provisions of UNCLOS that regulate the crime of piracy.⁹ Therefore, if a new treaty is drafted, it will not necessarily bring about a short-term change, but a gradual progressive development of a uniform approach to the crime of maritime piracy. The new treaty would, however, be just as onerous upon States as the UNCLOS provisions in that they would be required to revise, amend, and or create domestic laws in keeping with the provisions of such a treaty. Such a proposal would be beneficial in the long-term in successfully prosecuting suspected pirates.

⁴ L. Bento 'Toward an International Law of Piracy *Sui Generis*: How the Dual Nature of Maritime Piracy Enables Piracy to Flourish' (2011) Volume 29 *Berkeley Journal of International Law* 399, 441

⁵ *Id.*

⁶ *Id.*

⁷ *Ibid.* at 442

⁸ D. Chang 'Piracy Laws & The Effective Prosecution of Pirates' (2010) Volume 33 *Boston College International & Comparative Law Review* 273, 286

⁹ *Id.*

5.2. Establishing an International Piracy Court/Tribunal in accordance with a new Piracy Convention

In order to bring about a uniform approach in successfully prosecuting suspected pirates, legal scholars have suggested that an international piracy court should be created. Furthermore, it is proposed that a court of this kind should be 'modelled on the International Criminal Court.'¹⁰

It is submitted that the International Criminal Court, in its current form, is not an appropriate forum to prosecute suspected pirates. By way of illustration, South Africa acceded to and ratified the Rome Statute of the International Criminal Court (Rome Statute),¹¹ which has conferred authority on the country to try offenders of crimes against humanity. The list of offences that may be tried in the South African International Criminal Court (SAICC), are provided in Schedule 1 of the Implementation of The Rome Statute of The International Criminal Court Act.¹² However, the crime of piracy is not included within this list. Therefore the SAICC may not exercise jurisdiction over piratical matters. Although there have been suggestions to include piracy in the ambit of offences of the Rome Statute, it has been rejected by some legal scholars on account of the unfounded connection between the crime of piracy and the principles of the International Criminal Court, 'which mainly aims at international or national armed conflicts.'¹³

Another suggestion that has received some support is to establish an international tribunal as provided for in Chapter VII of the United Nations

¹⁰ N.C. Chwalisz 'Atlantic Memo #16' available at <http://www.atlantic-community.org/app/webroot/files/articlepdf/Memo%2016%20Somalia.pdf>, accessed on 27 November 2012

¹¹ UN General Assembly, 'Rome Statute of the International Criminal Court' (last amended 2010), 17 July 1998

¹² Implementation of The Rome Statute of The International Criminal Court Act 27 of 2002

¹³ A. Ramsey 'Barriers to Prosecution: The Problem of Piracy' (September 2011) available at https://www.cimicweb.org/Documents/CFC%20Anti-Piracy%20Thematic%20Papers/CFC_Anti-Piracy_Report_Prosecution_Aug_2011_FINAL.pdf, 7

Charter.¹⁴ The judicial body of such a tribunal would comprise signatory State representatives.¹⁵ It is suggested that the tribunal should convene in an area that is easily accessible to witnesses of a piratical matter.¹⁶ In keeping with the latter notion, it is recommended that a tribunal should be established in the regions where a number of piratical attacks occur.¹⁷

However, there are a number of arresting States that have rebuffed this idea of an international tribunal, primarily due to the potential costs such States would incur in establishing and maintaining it.¹⁸ A similar reservation is shared in the creation of an international piracy court.¹⁹

5.3. *International Tribunal for the Law of the Sea*

The International Tribunal for the Law of the Sea (ITLOS) is a creature of UNCLOS.²⁰ The purpose of the ITLOS is mainly to adjudicate inter-State civil matters.²¹ However, it has been suggested by legal scholars, that the ITLOS would be 'an ideal forum to convene a piracy trial.'²² The ITLOS may exercise

¹⁴ L. Bento *op cit.* note 4 at 445

¹⁵ *Id.*

¹⁶ *Ibid.* at 446

¹⁷ *Id.*, Potential locations for an international piracy tribunal could include Somalia, Mauritius, the Seychelles, and possibly Malaysia and Singapore

¹⁸ L. Bento *op cit.* note 4 at 443, United Kingdom and the United States of America are some of the nations that oppose the formation of an international piracy court.

¹⁹ *Ibid.* at 446

²⁰ UNCLOS *supra* note 3, Annex VI; The ITLOS is situated in Hamburg, and is comprised of 21 judges who are elected for a renewable nine year term at a meeting of State parties by secret ballot from a list of nominees.

²¹ C. Thedwall 'Choosing The Right Yardarm Establishing An International Court For Piracy' (2009-2010) Volume 41 *Georgetown Journal of International Law* 501, 516

²² *Id.*

jurisdiction over any matter that involves the interpretation or application of the provisions of UNCLOS as per **Article 288**.²³ This provision casts a wide enough ambit to include jurisdiction over piratical matters to the ITLOS.²⁴

Another significant feature of the ITLOS is that it is not necessarily obliged to convene exclusively in Hamburg, in other words, the ITLOS may convene in any appropriate location.²⁵ There are certain factors that would need to be taken into consideration in order to determine whether the proposed location for the trial to commence is indeed appropriate, or convenient.²⁶ A subjective approach may be adopted in considering the factors, which include the accessibility of evidence and the proximity of witnesses.²⁷ Furthermore, this means that the prospective judges would travel to the determined location.²⁸ This kind of forum would constitute a 'special chamber,' which does not require the sitting of all 21 judges.²⁹ Instead, the latter forum would consist of at least three judges depending on the nature of the matter upon it adjudicates.³⁰

²³ UNCLOS *supra* note 3 Article 288 of UNCLOS Article 288 provides: (1) A court or tribunal referred to in article 287 (includes the ITLOS) shall have jurisdiction over any dispute concerning the interpretation or application of this Convention (UNCLOS) which is submitted to it in accordance with this Part. (2) A court or tribunal referred to in Article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

²⁴ B. Pemberton 'The International Tribunal for the Law of the Sea as a High Court of Piracy' (2010) *One Earth Foundation Working Paper* available at <http://oneearthfuture.org/images/imagefiles/ITLOS-%20Beck%20Pemberton.pdf>, accessed on 26 November 2012, 18

²⁵ C. Thedwall *op cit.* note 21 at 517

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ UNCLOS *supra* note 3; *supra* note 20 Annex IV Article 15 states the following: (1) The Tribunal may form such chambers, composed of three or more of its elected members, as it considers necessary for dealing with particular categories of disputes. (2) The Tribunal shall form a chamber for dealing with a particular dispute submitted to it if the parties so request. The composition of such a chamber shall be determined by the Tribunal with the approval of the parties. (3) With a view to the speedy dispatch of business, the Tribunal shall form annually a chamber composed of five of its elected members which may hear and determine disputes by summary procedure. Two alternative members shall be selected for the purpose of replacing members who are unable to participate in a particular proceeding. (4) Disputes shall

The consequence in conferring judicial authority over piratical matters to the ITLOS will essentially facilitate a uniform interpretation and application of the relevant piracy provisions of UNCLOS.³¹ However, presently, the ITLOS does not have the competence to prosecute suspected pirates, but may issue an advisory opinion³² on the matter if it relates to the interpretation of UNCLOS.³³ As such, there are some academic critics who reject the notion of the ITLOS, being, in part, a criminal tribunal, as this would eclipse the main purpose of the ITLOS, which is to adjudicate the interpretational disputes in agreements against the provisions of UNCLOS.³⁴

be heard and determined by the chambers provided for in this article if the parties so request. (5) A judgment given by any of the chambers provided for in this article and in article 14 of this Annex shall be considered as rendered by the Tribunal

³⁰ *Id.*

³¹ UNCLOS *supra* note 3, Articles 101-107; C. Theodwall *op cit.* note 11

³² ITLOS Rule 138 provides that the ITLOS may give an advisory opinion on a legal question if an international agreement related to the purposes of UNCLOS specifically provides for the submission to the ITLOS of a request for such an opinion.

³³ R.P. Kelley 'UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy' (2011) Volume 95, No.6 *Minnesota Law Review* 2285, 2298

³⁴ *Id.*

CHAPTER 6: CONCLUSION

The framework of piracy legislation is contained in the provisions of UNCLOS.¹ However, as discussed in Chapter 2, it appears that the relevant provisions are inadequate to fully address the crime of piracy. It is evident that the provisions need to be coupled with inter-State efforts in order to fully combat the crime. In addition, there is no guidance as to how States may go about prosecuting suspected pirates. There are several ambiguities in interpreting the definition of piracy, the duty to co-operate as well as whether attempted piracy constitutes an offence. The piracy provisions of UNCLOS are as a result, unable to fully address modern day piracy in that the latter does not accommodate the various trends and methods that pirates of today practice. It is imperative that these provisions evolve to accommodate contemporary piracy, in order to afford courts the opportunity to uniformly interpret and apply UNCLOS to any piratical matter brought before them.

In addition, the UNSC Resolutions,² *prima facie* address the urgency in deterring piracy specifically in the region of the Gulf of Aden, but the

¹ *Geneva Convention On The High Seas* (April 29 1958)

² UN Security Council, Security Council Resolution 1816 (2008) [*on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia*], 2 June 2008, S/RES/1816 (2008), available at <http://www.unhcr.org/refworld/docid/48464c622.html>, accessed on 15 October 2012; UN Security Council, Security Council Resolution 1846 (2008) [*on repressing acts of piracy and armed robbery at sea off the coast of Somalia*], 2 December 2008, S/RES/1846 (2008), available at <http://www.unhcr.org/refworld/docid/493e3f852.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1851 (2008) [*on fight against piracy and armed robbery at sea off the coast of Somalia*], 16 December 2008, S/RES/1851 (2008), available at <http://www.unhcr.org/refworld/docid/4952044e2.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1897 (2009) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 30 November 2009, S/RES/1897 (2009), available at <http://www.unhcr.org/refworld/docid/4b18cff1d.html>, accessed on 16 October 2012; UN Security Council, Security Council Resolution 1918 (2010) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 27 April 2010, S/RES/1918 (2010), available at <http://www.unhcr.org/refworld/docid/4bea70cc2.html>, accessed on 17 October 2012; UN Security Council, Security Council Resolution 1950 (2010) [*on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*], 23 November 2010, S/RES/1950(2010), available at <http://www.unhcr.org/refworld/docid/4cf763c92.html>, accessed on 17 October 2012; UN Security Council, Security Council Resolution 2015 (2011) [*on acts of piracy and armed robbery at sea off the*

Resolutions fail to sufficiently provide States with guidance on how to prosecute pirates. Having said that, the effectiveness of the UNSC Resolutions is mutually dependent on the efforts of States in revising, and implementing domestic legislation that will regulate the crime.

SUA,³ whilst expanding on the definition of piracy by excluding the 'two-ship' and 'private ends' requirement, also contains numerous deficiencies in addressing the crime. SUA primarily focuses on the crime of maritime terrorism, but impliedly addresses piracy as the two crimes are very similar. In addition, the provisions of SUA are restrictive in that signatory States may not exercise universal jurisdiction over piracy. This provision is contrary to customary international law principles which confer upon any State authority to exercise universal jurisdiction in order to prosecute suspected pirates. It should be noted that unlike UNCLOS, SUA has not received the status of customary international law, and as such, is only binding on signatory States.

According to the provisions of SUA, in order for a State party to exercise jurisdiction over a piratical matter, it would be required to, amongst other requirements, establish a *nexus* between the piratical attack and a national interest. In addition, SUA does not allow member States to arrest and prosecute nationals of a State that is not party to it. As a result, SUA poses an additional challenge that hinders the successful prosecution of suspected pirates.

The various IMO legal committee papers⁴ have provided some interpretational relief to States who intend updating their domestic laws to facilitate the

coast of Somalia], 24 October 2011, S/RES/2015(2011), available at <http://www.unhcr.org/refworld/docid/4ec4eb3c2.html>, accessed on 17 October 2012

³ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*. (Rome, 10 March 1988)

⁴ LEG 98/8/1 Piracy: Elements Of National Legislation Pursuant To The United Nations Convention On The Law Of The Sea, 18 February 2011; LEG 98/8/3 Piracy: Elements Of National Legislation Pursuant To The United Nations Convention On The Law Of The Sea, 18 February 2011; LEG 98/8/2 Piracy: Establishment of a legislative framework to allow for effective and efficient piracy prosecutions, 18

prosecution of suspected pirates within their jurisdiction. These IMO legal committee papers have been issued only since 2011, and, as a result, it is too early to assess whether they have encouraged more States to review their domestic laws. However, some States have taken the responsibility of supplementing these papers with their own proposals in order to assist other States in moulding a uniform approach towards prosecuting suspected pirates, such as the Ukraine.

In addition, the DCoC⁵ and ReCAAP⁶ are positive instruments that are designed to promote inter-governmental cooperation in order to deter piracy in the Horn of Africa. The DCoC is useful in that it provides measures that may be employed in order to bring about the successful prosecution of suspected pirates in the region. Having said that, the ReCAAP and DCoC are regional instruments which mean they do not account for piracy, as it occurs on a global scale, within their ambit. However, it may be concluded that they are nonetheless progressive and would perhaps form the basis on which other similar agreements would be modelled on in other parts of the world.

Furthermore the efforts of the IMB PRC have paved the way for a pro-active means of deterring the crime of piracy. Whilst such a facility is primarily aimed at assisting vessels in distress by alerting law enforcement vessels in the region to the piratical attack, it is an important component in the greater context of combating piracy. Simply put, arresting vessels may become more proficient and efficient in intervening in more piratical attacks at sea, thus potentially leading to the successful prosecution of the suspected pirates they have detained.

February 2011; LEG 98/8/4 Piracy: Establishment of legislative framework to allow for effective and efficient piracy prosecutions, 25 February 2011

⁵ IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Annex, IMO Council Doc. C102/14 (Apr. 3, 2009), available at <http://www.asil.org/files/DjiboutiCodeofConduct.pdf>, accessed on 18 October 2012

⁶ Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) 2398 United Nations Treaty Series 199 (2005)

The problems with prosecuting suspected pirates are that whilst Regional courts have been tasked with the adjudication of piratical matters, many States have refrained from exercising universal jurisdiction conferred on them *via* customary international law to prosecute suspected pirates. This is primarily due to issues relating to asylum and non-refoulement as well as curbing potential human rights violations. In addition, it is concluded that the majority of arresting States prefer to transfer detained pirates to a Regional court to be tried. Thus, arresting States appear to only favour prosecuting suspected pirates themselves if there is a *nexus* between the act of piracy and a relevant State interest. Furthermore, it is clear that many States have declined to exercise universal jurisdiction over instances of piracy because they do not want to be burdened with the task of imprisoning foreign nationals within their country. In addition, there is also the underlying fear that such foreigners may become 'Stateless', eliminating the possibility of deporting them back to whence they came from.

Having said that, the *ad hoc* tribunals based in Kenya, have for the most part been a revelation in prosecuting suspected pirates, as the high court held⁷ that Kenya did not have jurisdiction over incidents of piracy that did not occur within its territory, but later in 2012,⁸ the decision was reversed. It is unsettling that there is a lack of uniformity in the interpretation of the international provisions of the crime of piracy, but also that, in this particular instance it may be concluded that Kenya refused to continue criminal proceedings against suspected pirates until they received more funds from their financiers (UN and other arresting States).

South Africa is a member State of the United Nations that has ratified and incorporated the piracy provisions of UNCLOS into its domestic legislation. Such developments are reflected in the DA which deals primarily with the procedures to capture suspected pirates. In addition, South Africa has taken

⁷ In Re Mohamud Mohamed Dashi & 8 Others [2009] eKLR

⁸ Attorney General v Mohamud Mohammed Hashi & 8 Others [2012] eKLR

positive steps in deterring the crime of piracy, by signing the Durban Resolution,⁹ which led to its accession to the DCoC, and finally concluding a Tri-lateral MOU with Tanzania and Mozambique to deter piracy in the region. Apart from this, POCDATARA provides for procedures that may be employed by the Republic in the event that the National Commissioner elects to exercise jurisdiction over what may be interpreted to include piratical matters, since it is included as an offence in this Act. However, there are no further developments reflected in its domestic laws or policies that show any intention of undertaking the task of prosecuting suspected pirates. It may be concluded that South Africa has only been classified as an arresting State for too short a period to make a proper assessment as to whether the State will adjudicate piratical matters or not.

Furthermore, it may be concluded that the lack of uniformity in interpreting the piracy provisions of international law in domestic arenas appears to pose a significant challenge to successfully prosecuting suspected pirates. As such, it is recommended that: (i) the United Nations should draft a Convention that specifically regulates the crime of piracy, which would include a broader definition of the crime itself as well as procedures that domestic courts may adopt, to conclude successful prosecutions in this regard. Alternatively, (ii) the United Nations should create an international piracy court or tribunal, which would be afforded the authority to preside over the prosecution of suspected pirates from around the world, or (iii) the mandate of the ITLOS should be extended to include the adjudication of piratical matters.

Finally, in light of the above, it may be concluded that there are several challenges that hinder the successful prosecution of suspected pirates, all of which cannot be remedied in the short-term. Therefore, it is suggested that a starting point to promote the efficient adjudication over the crime of maritime

⁹ Au/Mt/Min/Draft/Res. (II): Durban Resolution On Maritime Safety, Maritime Security And Protection Of The Marine Environment In Africa (2009) available at http://www.au.int/pages/sites/default/files/Durban%20Resolution_1.pdf, accessed on 2 December 2012

piracy is to review and amend the definition of piracy. In addition, the United Nations should provide States with some clarification on the issues such as the principle of non-refoulement and potential human rights violations in the context of piracy as well as address other factors which have discouraged States from exercising universal jurisdiction over piratical matters.

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ANNEXURE 'A'

Article 3 of SUA:

- (1) Any person commits an offence if that person unlawfully and intentionally:
 - (a) Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - (b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - (c) Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - (d) Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - (e) Destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
 - (f) Communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
 - (g) Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f)
- (2) Any person also commits an offence if that person:
 - (a) Attempts to commit any of the offences set forth in paragraph (1); or
 - (b) Abets the commission of any of the offences set forth in paragraph (1) perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
 - (c) Threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph (1), subparagraphs (b), (c) and

ANNEXURE 'A'

(e), if that threat is likely to endanger the safe navigation of the ship in question

Article 6 of SUA:

- (1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:
 - (a) against or on board a ship flying the flag of the State at the time the offence is committed; or
 - (b) in the territory of that State, including its territorial sea; or
 - (c) by a national of that State.
- (2) A State Party may also establish its jurisdiction over any such offence when:
 - (a) it is committed by a stateless person whose habitual residence is in that State; or
 - (b) during its commission a national of that State is seized, threatened, injured or killed; or
 - (c) it is committed in an attempt to compel that State to do or abstain from doing any act.
- (3) Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as "the Secretary-General"). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.
- (4) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not

ANNEXURE 'A'

extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

- (5) This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

ANNEXURE 'B'

Article 3 of the Torture Convention:

(1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Section 29 Defence Act 2002 *Co-operation with foreign states*

- (1) Subject to subsection (2), any officer of the Defence Force serving on a warship or military aircraft of the Defence Force or any ship or aircraft on government service specially authorised, may, in respect of any violation of the law of a foreign state –
- (a) Seize any vessel;
 - (b) Arrest any person on board such vessel;
 - (c) Seize any property on board such vessel;
 - (d) Conduct a hot pursuit operation in relation to such vessel;
 - (e) Escort such vessel to a foreign port;
 - (f) Surrender such vessel, person or property to the authorities of the foreign state contemplated in paragraph (e); and
 - (g) Assist in any of the actions contemplated in paragraphs (a) to (e).

Section 10 of POCDATARA 2004

Offences relating to hijacking a ship or endangering safety of maritime navigation

- 10.** Any person who intentionally—
- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; 15
 - (b) performs any act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; 15
 - (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
 - (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or causes damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; 20
 - (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such acts are likely to endanger the safe navigation of a ship; 25
 - (f) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship; or
 - (g) injures or kills a person, in connection with the commission of any of the acts set forth in paragraphs (a) to (f), 30
- is guilty of an offence relating to hijacking a ship or endangering the safety of maritime navigation.
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Act No. 33, 2004 PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST
TERRORIST AND RELATED ACTIVITIES ACT, 2004

(b) any court in a foreign State may have jurisdiction,
may be present in the Republic, the National Commissioner must cause such measures
to be taken as he or she may deem necessary to investigate the matter.

(6) Where it appears on reasonable grounds from the investigation referred to in
subsection (5) that extradition or criminal proceedings may be instituted against such 5
person, that person may be arrested as contemplated in section 40(1) of the Criminal
Procedure Act, 1977 (Act No. 51 of 1977), in order to ensure his or her presence at such
proceedings.

(7) The National Director must, upon an arrest contemplated in subsection (6),
promptly be notified thereof by the police official effecting such arrest. 10

(8) Upon being notified in terms of subsection (7), the National Director must
promptly notify any foreign State that might have jurisdiction over the offence in
question, either directly or through the Secretary General of the United Nations—

(a) of the fact that the person is in custody;

(b) of the circumstances that justify the person's detention; and 15

(c) whether he or she intends to prosecute the person.

with a view to the surrender of such person to a foreign State for prosecution by that
State, should the National Director decline to prosecute.

(9) The provisions of this section must be exercised subject to the provisions of the
Extradition Act, 1962 (Act No. 67 of 1962). 20