

PIRACY *JURE GENTIUM* IN TERRITORIAL SEAS:  
A PERSPECTIVE FROM THE EAST AFRICAN SEABOARD

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PIRACY *JURE GENTIUM* IN TERRITORIAL SEAS:  
A PERSPECTIVE FROM THE EAST AFRICAN SEABOARD

A THESIS  
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*School of Law and the Unit for Maritime Law and Maritime Studies*

## PRÉCIS

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The brazen acts of Somali pirates against international shipping transiting through the Gulf of Aden and around the Horn of Africa drew global media attention between 2006 and 2012. As a countermeasure, foreign and international naval resources were deployed to the region in an attempt to interdict the perpetrators and prevent further acts, particularly because Somalia possessed no capacity to police the waters adjacent to its coast. States are granted universal jurisdiction over acts of piracy committed on the high seas or exclusive economic zones of coastal states in terms of the United Nations Convention on the Law of the Sea (UNCLOS).

However, the perpetrators often committed similar piratical attacks in the territorial sea or found refuge in the territorial sea after descent from the high seas. The universal jurisdiction conferred by UNCLOS on all states does not apply in the territorial sea, where the coastal state exercise exclusive and sovereign jurisdiction. To circumvent this, the United Nations Security Council passed a series of resolutions authorising foreign naval intervention in the territorial sea. Some piratical acts could fall outside the geographical and temporal limitations of the resolutions and the study accordingly proposes the need for a permanent and binding universal enforcement regime which would extend into territorial seas in specified circumstances. The study considers two approaches to achieve this.

The first approach suggests a modification of the UNCLOS provisions to extend the universal enforcement jurisdiction granted under article 105 into territorial seas. The details and procedure of such modification is set out in the study. However, it will be shown how states are protective of their sovereign rights over their respective territorial sea and their preference to maintain the current UNCLOS regime. Thus attempts to modify UNCLOS would be adversely perceived by states as an erosion of sovereign rights and would be unlikely to be adopted. A contribution of the study is to challenge this perception of states regarding the erosion of their sovereign rights over the territorial sea. The study will reveal through an exegesis and revisit of legal scholarship and juridical doctrine that the notion of absolute and exclusive sovereignty is built upon a hollow historical foundations and there is an evolving contemporary jurisprudence to suggest an erosion of traditional concepts of maritime sovereignty.

The second approach turns to the east African seaboard and reveals from a continental perspective that there is a movement away from these traditional notions of sovereignty in the direction of the facilitation of international and regional cooperation, collaboration, intervention and pooling of resources in respect of maritime security. Against this background the second approach in this study proposes a model which is complementary to the existing UNCLOS regime and has a permanent and wide geographical application. Under this model, the role of the African Union to intervene in member states is highlighted. The proposed model facilitates the exercise of universal enforcement jurisdiction over piratical acts committed in the territorial sea by descent from the high seas or exclusive economic zone. This special jurisdiction is exercised under specified circumstances under the aegis of the African Union and through its institutional framework, particularly the African Standby Force and Continental Early Warning System.

## PROMOTER'S ENDORSEMENT

---

I, the undersigned, as the candidate's promoter, endorse the submission of this thesis for examination in candidacy for the degree of *Doctor of Philosophy*.

PAUL SWANEPOEL

*LL.B (Natal), MA (Hons) (St. Andrews), MSc., Ph.D (Edinburgh)*  
Promoter

The proposal for this thesis was approved by the Faculty of Law Higher Degrees Committee (FHDC) (*quorum*: Professors: Shannon Hoctor, Noël Zaal, Michael Kidd, Ed Couzens, Tanya Woker and Mr. Christopher Schembri) and ethical clearance for this project was granted by the Humanities and Social Sciences Research Ethics Committee under protocol reference number: HSS/2002/016M (Dr. Shenuka Singh: Chair). Rule DR5 of the College of Law and Management Studies Handbook (2016).

## DECLARATION

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I, the undersigned declare in terms of rule DR9(a) of the College Handbook that:

1. The research reported in this thesis, except where otherwise indicated, is my original research.
2. This thesis has not been submitted for any degree or examination at any other university.
3. This thesis does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
4. This thesis does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:
  - 4.1 Their words have been re-written but the general information attributed to them has been referenced
  - 4.2 Where their exact words have been used, then their writing has been placed inside quotation marks, and referenced.
5. This thesis does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the thesis and in the References sections.

VISHAL SURBUN

Ph.D candidate

17 February 2017

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॥ दुर्गम काज जगत के जेते  
सुगम अनुग्रह तुम्हरे तेते ॥<sup>1</sup>

*On a professional level, I wish to thank the following persons:*

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<sup>1</sup> 'The burden of all difficult tasks of the world become possible with your grace' Tulsidas *Hanuman Chalisa* (c1632) at stanza 20.

by my parents. I read them in my childhood and they instilled in me a love of learning and engaged my curiosity at an early age. I wish to preserve their names on these pages in grateful remembrance:

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*Rishikesh, Himalayan province of Uttarakand, India*  
17 February 2017

Corrigenda:  
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**To my parents**  
*sine qua non*

# I

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## IN LIMINE

### I. OPENING REMARKS

*Consider the following scenario:*

A large container vessel departing from Italy is *en route* to her destination in Tanzania. Her journey traverses the Red Sea into the Gulf of Aden and along the Horn of Africa close to the coastline of Somalia. She is underway and has logged a position of 25 nautical miles from the coastline, when the chief mate on the container vessel spots a suspicious skiff approaching at a fast speed. The skiff intercepts the container vessel – firing rocket-propelled grenades at the container ship. Using ladders, the crew of the skiff, who appear to be Somali nationals, are able to board the container vessel and forcibly take command. They alter the course of the vessel and head landward within 10 nautical miles of the Somali coast. The chief mate issues a distress call, which is received by a foreign naval vessel 50 nautical miles from the coast...

This scenario is a generic example of an act of piracy – many of which take place off the coast of Somalia and along the east African seaboard. This scenario is drawn from hundreds of recorded incidents which have occurred in the waters of this region during the relatively short period between 2006 and 2012.<sup>2</sup> The setting of this scenario, namely the waters off the coast of Somalia and the Gulf of Aden, is located along a vital shipping route where the coastal cities of Bosaso and Mogadishu have been confluences of lawlessness and corruption resulting from a weak Transitional Federal Government (TFG) that is attempting to reconstruct the country, which has borne the epithet ‘failed state’ since 1991.

The role of the foreign naval vessel in this scenario is a critical aspect of the research problem for this thesis. The act committed by Somali nationals in this scenario would amount to piracy as defined in article 101 of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>3</sup> This voluminous convention contains a few articles setting out the definition and enforcement regime to combat acts of piracy.<sup>4</sup> In this scenario, article 100

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<sup>2</sup> These incidents are recorded in monthly and annual reports of the International Maritime Organisation and the International Maritime Bureau’s Piracy Reporting Centre. *See* section 1.2 of chapter 2.

<sup>3</sup> United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982. UN Doc. A/CONF. 62/122 (1982). Abbreviated in this thesis as ‘UNCLOS’. *See* section 1.2 of chapter 4.

<sup>4</sup> These articles are annexed to this thesis *et seq.*

of UNCLOS creates a duty to cooperate in the repression of piracy, and, in fulfilling this duty, the naval vessel – under article 105 of UNCLOS – would be able to seize the pirate ship and the ship taken by piracy, arrest the persons, and seize the property on board. Pursuant to this article, the courts of the state of the capturing naval vessel would be able to exercise their domestic law and impose a penalty on the pirates. The article operates in the absence of any nexus between the capturing state and the victims or pirates. It thus provides for the exercise of universal jurisdiction.

Key to the UNCLOS provisions is the geographical restriction of its application. First, article 101 defines piracy as an act committed in a specific juridical realm or zone, described as the high seas (or the Exclusive Economic Zone [EEZ] or a place outside the jurisdiction of any state).<sup>5</sup> Second, article 105 provides for universal enforcement jurisdiction only on the high seas or a place outside the jurisdiction of any state.<sup>6</sup> To create a context for the reader, the chart below sets out the different juridical zones entrenched into customary international law by UNCLOS.

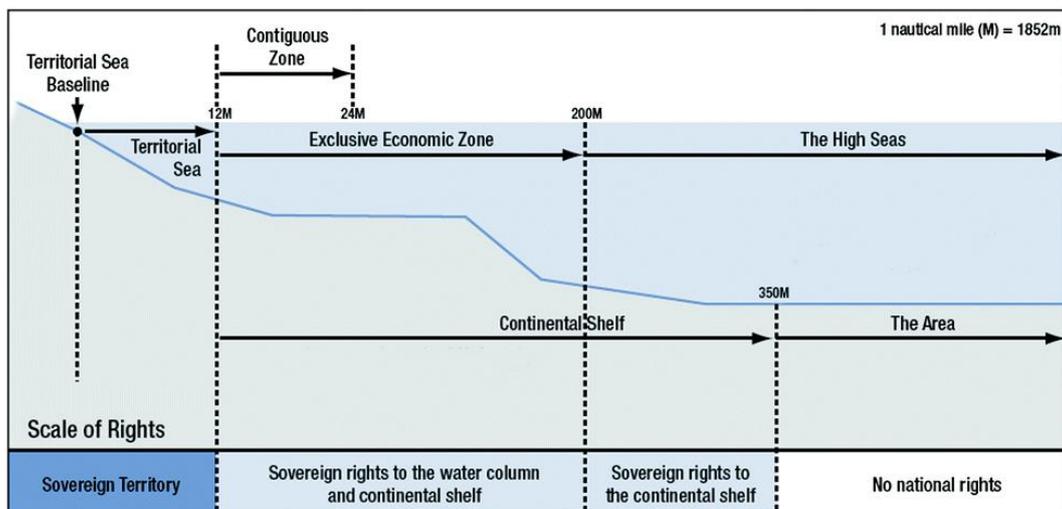


FIGURE 1: Chart depicting the zones formalised in the UNCLOS  
Source: Royal Society of Chemistry<sup>7</sup>

One of the consequences of this geographical limitation<sup>8</sup> in article 105 of UNCLOS is that the exercise of enforcement measures pursuant thereto can only be exercised on the high

<sup>5</sup> See article 101(a)(i) and (ii) of UNCLOS. This is read with article 58(2) of UNCLOS, which includes the Exclusive Economic Zone.

<sup>6</sup> This article is also read with article 58(2) of UNCLOS, which includes the Exclusive Economic Zone.

<sup>7</sup> Available at:

[http://pubs.rsc.org/services/images/RSCpubs.ePlatform.Service.FreeContent.ImageService.svc/ImageService/ArticleImage/2014/NP/c3np70123a/c3np70123a-f2\\_hi-res.gif](http://pubs.rsc.org/services/images/RSCpubs.ePlatform.Service.FreeContent.ImageService.svc/ImageService/ArticleImage/2014/NP/c3np70123a/c3np70123a-f2_hi-res.gif)

<sup>8</sup> For convenience, this geographical limitation is referred to intermittently in this thesis as ‘the high seas limitation’.

seas or the EEZ. In the above scenario, once the pirate skiff and the hijacked container vessel enter the territorial sea of Somalia, the foreign naval vessel is precluded from engaging in any enforcement measure pursuant to UNCLOS. Furthermore, any pursuit by a foreign naval vessel commenced on the high seas must cease once the suspect vessel being pursued enters the territorial waters of its own state or of a third state.<sup>9</sup>

The obligation to pursue and arrest the pirate suspects is then left exclusively to the coastal state, which exercises exclusive jurisdiction within its territorial sea.<sup>10</sup> However, this becomes problematic when the coastal state does not have the capacity to police its territorial sea, as in the case of Somalia.<sup>11</sup> There are no exceptions to this rule under the present international legal framework, in terms of allowing the foreign naval vessel to interdict pirates within the territorial sea of another state.

The fact that the coastal state is left to its own devices to exercise enforcement and adjudicatory jurisdiction exclusively in its territorial sea, has given rise to two lines of jurisprudence for the same *actus reus*. The determining factor as to which law would apply is the *locus delicti*: if the act is committed within the territorial sea of a coastal state, then that coastal state would exercise exclusive jurisdiction and the act would be defined, enforced, and adjudicated according to its municipal law.<sup>12</sup> According to Dickinson, ‘piracy by municipal law...comprehends as much or as little as the law-making authority of the particular state may choose to make it, and pirates by municipal law are offenders only against the law of the state concerned’.<sup>13</sup> In this instance, the act could be labelled as piracy under municipal law, or statutory piracy or any other offence such as armed robbery, assault or hijacking. Where the act is committed on the high seas or in a place outside the jurisdiction of the state, it would be classified as piracy under the law of nations or piracy

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<sup>9</sup> See article 111(3) of UNCLOS.

<sup>10</sup> See Attard and Mallia ‘The High Seas’ in Attard (ed.) *et al* 1 The IMLI Manual of International Maritime Law: The Law of the Sea (2014) at 259 where they note that: ‘the [International Law Commission] believed that where the attack takes place within the territorial sea of a state, the general rule should be applied that it is a matter for the affected state to take the necessary measures for the repression of acts within its territory.’ See also ILC Report to the UNGA concerning the work of its eighth session, par. 1(iv) at 282.

<sup>11</sup> See Doby ‘Piracy Jure Gentium: The Jurisdictional Conflict of the High Seas and Territorial Waters’ 41 *Journal of Maritime Law and Commerce* (2010) 561 at 562; Geiß and Petrig *Piracy and Armed Robbery at Sea* (2011) at 138. See United Nations Security Council Resolution: S.C. Res. 1816, U.N. Doc. S/RES/1816 (2 June 2008), which noted: ‘the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters’. (7<sup>th</sup> preambular paragraph). See Surbun *A Review of Developments in the Nature and Law of Maritime Piracy* Unpublished LL.M mini dissertation (University of KwaZulu-Natal) (2008) at 48.

<sup>12</sup> See Dickinson ‘Is the crime of piracy obsolete?’ 38 *Harvard Law Review* (1925-6) 334 at 339.

<sup>13</sup> *Idem*.

*jure gentium*. The view that concept of piracy *jure gentium* is reflected in UNCLOS is adopted in this thesis.<sup>14</sup> In turn, this Convention has acquired the force of customary international law. According to the law of nations, enforcement jurisdiction is universal, and all states may arrest and punish acts of piracy on the high seas – irrespective of the lack of a jurisdictional nexus.<sup>15</sup>

Given the conundrum created by the exclusivity of coastal state jurisdiction over acts in territorial waters and the circumstances of Somalia where domestic enforcement jurisdiction suffers severe incapacity, it seemed most appropriate for the international community to help strengthen the capacity of the TFG on land.<sup>16</sup> Furthermore, in response to growing incidents of piracy in 2010, there was a focus on presenting options to prosecute and imprison persons responsible for acts of piracy.<sup>17</sup> Statistics in the next chapter show that incidents of piracy off the east African coast surged during 2006 and 2007 and reached unprecedented levels from 2009 to 2011. Scholarship and commentaries on piracy peaked during this period<sup>18</sup> as novel scenarios arose, for example, on the legal implications and regulation of private maritime security companies<sup>19</sup> and prosecution of pirates captured by third party states.<sup>20</sup> This thesis, finalised in 2017, presents a useful temporal frame of reference. The incidents of piracy could be analysed within a 10-year period. In the period of review from 2006 to 2016, clear peaks and troughs can be seen in the statistics plotted on a graph in the next chapter.

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<sup>14</sup> Attard and Mallia (2014) at 259 refer to: ‘the definition of piracy *jure gentium* in the UNCLOS...’

<sup>15</sup> See Bingham ‘Harvard Research in International Law: Draft Convention on Piracy’ 26 *American Journal of International Law* (1932) Supplement 743 at 749.

<sup>16</sup> See ‘Report on the situation with respect to piracy and armed robbery at sea off the coast of Somalia’ UN Doc. S/2016/843 (7 October 2016) at par. 66: ‘The ultimate solution to the problem of piracy off the coast of Somalia lies in a stable and secure future for Somalia. As such, the piracy problem must not be tackled in isolation, but rather as part of a well-coordinated, international support package for the Federal Government of Somalia and the regional states to ensure, among other things, a stable political transition in 2016, a stronger security sector and the creation of economic opportunities, especially for young people and other vulnerable communities, with a key emphasis on national ownership. The United Nations remains committed to supporting the efforts to eliminate the threat of piracy off the coast of Somalia.’

<sup>17</sup> See ‘Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results.’ UN Doc. S/2010/394 (26 July 2010).

<sup>18</sup> A perusal of the bibliography appended to this thesis demonstrates this trend.

<sup>19</sup> See, for example: Pitney and Levin *Private Anti-piracy Navies* (2013).

<sup>20</sup> Scharf *et al Prosecuting Maritime Piracy* (2015).

Enforcement measures based on universal jurisdiction seemed to be stonewalled by the clear division between piracy *jure gentium* and piracy and armed robbery under municipal law.<sup>21</sup> This is a well-established and clear principle of law that conforms to the concept that a state may not exercise its power in any form in the territory of another state.<sup>22</sup> As a result, this rigid distinction did not receive much probative analysis.<sup>23</sup> However, the unique circumstances of Somali piracy necessitated the adoption of a series of resolutions<sup>24</sup> passed by the United Nations Security Council, which *inter alia* allowed states cooperating with the TFG to enter the territorial waters of Somalia and engage in enforcement jurisdiction using the powers vested in UNCLOS. However, these resolutions were narrowly constructed and contain various temporal and geographical restrictions. Their *ad hoc* and *sui generis* nature was emphasised with the disclaimer that they should not be construed and developed into a state practice which would eventually acquire the force of customary international law. Furthermore, at regional level the need for enforcement measures in the territorial seas of neighbouring states was recognised. As a result, the Djibouti Code of Conduct and a trilateral agreement between South Africa, Tanzania and Mozambique were concluded, with these considerations being one of their objectives.<sup>25</sup> These measures clearly demonstrated the need to exercise enforcement jurisdiction in territorial waters in order to effectively suppress piracy. All of the above measures were predicated on consent and cooperation, and were not permanent. Once these measures lapse and the resolutions expire, the existing high seas limitation in UNCLOS would continue to prevail. Thus subsequent isolated incidents like the one described in the above scenario would fall outside the reach of universal jurisdiction and enforcement under UNCLOS.

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<sup>21</sup> Attard and Mallia (2014) at 270 note that: '[a] final maritime crime to be considered is armed robbery against ships. The UNCLOS contemplates universal jurisdiction for the crime of piracy *jure gentium*, a crime of such gravity that it is included among the few classical examples of norms possessing *jus cogens* status. However, as is the case in other contemporary threats to maritime security such a maritime migrant smuggling, this [UNCLOS] fails to provide for similar, equally grave attacks on ships, thus creating a serious jurisdictional *lacuna*.' See Surbun (2008) at 48.

<sup>22</sup> See the *Lotus* case PCIJ series A no 10 at 18; see, also, Oppenheim *International Law* (1926) at §277; Johnson 'Piracy in Modern International Law' 43 *Transactions of the Grotius Society* (1957) 63 at 71; see further for example, ICC IMB Piracy and Armed Robbery against ships, Annual reports, where the IMB notes the restrictive *locus* element in the UNCLOS piracy definition, and provides an alternative definition which includes acts committed in the territorial sea. Each report is prefaced with a standard preambular comment stating that 'the majority of attacks against ships take place within the jurisdictions of States and piracy defined under [UNCLOS] does not address this aspect'.

<sup>23</sup> Other elements of the piracy definition contained in article 101, such as the motive of the pirate, have received extensive academic commentary – particularly since maritime terrorism became a concern.

<sup>24</sup> Discussed in section 2.1 of chapter 5.

<sup>25</sup> See section 2.1 of chapter 5.

## II. APPROACH AND MOTIVATION FOR THE THESIS

As indicated above, for the purposes of this study, the high seas limitation manifests in two ways in the UNCLOS provisions. The first is contained in article 101 which provides *inter alia* the geographical area within which the *actus reus* must be committed. The second is contained in article 105 which relates to the geographical area within which enforcement jurisdiction can be exercised against perpetrators once the *actus reus* has been committed.

### 2.1 Primary aim

In light of the foregoing high seas limitation, the primary aim of this thesis is to challenge the foundation of the distinction between acts of piracy on the high seas and armed robbery in the territorial sea, in order to propose the extension of the enforcement regime provided under UNCLOS to the territorial sea. In order to achieve this, the thesis proposes the application of the concept of piracy *jure genitum* as reflected in UNCLOS, into the realm of the territorial sea through a revision of article 105 (the enforcement provision dealing with piracy in UNCLOS), which removes the high seas limitation from this enforcement provision. This proposal will be made with certain caveats, which continue to recognise the sovereignty of the coastal state over its territorial sea.

The enforcement provision relates to a specific *actus reus* set out in article 101, namely ‘any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft’.<sup>26</sup> Thus, the proposal to extend of the enforcement provision into territorial seas is not envisaged in respect of other acts which may be regarded as criminal by the domestic law of respective coastal states. Although there is no obstacle to the geographical areas in articles 101 and 105 differing in extent, it is submitted that a corresponding amendment of the definition of piracy which removes the high seas limitation in certain restricted circumstances would complement the main proposal to extend the enforcement provision into territorial seas. The thesis will thus also proffer recommendations for the amendment of the definition provision of UNCLOS. The outcomes of these proposals are to create a permanent enforcement regime.

As seen above, the high seas limitation is solidified in the provisions articles 101 and 105 of UNCLOS. It is generally accepted, for example by the United Nations Security Council,

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<sup>26</sup> The *actus reus* is also inclusive of sub-paragraphs (b) and (c) of article 101.

that the suite of provisions contained in UNCLOS pertaining to piracy<sup>27</sup> sets out the extant legal framework applicable to combatting piracy and armed robbery at sea.<sup>28</sup> It can be noted at this stage that the assertion by the Security Council that UNCLOS sets out the framework pertaining to combatting *armed robbery at sea* is, however, debatable because article 101 specifies a specific *actus reus* qualified by the high seas limitation in its provisions, which are then read into articles 100 and 105. The same *actus reus*, when committed within the limits of national jurisdiction is usually termed as armed robbery and regulated by municipal legislation. That being said, the view that these articles reflect a codification of piracy *jure gentium* and presents the position *de lege lata* is buttressed by the widespread recognition of the codification process and the adoption of UNCLOS itself amongst states. Harrison notes that:

‘It is possible to conclude that the process of negotiating the [UNCLOS] had a substantial impact on the customary international law of the sea by forging and crystallising a consensus on the general rules and principles that apply to most uses of the oceans. Although the practice is not in rigorous conformity with the substance of the Convention, there is nevertheless clear evidence that states believe the Convention provides a repository of the prevailing rules and principles.’<sup>29</sup>

However, as will be shown in the course of this thesis,<sup>30</sup> these well-established piracy provisions of UNCLOS in relation to the *locus* leave no room for a flexible interpretation which would allow for the exercise of foreign or universal jurisdiction in the territorial sea. UNCLOS is often seen as a carefully negotiated package deal and changes to the framework thus need to be made with extensive and unanimous consultation.<sup>31</sup> Given the

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<sup>27</sup> The relevant articles have been reproduced in the register of artefacts appended *et seq.*

<sup>28</sup> See United Nations Security Council S/RES/1816 (2008) at preambular par. 4 which provides: ‘Affirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (“the Convention”), sets out the legal framework applicable to combatting piracy and armed robbery, as well as other ocean activities.’

<sup>29</sup> Harrison *Evolution of the law of the sea: developments in law-making in the wake of the 1982 Law of the Sea Convention* PhD thesis (University of Edinburgh) (2007) at 68-69. Rothwell describes UNCLOS as ‘a shining example of international cooperation, diplomacy and the role of international law in the regulation of international affairs and is considered to be one of the most complex and ultimately successful international diplomatic negotiations that took place in the twentieth century.’ Rothwell ‘Oceans Management and the Law of the Sea in the Twenty-First Century’ in Elferink and Rothwell (ed.) *Oceans Management in the 21<sup>st</sup> Century: Institutional Frameworks and Responses* (2004) at 329. See generally Harrison *Making the Law of the Sea: A Study in the Development of International Law* (2011).

<sup>30</sup> See section 5.1 of chapter 3.

<sup>31</sup> The amendment process set out in UNCLOS will be discussed in detail in the final chapter of this thesis. Rothwell comments that ‘the law needs to be flexible and able to change to reflect new

restrictive consequences to universal enforcement jurisdiction due to the high seas limitation demonstrated earlier in this chapter, it will be submitted that an appropriate or logical course of remedial action would be to amend the UNCLOS provisions, as alluded to above. The concluding chapter of this thesis presents specific recommendations on how such amendments could be formulated and integrated into the existing framework. However, it will be immediately recognised that the proposals advanced here could be construed, without further probative analysis by states, as an encroachment on the sovereignty which respective coastal states exercise over their territorial sea. This sacrosanct approach to the concept of state sovereignty over the territorial sea is thus a primary factor that would inhibit any proposal to extend a generic modification of UNCLOS which would extend the ambit of enforcement jurisdiction into the territorial sea. A prominent commentator on the law of the sea, Robin Churchill, expressed this reservation:

‘If piracy could be committed in the territorial sea and was subject to universal enforcement jurisdiction that applies to piracy committed on the high seas or EEZ, it would cause potentially serious conflict with the rights and jurisdiction of the coastal state.’<sup>32</sup>

The sovereign rights of the coastal state over its territorial sea are fully recognised and seen as being sacrosanct. In the case of Somalia, the Security Council – before passing resolutions authorising enforcement jurisdiction in the territorial sea – expressly reaffirmed ‘its respect for the sovereignty, territorial integrity, political independence and unity of Somalia’.<sup>33</sup>

Consequently, any proposals to amend the UNCLOS provisions need to be accompanied by a persuasive analysis or commentary. At the heart of this analysis would be an interrogation of the source and development of the extent and juridical nature of the territorial sea which is distinct from the realm of the high seas. In particular, unpacking the concept of maritime sovereignty is essential. Writing in relation to sovereignty of African states over their territorial waters and the creation of a blue economy and combined exclusive maritime zone, Potgieter and Walker comment that:

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circumstances whether it be increased national sovereignty, greater environmental protection, or enhanced global security.’ Elferink and Rothwell (ed.) (2004) at 350.

<sup>32</sup> Churchill ‘The Piracy provisions of the UN Convention on the Law of the Sea – Fit for Purpose?’ in Koutrakos and Skordas *The Law and Practice of Piracy at Sea* (2015) at 22.

<sup>33</sup> U.N. Doc. S/RES/1816 (2 June 2008).

‘This is where maritime security requires a thorough grounding in debates over African sovereignty, and possible means of transcending or innovating existing concepts, norms and expectations.’<sup>34</sup>

In a similar conceptual approach, a major path of this thesis is an attempt to provide such a grounding of historical debates in both scholarship and juridical doctrine relating to the key concepts of the territorial sea and maritime sovereignty versus the high seas and universal jurisdiction. Although acts of piracy have been committed for centuries and well documented across multiple disciplines, the unique situation engendering a lack of capacity to exercise enforcement jurisdiction in the waters off the coast of east Africa and the political situation in Somalia presents new facets of piracy that did not manifest during the period of the UNCLOS conferences and codification processes of the twentieth century. The jurisprudence pertaining to piracy instead developed for centuries prior to codification through the prism and influence of colonial powers. Capacity to suppress piracy was not a perpetual shortcoming because the naval resources of these various colonial powers ensured the effective suppression of piracy wherever it manifested leading to a dormancy of piracy towards the end of the nineteenth century and well into the first half of the twentieth century.

Also, during this period, the penchant towards sovereignty over the territorial sea was already well-established and it featured in the codification process in the twentieth century. It is therefore not surprising that when the Security Council passed resolutions authorising enforcement jurisdiction within the territorial waters of Somalia, some states were quick to revert and reaffirm the traditional respect for the sovereignty and territorial integrity of coastal states over their respective territorial seas. Given that the particular circumstances and consequences of piracy off the east African seaboard has only manifested over the past decade and subsequently declined significantly in recent years, widespread state practice evidencing changing norms and attitudes in this regard has not developed significantly to enable an analysis here. That fact on its own ought not to dismiss a revisit of the debates alluded to above. Indeed, the thesis will show, particularly from an African continental perspective, that there are growing signs of a trend in the direction of rethinking the concept of maritime sovereignty. This would have a direct impact on the proposal to extend universal enforcement jurisdiction into territorial seas.

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<sup>34</sup> Potgieter and Walker ‘The 2050 African Integrated Maritime Strategy (AIMS): Content and Progress’ in Vreij and Mandrup *Towards Good Order at Sea: African Experiences* (2015) at 110.

Thus to begin this grounding of debates it will be shown in the course of this thesis that the distinction between piracy *jure gentium* and piracy (or armed robbery, robbery, hijacking, theft, assault) as defined under municipal law, is based on two well established assumptions, namely:

- (i) Responsibility for combating piracy<sup>35</sup> in the territorial sea and the exercise of enforcement and adjudicatory jurisdiction, lies with the coastal state,<sup>36</sup> and
- (ii) There is an underlying concept of respect for the sovereignty of the coastal state over its adjacent waters.<sup>37</sup>

These two assumptions are not inconsistent with the extant UNCLOS piracy provisions, however they can be challenged because (i) the first assumption above is based on a presumption of state capacity which in the case of Somalia has been largely ineffective during most of the period under review, and (ii) the second assumption of an absolute deference to the sovereign rights of the coastal state over the territorial waters is based on a hollow historical foundation – with contemporary trends on sovereignty eroding traditional views of sovereignty.

A core approach in the primary aim of this thesis is to challenge the second assumption above that promotes the predominant adherence to absolute and exclusive sovereignty over the realm of the territorial sea which prohibits the reach of enforcement measures through the exercise of universal jurisdiction under UNCLOS. Although the adherence to exclusive sovereignty over the realm of the territorial sea is viewed as a traditional and longstanding right of states, the arguments highlighted below point to a hollow foundation. This challenge is founded on the following grounds, which the contents of this thesis will support:

- 2.1.1 It is submitted that some of the features which ought to underscore the concept of exclusive state sovereignty over the territorial sea are clearly defined boundaries and universally accepted limits of the breadth of the territorial sea. Having defined boundaries or knowledge of the breadth of the territorial sea, states could then facilitate the exercise of *imperium* over the territorial sea. Today, these limits are clearly laid out in the framework of UNCLOS. Under this framework, if a vessel

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<sup>35</sup> As may be defined in the municipal law of the respective coastal state.

<sup>36</sup> See section 2.1 of chapter 4.

<sup>37</sup> See section 2.1 of chapter 4, and Haywood and Spivak *Maritime Piracy* (2012) at 95.

is hijacked 13 nautical miles from the baseline<sup>38</sup> along the coast, such an act would constitute piracy and exposes the pirates to the reach of universal jurisdiction. However, if the same act of hijacking occurs within 11 nautical miles from the baseline along the coast, this would fall within the territorial sea of the coastal state.<sup>39</sup> Based on this, a difference of a few nautical miles can enlist the application of a completely different juridical realm. Thus the *locus* of the piratical act is a crucial factor in determining jurisdiction. However, this is in stark contrast to the position prior to the adoption of UNCLOS because extent of the realm of the territorial seas was not settled in law until the codification in UNCLOS. Prior to adoption of the rigid 12 nautical mile limit of the breadth of the territorial sea specified in the UNCLOS, it will be shown that the realm of the territorial sea was never codified, nor was there unanimity of academic opinion.<sup>40</sup> The thesis surveys the writings of influential commentators and jurists and the varying opinions in order to demonstrate this lack of clarity on the extent of the realm of the territorial sea – which persisted from the Seventeenth Century to well into the mid Twentieth Century during the second United Nations Conference on the Law of the Sea. Accordingly, this is the first factor which points adversely to a long established tradition of exclusive state sovereignty.

2.1.2 Secondly, when states historically exercised enforcement jurisdiction under its respective municipal law to interdict pirates<sup>41</sup> prior to the adoption of the special distribution of jurisdictions created by the UNCLOS regime, they ought to have taken cognisance of the distinction between the high seas and the territorial sea and the extent of the exercise of enforcement jurisdiction over such realms. This distinction ought to have been particularly prominent in light of the developing jurisprudence on the extent of the territorial sea.<sup>42</sup> However, the reference to the ‘high seas’ or ‘open seas’ in cases such as *R v Dawson*,<sup>43</sup> *Serhassan pirates*,<sup>44</sup> the *Magellan pirates*<sup>45</sup> and *People v Lol-lo and Saraw*,<sup>46</sup> concludes in general and superficial terms that the high seas would be synonymous with the entire realm of

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<sup>38</sup> For a description of a baseline, see article 5 of UNCLOS.

<sup>39</sup> Assuming that the coastal state has claimed a territorial sea of that breadth under article 3 of UNCLOS.

<sup>40</sup> Azuni *The maritime law of Europe* (1806) at 196.

<sup>41</sup> See the excursus in section 3.2 below dealing with the nature of piracy *jure gentium* and the interface with municipal law.

<sup>42</sup> Discussed in detail in section 5.3.2 of chapter 5.

<sup>43</sup> See sections 3.1 and 4.4 of chapter 3.

<sup>44</sup> See section 3.2.2 of chapter 3.

<sup>45</sup> *Idem*.

<sup>46</sup> See section 4.4 of chapter 3.

the ocean – up to and including port areas, rivers and creeks. This is the second factor which points adversely to a long established tradition of exclusive state sovereignty.

2.1.3 Concurrent with the debate relating to the extent of the territorial sea, is a further debate on the juridical nature of the territorial sea. Sovereignty is not defined in UNCLOS, however, it has been described as ‘the fullness of rights, only subject to a certain number of limitations determined by public international law’.<sup>47</sup> Oppenheim comments that ‘no unanimity exists as to the nature of the jurisdiction of the littoral States’.<sup>48</sup> The thesis undertakes a further survey to unpack the juridical nature of the territorial sea, which entails an understanding of ownership, control, authority and possession.<sup>49</sup> This entails a revisit of the concept of *dominium* and *imperium* and the distinction between these two concepts, followed by surveying theories on the juridical nature of the territorial sea. These include the property theory, police theory, conservation theory, competence theory and servitude theory, which all point to restrictions and limitations of differing intensity on the reach of the state’s sovereignty over its territorial sea. The right of innocent passage across the territorial sea by foreign ships has often been cited as the quintessential limitation of the rights of the territorial sovereign. By amending the enforcement regime in UNCLOS, the concerns raised about infringing the territorial integrity could be challenged by reference to these historical restrictions of state control, unique to maritime territory.<sup>50</sup> These historical limits of the depth of state sovereignty have not been invoked in any discussion criticising the concern of a lack of a universal enforcement regime in territorial waters.<sup>51</sup>

2.1.4 With the grounds set out in 2.1.1, 2.1.2 and 2.1.3 above, founded primarily in the varying opinions and commentaries of jurists and publicists and a few scattered precedents, the thesis discusses attempts at codification in the Twentieth Century. These commenced with efforts by the International Law Commission (ILC), Harvard University Research in International Law, the Geneva Convention on the High Seas, and the third United Nations Conference on the Law of the Sea. This

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<sup>47</sup> Verzijl *International Law in Historical Perspective* 3 (1970) at 53, cited in Vrancken ‘The Marine Component of the South African Territory’ 127 *South African Law Journal* (2010) 207 at 211. See, also, section 5.3.3 of chapter 3.

<sup>48</sup> Lauterpacht (ed) 1 *International Law: A treatise by L. Oppenheim* (1955) at 487.

<sup>49</sup> See section 5.3.3 of chapter 3.

<sup>50</sup> See Vrancken (2010) at 209.

<sup>51</sup> See, for example, Churchill (2015) at 21-28.

analysis is undertaken to identify any codification attempts that extended foreign jurisdiction into territorial waters, and looked both at the actual text of the instruments and the *travaux préparatoires*. It will be shown that this issue was raised in all the codification efforts, and some codification attempts like the draft convention prepared by the Harvard Research in International Law included enforcement jurisdiction in the form of ‘reverse hot pursuit’ by a foreign naval vessel from the high seas into the territorial waters of the coastal state. It will further be shown that these concerns and draft provisions were simply excluded in later codification attempts, and disappeared completely in the final UNCLOS text. Two explanations for this are offered: first it was recognised at the time of these codification attempts that piracy was primarily a historical curiosity and that very few incidents occurred which demanded international attention, and drafters even doubted whether any provisions pertaining to piracy should be included in the draft conventions. Second, the unique circumstances of Somali piracy were not envisaged during these codification attempts, because the areas where piracy flourished were ultimately quelled by colonial powers with extensive naval capacity to suppress piracy.

2.1.5 Turning towards contemporary grounds, it will be shown that there is a need to consider the notion of sovereignty through the prism of contemporary challenges, and in relation to modern conceptions of the political system. Brus notes how states initially ‘entered the international stage, endowed with full external sovereign powers, without having sufficient capacity for internal self-government’.<sup>52</sup> The case of merchant vessels transiting the east African seaboard, and being exposed to the risk of piracy arising from states without such capacity, shows how such capacity or the lack thereof can have a global effect and a consequence on international trade. Ferreira-Snyman notes that this interdependence of states thus questions the traditional definition of sovereignty as an absolute concept of unlimited freedom and authority.<sup>53</sup> This has also given rise to growing trends towards cooperation amongst states, and this is demonstrated in cooperation agreements at a regional level aimed at combatting piracy.<sup>54</sup> These cooperation agreements authorise the entry of foreign navies who are parties to the agreement, to the territorial waters of other state parties in order to suppress piracy. Other

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<sup>52</sup> Brus ‘Bridging the Gap between State Sovereignty and International Governance: The Authority of Law’ in Kreijen (ed) *State, Sovereignty, and International Governance* (2002) at 8.

<sup>53</sup> Ferreira-Snyman ‘The evolution of State sovereignty: A historical overview’ 12 *Fundamina* (2006) 1 at 17-18.

<sup>54</sup> Chapter 5 will discuss the Djibouti Code of Conduct and the Africa Integrated Maritime Strategy.

regional instruments like the Africa Integrated Maritime Strategy, propose concepts such as a combined EEZ, which can be interpreted as illustrating a growing trend toward interconnectedness and eroding traditional formal boundaries.

## **2.2 Secondary aim**

The primary aim analyses both historical and contemporary jurisprudence to support a modification of the UNCLOS regime. The secondary aim of the thesis is to consider whether a model that provides for universal enforcement jurisdiction could be formulated that would complement the existing UNCLOS regime instead of modifying it. Given that the thesis is contextualised against incidents of piracy along the east African seaboard, it is submitted that such a model could be formulated within the institutional framework of the African Union (AU). Under this framework, the model could achieve its widest geographical application and endure as a permanent feature of the continental response to piracy along its coasts, particularly the east African seaboard.

In traversing in detail the work of the AU and instruments such as the Africa Integrated Maritime Strategy and the Lomé Charter, it will be shown that universal enforcement jurisdiction can be compatible with AU jurisprudence. To practically formulate this model, proposals will be made to integrate foreign naval interdiction in territorial waters of AU member states using the AU principle of intervention enshrined in its Constitutive Act and through AU structures such as the African Standby Force and Continental Early Warning System.

## **2.3 Holistic approach**

This approach of this thesis is thus a synthesis of historical jurisprudence and contemporary practices and views.<sup>55</sup> Much of the prevailing scholarship focuses on a myriad of issues surrounding contemporary Somali piracy – including naval countermeasures,<sup>56</sup> domestic

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<sup>55</sup> Dubner in *The law of international sea piracy* (1980) at 9, commented that '[a]lthough the problems regarding piracy have been transpiring for centuries, the analysis contained in the literature is somewhat dated and illustrates a lack of interest and creative thinking. There are a few articles that discuss the history of piracy with a view to setting forth approaches to current problems'.

<sup>56</sup> See, generally, Geiß and Petrig *Piracy and armed robbery at sea: The legal framework for counter-piracy operations at sea* (2011) at 17-36; Pedone and Hart *Piracy in comparative perspective* (2012) at 201-310.

responses,<sup>57</sup> the interface between maritime piracy and maritime terrorism,<sup>58</sup> and prosecutions and transfer agreements.<sup>59</sup> Similar considerations are also examined in the work of the United Nations.<sup>60</sup> The issue of the *locus* of piracy and the proposal to extend the unique universal jurisdiction provisions into the realm of the territorial sea, have never been closely examined given the rigid notions of sovereignty. This thesis challenges this bedrock of sovereignty in the light of the limitations of the piracy regime in UNCLOS, by synthesising the historical development of the law of the sea, piracy jurisprudence, and the effect of contemporary cooperative agreements. Using the above grounds of argument, the thesis will conclude by providing a practical suggestion to a largely academic debate and ventures to propose amendments to the UNCLOS provisions dealing with piracy and lastly to present alternative complementary proposals for universal enforcement jurisdiction under the aegis of the AU.

### III. PARAMETERS & METHODOLOGY

#### 3.1 Broad parameters

The narrow focus of this thesis to the *locus* of piracy is still shrouded in much diversity of academic opinion, a paucity of judicial precedent on universal jurisdiction,<sup>61</sup> and until the mid Twentieth Century it was not contained in any codification. The few judicial precedents discussed were scattered across various national forums and had differing persuasive value. That said, the survey in this thesis highlights principal authorities and key commentators in order to confirm the grounds of the argument set out above.

Piracy has occurred at many places across the globe. However, the discussion in this thesis is contextualised to the incidence of piracy off the coast of Somalia and the East African seaboard – particularly between 2006 and 2016 when peaks in the incidents of piracy in the region at intervals during this period became evident.<sup>62</sup>

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<sup>57</sup> See, for example, Murdoch ‘Piracy and the UK’ in Koutrakos and Skordas (2015) at 207-224; Rahman ‘The international politics of combating piracy in Southeast Asia’ in Lehr (ed) *Violence at sea: Piracy in the age of global terrorism* (2007) at 183-198.

<sup>58</sup> See, for example, Banloaoi ‘The Abu Sayyaf Group: The threat of Maritime Piracy and Terrorism’ in Lehr (2007) at 121-138.

<sup>59</sup> See, generally, Scharf and Sterio *Prosecuting Maritime Piracy* (2015).

<sup>60</sup> See, for example, ‘Report on the situation with respect to piracy and armed robbery at sea off the coast of Somalia’ UN Doc. S/2016/843 (7 October 2016)

<sup>61</sup> See Rubin *The law of piracy* (1988) at 302.

<sup>62</sup> As at 1 November 2016.

### 3.2 Conceptual parameters: the nature of piracy *jure gentium* and the interface with municipal law: an excursus

As can be seen above, the historical analysis undertaken in this thesis traverses and intersects both international law and municipal law. Conceptually, the nature of piracy within the framework of international law and the various systems of municipal law requires some comment at this stage.

Piracy *jure gentium* has been traditionally viewed through the prism of international criminal law. Schwarzenberger wrote an influential article in 1950 in which he challenged the understanding of the concept of ‘international criminal law’. In general, he contended that ‘[i]t would be unduly optimistic to assume that ‘International Criminal Law’ has now been established unequivocally as a technical term’.<sup>63</sup> He found that there were six traditional meanings of international criminal law. One of these meanings attributes international criminal law as ‘internationally authorised municipal criminal law’.<sup>64</sup> In this particular meaning, piracy *jure gentium* was adduced as ‘evidence *par excellence* of the existence of international criminal law’.<sup>65</sup>

Piracy *jure gentium* is often considered to be reflected or alternatively codified in the UNCLOS piracy provisions<sup>66</sup> and the legislative antecedents of UNCLOS embodied in the work of the Harvard University scholars in 1932 and the International Law Commission in 1956 was seen as an endeavour to codify the international law of piracy.<sup>67</sup> The provisions contained in UNCLOS are, however, not international criminal law provisions, but instead they set out a specific distribution of jurisdictions between states with regard to acts for

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<sup>63</sup> Schwarzenberger ‘The Problem of an International Criminal Law’ 3 *Current Legal Problems* (1950) 263 at 264. See also Erasmus ‘Revisiting Schwazemberger today: The problem of an international criminal law’ 16 *South African Journal of Criminal Justice* (2003) 393.

<sup>64</sup> *Idem* at 268.

<sup>65</sup> *Idem*. In a discussion of the example of piracy *jure gentium* (at 268-269), he submits two principles which have acquired the force of customary international law, namely (i) ‘every State is under an international obligation to suppress piracy within its own territorial jurisdiction’ and (ii) the concept summarised by the term piracy *jure gentium* which means that ‘in the interest of the freedom of the seas, every State is authorised to assume jurisdiction on the high seas over pirate ships. If it does so it may mete out to pirates any condign punishment, including the death penalty. Yet the recognition of acts of piracy as [‘]constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country[’]. The grant to States under international law, of jurisdiction over pirates in an apparent exception to the principle of the freedom of the seas, according to which, in time of peace, States exercise on the high seas only jurisdiction over ships sailing under their own flag’.

<sup>66</sup> See for example: Attard and Mallia (2014), in the course of their survey of the law pertaining to the high seas, refer to the ‘definition of piracy *jure gentium* in the UNCLOS’ (at 259) and ‘[t]he UNCLOS contemplates universal jurisdiction for the crime of piracy *jure gentium*’ (at 270).

<sup>67</sup> These are investigated and analysed at length in chapter four.

which the default distribution of jurisdictions<sup>68</sup> is not adequate.<sup>69</sup> Ascertaining the nature of piracy *jure gentium* outside the provisions of UNCLOS is a challenging and near impossible task. In his seminal, but outdated, monograph on piracy, Rubin traversed the various aspects and elements of piracy from its origins until the 20<sup>th</sup> century in remarkable detail. In drawing his critical analysis to a close, he commented that:

‘[i]t may be concluded that both in current practice and in current theory built upon ancient roots and the evolution of the international and political legal orders, there is no public international law defining “piracy”; that the only legal definitions of “piracy” exist in municipal law and are applicable only in municipal tribunals bound to apply that law; that these examples of municipal law do not represent any universal “law of nations” based on moral principle and right reason exemplified through identical laws of different countries, but rather rest on national policies made law by the constitutional processes of different countries and that such other uses of the word “piracy” as exist in international communication reflect vernacular usages, pejoratives, and perhaps memories of Imperial Rome and Imperial Britain...’<sup>70</sup>.

In other words, he stated more succinctly that:

‘there is no substantive international law defining “piracy” to be enforced by states directly; there is an international law distributing the legal power to apply municipal law to the acts of foreigners. It would seem that if there is any international law relating to “piracy” it is the legal power given to all states to apply their municipal laws to foreigners...’<sup>71</sup>

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<sup>68</sup> See article 92(1) which outlines the principle of flag-state jurisdiction. Attard and Mallia (2014) note the shortcoming of this default framework which is worth noting. They state (at 258) that ‘[i]n the event of flag State inaction, certain vessels may escape jurisdiction entirely unless subsequently putting into the port of an affected State since it is only in a limited set of circumstances where the UNCLOS provides for a role for non-flag State actors, thus allowing other States to share in enforcement, and sometime, legislative jurisdiction’.

<sup>69</sup> These provisions distributing jurisdictions are not unique in the UNCLOS framework. See for example article 109 and 218 of UNCLOS. However, some of these provisions do not set out an effective enforcement mechanism. This enforcement gap is filled in complementary instruments. For example, article 108 [dealing with cooperation in the suppression of illicit traffic in narcotic drugs and psychotropic substances] is complemented by the Convention against Illicit Traffic in Narcotic Drugs and Pycotrophic Substances UN Doc. E/CONF.82/15 (1988) and article 99 [dealing with the prohibition in the transport of slaves] is complemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) 40 *International Legal Materials* 335. By contrast, enforcement jurisdiction over piracy is not covered in a complementary convention.

<sup>70</sup> Rubin *The Law of Piracy* (1988) at 344.

<sup>71</sup> *Idem* at 345.

In light of this, the impact of municipal law is also considered during the course of the thesis. Early jurisprudence from English and American courts have been particularly influential in forging the jurisprudence which came to be described as piracy *jure gentium*. In *The Scotia*<sup>72</sup> where a dispute arose concerning the application of the customary law of the sea in the case of a ship collision, the United States Supreme Court held in 1871 that:

‘[m]any of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of a single state, which were first of limited effect, but which, when generally accepted, became universal obligation.’<sup>73</sup>

Preceding the international institutional and legislative framework created by the United Nations, early admiralty courts applied law that was perceived as largely international in character.<sup>74</sup> Sir Charles Hedges, a judge of the English High Court of Admiralty<sup>75</sup> noted that:

‘[t]he Court of Admiralty is a Court of Justice, and the judge who is sworn to administer it is as much obliged to observe the laws of nations as the Judges of the Courts of Westminster are bound to proceed according to the statutes and the common law.’<sup>76</sup>

Rubin appropriately asserted, however, that ‘there is no international law of “piracy” at all, and it is possible that there never has been any such law except in the autointerpretive projections of some states from time to time seeking either to expand their jurisdiction to safeguard their own trade or establish imperial interests’.<sup>77</sup> In the historical analyses during the course of the thesis, references to and analyses of municipal law highlight these autointerpretive projections and jurisprudence of states, which were assimilated into what is termed as piracy *jure gentium*. In the contemporary analyses by contrast, municipal law is of limited import to the formulation of recommendations to modify the present UNCLOS framework; however, it does offer a useful survey of the reception of the international

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<sup>72</sup> *The Scotia* (1871) 81 US Reports 170.

<sup>73</sup> *Idem*.

<sup>74</sup> Harrison (2007) at 17.

<sup>75</sup> See the discussion of *Rex v Dawson* in section 3.1 of chapter three.

<sup>76</sup> Cited in Columbus *The International Law of the Sea* (1967) at 11. See also Harrison (2007) at 18.

<sup>77</sup> Rubin (1988) at 343.

framework in municipal law and an indication of domestic policy in implementing international obligations.

### 3.3 Methodology

The arguments in this thesis and the authorities in support thereof have been derived exclusively from published documentary sources. Given that there were few cases where pirates were tried pursuant to capture affected by universal jurisdiction, the commentaries of publicists and jurists were influential in the development of the law of the sea and piracy jurisprudence. The thesis draws on a variety of published primary sources, such as international conventions and their *travaux préparatoires*, resolutions by the United Nations Security Council, regional cooperative agreements, domestic legislation and policy documents, foreign judicial precedent, and official reports and statistics by international organisations like the International Maritime Organisation, the International Maritime Bureau and the AU. Publicly accessible archival records were also consulted.

Various secondary sources were relied upon: academic textbooks, books, journal articles, media reports and miscellaneous Internet sources. Where older sources were inaccessible, they were cited through later authoritative secondary sources.

### 3.4 Development of the thesis

This impetus to engage in this study manifested during the proliferation of piratical acts by Somali nationals off the Horn of Africa during 2010. In response thereto, the volume of academic scrutiny reached unprecedented levels. Until this time, the only comprehensive and seminal treatise on the law of piracy was undertaken by Rubin in 1988.<sup>78</sup> During the resurgence of piracy between 2009 and 2011, reports on piratical attacks featured frequently and at some periods on a weekly basis in international and domestic media reports, where there were also encounters that ranged from the bizarre<sup>79</sup> to the sensational.<sup>80</sup>

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<sup>78</sup> Rubin *The Law of Piracy* (1988). To a lesser extent, the work by Dubner *The International Law of Sea Piracy* was published in 1980 and provided a holistic overview.

<sup>79</sup> See Jonze 'Britney Spears' music used by British navy to scare off Somali pirates' *The Guardian* (29 October 2013). Available at: <https://www.theguardian.com/music/2013/oct/29/britney-spears-navy-scare-somali-pirates>.

<sup>80</sup> In 2009, a short paragraph appeared as entry in the annual piracy report issued by the International Maritime Bureau recording an act of piracy committed by Somali nationals on the vessel *Maersk Alabama*. It was reported in various places as the first hijacking of a US flagged vessel in over two hundred years. See for example: <https://www.vbattorneys.com/case-results/maersk-settles-lawsuit-brought-victims-somali-piracy/>. An account of the incident was published by the Master of the vessel, see Phillips *A Captain's Duty* (2010) and subsequently produced as a critically acclaimed

Keeping pace with the rapid and exponential flow of media reports, the convening of conferences and the publication of academic commentaries during this period was a vigorous and persistent task. However, it necessitated a comprehensive and wide-ranging survey of literature and documentary sources<sup>81</sup> undertaken over an extended period of several years in which it became apparent that the high seas limitation and the question of universal enforcement jurisdiction to interdict pirates in territorial seas has never received any close scrutiny. This research contained in this thesis is the first attempt to do so. The historical orientation of aspects of the thesis was accentuated after my attendance as a delegate to a global conference of legal historians and piracy law experts in 2012.<sup>82</sup> My observations and informal discussions with the scholars at the conference made it apparent that the research objectives combined with the historical orientation contained in this thesis have hitherto not received close academic scrutiny.

#### IV. ARCHITECTURE OF THE THESIS

This thesis presents a survey of scholarship and an analysis of legal instruments to support the grounds listed above, and approaches these questions using the following general structure and sequence of chapters:

- 4.1 With the rationale for the study set out in the introductory chapter, chapter two begins with a brief statistical analysis of incidents of piracy globally and especially along Africa's eastern seaboard. The data will demonstrate that incidents occurred within territorial waters and port areas. While the period under review shows a significant decline in incidents of piracy, naval officials and commentators maintain the possibility of resurgence – should naval operations in the region cease.
- 4.2 Chapter three is divided into six parts:

After setting out some introductory remarks in the first part, the second part of the chapter looks at the earliest conception of the pirate as *hostis humani generis*, or

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motion picture: *Captain Phillips* Dir. Paul Greengrass, Star. Tom Hanks, distributed by Columbia Pictures (2013).

<sup>81</sup> In surveying the literature, published academic commentary often overlapped and duplicated the analysis covered elsewhere with only slight nuances. Several published scholarly articles and book chapters that were initially selected for review and comment in the course of this thesis were discarded on this basis.

<sup>82</sup> International conference on Persistent Piracy: Historical Perspectives on Maritime Violence and State Formation [Stockholm, 3-5 May 2012] *Swedish Institute for International Affairs* and *Centre for Maritime Studies* (Stockholm University).

the 'enemy of all mankind'. An analysis of this conception is significant, because, being equated with 'heinousness', it forms one of the jurisprudential frameworks for the exercise of universal jurisdiction. The section considers the evolution of the phrase during several centuries through the works of influential publicists and commentators. In the development and usage of this phrase, the only reference to the *locus* of piratical acts was to the high seas.

The third part of the chapter examines the development of the definition of piracy by revisiting seminal doctrines and cases. Early English jurisprudence is surveyed and is followed by developments in the Nineteenth Century, prior to the codification in the Twentieth Century. Thereafter, American practice and jurisprudence are considered. These two jurisdictions provide a holistic reflection of the jurisprudence of the period.

In the fourth part, the concept of universal jurisdiction is revisited. This is necessary because this is a key feature of the enforcement jurisdiction provisions contained in UNCLOS and it is featured in the earliest juridical treatment of piracy and in discussion of the *hostis humani generis* epithet. The discussion first lays out the traditional grounds for jurisdiction and then proceeds to define the concept of universal jurisdiction. The rationale for exercising universal jurisdiction in the case of piracy was addressed and followed by antecedents of state practice of universal jurisdiction over piracy, as manifested in judicial precedent. The section concludes with an appraisal emphasising the continued relevance of universal jurisdiction to suppress piracy.

The foregoing parts address the developing jurisprudence of piracy. This is then contrasted with developments in the law of the sea relating to the territorial sea in the fifth part of the chapter. The concept of maritime sovereignty is laid out, followed by an exposition of the works of jurists and publicists on the juridical nature and extent of the territorial sea. Under the discussion on the juridical nature, the concepts of *imperium and dominium* are revisited. Various restrictions and limitations to sovereignty are then identified and categorised in a sequence of theories, as to the underlying nature of the territorial sea. The section concludes with discussion of modern conceptions of sovereignty. Part six provides some concluding remarks.

4.3 Chapter four surveys the development of the codification of piracy jurisprudence into an international framework. The extant framework under UNCLOS is set out in the first part of the chapter, followed by comments on its restrictive application. This leads to the discussion on the high seas limitation – which restricts the application of UNCLOS to the high seas.<sup>83</sup>

The second part of the chapter interrogates this limitation in greater detail and considers how developments in the extent of the territorial sea resulted in corresponding consequences to the reach of the high seas. The discussion considers that, in the juridical development of the territorial sea, there was a presumption of state capacity within that realm, and the practical implications of the high seas' limitation are highlighted. This is followed by pointing out academic commentary which dismissed the high seas' limitation as an area of contention that requires revision, and a critique of these views is undertaken – with the conclusion that further scrutiny of the high seas' limitation is warranted. The discussion considers why there was a lack of any progressive development on the high seas' limitation.

The remainder of the chapter is then divided into parts to discuss *ad seriatim* the various attempts to codify the law of piracy. The discussion provides, firstly, an overview of the codification and narrows the focus to specific aspects of the *travaux préparatoires* and the provisions of the instruments drafted which are relevant to the high seas' limitation. The codification attempts discussed are: (i) the League of Nations Codification Conference; (ii) The Harvard University Draft; (iii) the work of the International Law Commission; (iv) the 1958 United Nations Conference on the Law of the Sea; and (v) the United Nations Convention on the Law of the Sea.

4.4 Chapter five offers a detailed treatment of the legal frameworks applicable to the east African seaboard and is divided into five parts. Having set out some introductory remarks in the first part, the second part considers the application of international and regional frameworks. In this part, the effect and limitations of the Security Council resolutions applicable to Somalia are critically analysed and a comprehensive analysis of the Djibouti Code of Conduct as a regional instrument is undertaken. The third and fourth parts set out the municipal framework of regional powers, South Africa and Kenya and examines its reception of the

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<sup>83</sup> This also encompasses the EEZ and places outside the jurisdiction of a state.

international framework and its domestic policy. Part five turns to the continental framework and presents a comprehensive survey of the continental response to maritime security and piracy. Key instruments such as the Africa Integrated Maritime Strategy and the Lomé Charter are unpacked and analysed. This part then turns to assess the proposal to extend universal enforcement jurisdiction into territorial seas and test its compatibility with the developing AU jurisprudence and architecture. Lastly part six is a summative review of the findings of the chapter.

- 4.5 The concluding chapter highlights and consolidates the findings of the previous chapters, in order to support the line of argument proposed in the introduction. Guided by these findings, the chapter then presents a primary recommendation and prognosis to amend the piracy provisions of UNCLOS and a secondary recommendation to facilitate universal enforcement jurisdiction in territorial seas under the aegis of the African Union Standby Force. This recommendation envisages an additional annex to the Lomé Charter to facilitate these joint naval interdiction operations and proposes an additional role for the Continental Early Warning System. The chapter lastly sets out my parting remarks.

The thesis reflects the law as stated in the sources available, as at November 2017. All Internet sources cited were last accessed in November 2017.

## II

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### ACTS OF PIRACY ON THE EAST AFRICAN SEABOARD (2006-2016): A BRIEF STATISTICAL ANALYSIS

#### I. INTRODUCTION

##### 1.1 Prefatory

Before commencing a study on the law of piracy from the perspective of the East African seaboard, an appraisal must be undertaken of the statistics of acts of piracy and armed robbery in this region over the 10-year period from 2006 to 2016. In doing so, this chapter will reveal the prevalence of piracy in general and the *modus operandi* of pirates, and then draw the focus towards Africa's eastern seaboard and highlight the *locus* of the incidents of piracy. The data reveal incidents committed within territorial waters – thereby providing a contextual framework for the analysis in the remaining chapters. These present the argument for a modified extension of the UNCLOS enforcement regime into the realm of territorial waters.

##### 1.2 The East African seaboard and Somali piracy

Murphy has described piracy as a 'low-risk criminal activity that pays well' and '[i]t occurs for one overriding reason: opportunity'.<sup>84</sup> Murphy goes on to list seven further factors that enable piracy to flourish. Briefly they are: legal and jurisdictional weakness; favourable geography; conflict and disorder; under-funded law-enforcement/inadequate security; permissive political environments; cultural acceptability; and the promise of reward.<sup>85</sup> Somalia during the first decade of the 21<sup>st</sup> Century manifested these conditions, and piracy in the waters off its coast flourished to unprecedented levels during 2009-2011. The country is frequently described as the 'archetypical failed state' since the end of the regime of Siyaad Barre on 26 January 1991 – which left the country without an effective

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<sup>84</sup> Murphy *Contemporary Piracy and Maritime Terrorism: The threat to international security* (2007) at 12. Palmer in *The New Pirates: Modern Global piracy from Somalia to the South China Sea* (2014) at 2, commented that 'maritime piracy is a symptom of deep and underlying problems. Piracy arises where governance breaks down and where people are desperate enough to risk their lives in perilous attacks on the high seas, where they are as likely to be the victims of storms and other dangers of the seas, as they are to be captured, injured or killed by those they are attacking.' See Murphy (2007) at 8-12.

<sup>85</sup> Murphy (2007) at 13.

administration for over 20 years,<sup>86</sup> and it continues to be a challenge for the current Transitional Federal Government (TFG).<sup>87</sup>

While an examination of the causes of Somali piracy is not within the ambit of this thesis and has been considered elsewhere,<sup>88</sup> researchers at the Oceans Beyond Piracy (OBF) programme, in their latest report on the state of maritime piracy, noted that:

‘The threat [piracy] poses may be exacerbated by illegal, unregulated, and unreported (IUU) fishing. The presence of foreign trawlers in Somali waters serves as an antagonism to locals, many of whom feel that these trawlers are stripping the waters of resources and threatening livelihoods. IUU fishing and reckless, sometimes violent behaviour on the part of these trawlers creates a narrative that legitimises the actions of pirates in the eyes of the local population.’<sup>89</sup>

Providing an analysis of the accounts of the vessels hijacked is also beyond the scope of this thesis. It was the brazenness of attacks on vessels like the *Sirus Star*, the *Seabourne Spirit* and the *Maersk Alabama*<sup>90</sup> and the human costs,<sup>91</sup> that drew international attention to contemporary piracy. It was also the resultant total economic costs which led to a

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<sup>86</sup> Palmer (2014) at 32. For a detailed account on the history of political development in Somalia, see *idem* at 17-69. See, also, Lehr and Lehmann ‘Somali – Pirates’ New Paradise’ in Lehr (ed) *Violence at sea: Piracy in the age of global terrorism* (2007) at 1-20.

<sup>87</sup> In a report by the Monitoring Group on Somalia and Eritrea, UN Doc S/2011/433 (July 2011) at 16, it was stated that ‘The principal impediments to security and stabilisation in southern Somalia are the Transitional Federal Government’s lack of vision or cohesion, its endemic corruption and its failure to advance the political process...’.

<sup>88</sup> See, for example, Lehr and Lehmann (2007) at 1-20. See, also, Oceans Beyond Piracy ‘The state of maritime piracy 2015’ available at: <http://oceansbeyondpiracy.org/reports/sop2015>.

<sup>89</sup> See Oceans Beyond Piracy ‘The state of maritime piracy 2015’ available at: <http://oceansbeyondpiracy.org/reports/sop2015>. A similar view is held by Murphy (2007) at 31. See, also, Anderson (2014) at 123-127.

<sup>90</sup> For a general narrative of pirate incidents, see, for example: Cawthorne *Pirates of the 21<sup>st</sup> Century* (2009); Burnett *Dangerous Waters: Modern day piracy and terror on the high seas* (2002); Langewiesche *The Outlaw Sea* (2004); and Philips *A Captain’s Duty* (2010). For more academic account, see Lehr (2007) and also the individual accounts of incidents appended to the ICC IMB piracy reports.

<sup>91</sup> For example, in the ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2012) at 20, it was stated that ‘470 seafarers have been taken hostage, 10 kidnapped, three injured and eight killed’ during the year under review.

reaction from the global community.<sup>92</sup> Researchers at the OBF programme estimated the economic cost<sup>93</sup> of piracy, and the results are tabulated below:

Year	2010	2011	2012	2013	2014	2015
Costs	\$6 billion	\$6.6 billion	\$5.7 billion	\$3 billion	\$2.3 billion	\$1,3 billion

TABLE 1: Total economic cost of piracy: Indian Ocean Region  
Source: Oceans Beyond Piracy<sup>94</sup>

What is useful to consider at this stage, is the ‘business model’ or *modus operandi* of pirate activity in the region under review. The International Maritime Bureau (IMB) reports that ‘[t]he Somali pirates used hijacked ocean going fishing vessels and dhows as mother vessels to conduct piracy operations. Skiffs are launched from those hijacked vessels which quickly intercept and attack innocent vessels resulting in some being successfully hijacked’.<sup>95</sup> The IMB also reports that ‘[t]he pirates fire automatic weapons and Rocket Propelled Grenades (RPG) at merchant vessels in an attempt to board and hijack them. Once the attack is successful and the vessel hijacked, they would sail the vessel towards the Somali coast and thereafter demand a ransom for the release of the vessel and crew’.<sup>96</sup> Researchers at the OBF programme also observed the business model of Somali pirates, and found that:

‘Somali piracy is unique among piracy business models worldwide because of the level of community support that Somali pirates have enjoyed in the past and the ability to hold crews and their vessels for months or even years in “safe havens” just off the coast during ransom negotiations.’<sup>97</sup>

<sup>92</sup> Anderson (2014) at 4-5 notes quite aptly: ‘everything in our world is interconnected; the fact that giant oil tankers can be regularly attacked while carrying the crude oil on which our economies are so clearly dependent is not something that we can view in isolation, and that the failed economies of Africa and Asia sit astride key lines of communication and control raw materials that are in increasingly short supply.’

<sup>93</sup> The economic cost constitutes the following: (i) government and civil-society costs: naval operations, ransoms and associated payments, prosecutions and imprisonment, counter-piracy organisations; (ii) industry-employed vessel-protection measures: armed guards, security equipment, increased speed, rerouting; and (iii) other industry costs: insurance and labour. See Oceans Beyond Piracy ‘The State of Maritime Piracy 2014: Executive Summary’, available at: <http://oceansbeyondpiracy.org/sites/default/files/attachments/SoP2014ExecutiveSummary.pdf> .

<sup>94</sup> Oceans Beyond Piracy ‘The state of maritime piracy 2015’ Available at: <http://oceansbeyondpiracy.org/reports/sop2015>.

<sup>95</sup> ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2012) at 20.

<sup>96</sup> ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2011) at 22.

<sup>97</sup>Oceans Beyond Piracy ‘The state of maritime piracy 2015’ Available at: <http://oceansbeyondpiracy.org/reports/sop2015>.

This analysis of the business model is particularly important for the ensuing analysis of the anti-piracy enforcement regime under UNCLOS. While the statistics show a higher percentage of incidents being committed on the high seas, the hijacked vessels and hostages are brought within the coast of Somalia – in the territorial sea of that state, outside the jurisdiction of the UNCLOS enforcement regime. Naval pursuits of suspected pirate vessels or hijacked vessels on the high seas would need to engage in a ‘reverse hot pursuit’ into the territorial waters of Somalia, in order to effectively suppress the incidents.

For the purposes of this thesis, the area described as the East African seaboard encompasses the African coastline from Somalia on the horn of Africa and the Gulf of Aden, down towards the Mozambique Channel, South Africa and the Western Indian Ocean islands adjacent thereto. This ‘high risk’ region is depicted in the chart below:



FIGURE 1: Chart depicting the high-risk region along Africa’s eastern seaboard  
 Source: Oceans Beyond Piracy<sup>98</sup>

## II. ENUMERATING INCIDENTS OF PIRACY AND ARMED ROBBERY

To evaluate the incidence of piracy, recourse must be made to an appropriate source of statistical information. Detailed records are published by two organisations and are accessible to the general public. The first source is the International Maritime Organisation (IMO). Since 1982, the IMO has issued incident reports in order ‘to provide an overall view

<sup>98</sup> ‘Joint war risk committee revises Indian Ocean listed area’ *Oceans Beyond Piracy Report* (2016), available at: <http://oceansbeyondpiracy.org/publications/joint-war-risk-committee-revises-indian-ocean-listed-area>.

of the global threat posed by piracy and armed robbery against ships'.<sup>99</sup> Data and information supplied by IMO member states and other international and regional organisations are collated in the reports.<sup>100</sup> The second source is the International Maritime Bureau (IMB), which is a specialised division of the International Chamber of Commerce (ICC). The IMB is described as 'a non-profit making organisation, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice'.<sup>101</sup> The website of the IMB notes that:

'One of the IMB's principal areas of expertise is in the suppression of piracy. Concerned at the alarming growth in the phenomenon, this led to the creation of the IMB Piracy Reporting Centre in 1992. The Centre is based in Kuala Lumpur, Malaysia. It maintains a round-the-clock watch on the world's shipping lanes, reporting pirate attacks to local law enforcement and issuing warnings about piracy hotspots to shipping.'<sup>102</sup>

Murphy points out that although the IMB neither conducts nor tracks subsequent investigations of incidents, the Piracy Reporting Centre has become the 'internationally recognised collection point for piracy reports and statistics'.<sup>103</sup> The reports issued by the IMO and the IMB are the primary statistical sources used in the foregoing analysis. While these statistics provide a useful and central repository source for the purposes of this thesis, it is worth mentioning some of the reservations that Murphy presents in relation to the accuracy of the reports. He contends that '[i]t is widely suspected that under-reporting hides the full extent of the piracy problem'.<sup>104</sup> He furnishes several reasons for such under-reporting: for example: (i) 'states and ports, wary of being seen as having a piracy problem, fail to record or report incidents'; (ii) 'sometimes the witnesses are dead'; (iii) 'in cases involving kidnappings in particular, the victims are intimidated into silence'.<sup>105</sup> He goes on to provide the perspective of shipping companies who under-report incidents because: (i) they want to 'avoid damaging their reputations'; (ii) 'to prevent crew demands for additional pay for sailing into or through pirate-prone areas'; and (iii) to avoid the expense

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<sup>99</sup> See, generally:

<http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Pages/Default.aspx>. This website contains monthly incident reports and annual reports since 2008.

<sup>100</sup> *Idem*.

<sup>101</sup> See, generally: <https://icc-ccs.org/icc/imb>.

<sup>102</sup> *Idem*.

<sup>103</sup> Murphy (2007) at 21. It would appear that it is voluntary for ship owners and ship masters to report incidents, and the gathering of data for these reports is dependent on such reporting (*idem* at 23).

<sup>104</sup> *Idem* at 23.

<sup>105</sup> *Idem*.

incurred by ships' delay during an investigation'.<sup>106</sup> Accordingly, he concludes that it is widely suspected that such under-reporting, for the reasons stated, hides the full extent of the piracy problem.<sup>107</sup> With these reservations on hand, and turning now to the information contained in the various reports of the IMO and IMB, the first item to observe is the account of global incidents, as it appears in the graph below prepared by the IMO:

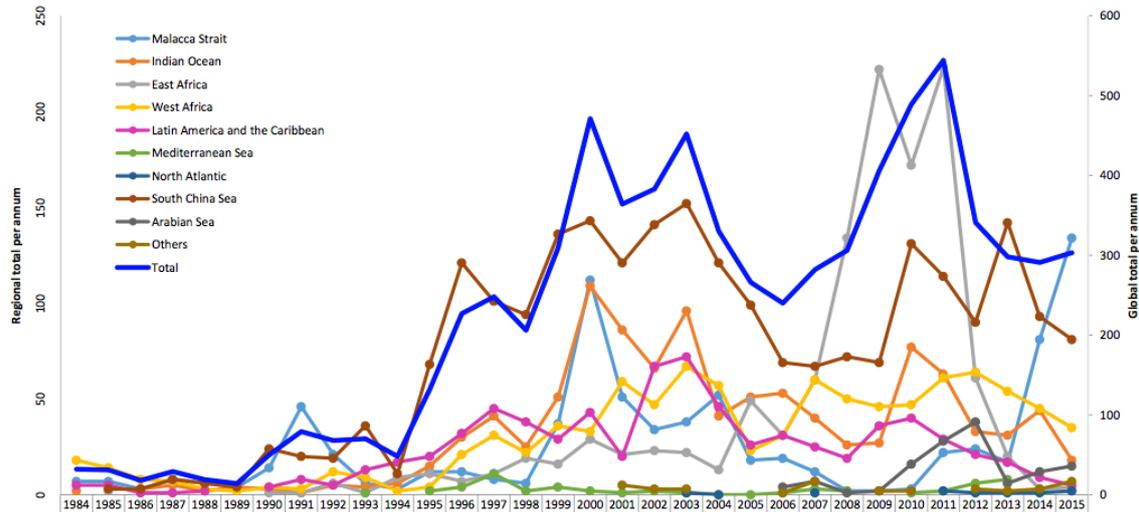


FIGURE 2: Global Incidents of Piracy and armed robbery  
Source: International Maritime Organisation<sup>108</sup>

This graph records incidents which have occurred at both regional and global levels since records were first kept in 1984. It is patent from the graph that incidents of piracy off East Africa between 2009 and 2015 peaked exponentially, and then reduced dramatically from 2012 to the present. To gain a more accurate estimate of the extent of global piracy, the statistics in the IMB annual reports over the decade under review are compiled into the following table:

2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016 <sup>109</sup>
239	263	293	410	445	439	297	264	245	246	98

TABLE 2: Global Incidents of piracy and armed robbery  
Source: Compiled using ICC: International Maritime Bureau: Annual Piracy Reports: 2006 to Third Quarter of 2016<sup>110</sup>

<sup>106</sup> *Idem.*

<sup>107</sup> *Idem.* For a more detailed discussion see Lombardo 'Underreporting of crimes at sea: Reasons, consequences and potential solutions' *Oceans Beyond Piracy Discussion Paper* (November 2014).

<sup>108</sup> MSC.4/Circ 232/Annexure 4 (Annual Report: 2015).

<sup>109</sup> This statistic represents the third quarterly report. An annual report for 2016 was not released at the time of submission of this thesis.

<sup>110</sup> The reports are accessible at: <https://icc-ccs.org/icc/imb>.

The IMB reports also provide statistics per region, and the areas constituting the eastern African seaboard are extrapolated in the following table:

<i>Region</i>	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016 <sup>111</sup>
Somalia	10	31	19	80	139	160	49	7	3	0	0
Kenya	0	4	2	1	0	1	1	1	0	2	2
Tanzania	9	11	14	5	1	0	2	1	1	0	0
Mozambique	0	3	2	0	0	0	2	2	1	1	0
South Africa	0	0	0	0	0	0	0	0	0	0	1 <sup>112</sup>
TOTAL	19	49	37	86	140	161	54	11	5	3	3

TABLE 3: Incidents of piracy and armed robbery on Africa’s eastern seaboard  
Source: ICC: Compiled from: International Maritime Bureau: Annual Piracy Reports: 2006 to Third Quarter of 2016<sup>113</sup>

The regional reports show that incidents on the East African seaboard peaked between 2009 and 2011, and thus contributed significantly to the global surge in incidents during the same period. The statistics are, however, presented in very broad geographic terms. For example, the statistics for Kenya do not reveal whether the incidents occurred in Kenyan territorial waters or the high seas adjacent to Kenya. Each of the IMB reports contain a standard preamble to the report, stating that ‘the majority of attacks against ships take place within the jurisdictions of States and piracy as defined under [UNCLOS] does not address this aspect.’<sup>114</sup> Accordingly, the IMB defines ‘Piracy and Armed Robbery’ in the following terms:

‘An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.’<sup>115</sup>

This definition thus removes the *locus* element of the UNCLOS definition of piracy – thereby accommodating ‘actual or attempted attacks whether the ship is berthed, at anchor or at sea...’.<sup>116</sup> For the purposes of the research objectives of this thesis, some indication needs to be given as to whether incidents demonstrating the *actus reus* elements of piracy as defined in UNCLOS, occur in territorial waters. The annual reports prepared by the IMO

<sup>111</sup> This statistic represents the third quarterly report. An annual report for 2016 was not released at the time of submission of this thesis.

<sup>112</sup> A narration of this lone incident will be provided in the discussion in Chapter 5 *et seq.*

<sup>113</sup> The reports are accessible at: <https://icc-ccs.org/icc/imb>.

<sup>114</sup> *Idem.*

<sup>115</sup> *Idem.*

<sup>116</sup> *Idem.*

offer some assistance in this regard – where incidents are divided according to location. The results of these reports over the decade under review, and for the area in the vicinity of the East African seaboard, can be seen from the table below:

	East Africa			Indian Ocean		
	<i>High Seas</i>	<i>Territorial</i>	<i>Port Area</i>	<i>High Seas</i>	<i>Territorial</i>	<i>Port Area</i>
2008	117	11	6	1	12	13
2009	306	22	3	0	20	10
2010	168	2	2	50	4	23
2011	209	10	4	42	11	10
2012	42	11	8	7	6	20
2013	13	4	3	1	5	25
2014	1	1	1	5	17	22
2015	1	0	4	0	4	14

TABLE 4: Comparison of the *locus* of acts of piracy and armed robbery [actual and attempted acts]

Source: Compiled from: International Maritime Organisation: Annual Reports on Acts of piracy and armed robbery against ships: 2008-2015<sup>117</sup>

When compared to the IMB statistics, however, the data are aggregated over a much broader area. For example, the East African seaboard can be scrutinised in greater analysis by countries like South Africa in IMB reports, whereas the IMO data in the above table record statistics for ‘East Africa’ and the ‘Indian Ocean’.<sup>118</sup> With respect to the data in the table above, areas within the jurisdiction of individual states are divided into territorial seas and ‘port areas’. There is no definition of a port area, and a ship at berth could juridically be within the internal waters of a state and a ship at anchor within the vicinity of the port could juridically be in the territorial waters of a state. Accordingly, the data presented above for territorial seas and port areas could ambulate.

Importantly, however, from the data it can be concluded that incidents of a similar *actus reus* of piracy on the high seas also occur in territorial waters,<sup>119</sup> and roughly seem to follow the peaks and troughs of piratical incidents in the region under review, and over the same period of time. Trends from a global perspective during the period under review are

<sup>117</sup> See ‘Reports on Acts of Piracy and Armed Robbery against Ships’ Annual Reports issued by the IMO: MSC.4/Circ. 133 (19 March 2009); MSC.4/Circ. 152 (29 March 2010); MSC.4/Circ. 169 (1 April 2010); MSC.4/Circ. 180 (1 March 2012); MSC.4/Circ. 193 (2 April 2013); MSC.4/Circ. 208 (1 March 2014); MSC.4/Circ. 219/Rev.1 (28 April 2015); MSC.4/Circ. 232/Annex. Accessible at: <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Pages/Default.aspx>.

<sup>118</sup> See, also, Murphy (2007) at 22.

<sup>119</sup> See, also, ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2011) at 22, where it is reported that ‘pirates are also attacking vessels *close to the coast* of Tanzania, Kenya, Somalia and Yemen’ (my emphasis).

difficult to derive: the IMO reported in 2011 that 60% of attacks took place on the high seas;<sup>120</sup> in 2012: 37% of incidents occurred on the high seas, 19% in territorial waters and 44% in port areas;<sup>121</sup> in 2013: 60% of incidents occurred in port areas;<sup>122</sup> and in 2014: 40% of incidents occurred in territorial waters.<sup>123</sup>

From an industry perspective, the distinction of *locus* is immaterial, as can be seen in a statement by the Chief Security Officer of BIMCO in 2016:

‘Over the past 15 years we have continually seen ships physically pirated – the ship taken from the master – cargo regularly stolen and often crew held to ransom – and the incident dismissed as a local robbery event. Ship owners and their representative organisations have been at great pains to point out that the levels of violence threatened or actuated against seafarers is no different, whether armed robbery or piracy.’<sup>124</sup>

It is also evident from all the data presented above that the record high of 160 incidents of piracy off Somalia alone in 2011, has been reduced dramatically to 0 incidents in 2015 and none were reported, to date, during 2016.<sup>125</sup> This has been, to some measure, due to the intervention of naval forces operating in that area – deployed in counter piracy missions – as the IMB annual reports observe:

‘This reduction in reported incidents is attributed to increased/active military action on suspected skiffs, military land based anti piracy operations, preventative measures used by merchant vessels and employment of Privately Contracted Armed Security Personnel.’<sup>126</sup>

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<sup>120</sup> Reports on Acts of Piracy and Armed Robbery against Ships’ Annual Report: MSC.4/Circ. 180 (1 March 2012) at par. 7.

<sup>121</sup> Reports on Acts of Piracy and Armed Robbery against Ships’ Annual Report: MSC.4/Circ. 193 (2 April 2013) at par. 9.

<sup>122</sup> Reports on Acts of Piracy and Armed Robbery against Ships’ Annual Report: MSC.4/Circ. 208 (1 March 2014) at par. 10.

<sup>123</sup> Reports on Acts of Piracy and Armed Robbery against Ships’ Annual Report: MSC.4/Circ. 219/Rev 1 (28 April 2015) at par. 10.

<sup>124</sup> Noakes ‘A view on piracy and armed robbery in 2016’, available at: <http://oceansbeyondpiracy.org/reports/sop2015>.

<sup>125</sup> In the ‘Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia’ UN Doc S/2016/843 (7 October 2016), it was reported, at par. 3, that ‘[m]ore than three years have passed since Somali pirates successfully hijacked and held a large commercial vessel for ransom. As at August 2016, no seafarers from large commercial vessels were being held hostage by Somali pirates. Those developments reflect the trend of an overall decline in piracy off the coast of Somalia’.

<sup>126</sup> ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2012) at 20. *See*, also, ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2013) at 20.

It was also reported that ‘[t]he overall figures for Somali piracy could have been a lot higher if it were not for the continued efforts of international Naval forces patrolling and responding to the threat. In the last quarter of 2011 alone, the navies have disrupted at least 20 Pirate Action Groups before they became a threat to commercial fleets.’<sup>127</sup> Researchers at the OBF program commented that the Somali pirates’ ability to utilise safe havens along the coast for keeping hostages has ‘degraded over the years, because of a more vigorous international naval presence and shifts in support on the ground in Somalia’.<sup>128</sup>

Given that the data presented above have demonstrated a clear decline in incidents, much to the relief of the global shipping industry, commentators have emphasised that this does not equate to permanent eradication of piracy in the region. Various perspectives on this point have been noted: A fisherman is quoted as saying ‘I’m sure they will re-organize themselves if the international navies leave.’<sup>129</sup> A Puntland Counter-Piracy Minister, Abdallah Jama Saleh, stated: ‘[the pirates] are not dead, but dormant now, so they will come definitely ... straight away, no question about it [as soon as the warships leave]’.<sup>130</sup> In 2012, at the start of the decline in incidents, the IMB observed that ‘[t]he continued presence of the navies is vital to ensuring that Somali piracy remains low. This progress could easily be reversed if naval vessels were withdrawn from the area’.<sup>131</sup> In mid 2016, despite only one incident being recorded for the first half of the year and in keeping with the downward trend of incidents, the IMB cautioned that ‘[t]he IMB PRC believes that a single successful hijacking of a merchant vessel, will rekindle the Somali pirates’ passion to resume its piracy efforts’.<sup>132</sup> In bringing this chapter to a close, it would also be apt to quote two naval officers mentioned in the IMB Reports. First, Commodore Bekkering, erstwhile NATO Commander of the Dutch Navy, said:

‘I am convinced, if the navy ships would disappear, the piracy model would still be intact. Yes, they don’t deploy that much to sea now but the leadership of the piracy is still there and if they hold their breath for a little while and

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<sup>127</sup> ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2011) at 24.

<sup>128</sup> Oceans Beyond Piracy ‘The state of maritime piracy 2015’, available at: <http://oceansbeyondpiracy.org/reports/sop2015>.

<sup>129</sup> Cited in: ‘The State of Maritime Piracy: 2015’ Report prepared by the Oceans Beyond Piracy project, available at: <http://oceansbeyondpiracy.org/reports/sop2015>.

<sup>130</sup> *Idem*.

<sup>131</sup> ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2012) at 24.

<sup>132</sup> ICC IMB Piracy and Armed Robbery Against Ships, Report for the period 1 January to 30 June 2016, at 16.

nations take their navies back, I am pretty sure that the business model is still intact.’<sup>133</sup>

Second, Rear Admiral Bernhard Teuteberg of the South African Navy, which deployed naval assets to patrol the waters off Mozambique and Tanzania, commented that:

‘We can never give up; we can never leave the Mozambique channel. We can never leave the area off Somalia because if we leave a vacuum, piracy will return.’<sup>134</sup>

### III. CONCLUDING REMARKS

In the decade under review, the data presented in this chapter have shown the volatility in recorded incidents of piracy and armed robbery over the broader East African seaboard. Midway through this decade, the data revealed unprecedented levels of incidents and the decade ended with almost no incidents. It was shown that naval interdictions were a significant contributing factor leading to the decline of incidents by the end of the period. It is submitted that such records should continue to be monitored and analysed over a longer period of time, in order to establish reliable and well-considered trends in incidents. The IMB has drawn attention in its reports to the fact that it would be prudent to monitor the situation. Indeed, as navies begin to withdraw at the end of the period under review, it remains to be seen whether piracy, being an opportunistic crime, will resurface.

The chapter considered the business model or *modus operandi* of Somali pirates and suggested that their activities traverse the different juridical realms of the ocean in the course of the act. The data also reveal incidents occurring in territorial waters, which would be out of the reach of the universal enforcement jurisdiction under UNCLOS. This factor thus presents a rationale in the forgoing legal analysis of the enforcement regime.

In the next chapter, the legal analysis commences with a critical revisit of the historical foundations of piracy law.

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<sup>133</sup> ICC IMB Piracy and Armed Robbery Against Ships, Annual Report (2012) at 35.

<sup>134</sup> *Idem*.

# III

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## HISTORICAL FOUNDATIONS OF PIRACY LAW: A CRITICAL REVISIT

### I. INTRODUCTION

#### 1.1 Prefatory

Having set out the context to the research problem in the preceding chapter through a statistical analysis of the incidents of piracy on the East African seaboard, this chapter will commence analysis of the regulatory framework that defines piracy and sets out enforcement measures. It entails understanding the interface between international law and municipal law. In order to present proposals for the revision of the current regulatory framework, an understanding of the jurisprudence and doctrines that led to the establishment of the current regulatory framework is a necessary exercise. Using historical analysis of judicial precedent and the opinions and publications of commentators and jurists, this chapter aims to address the contention advanced in chapter 1, which refutes the foundations of the notion of the absolute nature of sovereignty over the territorial sea, and which precludes the universal jurisdiction applicable on the high seas to engage in enforcement measures. The findings of this chapter will point towards concepts and provisions that were discarded codification attempts during the Twentieth Century and which refer to the rationale in early case law that is instructive in understanding the extent and juridical nature of the territorial sea.

The present state of research on the history of piracy itself constitutes a vast body of scholarship, and a researcher can probe numerous accounts of historians in ancient, medieval and modern literature in pursuit of the subject. In the ancient world, piracy law was preserved in Justinian's *Digesta*, the *Institutiones* of Gaius and Justinian, and in the works of Marcus Tulli Cicero.<sup>135</sup> The latest research on this period can be found in the comprehensive works of Tarwacka<sup>136</sup> and de Souza.<sup>137</sup> The literature into more recent periods of piracy can be found, for example, in the popular classic *A General History of the Robberies and Murders of the most notorious pyrates*<sup>138</sup> and in Gosse<sup>139</sup> and

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<sup>135</sup> See *De officiis* and speeches *In Verrem*.

<sup>136</sup> Tarwacka *Romans and Pirates: Legal Perspective* (2009).

<sup>137</sup> de Souza *Piracy in the Graeco-Roman World* (1999).

<sup>138</sup> Johnson *A General History of the Robberies and Murders of the most notorious Pyrates* (1724).

<sup>139</sup> Gosse *The History of Piracy* (1932).

Konstam.<sup>140</sup> The groundbreaking work by Rubin<sup>141</sup> is the quintessential and most frequently cited modern authority on the law of piracy and will be frequently referred to in this chapter.<sup>142</sup> With this comprehensive source of literature at hand, this chapter makes no attempt to traverse extensively the historical foundations of piracy, and to do so is irrelevant to would not serve the purpose of the present research problem.

## 1.2 Flow of the chapter

The remainder of this chapter consists of four distinct parts. Part two of this chapter considers one of the earliest and frequently used terms to describe pirates: namely *hostis humani generis*. The section surveys the varying rationales behind the term and its use. The third part begins to provide an account of seminal judgments and doctrine upon which the early jurisprudence defining piracy was based. This is followed by a survey of the jurisprudence and practice as it developed during peak periods of imperial British rule, and when cases of piracy peaked in the United States in the Nineteenth Century. The discussion draws generally on how piracy was conceived and defined. Attention will be drawn to specific aspects of the early cases and academic scholarship that dealt with the *locus* of piracy. Next, part four will consider the concept of universal jurisdiction, which is the basis of the enforcement regime to suppress piracy on the high seas under UNCLOS. This section will also offer a critique on the continued relevance of exercising this form of jurisdiction. The final part of the chapter examines the *locus* of piracy by considering the juridical developments in the nature and extent of the territorial sea, and concludes with a discussion of contemporary conceptions of sovereignty.

## II. THE PIRATE AS *HOSTIS HUMANI GENERIS*: THE ILLEGITIMATE ENEMY

The phrase *hostis humani generis* or ‘enemies of all humankind’ is a phrase frequently used to describe pirates. It has been reasoned that because pirates indiscriminately attack ships on the high seas, they therefore wage war on all countries.<sup>143</sup> Accordingly, any country can

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<sup>140</sup> Konstam *Piracy: the complete history* (2008).

<sup>141</sup> Rubin *The Law of Piracy* (1988). Rubin comprehensively revisits primary sources and therefore does not exclusively build on the works of previous writers. This approach allows a fresh and critical appraisal of these sources.

<sup>142</sup> For a more comprehensive review of published piracy reporting and scholarship, see Menefee and Mejia ‘A “rutter for piracy” in 2012’ *WMU Journal of Maritime Affairs* (2012) 11 at 1-13. This chapter significantly expands on an article published by the present researcher, with a view to its adoption in this thesis: Surbun ‘The developing jurisprudence to combat modern maritime piracy: A crime of the high seas?’ *Comparative and International Law Journal of Southern Africa* (2010) 43 at 1-22.

<sup>143</sup> Goodwin ‘Universal Jurisdiction and the Pirate: Time for an Old Couple to Part’ 39 *Vanderbilt Journal of Transnational Law* (2006) 973 at 989.

capture and punish a pirate,<sup>144</sup> regardless of any nexus with the offence and in the absence of any link provided by other grounds of prescriptive jurisdiction recognised by international law.<sup>145</sup> This forms one of the conceptual bases for the exercise of universal jurisdiction discussed later in this chapter. Therefore, an elucidation of the *hostis* phrase as a doctrine is a useful exercise here. Goodwin comments that because the *hostis* phrase is Latin, it instantly suggests that it is a phrase of ancient origin<sup>146</sup>. He submits that the Romans did not use the phrase *hostis humani generis*. However, it may be a shortening of a phrase used by a statesman and orator of the classical age of Rome – Cicero – who claimed that pirates were the ‘common enemies of all communities’ (*sed communis hostis omnium*).<sup>147</sup>

## 2.1 Roman views

In his treatise *On Obligations*, Cicero discusses the various types of moral obligations and classifies them to various degrees. Outside the closest bonds of the home and family, there are duties to the city-state as citizens and lastly at the end of the threshold are the final set of duties which hold by virtue of the “immense fellowship of the human species” (*immense societate humani generis*).<sup>148</sup> Heller-Roazen, in his analysis of the works of Cicero, comments that in this context, ‘even individuals of other peoples who show a clear and forceful animosity toward the home and fatherland may belong to the orbit of responsibility’.<sup>149</sup> He notes that Cicero asserted that even such enemies may demand a rightful treatment, such as certain duties being respected in battle and protection being afforded to those who lay down their arms.<sup>150</sup> Heller-Roazen then discusses Cicero’s seminal concept: that there are those that fall *outside* the borders of this collectivity, who ‘while capable of speech and reason, may not be said to unite in any lawful community; people who, while committing acts that are wrong may not be defined as criminals; people, who while often foreign and aggressive, may not be accorded any of the many rights of enemies’.<sup>151</sup> This is the realm of the pirate, who cannot be counted among the foreign opponents of war, as he is not included in the suite of lawful enemies.<sup>152</sup> This is therefore

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<sup>144</sup> *Idem*. See, also, Blackstone 4 *Commentaries on the Laws of England* (1765) at 71.

<sup>145</sup> Garrod ‘Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law’ 25 *Diplomacy and Statecraft* (2014) at 195.

<sup>146</sup> Goodwin (2006) at 989.

<sup>147</sup> Marcus Tulli Ciceronis, *De Officiis* III at 107, cited in Goodwin (2006) at 991. The phrase only appears much later, when first cited around 1634: See Rubin (1988) at 83.

<sup>148</sup> Heller-Roazen *The Enemy of All: Piracy and the Law of Nations* (2009) at 14-15.

<sup>149</sup> *Idem*.

<sup>150</sup> *Idem*.

<sup>151</sup> *Idem* at 16.

<sup>152</sup> *Idem*.

a realm in which duties no longer hold and nothing ought to be owed to the pirate.<sup>153</sup> Heller-Roazen's analysis of Cicero reveals that in dealing with a pirate, one becomes a pirate oneself, because one must act exactly as he does: faithlessly, without any pledged word, nor any oath.<sup>154</sup>

Lastly, Heller-Roazen offers a critique of this conception, in that Cicero is not clear on how one could identify an unlawful antagonist, i.e. 'who is a speaking, acting human being who must, for reasons of moral and legal principle, be excluded from the common domain of the obligation that unites the many members of the species?'<sup>155</sup> He argues that the common enemy of all, despite hostility, foreignness, and utter unreliability, remains in fact and by right a member of the 'fellowship of human species'.<sup>156</sup> Rubin, however, finds that although Cicero is the most commonly cited authority on the Roman conception of piracy, the passages cited above relate to a work on moral duties and are not considered legal opinion.<sup>157</sup> He concludes that:

[T]he fundamental Greek and Roman conception of "piracy" distinguished between robbers, who were criminals at Roman Law, and communities called "piratical" which were political societies of the Eastern Mediterranean, pursuing an economic and political course which accepted the legitimacy of seizing goods and persons of strangers without the religious and formal ceremonies the Romans felt were legally and religiously necessary to begin a war. Nonetheless, the Romans treated them as capable of going to "war" – indeed as in a permanent state of "war" with all people except those with whom they had concluded an alliance.<sup>158</sup>

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<sup>153</sup> *Idem* at 17.

<sup>154</sup> *Idem* at 20. In Book 3 of *De Officiis*, Cicero writes: 'if an agreement is made with pirates in return for your life, and you do not pay the price, there is no deceit, not even if you swore to do so and did not. For a pirate is not included in the number of lawful enemies, but is the common enemy of all. With him, there ought not to be any pledged word nor any oath mutually binding'. [*cited in Heller-Roazen (2009) at 16*]. This notion is followed centuries later when Molly, in his treatise *De Jure Maritimo et Navali* (1769), states that 'By the civil law a ransom promised to a Pirate, if not complied with, creates no wrong; and the reason given is, for that Law of Arms is not communicated to such, neither are they capable of enjoying that privilege which lawful enemies may challenge in the Caption of another.' (Ch 4, at 80 VII).

<sup>155</sup> Heller-Roazen (2009) at 19.

<sup>156</sup> *Idem*.

<sup>157</sup> Rubin (1988) at 10.

<sup>158</sup> *Idem* at 12.

Indeed, in the phrase, the word *hostis* itself means an enemy in the sense of a wartime foe<sup>159</sup> and its application to pirates stemmed from the theory that a nation's vessels could attack pirates as if they were military enemies, even without a declaration of war or formal hostilities.<sup>160</sup> To the Romans, pirates were therefore seen as more than just those who plundered Roman ships, but rather communities that did not follow the rules of war because they did not go through the formalities of war before attacking.<sup>161</sup>

## 2.2 Seventeenth to Nineteenth Century views

The *hostis* phrase survived and was used by the writers of the Seventeenth and Eighteenth Centuries during the 'golden age' of piracy, but was applied differently. Rubin finds that the *hostis* phrase shifted from referring to raiders with a substantial political organisation in an implied 'perpetual war' with their neighbours, to common robbers in English common law.<sup>162</sup> In other words, Goodwin comments that the word 'pirate' and the *hostis* phrase were later used to describe outlaws – something that neither had ever been used to describe before.<sup>163</sup> Rubin further comments that this phrase that survived its original concept and was later applied to the new concept without thought as to the real meaning of the word *hostis* in Latin and its legal consequences in public international law,<sup>164</sup> was done in a desire to heap contempt on such raiders or common robbers – that they were labeled pirates and *hostis humani generis* by writers of the Seventeenth Century.<sup>165</sup>

### 2.2.1 Alberico Gentili

The first of these subsequent writers meriting analysis here is Alberico Gentili (1552-1608) whose 1612 treatise *De Jure Belli Libri Tres* refers directly to Cicero and states: 'pirates are the common enemies of all mankind and therefore Cicero says that the laws of war cannot apply to them'.<sup>166</sup> Unlike the Romans who viewed pirates as being in a perpetual state of war, without any conformity to the established traditions of war, Gentili was the first to argue that the label *pirate* carries with it a meaning of outlawry and that what pirates do is forbidden by international law.<sup>167</sup> He states in his treatise that: 'a state of war cannot

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<sup>159</sup> Kontorovich 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' 45 *Harvard International Law Journal* (2004) 183 at 234.

<sup>160</sup> *Idem* at 232.

<sup>161</sup> Goodwin (2009) at 978. The Romans used the term *praedones* to refer to criminals and *pirata* to refer to those who warred with their neighbours with a substantial degree of political organisation and economic hold.

<sup>162</sup> Rubin (1988) at 84.

<sup>163</sup> Goodwin (2006) at 993.

<sup>164</sup> Rubin (1988) at 84.

<sup>165</sup> *Idem*.

<sup>166</sup> Rolfe (trans) *De Jure Belli Libri Tres* by Alberico Gentili 1933(2) at 22.

<sup>167</sup> Rubin (1988) at 20.

exist with pirates and robbers'.<sup>168</sup> He argues that 'the enemy are those who have officially declared war upon us, or upon who we have officially declared war; all others are brigands or pirates'.<sup>169</sup> This is qualified by his assertion that 'war on both sides must be public and official and there must be *sovereigns* on both sides to direct the war' (emphasis mine).<sup>170</sup> Therefore, Gentili concludes that a state of war can only exist between sovereigns as they are supreme and they alone merit the title of public, while all others are inferior and are rated as private individuals.<sup>171</sup>

Gentili then provides two arguments to support his above assertions: First, the pirate does not fall within the definition of an enemy (*hostes*), as they 'have not through their misconduct emancipated themselves from jurisdiction. One who is a subject does not by rebellion free himself from subjection to the law ... and no one improves his legal status by transgression'.<sup>172</sup> In other words, Goodwin remarks that even though they may act as pirates, individuals are still citizens of their state of citizenship, and do not free themselves from the law of their country through piracy.<sup>173</sup> Second, because that law is derived from the law of nations, malefactors do not enjoy the privileges of a law to which they are foes.<sup>174</sup> He draws this argument from a proposition that the law, which is nothing but an agreement and a compact, could not extend to those who have withdrawn from the agreement and broken the treaty of the human race.<sup>175</sup>

This is distinguished from his criteria for an enemy who 'has a state, a senate, a treasury, united and harmonious citizens and some basis for a treaty for peace, should matters so arise'.<sup>176</sup> He argues further that 'pirates may follow the customs of war, and not those of brigands ... yet they do not wage war'.<sup>177</sup> The consequence of all of this is that because they are everyone's enemies, and who violate all laws resulting in no laws remaining in force,<sup>178</sup> one can interpret Gentili as saying that states can do with pirates as they wish.<sup>179</sup> In the closing paragraphs of his chapter on why brigands do not wage war, Gentili remarks:

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<sup>168</sup> Rolfe (1932) at 22.

<sup>169</sup> Rolfe (1932) at 15.

<sup>170</sup> *Idem.*

<sup>171</sup> *Idem.* Note his comment that 'private individuals ... are never confronted with the necessity if resorting to the arbitrament of Mars, since they can obtain their legal rights before their superior's tribunal' (*Idem* at 20, *see*, also, Heller-Roazen (2009) at 106.

<sup>172</sup> Rolfe (2009) at 22.

<sup>173</sup> Goodwin (2006) at 991.

<sup>174</sup> Rolfe (1932) at 22.

<sup>175</sup> *Idem.*

<sup>176</sup> Rolfe (1932) at 25.

<sup>177</sup> *Idem.*

<sup>178</sup> Rolfe (1932) at 24.

<sup>179</sup> Goodwin (2006) at 991.

‘For the word *hostes*, ‘enemy’, while it implies equality, like the word ‘war’, since names are general and include several varieties, is sometimes extended to those who are not equal, namely, to pirates ... nevertheless it cannot confer the rights due to enemies, properly so called, and the privileges of regular warfare.’<sup>180</sup>

An interpretation of Gentili’s writings quoted above raises the following question: If no laws apply to pirates and states could do with them as they please, what is the basis then for the contention that the actions of the pirate do not emancipate them from the jurisdiction (and therefore the law) of their own state? While the above statements support a traditional model,<sup>181</sup> Gentili’s treatise then takes a novel direction – namely that in war there must also be the ‘assumption of a public cause’.<sup>182</sup> Rubin, who has written of Gentili, concludes that the license of an established sovereign is key to his thinking.<sup>183</sup> He summarises the effect of Gentili’s writings on the evolution of the meaning of a pirate:

“‘[P]iracy’ was not a matter of permanent war with communities pursuing violent tax collections at sea or basing part of their economy on booty seized from their neighbours. ‘Piracy’ to Gentili was apparently any taking of foreign life or property *not authorized by a sovereign*, synonymous with brigandage or robbery on land, i.e. that his conception of the criminal law implications of the words *pradones* and *latrones* or *latrunculi* in Roman law, which he does not analyse, applied equally to ‘pirates’ without analysis.’<sup>184</sup>

Rubin also considers the significant impact of this position of Gentili, which he says might be considered the birth of positivism as an operating theory of international law.<sup>185</sup> He argues that this creates an enormous power<sup>186</sup> placed in the hands of sovereigns, because ‘all takings were in some sense “criminal” unless authorized by a person whose legal power

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<sup>180</sup> Rolfe (1932) at 25.

<sup>181</sup> Heller-Roazen (2009) at 107.

<sup>182</sup> *Idem* (*adeptio publicae caussae*).

<sup>183</sup> Rubin (1988) at 20. This licence refers and dates back to medieval times where Rubin states that ‘in an effort to avoid bringing about a state of war between princes that letters of marque and reprisal [re-taking] were issued to private persons authorizing them to recapture from foreigners goods that had been wrongfully taken by those foreigners’. (*Idem* at 21-22).

<sup>184</sup> *Idem*. See the original translated text: Rolfe (1932) at 26, for an example illustrating this summation by Rubin. See, also, Heller-Roazen (2009) at 108.

<sup>185</sup> *Idem* at 58.

<sup>186</sup> This power can be described more fully as a power of “recognition or non-recognition” to classify belligerent behaviour as “piracy”. See *Idem* at 25.

to issue such an authorization were acknowledged, no degree of political organization or goal could make a “rebel” into a lawful combatant or require the application of the laws of war to the struggle against the rebel army.<sup>187</sup>

### 2.2.2 *Hugo Grotius*

The most influential writer of the period, Hugo Grotius (1583-1645), disagreed with Gentili’s emphasis on the power of an established sovereign through non-recognition to place an active political community within the legal classification of the pirate.<sup>188</sup> In other words, he adopted a more naturalistic approach and opposed the juridical distinction between the lawful and unlawful combatant based solely on a sovereign licence.<sup>189</sup> He calls for a more objective classification that does not focus on recognition or the derivation of authority from some acknowledged prince, but through a determination of the character of the opponent with reference to the nature of the association to which they belong.<sup>190</sup> This is a factual enquiry of the label, which attaches only to those who are banded together for wrongdoing – but does not include societies formed for other reasons, even if also committing illegal acts.<sup>191</sup>

### 2.2.3 *Edward Coke*

Another contemporary of Gentili was Sir Edward Coke (1552-1634), who was the Chief Justice of England at the Common Law Court of the King’s Bench. His three-part work, *The Institutes of the Laws of England*, written between 1628 and 1644, is a widely recognised foundational document of the English common law. In the third part of this work,<sup>192</sup> Coke discusses the offence of piracy and other felonies committed upon the sea and provides a technical analysis of the Statute of the period – and he does briefly refer to the *hostis* phrase in the following context:

‘... if a subject had committed piracy upon another, this was held to be petit treason, for which he was to be drawn and hanged: because *pirate est hostis humani generis* and it was *contra ligeantiae suae debitum*’.<sup>193</sup>

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<sup>187</sup> *Idem* at 21.

<sup>188</sup> *Idem* at 26.

<sup>189</sup> Heller-Roazen (2009) at 110.

<sup>190</sup> See Heller-Roazen (2009) at 110, and Rubin (1988) at 26-28.

<sup>191</sup> Rubin (1988) at 27.

<sup>192</sup> Concerning ‘High treason and other pleas of the Crown and criminal causes, 1797.

<sup>193</sup> Edward Coke 4 *Institutes of the Laws of England* (1797) at 113.

Rubin analysed this aspect of Coke's writing and remarked that to Coke, piracy at common law was a type of petit treason and those who are not subject to the King of England cannot break the tie of allegiance (*contra ligeantiae suae debitum*), since there is no such tie. Therefore, they cannot commit treason and barring minor exceptions there cannot be a case of a foreigner guilty of piracy.<sup>194</sup> Goodwin comments that Coke does not explain why pirates are *hostis humani generis* or why this makes piracy treason.<sup>195</sup>

#### 2.2.4 Charles Molloy

Another writer whose works became influential after Coke, was Irish-born lawyer Charles Molloy (1640-1690). In his treatise *De Jure Maritimo et Navali* or a Treatise of Affairs Maritime and of Commerce, Molloy defines a pirate with reference to the *hostis* phrase in the opening paragraph of his chapter on piracy:

‘A pirate is a Sea-Thief, or *hostis humani generis*, who to enrich himself, either by surprise or open force, sets upon Merchants and others trading by sea, ever spoiling their Landing, if by any possibility he can get mastery, sometimes bereaving them of their lives and sinking their ships; the Actors wherein, Tully [Cicero] calls Enemies to all, with whom neither Faith nor Oath is to be kept. Against Pirates and as such live by robbery at sea, any prince hath power to make War, tho' they are not subject to his Government.’<sup>196</sup>

He notes further that although pirates ‘are called Enemies, yet they are not properly so termed’, and he cites the criteria that define an enemy as enumerated by Cicero, set out above, and accordingly excluding the pirate from the purview of an enemy who has a commonwealth.<sup>197</sup> Molloy's doctrines are discussed further in this chapter, but at this stage it can be noted that Molloy adopts much of Cicero's writings, and it can be interpreted from the paragraphs cited above that the power of the state to pursue pirates is wider than that of Coke and extends to those who are not its citizens.

#### 2.2.5 William Blackstone

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<sup>194</sup> Rubin (1988) at 46.

<sup>195</sup> Goodwin (2006) at 991.

<sup>196</sup> Molloy *De Jure Maritimo et Navali* 9<sup>th</sup> ed. (1769) at 75.

<sup>197</sup> *Idem* at 77. See, also, *Idem* at 80, par. VII, which invokes the Ciceronian view that no oath of allegiance is owed to the pirate.

A century later, Sir William Blackstone (1723-1780), an English jurist and judge, and noted for his work *Commentaries on the Laws of England*, refers to the *hostis* phrase. In chapter five of book IV, Blackstone develops on Coke and Molloy, and writes:

‘The crime of piracy, or robbery and depredation upon the high seas is an offense against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community has a right, by virtue of self defence, to inflict that punishment upon him, which every individual would in a state of nature have otherwise been entitled to, for any invasion of his person or personal property.<sup>198</sup>

This paragraph shows that while Blackstone cites Coke, he does not conclude that piracy is a form of treason.<sup>199</sup> Goodwin’s analysis shows that this view of Blackstone on piracy seems to follow that of Gentili in that every individual has the right to punish pirates wherever they are found because they are the enemies of mankind, and no longer enjoy the privileges and protection of the law.<sup>200</sup> However, contrary to Gentili’s view that the pirate did not renounce his citizenship by virtue of committing an act of piracy, Blackstone concludes that by engaging in unlawful pursuits, the pirate is stripped of his nationality.<sup>201</sup>

#### 2.2.6 Travers Twiss

The *hostis* phrase then finds its way into the works of the prolific writer and English jurist, Sir Travers Twiss (1809-1897). In his treatise on the Law of Nations,<sup>202</sup> he expresses the *hostis* phrase in the following context:

‘The maintenance of the peace of the sea is one of the objects of that common law, and all offences against the peace of the sea are offences against the Law of Nations, and of which all nations may take cognizance. The robber equally with the murderer on the High Seas is technically a sea-fellon or pirate, and every hand may be lawfully raised against him, he is, in fact, regarded as an

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<sup>198</sup> Blackstone 4 *Commentaries on the Laws of England* (1772) at 71.

<sup>199</sup> See Goodwin (2006) at 992.

<sup>200</sup> *Idem*.

<sup>201</sup> *Idem*.

<sup>202</sup> Twiss *The law of nations considered as independent political communities: On the rights and duties of nations in time of peace* 2<sup>nd</sup> ed. (1884).

enemy of the human race (*hostis humani generis*). The pirate has no national character, and to whatever country he may have originally belonged, he is justiciable everywhere, being reputed out of the protection of all laws and privileges whatever.<sup>203</sup>

### 2.2.7 *Later usage*

The *hostis* phrase then received a more contemporary judicial scrutiny in the American case *The Ambrose Light*,<sup>204</sup> a prize proceeding. The court referred to an earlier case of privateers commissioned by the deposed King James II where the Judges smiled and asked counsel whether ‘there was ever any such thing as a pirate, if none could be a pirate that was actually in war with all mankind’.<sup>205</sup> The court remarked further: ‘*Hostis humani generis*, it was said is neither a definition, nor so much as a description of a pirate, but a rhetorical invective to show the odiousness of the crime’.<sup>206</sup> Indeed, the court further remarks that ‘no doubt indiscriminate violence and robbery on the high seas are piracy, but it is doubtful whether any pirates ever really practiced or intended to practice, wholly indiscriminate robbery upon all vessels alike and it was far from true that no acts are piratical by the law of nations except such as are of that description’.<sup>207</sup> In other words, Kontorovich argues that no one supposed the pirate to actually be the enemy of all mankind; it was a legal fiction and a mere embellishment and no part of the legal definition.<sup>208</sup> He goes on to reason that ‘the *hostis* criterion simply restates another element of the piracy offense – attacking without a writ of marque and such writs precluded the bearer from attacking ships of the issuing state and its allies; thus the privateer was at most the enemy of some or much of mankind’.<sup>209</sup> He therefore concludes that ‘*hostis* just stands in for the need for commerce raiders to obtain sovereign protection and that *hostis* is a criterion that deals simply with regulatory formalities, and says nothing about the substantive conduct of the parties.’<sup>210</sup>

The preceding paragraphs of this section have presented a brief chronological reference to the writings of learned publicists and their conceptions of the *hostis* phrase and associated notions of an enemy. They were quoted above by virtue of their eminence and influence on

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<sup>203</sup> *Idem* at 290-291.

<sup>204</sup> 25F 408 [1885].

<sup>205</sup> *Idem* at 422.

<sup>206</sup> *Idem*.

<sup>207</sup> *Idem* at 423.

<sup>208</sup> Kontorovich (2004) at 235.

<sup>209</sup> *Idem*.

<sup>210</sup> *Idem*.

subsequent writers and state practice, and participation in the law-making process.<sup>211</sup> Rubin comments how Grotius and Gentili established or applied patterns of legal thought that have been influential regardless of superficiality, and others like Molloy, Jenkins and Blackstone have been significantly influential with regard to the course of Anglo-American jurisprudence and practice – and therefore an examination of their patterns of thought, as reflected in the extracts quoted above, have been necessary.<sup>212</sup>

### 2.3 Evaluation

What emerges prominently from the analysis above is that while a literal translation of the *hostis* phrase has been constant, a consistent definition and contextualisation of an enemy has been fleeting.<sup>213</sup> It has been shown how the Romans applied the *hostis* phrase to communities that committed depredations without declaring war, and thus the Romans placed them in a state of perpetual war. The *hostis* phrase was then used in later writings, starting with Gentili to refer to an outlaw who could never be in a state of war with sovereign nations or princes. Pirates were thus seen as outside the realm of the law – and therefore an illegitimate opponent. This differs markedly from the Roman conception of a pirate. A positivistic approach was given to the concept of a pirate by Gentili, who argued that a process of recognition by an authorised state or sovereign could legitimise the actions of the pirate. It was then shown how a naturalistic approach by Grotius opposed this construction and contested that the state of a pirate needed a factual inquiry into the purposes of their association, rather than being based solely on the recognition of a sovereign. The pirate was given a narrow construction as a form of treason by Coke and enforceable only against its nationals. This contrasted with Molloy whose view was that suppression and prosecution could extend to those who were not its citizens. The antagonist as an individual was considered by the writers: Gentili argued that the acts of piracy did not absolve the offender of his nationality, whereas Blackstone and Twiss contended that the offender was stripped of his nationality.

With the conflicting views of writers, what remains is a phrase that could be described as an unreliable epithet and a metaphorical invective,<sup>214</sup> which does not deal with the substantive conduct of pirates.<sup>215</sup> Dickinson, writing in 1924, commented that '*pirata est hostis humani generis* has been asserted many times, but not in the way to suggest so much

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<sup>211</sup> See Rubin (1988) at 305.

<sup>212</sup> *Idem*.

<sup>213</sup> See Goodwin (2006) at 994.

<sup>214</sup> See Kontorovich (2004) at 233-234.

<sup>215</sup> *Idem* at 235.

a constituent element of the offence as an epithet of opprobrium which the offence deserves'.<sup>216</sup> Rubin describes the paradox of the phrase as 'the one phrase that all writers seem to agree should fit somehow in any definition or description of "piracy", [and] is the one phrase impliedly linking the 17<sup>th</sup> century conception of "piracy" to classical writings, and in no way fits the facts or the legal conclusions drawn by 17<sup>th</sup> century policy makers or tribunals from those facts.'<sup>217</sup> Heller-Roazen remarked that with such an exceptional opponent, the many rules of combat were suspended: no battle was to be declared; no rules respected; and no due form observed.<sup>218</sup> He further assesses the effect being that the public law of Europe could prescribe no interactions for the modern states when confronting their uncounted antagonists.<sup>219</sup> This is seen in the macabre sentiments of Gentili: 'a war with a pirate has never been terminated by agreement or brought to an end by treaty of peace, but the pirates have either saved their lives by victory, or have been conquered and compelled to die',<sup>220</sup> and in the words of Jenkins who remarked that the unlawful combatants were simply to be 'subdued' and 'rooted out'.<sup>221</sup> In the result, the *hostis* phrase and its associated conceptions of an enemy – as expounded by the jurists above – are not comprehensive and legally ambiguous.

Throughout the discussion, the scholarship around the phrase centred on the person of the pirate – particularly whether the pirate possessed a sovereign licence and whether the pirate was stripped of nationality. It is noteworthy that there is only a reference to the high seas as the *locus* of pirate activity and while the *hostis* phrase survived through several centuries of usage, there was no reference to the developing jurisprudence on the juridical nature of the territorial sea – and what becomes of acts committed by pirates within that realm.

This chapter will now consider early definitions through selected seminal Anglo-American cases.

### III. ON THE DEFINITION OF PIRACY: EARLY CASES AND DOCTRINES

At the outset, researchers into the evolution of piracy law took cognisance of the characteristic feature of piracy as a crime under international law (or the law of nations or piracy *jure gentium*) and a crime under domestic (or municipal) law. Dickinson wrote of

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<sup>216</sup> Dickinson 'Is the Crime of Piracy obsolete?' 38 *Harvard Law Review* (1925-1926) 334 at 351.

<sup>217</sup> Rubin (1988) at 84.

<sup>218</sup> Heller-Roazen (2009) at 118.

<sup>219</sup> *Idem*.

<sup>220</sup> Rolfe (1932) at 22.

<sup>221</sup> Wynne 1 *Life of Sir Leoline Jenkins* (1724) at lxxxvi.

piracy *jure gentium* as robbery or other unauthorised acts of violence against persons or property committed upon the open seas.<sup>222</sup> He then contrasted this with municipal law which comprehends piracy as much or as little as the law-making authority of the particular state may choose to make it, and that pirates in municipal law are offenders only against the law of the state concerned.<sup>223</sup> In municipal law, the jurisdiction to arrest and punish must be confined to the particular state, and depends on the allegiance of the offender, the locality of the offence, or the nature of the offence committed.<sup>224</sup> The distinction between municipal law and international law and their jurisdictional implications will become apparent from the doctrines and cases below. This section discusses selected, seminal Anglo-American cases – given their influence in later attempts at codification and frequent citation in subsequent cases.

### 3.1. Early English jurisprudence

A very early account of a definition of piracy can be found in a charge to the jury in an Admiralty session in 1668, by Welsh academic and lawyer serving the Admiralty Court, Sir Leoline Jenkins (1625-1685). He stated that:

There are some sorts of felonies and offences, which cannot be committed anywhere else but upon the sea, within the jurisdiction of the Admiralty ... the chiefest of this kind is Piracy ... You are therefore to enquire of all Pirates and Sea-rovers, they are in the Eye of the Law *Hostes humani generis*, Enemies not of one Nation ... only, but of all Mankind. They are outlawed, as I may say, by the Laws of all Nations: that is, out of the Protection of all Princes and of all Laws whatsoever. Every Body is commissioned, and is to be armed against them, as against Rebels and Traytors, to subdue and to root them out.

... That which is called robbing upon the highway, the same being done upon the water, is called piracy: now robbery, as'tis distinguished from thieving or larceny, implies not only the actual taking away of my goods, while I am, as we say, in peace, but also the putting me in fear, by taking them away by force and arms out of my hands, or in my sight and presence; when

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<sup>222</sup> Dickinson (1925-6) at 339.

<sup>223</sup> *Idem*.

<sup>224</sup> *Idem*.

this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy.<sup>225</sup>

From this charge, it appears that Jenkins interpreted the English law to commission everybody as a law officer and the crude elements of the crime constructed as consisting of armed robbery, without any authorisation from a sovereign through a letter of marque. A further source of Jenkins's views can be found in a subsequent charge to the Admiralty Court in 1674/5.<sup>226</sup> He draws on some of the provisions of the prevailing Statute of Henry VIII,<sup>227</sup> and comments that prior to the Statute, pirates often escaped punishment because the civil law rules that were applied required that persons could not be convicted unless they confessed their offences, or that there was direct proof by eye witnesses.<sup>228</sup> Jenkins was writing at the time when the Court of the Lord High Admiral was created – chiefly because of the difficulties experienced in dealing with pirates.<sup>229</sup> The Statute of Henry VIII provided that a King's commission should try piracies directed to the Admiral or his deputy and to three or four other substantial persons designated by the Lord Chancellor.<sup>230</sup> According to the Statute, the offence must be 'committed in or upon the Sea, or in any other Haven, River, Creek or Place where the Admiral or Admirals have or pretend to have Power, Authority or Jurisdiction'.<sup>231</sup> Jenkins then explains the broad extent of this jurisdiction in the following way:

Every Englishman knows that His Majesty hath an undoubted empire and sovereignty in the seas<sup>232</sup> that environ these his kingdoms ... but besides these four seas, which are the peculiar care, and as it were, part of the domain of the Crown of England, His Majesty hath a concern and authority (in right of his Imperial Crown) to preserve the public peace, and to maintain the freedom

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<sup>225</sup> Wynne (1724) at lxxxvi. (Charge given to an Admiralty Session within the Cinque Ports, 2 September 1668).

<sup>226</sup> This charge has been persevered in a commentary by Baker 'IV – A Charge by Sir Leoline Jenkins, at an Admiralty Session, 1674-5' *Law Magazine and Review; a Quarterly Review of Jurisprudence and Quarterly Digest of Reported Cases* 10 (1884-5) 5<sup>th</sup> Serv. 412.

<sup>227</sup> Offences at Sea Act, 28 Henry VIII c. 15 (1536) 'For Pirates'. The full text of the Statute has been appended *et seq* to this thesis, and is referred to herein as the Statute of Henry VIII.

<sup>228</sup> See Statute of Henry VIII at §I (2). See, also, Baker (1884-5) at 412, and Dickinson (1925-6) at 340.

<sup>229</sup> Dickinson (1925-6) at 340.

<sup>230</sup> Statute of Henry VIII at §I (3)-(4). The difficulties experienced in bringing pirates from remote places to England for trial at the Old Bailey, led to further legislation authorising trials at sea or in the colonies: see Dickinson (1925-6) at fn 26.

<sup>231</sup> See Statute of Henry VIII at §I (3).

<sup>232</sup> For a description of the 'four seas' of Britain, see Coke *First Part of the Institutes of the Laws of England* 19<sup>th</sup> ed. 1838(1) at 157-8, fn 6. The British Seas at this time were considered to extend by virtue of long custom and usage right up to the coasts of the Netherlands and France: See Rubin (1988) at 87.

and security of navigation all the world over, so that not the utmost bound of the Atlantic Ocean, not any corner of the Mediterranean, nor any part in the South or other Seas, but that if the peace of God and the King be violated upon any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold on in any of His Majesty's ports, such breach of the peace is to be enquired of, and tried ... in such country, liberty, or place, as His Majesty shall please to direct. So long an arm hath God, by the laws given to his Vice-regent the King, and so odious are the crimes of piracy, bloodshed, robbery and other violence upon the sea, that justice observes and reaches the malefactors even in the remotest corners of the world ... This power and jurisdiction which His Majesty hath at sea in those remoter parts of the world, is but in concurrence with all other sovereign princes that have ships and subjects at sea.<sup>233</sup>

This extract illustrates an early form of what was to develop as universal jurisdiction. The far-reaching jurisdiction is evident from the language and description. It appears that provision is made for the application of English municipal law that has no restriction in terms of territorial extent – with a principal proviso of cooperation with other Sovereigns through the exercise of concurrent jurisdiction.<sup>234</sup> Now having set out the extent of jurisdiction, Jenkin then turned to define the crimes that are the subject matter of the Court's enquiry. He explains that robbery when committed upon land constitutes three elements: a violent assault; the victim must be deprived of their possessions; and the victim must be put in fear as a result.<sup>235</sup> He goes on to state that when this is done upon the sea, when one or more persons enter on board a ship with force and arms, and that those in the ship have their ship carried away by violence, or their goods are taken from their possession, and are put into fright by the assault - this is piracy, and he that does so is a pirate or robber within the Statute.<sup>236</sup> A closer reading of Jenkin's writings seems to indicate that a mutiny on a vessel would not constitute piracy, as the perpetrator must enter or board a victim vessel. His views differ from those of Coke, who regarded piracy as a form of treason, because, in Jenkin's analysis, any attack on a foreigner who is in amity<sup>237</sup> with the King would also be considered piracy justiciable by the realm. A clear exemption from

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<sup>233</sup> Cited in Baker (1884-5) at 414-415.

<sup>234</sup> Rubin comments that under Jenkins' rationale for allowing private justice to be meted out to pirates, he appears to have considered the Admiral's jurisdiction under English law to extend *everywhere on the seas* as if *territorially* based (with my emphasis). See Rubin (1988) at 87.

<sup>235</sup> *Idem* at 425.

<sup>236</sup> *Idem*.

<sup>237</sup> Described as *amicitia regis*. See *idem*.

piracy by an aggressor is where there is a commission from a foreign prince who is a lawful enemy.<sup>238</sup> The aggressor must, however, act within the bounds of his commission, and cannot despoil and rob those that his commission warrants him not to fight or meddle with.<sup>239</sup>

Rubin categorises Jenkin's writings as adopting a positivistic approach and concludes that 'from this point of view, there is no international law of "piracy"; only a municipal law authorizing its subjects to act against some people which that municipal law designates "pirates" on whatever basis it chooses'.<sup>240</sup> This contrasts with the views of Molloy who adopted a naturalistic approach. This latter approach, is quite significant.<sup>241</sup> Molloy also provides for a broad scope of self-help in the realm of the *ocean*:

'If Piracy be committed on the *Ocean*, and the Pirates in the attempt there happen to be overcome, the Captors are not obliged to bring them to any port, but may expose them immediately to punishment, by hanging them up, at the Main-yard end before Departure; for the old *natural liberty* in places where there are no Judgments.<sup>242</sup>

So likewise, if a Ship shall be assaulted by Pirates, and in the Attempt the Pirates shall be overcome, if the Captors bring them to the next port, and the Judge openly rejects the Trial, or the Captors cannot wait for the Judge without certain peril and loss, Justice may be done upon them by the *Laws of Nature* and the same may be there executed by the Captors.'<sup>243</sup>

The clear distinction between Molloy and Jenkins is Molloy's reference to the *Laws of Nature*. This underlies Molloy's view that there is a *natural law* forbidding any person to deprive another of life or property, without a higher motive supported by reason – life and property being the natural right of all.<sup>244</sup> The justice 'done upon them by the Laws of Nature' infers that the tribunal must be guided by reason – in the light of higher principles of justice and morality.<sup>245</sup> Rubin, in his analysis of the period, reveals that this latter notion

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<sup>238</sup> *Idem* at 426.

<sup>239</sup> *Idem*. See, also, Molloy (1769) at 76 par. II.

<sup>240</sup> See Rubin (1988) at 91.

<sup>241</sup> Rubin (1988) at 90.

<sup>242</sup> Molloy (1769) at 83, par. XII (with my emphasis).

<sup>243</sup> *Idem* at 84, par XIII (with my emphasis). See, also, *Idem*: Chapter IX (Of the Laws of Nature and Nations) at 338, par. VI.

<sup>244</sup> Rubin (1988) at 90.

<sup>245</sup> See *Idem* at 91.

of natural justice was of little practical value, so leaving the approach of Jenkins as the only one that made sense in the circumstances. He wrote:

‘...[N]aval officers or merchants seeking to protect their lives or property or the lives or property of those who rely on them for protection, the notion that deep analyses of the underlying values of society must be undertaken before a “pirate” can be hanged is absurd. A simple rule that life and property can be legally protected from any assault is attractive, and the notion that any responsible person is commissioned by the operation of law, whether via a commission issued by the Crown’s officers or by direct operation of the King’s will without a written commission, is irresistible.’<sup>246</sup>

Turning now to some of the cases – one of the earliest and most frequently cited is a 1696 English precedent, *Rex v Dawson*.<sup>247</sup> In this case, the King’s Counsel read out the indictment: ‘The prisoners are indicted for Piracy, in robbing and plundering the ship *Gunsway*, belonging to the Great Mogul, and his subjects, in the Indian Seas, to a very great value.’<sup>248</sup> The case is quoted for the Judge of the Admiralty’s charge to the Grand Jury on that occasion. Sir Charles Hedges addressed the grand jury on three issues: the nature of the crimes they were to enquire after; the extent of the jurisdiction and power in making such enquiries; and the duty incumbent on the jury.<sup>249</sup> As to the first issue, Sir Hedges defines the crime of piracy:

‘Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without any legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a felonious intention, in any place where the Lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy. The intention will, in these cases, appear by considering

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<sup>246</sup> *Idem* at 92.

<sup>247</sup> (1696), 13 How. St. Tr. 451. For a useful transcript of the entire proceedings, published by Joe Everingham in 1696, and entitled *The Tryals of Joseph Dawson, Edward Foreseith, William May, William Bishop, James Lewis and John Sparkes*, see facsimile available through the United States Library of Congress at: [http://www.loc.gov/law/help/piracy/piracy\\_trials.php](http://www.loc.gov/law/help/piracy/piracy_trials.php).

<sup>248</sup> Everingham (1696) at 4.

<sup>249</sup> *Idem* at 5-6.

the end for which the fact was committed; and the end will be known, if the evidence shall shew you what hath been done.’<sup>250</sup>

From this extract, it can be seen that the breadth of the crime is apparent, and that it encompasses acts of mutiny where the entire act is committed on board a single vessel. Intention to commit robbery or *animus furandi* does not appear to be an element, other than the actual act of the taking. Turning to the second issue on jurisdiction, Sir Hedges declares:

‘The King of England hath not only an empire and sovereignty over the British seas; but also an undoubted jurisdiction, and power, in concurrency with other Princes and States for the punishment of all piracies and robberies at sea, in the most remote parts of the world, so that if any person whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity, shall be robber or spoiled, in the narrow seas, the Mediterranean, Atlantic, Southern or any other seas, or the branches thereof, either on this, or the other side of the line, it is piracy within the limits of your enquiry and the cognizance of this Court.’<sup>251</sup>

This unqualified assertion of an expansive jurisdiction was criticised by Rubin: Firstly, Sir Hedges did not consider whether an Englishman was authorised by an implied commission or by universal natural law to hang pirates wherever they are captured.<sup>252</sup> Secondly, the issue of universal jurisdiction<sup>253</sup>, insofar as it relates to the applicability of English conceptions of piracy as a crime to foreigners acting beyond the realm of English territorial claims, is not addressed.<sup>254</sup>

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<sup>250</sup> *Idem*.

<sup>251</sup> *Idem*. This wide seaward jurisdiction can be compared to Molloy’s assertion that piracy cannot exist in Ports of the Realm. He writes: ‘Though a Port be *Locus publicus uti pars Oceani*, yet it hath been resolved more than once, that all Ports, not only the Town, but the Water is *infra corpus Comitatus*. If a Pirate enters into a Port or Haven of this Kingdom, and a Merchant being at Anchor there, if the Pirate assaults him and robs him, this is not Piracy, because the same is not done *super altum mare*; but this is downright Robbery at the *Common Law*, for what the Act is *infra corpus Comitatus*, and was inquirable and punishable by the *Common Law*.’ *De Jure Maritimo et Navali* (1769) at 96, par. XXVII.

<sup>252</sup> Rubin (1988) at 90.

<sup>253</sup> A fuller discussion of universal jurisdiction and its associated cases appear later in this Chapter.

<sup>254</sup> Rubin (1988) at 93. In any event, in the case none of the defendants were foreigners, rendering the issue of universal jurisdiction moot. As a result, Rubin concludes that the entire proceeding can be rationalised as the application of English municipal law to Englishmen through the normal processes of English judicial administration, and the unqualified assertions of extensive jurisdiction and authority as puffery: *See Idem*.

### 3.2. Nineteenth Century English practice and jurisprudence

By the turn of the Eighteenth Century, British naval power dominated the oceans to such an extent that British assertions of law were seen as persuasive statements of true international law, and were acquiesced by other states where not protested.<sup>255</sup> In common parlance it was often said that piracy was suppressed to near extinction at the end of the Nineteenth Century through direct naval intervention. However, understanding the policy and rationale behind British Nineteenth Century practice is useful because of its domination in terms of influencing public international law, and, secondly, through imperial interpretations of piracy.

Dickinson commented that there have been several cases that demonstrated that universal hostility or the intention to plunder without discrimination are not an element of the offence, and there are a few cases where seizures were made by naval forces of unrecognised insurgents which have been regarded as piratical.<sup>256</sup> Shifting from the common element of robbery in piracy, this section considers selected incidents which demonstrated how British Imperial authorities interpreted unique foreign insurrections within the ambit of piracy.

An early theory for British naval action derives from an analogy with slave trade by the British Foreign Secretary, Lord Castlereagh, in 1818. His theory was based on a naturalist foundation, which proposed that if a law is common to the municipal orders of all civilised states, then that law reflects a natural law which exists independently of state boundaries.<sup>257</sup> This would then relieve British naval action from the normal rules of ‘standing’<sup>258</sup> and becomes the basis for British action against foreigners abroad for violating the law of nations, which was conceived as a part of international law.<sup>259</sup>

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<sup>255</sup> See Rubin (1988) at 201. He remarks that: ‘British sea power emerging from the Napoleonic Wars so dominated international sea commerce that it is difficult throughout the nineteenth century to distinguish British interpretations of international law uttered for the purposes of self-justification and adversary argument from statements of international law persuasive on all states participating in the international legal order as defined in Europe.’ *Idem* at 201.

<sup>256</sup> Dickinson (1825-6) at 352.

<sup>257</sup> Discussed in Rubin (1988) at 203-204. Ultimately, his arguments were rejected. For a general account of piracy during this period, see McCarthy *Privateering, Piracy and British Policy in Spanish America 1810-1830* (2013).

<sup>258</sup> For example, English municipal law would not apply to a foreign ship on the high seas.

<sup>259</sup> Rubin (1988) at 203.

Piracy, as a word, was then incorporated into military/political vocabulary in legislation<sup>260</sup> which had been aimed solely at encouraging the British Navy to fight Napoleon's warships through a substantial financial inducement provided in the Bounty Act.<sup>261</sup> The Navy later applied this when its focus shifted to the protection of the growing maritime commerce of the empire.<sup>262</sup> According to Rubin, this Bounty Act did not require any adjudication of the criminality of anybody, and seems to have continued the wartime legislation to cover acts against pirates – in what appears once again to be a literal reading of the *hostis* phrase.<sup>263</sup> In other words, under the Bounty Act, the British seemed to assume they were legally *at war* with all who obstructed the expansion of British dominance – both on the high seas and elsewhere.<sup>264</sup>

### 3.2.1 *The Qawasim in the Persian Gulf*

British dominance in its political activities in the Persian Gulf,<sup>265</sup> became evident when, in 1806, the British established formal relations with the Sheikh of Qawasim as a result of the increase in piracy and lawlessness at sea in that area.<sup>266</sup> The British were motivated by a desire to keep open an important commercial and mail route<sup>267</sup> Pursuant to this, a “contract”<sup>268</sup> was concluded between the Sheikh and the British East India Company in 1820, in an attempt to stabilise the legal order in the Persian Gulf in a way that would protect their shipping interests.<sup>269</sup> The contract does not have much probative value for the purposes of this analysis, as there is no definition of piracy with a clear element of *animus furandi*, and no provision for the legal result of the label as used. What is significant, however, is Rubin's conclusion that the word *piracy* was being used ‘in a political sense

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<sup>260</sup> See 6 Geo. IV c. 49 (1825), Piratical Ships (Bounty Act); 13 & 14 Vic. C. 26 (1850), Piracy (Bounty Act).

<sup>261</sup> Rubin (1988) at 204-205.

<sup>262</sup> *Idem*.

<sup>263</sup> *Idem* at 206.

<sup>264</sup> *Idem*.

<sup>265</sup> This region was chosen for analysis here because of its proximity to the East African seaboard and Indian Ocean, and it lends a historical context to the region.

<sup>266</sup> See, generally, Rubin (1988) for a more detailed discussion at 206-211.

<sup>267</sup> For a comprehensive analysis, see, generally, Al-Otobi *The Qawasim and British Control of the Arabian Gulf* (1989) Unpublished PhD Thesis, University of Salford.

<sup>268</sup> Rubin is critical of the true nature of this agreement, in that the British dominated the negotiation and controlled the translations between English and Arabic (Rubin (1988) at 206-208).

<sup>269</sup> *Idem* at 206. The full text of the contract appears as annexure D in Al-Otobi (1989) at 187, and cited as 70 C.T.S. 464 (extracts thereof are in Rubin (1988) at 207-8). For example, Article 2 provides: ‘If any individual of the people of the Arabs contracting, shall attack any that pass by land or sea, of any Nation whatsoever, in the way of plunder and piracy, and not of acknowledged war, he shall be accounted an enemy of all mankind, and shall be held to have forfeited both life and goods; and acknowledged war is that which is proclaimed, avowed, and ordered by Government against Government, and the killing of men and taking of goods, without proclamation, avowal, and the order of Government is plunder and piracy.’

implying a British intention to suppress by force whatever the British determined unilaterally to be “piracy”, and whether on land or seas, and without any criminal or Admiralty proceedings in any court’.<sup>270</sup> The British were tempted, in the circumstances, to regard any political action by others that obstructed the course of commerce as illegal, and under-unwritten ‘British Imperial Law’ enforcement powers were given to the navy by direct action rather than to the judiciary.<sup>271</sup> This notion seems to have been confirmed by other writers in the Middle East. Al Otabi advanced a thesis that the Qawasim were ‘proto-nationalists concerned to forge a nation in the Gulf, [and were] only peripherally interested in the proceeds of piracy and much more influenced by the desire to maintain their commerce from the ruthless competition of the East India Company’.<sup>272</sup> The ruler of Sharjah, Sheikh Sultan bin Mahomed Al Qasimi, writing in 1986, challenged the conventional view that justified British imperial invasion in the region because of the need to suppress Arab piracy. He argues that the company was determined to increase its share of the Gulf trade with India at the expense of native Arab traders – especially the Qawasim.<sup>273</sup> He further states that the Company, however, did not have the necessary warships and needed to persuade the British government to commit the Royal navy to achieve this dominance, and, accordingly, the East India Company orchestrated a campaign to misrepresent the Qawasim as pirates who threatened all maritime activity in the northern Indian Ocean.<sup>274</sup> The Imperial policy of the period was thus summarised by Rubin, to the effect that the British East India Company’s officials wanted the privileges of war themselves in the struggles with the Arab Sheikdoms and military arms and unruly merchants, but also wanted to deny the legal status of prisoners of war and belligerent rights of search and seizure to those Arabs.<sup>275</sup> Thus, piracy, reminiscent of the Roman conception of *pirata*, was used by the British to achieve these ends.<sup>276</sup>

In this way, it can be seen that the word ‘piracy’ now began to take on a broader definition than what was originally envisaged in earlier English jurisprudence, as relating to robbery within the jurisdiction of the Admiral. However, the British administration soon sought other methods to spread the ambit of British Imperial law to make sea lanes safe for peaceful trade. In doing so, they proposed that the focus shift out of the courts and asserted a right in British Imperial law to hunt down pirates as a matter of enforcing not the

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<sup>270</sup> Rubin (1988) at 209.

<sup>271</sup> *Idem* at 210.

<sup>272</sup> Al-Otabi (1989) at 164.

<sup>273</sup> See, generally, Al Qasimi *The Myth of Arab Piracy in the Gulf* (1986); extracted from the abstract available at: [http://www.amazon.com/Myth-Arab-Piracy-Mohammed-Al-Qasimi/dp/0709921063\\_](http://www.amazon.com/Myth-Arab-Piracy-Mohammed-Al-Qasimi/dp/0709921063_)

<sup>274</sup> *Idem*.

<sup>275</sup> Rubin (1988) at 211.

<sup>276</sup> *Idem*.

municipal law administered by Admiralty courts, but of a British version of international law against pirates who were not protected by the laws of war and were seen as outlaws requiring no special licence under international law for action against them.<sup>277</sup>

### 3.2.2 *The Serhassan pirates*

An example of this wide jurisdiction can be seen in the 1845 case of the *Serhassan Pirates*.<sup>278</sup> In this case, H.M. ship of war *Dido*, under the command of Captain Keppel, was given orders from Singapore to reconnoitre pirates. On the morning of 10 May 1843, the cutters dispatched from the *Dido* spotted six large native skiffs nearing the island of Serhassan, off the coast of Borneo. Evidence was led that the skiffs manned by 120 men approached the cutters with loud cries, accompanied by the beating of gongs and other indications of hostility.<sup>279</sup> Notwithstanding warnings issued by the commanding Lieutenant on board the cutter, the skiffs continued to engage the cutters and commenced firing – resulting in an armed contest ensuing. The skiffs were subdued and those that fled to the shore were captured. A tally of 55 men were either killed or taken into custody. A bounty was claimed under the provisions of the 1825 Bounty Act,<sup>280</sup> and, therefore, the issue arose as to whether the attack made upon the cutters constituted an act of piracy, so as to bring the persons who were on board within the legal denomination of pirates.<sup>281</sup> Dr Lushington held that:

‘It matters not that they may possibly have entertained no inclination to bring themselves in conflict with the British power; it is sufficient, in my view of the question, to clothe their conduct with a *piratical character* if they were armed and prepared to commence a piratical attack upon any other persons.’<sup>282</sup>

Considering that the only act of “piracy” alleged against the Serhassan pirates was their engagement of the British force under the command of Captain Keppel, the judgment of Dr Lushington is extremely sparse. The engagement involved no element of *animus furandi* and Dr Lushington did not define ‘piratical character’ or provide any analysis thereof. Dr Lushington’s view that they were armed created an inference of piratical character, is vague

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<sup>277</sup> *Idem* at 230.

<sup>278</sup> *The Serhassan (Pirates)*, 3 *British International Law Cases* 788. Also cited as 2 W. Rob. 354 (1845).

<sup>279</sup> *Idem* at 788.

<sup>280</sup> 6 Geo. IV c. 49 (1825), *Piratical Ships (Bounty Act)*; 13 & 14 Vic. C. 26 (1850), *Piracy (Bounty Act)*.

<sup>281</sup> *The Serhassan (Pirates)* (1845) at 789.

<sup>282</sup> *Idem* (with my emphasis).

and seems to afford the Serhassan pirates with no refuge within the bounds of their territory. He went on the hold that ‘It can make no difference whether they were inhabitants of that or any other island’,<sup>283</sup> seemingly disregarding the protection of their nationality. One of the direct impacts of the case was that it precipitated a proliferation of claims under the Bounty Act – to the point that it had to be repealed.<sup>284</sup> The engagement took place close to the coast and the capture on the shore. This was not in the realm of the high seas, and the judgment seems to take notice of this:

‘[i]t [cannot] be imagined that the title of pirate attached solely to persons following an avowed piratical occupation upon the high sea. In the seas where this transaction took place there is every species of distinction to be found.’<sup>285</sup>

### 3.2.3 *The Magellan pirates*

Dr Lushington also presided over another frequently cited case of the *Magellan Pirates*.<sup>286</sup> The judgment records that towards the end of 1851 there was an insurrection in some of the dominions belonging to the States of Chile. There was a Chilean convict settlement where an insurrection took place against the Governor and the insurgents seized an American and British Ship *The Eliza Cornish* which was anchored in the port – murdering her Master and owner, and then made out to sea. A British Sloop then recaptured the vessel.<sup>287</sup> The case thus arose on a petition, filed on behalf of the Sloop that captured the *Eliza Cornish* and its insurgents, praying that the Court determine, pursuant to the provisions of the Bounty Act, that certain persons were pirates, and to determine the number thereof, in order to make an application for Bounty under the Act.<sup>288</sup> Dr Lushington found that:

‘In the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of *piratical* acts; and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our Courts of Common Law<sup>289</sup> ever thought it

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<sup>283</sup> *The Serhassan (Pirates)* (1845) at 789.

<sup>284</sup> Rubin (1988) at 231.

<sup>285</sup> *The Serhassan (Pirates)* (1845) at 790.

<sup>286</sup> [1853] 1 Spink Ecc. & Ad. 81.

<sup>287</sup> *Idem* at 85.

<sup>288</sup> *Idem* at 81.

<sup>289</sup> Rubin comments that this is, in fact, incorrect, as English Common Law Courts were never involved in ‘piracy’ cases. *See* Rubin (1988) at 233.

necessary to extend their inquiries further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas.’<sup>290</sup>

Dr Lushington goes on to describe the acts of the insurgents as ‘in one sense, of wanton cruelty, in the murder of foreign subjects, and in the indiscriminate plunder of their property. I am of the opinion that the persons who did these acts were guilty of piracy, and were deemed to be pirates’.<sup>291</sup> Lushington adds a different conception of the elemental framework of the piracy concept, in that he held ‘it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes had intended to rob on the high seas, or to murder on the high seas indiscriminately’.<sup>292</sup> This creates the precedent that an intention of universal hostility is not a requisite element of the offence piracy *jure gentium*.<sup>293</sup> His analysis crafts a way for circumstances to distinguish acts of insurgency from piratical acts. Lushington held:

‘It is true that where subjects of one country may rebel against the ruling power, and commit divers[e] acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy ... I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion.’<sup>294</sup>

In the above extract, Dr Lushington acknowledges that other nations may not consider certain types of acts as piracy, but he assumes, however, that British courts, applying a municipal conception of ‘piracy’ as a crime under English law, faced no conflict under the international legal order:

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<sup>290</sup> [1853] 1 Spink Ecc. & Ad. 81 at 83.

<sup>291</sup> At 86 (with my emphasis). Rubin (1988) at 236 is critical of Lushington’s approach in the defining of ‘piratical’ and he argues that his search for a meaning for the adjective ‘piratical’, rather than a meaning for the noun ‘pirate’, indicates the narrow scope of his logic. He further concludes that the Bounty Act was construed to provide bounties for those engaging with persons committing ‘piratical acts’ whether or not ‘pirates’ technically – and whether or not amenable to the jurisdiction of British courts.

<sup>292</sup> [1853] 1 Spink Ecc. & Ad. 81 at 83

<sup>293</sup> See Dickinson (1925-6) at 356.

<sup>294</sup> [1853] 1 Spink Ecc. & Ad. 81 at 83.

‘Though the municipal law of different countries may and does differ, in many respects, as to its definition of piracy, yet I apprehend that all nations agree in this: that acts, such as those which I have mentioned, when committed on the high seas, are piratical acts and contrary to the law of nations.’<sup>295</sup>

The judgment has been criticised by Rubin, who observes that: (i) throughout the opinion by Dr Lushington, his concern is not with establishing any definition of piracy, in international law or municipal law; he failed to distinguish between those who might have had political motives from those acting *animo furandi*;<sup>296</sup> (ii) his concern did not pertain to the reach of British jurisdiction, but only to the acts of those who claimed a licence from a foreign belligerent: insurgents.<sup>297</sup> In summation, Rubin argues that the precedent value of the case becomes petty, as it turns out to have nothing to do with definitions of piracy. Rather it is a construction of a municipal statute giving a municipal reward to designated agencies of government deployed to suppress an activity in the public sphere, which the Parliament felt should be suppressed.<sup>298</sup>

The judgment provides three propositions in relation to *locus* of piracy, which are relevant to cite here<sup>299</sup>:

- (i) He cites a text, *Russell on Crimes* which stated ‘[i]f a robbery be committed in creeks, harbours, ports ... in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy’.<sup>300</sup>
- (ii) He also refers to a case where ‘a prisoner was indicted for stealing three chests of tea out of the ‘Aurora’ of London on the high seas, and it was proved that the larceny was committed while the vessel lay of Wampa, in the river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing or otherwise, at the place where the vessel lay, [and] it was held, from the circumstance that the tea was stolen on board the vessel which had crossed the ocean, [and] that there was sufficient evidence that the larceny was committed on the high seas’.<sup>301</sup>

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<sup>295</sup> At 83. *See*, also, Rubin (1988) at 234.

<sup>296</sup> *Idem* at 235.

<sup>297</sup> *Idem* at 234.

<sup>298</sup> *Idem* at 236.

<sup>299</sup> *See*, generally, Surbun ‘The developing jurisprudence to combat modern maritime piracy: A crime of the high seas?’ 43 *Comparative and International Law Journal of Southern Africa* (2010) 1 at 17.

<sup>300</sup> [1853] 1 Spink Ecc. & Ad. 81 at 84.

<sup>301</sup> *Idem*.

- (iii) Another case cited by the court was where ‘A., standing on the shore of a harbour, fired a loaded musket at a revenue cutter which had struck upon a sand-bank in the sea, about 100 yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy.’<sup>302</sup>

Dr Lushington goes on to make a significant observation later in the judgment relating to the *locus* of piracy:

‘It has been said that these acts were not committed on the high seas, and therefore the murder and robbery not properly or legally piratical. This objection well deserves consideration; for it is true that murder and robbery done upon land, and not by persons notoriously pirates would not be piracy ... Had the vessels been recaptured whilst lying in port, there might be raised an argument, though I do not say it would prevail, that these offences, legally speaking, would not be classed as acts of piracy. I say it might be so; though I am not disposed to hold that the doctrine that the port, forming a part of the dominions of the State to which it belongs, ought in all cases to divest robbery and murder done in such port of the character of piracy.’<sup>303</sup>

Another relevant dictum in the judgment relates to the *locus* of piracy: ‘we all know that pirates are not perpetually at sea, but under the necessity of going on shore at various places; and of course, they must be followed and taken there or not at all.’<sup>304</sup>

#### 3.2.4 *The Kwok-A-Sing pirates*

Another saga which applied the naturalistic stance of Lushington’s notions of universal jurisdiction, was the 1873 case *The Attorney-General for Our Lady the Queen for the Colony of Hong Kong and Kwok-A-Sing*.<sup>305</sup> This was the only case where British jurisdiction was actually applied to a transaction wholly within a foreign vessel outside of British territorial waters.<sup>306</sup> The facts, as appearing in the judgment,<sup>307</sup> were: on 30 September 1870, a French vessel *La Nouvelle Pénélope*, sailed from Macao with 310 ‘coolie’ Chinese emigrants, including one Kwok-a-Sing, bound for Peru in South America. However, about 100 of the emigrants complained of being kidnapped. Later, on 4 October

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<sup>302</sup> *Idem*.

<sup>303</sup> *Idem* at 86.

<sup>304</sup> *Idem*.

<sup>305</sup> L.R. 5 P.C 179 (1873).

<sup>306</sup> Rubin (1988) at 239.

<sup>307</sup> L.R. 5 P.C 179 (1873) at 181.

1870, when the vessel was at sea, Kwok-a-Sing and other emigrants attacked the captain and others of the crew, and killed them; they then took possession of the ship and compelled the remaining seamen to conduct it back to China. They then landed and abandoned ship. Some of the emigrants were arrested in China and tried there. Kwok-a-Sing escaped to Hong Kong and was later arrested and charged before the magistrate. China requested his extradition in terms of an extradition ordinance;<sup>308</sup> however, immediately after the commitment of Kwok-a-Sing, a writ of *habeas corpus* to discharge him was granted by the Chief Justice of the Supreme Court of Hong Kong.<sup>309</sup> The Attorney-General then caused Kwok-a-Sing to be again arrested on a charge of piracy *jure gentium* – with a view to his trial on that charge before the Hong Kong Supreme Court. However, he was ordered to be discharged again upon the ground that this second arrest was a violation of the Habeas Corpus Act.<sup>310</sup> The matter then went on appeal before the Privy Council. It appears, from the circumstances, that the British government repeatedly refused to extradite Kwok-a-Sing to China on charges of murder and piracy.<sup>311</sup> Wells argues that Britain’s refusal to extradite directly to China contradicted the extradition Ordinance referred to above.<sup>312</sup> The Court considered whether there was evidence that Kwok-a-Sing had been guilty of crimes against the laws of China within the meaning of the Ordinance and through a detailed analysis<sup>313</sup> of the inapplicability of the Ordinance and treaties, and concluded in the negative.<sup>314</sup> This allowed the British government to assert universal jurisdiction, if the crime could be shown as piracy *jure gentium*. The court had to consider whether there was sufficient evidence before the magistrate that Kwok-a-Sing had committed an act of piracy *jure gentium*, and held that there was sufficient prima facie evidence before the magistrate to justify his committal for trial for the offence of piracy *jure gentium*.<sup>315</sup> The court, in reaching this conclusion, cited Sir Charles Hedge’s charge to the Jury in *R v Dawson* (quoted earlier in this chapter), that brought within the ambit of piracy instances where mariners violently dispossess the Master of the ship and proceed with felonious intentions. The court held:

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<sup>308</sup> Hong Kong Ordinance, No. 2 of 1850 provided that “Whereas, by the treaties between Great Britain and China, provision is made for the rendition for trial to officers of their own country of such subjects of China as have committed crimes or offences against their own Government, and afterwards taken refuge in Hong Kong.”

<sup>309</sup> At 184.

<sup>310</sup> At 197.

<sup>311</sup> The politics behind this approach by the British is beyond the scope of this thesis, but this has been dealt with comprehensively in: Wells ‘Clashing Kingdoms, Hidden Agendas: The Battle to Extradite Kwok-A-Sing and British Legal Imperialism in Nineteenth-Century China’ *University of Pennsylvania East Asia Law Review* (2011) at 161.

<sup>312</sup> *Idem* at 163.

<sup>313</sup> Wells argues that the British used skillful reasoning at that point to circumvent laws, in order to assert their political domination (Wells (2011) at 161).

<sup>314</sup> At 197-200.

<sup>315</sup> At 199.

‘Of course there can be no difference between mariners and passengers, and there was unquestionably evidence that Kwok-a-Sing was a part to violently dispossessing the master and carrying away the ship itself and the goods therein; and the only question can be whether there was sufficient evidence that the act was done with a felonious, that is a piratical, intention. In their Lordship’s opinion, there was evidence of such an intention on the part of Kwok-a-Sing to be left to a jury, though they wish to be understood as giving no opinion on which way a jury ought to find on this question.’<sup>316</sup>

The court was thus of the opinion that the magistrate should have committed Kwok-a-Sing to be tried for piracy in Hong Kong and that the acts of piracy *jure gentium* may be plainly distinguished from those acts of piracy which were in the ambit of the Ordinance and the Treaties.<sup>317</sup> All that was provided in an earlier commentary of this judgment, as to its precedent value, was that ‘the seizure of a single ship by persons having no intention of universal hostility might be piracy by the law of nations’.<sup>318</sup> This was, however, a significant political decision in a conflict for domination, and Wells in her comprehensive analysis of Western-Sino relations of the period submitted that:

‘The Kwok-a-Sing decisions accordingly demonstrate how Britain utilized English law and legal decisions in order to consolidate its own power by rendering China politically, legally and culturally inferior. This in turn provoked a lasting legacy of bitterness and deep skepticism towards the Western international legal order that continues to define China’s relationship with the West.’<sup>319</sup>

If one is to speculate and accept Well’s thesis, this may provide a context for the superficial treatment of the analysis of piracy *jure gentium* by the Court. Counsel for Kwok-a-Sing presented a cogent argument before the Court submitting that the crime was not piracy *jure gentium* – because, to constitute that, there must have been violence *ab extra*, or the ship must have been run away with for the purpose of depredation.<sup>320</sup> In fact, Counsel submitted that no crime was committed:

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<sup>316</sup> Judgment at 200.

<sup>317</sup> *Idem.*

<sup>318</sup> Dickinson (1925-6) at 355.

<sup>319</sup> Wells (2011) at 165.

<sup>320</sup> Judgment at 193.

‘The coolies had reasonable ground for supposing that they were deprived of their liberty by the Captain and crew of the ship; they took possession of the ship, and used a certain amount of violence that would be reasonably necessary under those circumstances, we must apply a different standard in the case of ignorant Chinese coolies from that which would be applied in the case of Europeans.’<sup>321</sup>

These arguments were dismissed by the court without extensive analysis, and its definition of piracy *jure gentium* rested entirely on a superficial reading of Sir Charles Hedge’s charge delivered 177 years prior. More could have been said about distinguishing robbery from mutiny. It was patent that the court refrained from attempting to determine questions of evidence of intention *animus furandi* – a basic element essential to Hedge’s charge.<sup>322</sup> In the result, this was a missed opportunity to develop a definition of piracy within the unique circumstances of the rebellion and subsequent taking control of the vessel by Kwok-a-Sing and others.

### 3.2.5 *The Battle of Pacacho and the Huascar incident*

A final account that is worthy of mention here and that blurred the distinction between a pirate and a political insurgent was the *Battle of Pacacho*, which arose in 1877 when one Nicolas de Pierola was leading a revolution to overthrow the then President of Peru. The crew of a Peruvian warship, the *Huascar*, who were supporters of de Pierola, mutinied and took control of the vessel and left the Port of El Callao in Peru. A Peruvian diplomat had then exchanged correspondence with the Chilean government calling on the latter to seize the *Huascar* as a pirate ship.<sup>323</sup> After analysing the exchange of further diplomatic correspondence, Rubin concluded that:

‘while the Governments of Chile and Peru disagreed as to the proper legal classification to be given to the *Huascar*, belligerent rebels requiring Chilean neutrality or Peruvian criminals of no legal concern at all to Chile but to be denied a base of operations there and Peruvian property in Chile to be returned to Peruvian authorities, they agreed that the international law regarding ‘piracy,’ if there were any such law, was not applicable.’<sup>324</sup>

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<sup>321</sup> *Idem*.

<sup>322</sup> See Rubin (1988) at 241.

<sup>323</sup> The extracts from this account summarised in this section are derived from Rubin (1988) at 258-270, who analysed the correspondence and parliamentary reports pertaining to this incident, together with his commentary thereof.

<sup>324</sup> *Idem* at 262.

While this correspondence was in progress between the two governments, the *Huascar* detained two British ships – demanding mail and dispatches– but it was recorded that the boarding party left peacefully when the request was refused, but claimed and seized a cargo of coal which was alleged to belong to Peruvians.<sup>325</sup> The classification of the acts of the *Huascar* became important: if they were classified as pirates, this would justify British self-help to recover the property. If, however, they were regarded as ‘rebels’ exercising ‘belligerent rights’, then the seized property would be ‘contraband of war’ against a neutral state, to be resolved by diplomacy.<sup>326</sup> Shortly thereafter, the British authorities sent two warships, the *Shah* and *Amethyst* under Real-Admiral de Horsey, which then engaged the *Huascar* – culminating in the Battle of Pacocha. The *Huascar*, which was an armoured ship, withstood the barrage of ammunition from the British warships – including evading the first ever use of a torpedo fired with intent to sink a ship.<sup>327</sup> It is significant that this engagement did not take place on the high seas, but within Peruvian territorial waters. The *Huascar* then managed to escape under cover of darkness, but later surrendered to the Peruvian authorities at port.<sup>328</sup> In reporting to the Admiralty, de Horsey explained his actions:

‘[H]aving no lawful commission as a ship of war, and owing no allegiance to any State and the Peruvian Government having disclaimed all responsibility for her acts, no reclamation or satisfaction could be obtained except from that ship herself ... That the status of the *Huascar*, previous to action with [my fleet], was, if not that of a pirate, at least that of a rebel ship having committed piratical acts ... [and] that the status of the *Huascar*, after refusing to yield to my lawful authority, and after engaging Her Majesty’s ships, was that of a pirate.’<sup>329</sup>

The Peruvian government condemned this incident, particularly as the British had opened fire within Peruvian territorial waters.<sup>330</sup> The issue pertaining to the legality of the incident

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<sup>325</sup> *Idem* at 259.

<sup>326</sup> *Idem*.

<sup>327</sup> For the naval details of the engagement, see Stern *Destroyer Battles: Epics of Close Naval Combat* (2008) at 15-16; and Little ‘The Naval Campaign in the War of the Pacific 1879-1884’ 24 *Scientia Militaria, South African Journal of Military Studies* (1994) at 1-8.

<sup>328</sup> Rubin (1988) at 263.

<sup>329</sup> 68 *British and Foreign State Papers* 753 at 754-755; Rubin (1988) *idem*.

<sup>330</sup> *Idem* at 746; C. 1883.2, cited in Rubin (1988) at fn 294, where the Peruvian Foreign Minister commented that the *Huascar* did not, on account of having refused to recognise the authority of government, cease to belong to Peru.

was referred to the Law Officers of the Crown,<sup>331</sup> who appear to have adopted the view of de Horsey, without referring to the term ‘pirate’.<sup>332</sup> This conclusion has several shortcomings: (i) the crew of the *Huascar* were still Peruvian and therefore not within earlier contemplations of pirates as ‘stateless’;<sup>333</sup> (ii) the actions of the *Huascar* were not classified by the British as ‘belligerent’, committed by those who are recognised as such, but extended to politically motivated acts of rebels or other groups committing depredations without *animus furandi*;<sup>334</sup> and (iii) lastly, and most importantly for the purpose of this thesis, is that they did not address the issue of the direct violation of Peruvian territorial waters.<sup>335</sup> This shortcoming thus prevented the incident from setting a major precedent in practice, and presents another missed opportunity to set out a clear definition of the elements of piracy. To the contrary, Rubin concludes that the incident does not even represent a view of British Imperial law, but instead is ‘a simple political argument put forth by a government that has made an embarrassing mistake, covering it over with a show of legal words convincing to nobody involved, except, perhaps, to Rear-Admiral de Horsey’.<sup>336</sup>

### 3.3 Nineteenth Century American practice and jurisprudence

Across the Atlantic, the nascent United States of America dealt with piracy in legislation and in the courts in a manner that merits some analysis.<sup>337</sup> The starting point for this analysis can be found in the Federal Constitution, which delegated power to Congress to:

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<sup>331</sup> The Law Officers of the Crown are the chief legal advisers to the Crown, and advise and represent the central and devolved governments in the United Kingdom, and national and sub-national governments in other Commonwealth realms. See, generally, Kyriakides ‘The Advisory Functions of the Attorney-General’ 1 *Hertfordshire Law Journal* (2003) at 73-84.

<sup>332</sup> They advised that: ‘Admiral de Horsey was bound to act decisively for the protection of British subjects and British property, and ... the proceedings resorted to by him were in law justifiable’ (cited in Rubin (1988) at 264).

<sup>333</sup> *Idem* at 267.

<sup>334</sup> *Idem* at 269, where Rubin also comments that it was for each state to decide for itself whether any vessel could properly be classified as ‘piratical’, and no one state’s auto interpretation would be binding on the other. In the parliamentary debates of the period, referred to in 36 Hansard *Parliamentary Debates* (3<sup>rd</sup> ser.) 787-802, where Sir William Harcourt challenged the findings of the Law Officers of the Crown, he pointed out that: ‘the acts of the *Huascar* hardly seem “piratical” when all she did would have been permissible if she were conceded the rights at international law of a “belligerent”. The *Huascar* indeed stopped two “neutral” (British) vessels, but did not seize any property or mail, and left after being satisfied of their neutrality.’ (cited in Rubin (1988) at 264).

<sup>335</sup> *Idem* at 266, where Rubin argues that no equivalent failure of Peruvian local authorities could be alleged to justify an incursion based on British self-help or self-defence, and considering that, at the time the *Huascar* was attacked there was no British legal interest under threat. Piracy and the territorial sea will be discussed more fully in section IV of this chapter.

<sup>336</sup> *Idem* at 268.

<sup>337</sup> A fuller treatment of the law during this period can be found in Rubin (1988) at Ch. III; White ‘The Marshall Court and International Law: The Piracy Cases’ 4 *The American Journal of International Law* (1989) 83 at 727-735; Lenoir ‘Piracy Cases in the Supreme Court’ 25 *Journal of*

‘define and punish piracies and felonies committed on the high seas, and offences against the law of nations’.<sup>338</sup>

White, in his commentary of cases during the period, began by observing that the Constitution anticipated that international disputes would regularly come before the United States’ courts and that the decisions in those cases could rest on principles of international law – without any necessary reference to the common law or to constitutional doctrines.<sup>339</sup> White then studied the doctrines applied by the Marshall Court<sup>340</sup> to ascertain just what was “the law of nations”, as understood by the court of that period. He found that it had a naturalistic foundation:

‘It was clear that the concept embraced more than the aggregate of particularistic decisions: it was intended to signify general principals on which “civilized” nations were in accord. Indeed, it was intended to signify something more: a set of bedrock belief that lay behind those principles.’<sup>341</sup>

The Supreme Court had its highest concentration of piracy cases between 1815-1823, when piracy reached its peak, mainly due to the turbulent political situation in South America’s newly independent ‘republics’ – that created a market for illegal commerce in the North Atlantic.<sup>342</sup> During this period, the Court had to consider matters *inter alia* pertaining to the definition of piracy, the nature of sovereignty, and the limits of the jurisdiction of the U.S. courts.<sup>343</sup> Of particular importance is the American approach to the interface between the mechanism for punishing pirates under the law of nations, and under municipal law.

In terms of municipal law, pursuant to this authority granted by the Constitution, Congress passed an ‘act for the punishment of certain crimes against the United States’ in 1790<sup>344</sup> (hereafter, the 1790 Act) – drafted by Senator (and later Chief Justice) Oliver Ellsworth. The relevant provision with respect to piracy was incorporated in section 8.<sup>345</sup> The section

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*Criminal Law and Criminology* (1934) at 532; Dickinson (1925-6) at 342-350; Kent *Commentaries on American Law* 1 2<sup>nd</sup> ed. (1832) at lecture IX; and Peter *Statutes at Large* 3 (1850) at 510.

<sup>338</sup> Article I, §8, Cl. 10.

<sup>339</sup> White (1989) at 727.

<sup>340</sup> This refers to the U.S. Supreme Court under the eminent Chief Justice Marshall.

<sup>341</sup> White (1989) at 728.

<sup>342</sup> *Idem* at 729

<sup>343</sup> *Idem* at 727.

<sup>344</sup> 1<sup>st</sup> Cong. 2<sup>d</sup> Sess., 1 Stat. 112 (Act of 30 April 1790).

<sup>345</sup> The full text of §8 provides:

was convoluted and Dickinson commented that confusion in application was a foregone consequence.<sup>346</sup> He pointed out that the section could be construed to provide for the punishment of pirates *jure gentium*, in that it was applicable to the nationals of all countries for acts committed on the ships of any flag.<sup>347</sup> On the other hand, it made certain acts piratical by virtue of a law peculiar to the United States, and therefore it could only be applicable to American nationals, or on American ships.<sup>348</sup> Dickinson thus pondered on these two constructions of the section: ‘who could tell from the text where one left off and other began?’<sup>349</sup>

It was only a matter of time until the complexities of international relations would call into question the interpretation of the section, and, in 1818, the United States Supreme Court heard its first case pertaining to this section of the 1790 Act, in *United States v Palmer*.<sup>350</sup> Questions for certification were referred to the Court from a Circuit court of Massachusetts, which originally heard the matter. Because of this, no transcript, memorials or evidence were provided to the court,<sup>351</sup> resulting in a very meagre set of facts available for the case. What could be ascertained is that one John Palmer and Thomas Wilson, who were purportedly American citizens<sup>352</sup> and mariners, invaded a Spanish ship, the *Industria Raffaelli*, on the high seas and robbed its crew (who were subjects of the Spanish King) of a cargo of sugar, honey, hides, coffee and bags of silver and gold valued at more than a hundred thousand dollars.<sup>353</sup> They were subsequently apprehended and indicted for piracy

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‘That if *any person or persons* shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, *murder or robbery, or any other offence* which if committed within the body of a country, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trail of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.’ (my emphasis).

<sup>346</sup> (1925-6) at 344.

<sup>347</sup> *Idem*.

<sup>348</sup> *Idem*.

<sup>349</sup> *Idem*.

<sup>350</sup> 16 U.S. (3 Wheat.) 610 (1818).

<sup>351</sup> Judgment at 640.

<sup>352</sup> *See White* (1989) at 730-731, where, although not stated in the judgment, he finds that they were Americans claiming to be domiciliaries of an unrecognised South American Republic that was engaged in a war of independence with Spain, and who possessed a commission from the Republic. The court, however, seemed to regard the prisoners as foreign nationals in the circumstances. *See*, also, Dickinson (1925-6) at 344, read with Judgment at 611.

<sup>353</sup> Judgment at 611-612.

under section 8 of the 1790 Act in the court *a quo*. This court then referred a series of questions for an opinion by the Supreme Court, and the relevant ones for discussion here related to the construction of section 8. Two questions on aspects of the section are dealt with, in turn, below.

The first dealt with the portion of the section which provided that: ‘murder or robbery, or any other offence which if committed within the body of a country, would by the laws of the United States be punishable with death’, and the question under issue therefrom which was whether this included robbery that was not punishable by death if committed on land. In other words, did the language mean that all robberies were made piratical acts or only robberies punishable with death on land?<sup>354</sup> Justice Marshall noted that the argument is understood to be ‘that congress did not intend to make that a capital offence on the high seas, which is not a capital offence on land’.<sup>355</sup> Justice Johnson held that with regard to crimes which may be committed either on the sea or land, the intention of the legislature was to produce uniformity in punishment, so that where death was inflicted in the one case, it should be inflicted in another.<sup>356</sup>

Johnson also applied a careful statutory construction to this phrase defining piracy in the section - cautioning that: ‘as singular as it may appear, it really is the fact in this case, that these men’s lives may depend upon a comma more or less’.<sup>357</sup> The comma he was referring to was one after the words “murder or robbery”, which separated it from “or any other offence”. He read it as meaning that the relative of the phrase – i.e. it must be an offence which if committed on land would be punishable with death – applied to all three antecedents: murder, robbery and other crimes. Johnson, however noted that constructing an interpretation which favours that all robberies are made piratical acts on the sea, could lead to an inconsistency where ‘a whole ship’s crew may be consigned to the gallows for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond whipping or confinement’.<sup>358</sup> Ultimately, the court held that a robbery committed on the high seas, although such robbery, if committed on land, would not by the laws of the United States be punishable with death, is piracy under the 1790 Act, and that the crime of robbery is that which is defined at the common law.<sup>359</sup>

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<sup>354</sup> White (1989) at 731.

<sup>355</sup> Judgment at 627.

<sup>356</sup> Judgment at 637.

<sup>357</sup> Judgment at 636.

<sup>358</sup> Judgment at 639.

<sup>359</sup> Judgment at 643.

The second and more complex issue dealt with by the court was the question of whether the Act extended further than to American citizens or acts against foreign nationals on foreign ships. The circumstances of the case were that a robbery had been perpetrated against Spanish citizens on a Spanish ship. Here, the key part of the section analysed was: ‘That if *any person or persons* shall commit upon the high seas’. The court recognised that these words imply terms of unlimited extent and are broad enough to comprehend every human being.<sup>360</sup> Yet, through an exercise of statutory interpretation<sup>361</sup> the court chose to view this general term in a ‘limited sense’. For example, the court looked at the title of the Act – ‘an act for the punishment of certain crimes against the United States’ – and deduced offences against the United States, not offences against the human race, which were the crimes which the legislature intended, by this law, to punish.<sup>362</sup> The court concluded that:

‘[T]he crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the act.’<sup>363</sup>

From this conclusion, it can be deduced that the Court regarded this section as a statutory definition of piracy under municipal law, with no scope for the punishment of pirates in domestic courts by the law of nations.<sup>364</sup> This interpretation by the court of the definition thus restricted the envisaged ambit of the Constitution to punish offences against the laws of nations. This was criticised during the period, particularly by the American statesman John Quincy Adams, whose handwritten memoirs which are preserved by the Massachusetts Historical Society, revealed his disgust with the decision.<sup>365</sup>

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<sup>360</sup> Judgment at 631.

<sup>361</sup> *See*, particularly, judgment from 631-634.

<sup>362</sup> Judgment at 631.

<sup>363</sup> Judgment at 643.

<sup>364</sup> *See* Dickinson (1925-6) at 345.

<sup>365</sup> In his diary entry of 11 May 1819 (at 107), he writes:

‘But the Supreme Court of the United States by a decision founded upon captious subtleties, in Palmer’s case cast away the Jurisdiction which a Law of Congress had given to the circuit courts in cases of Piracy committed by foreigners by construing the words “any person or persons” to mean only citizens of the United States. Their reasoning is a sample of judicial logic – disingenuous, false and hollow. A logic so abhorrent to my nature, that it gave me an early disgust to the practice of law, and led me to the unalterable position never to accept judicial office. In this case, if human language means anything; Congress had made general piracy by whomsoever, and wheresoever upon the high seas committed cognizable by the Circuit Courts – the law has been in force from the 30<sup>th</sup> day of April 1790. Foreign pirates for piracies committed in foreign vessels have been tried and hung by this authority, and now the Supreme Court have discovered that any person or persons means only citizens of the

Following this decision, the Court in *United States v Klintonck*<sup>366</sup> revisited its position to mitigate the limiting effects of the *Palmer* decision. In this case, Ralph Klintonck, a citizen of the United States, was indicted and convicted in the court *a quo* for piracy committed on the high seas by the *Norberg*, a Danish vessel. He falsely claimed that he was commissioned by one styling himself as Brigadier Aury of the then unrecognised “Mexican Republic” which was at war at Spain, and consequently falsely claimed that the *Norberg* was a Spanish vessel which could be seized pursuant to such commission.<sup>367</sup> As to this contention, the court found that that the *Norberg* was not captured *jure belli* but seized *animo furandi*. Thus it was not a belligerent capture but rather a robbery on the high seas.<sup>368</sup> In dealing with the significant issue of the application of the 1790 Act, the Attorney-General pointed out the lacunae in the court’s application of section 8 in *Palmer*. These were that it does not decide whether the same offence committed by a citizen on board a vessel *not* belonging to the subjects of any foreign power, is not piracy.<sup>369</sup> Chief Justice Marshall appears to have confirmed this view, and thus through a ‘reconsideration’ of the earlier approach in *Palmer*, he held that while section 8 of the 1790 Act, with its reference to general piracy committed by *any person*, ought not to extend to persons under the acknowledged authority of a foreign state, it should be construed to comprehend those who acknowledge the authority of *no state*<sup>370</sup> and who thus ‘throw off their national character by cruising piratically and committing piracy on other vessels’.<sup>371</sup> This judgment was thus a positive step to restore the adjudication of piracy *jure gentium* prosecutions under the law of nations by national courts contemplated in the American Constitution – as Chief Justice Marshall declares:

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United States, and that piracy committed by foreigners in foreign vessels is not punishable by the laws of the United States.’

Extracted from: [www.masshist.org/jqadiaries/php/popup?id=jqad31\\_107](http://www.masshist.org/jqadiaries/php/popup?id=jqad31_107).

<sup>366</sup> 18 U.S. (5 Wheat.) 144 (1820). *See, generally*, commentaries on this case in White (1989) at 732; and Dickinson (1925-6) at 345-347.

<sup>367</sup> Judgment at 144-145; *see, also*, commentary by White (1989) at 732.

<sup>368</sup> Judgment at 150.

<sup>369</sup> Judgment at 147.

<sup>370</sup> Judgment at 152.

<sup>371</sup> Judgment at 153. *See Peter Statutes at Large* 3 (1850) at 510, where it is reported that a ‘vessel loses her national character by assuming a piratical character; and a piracy committed by a foreigner on board such a vessel, upon any other vessel, whatever, is punishable under the eighth section of the act of 30 April, 1790.’ In *United States v Furlong* 18 U.S. (5 Wheat.) 203 (1820) – which involved prisoners of various nationalities aboard ships cruising under domestic and foreign flags – the court found that regardless of their nationality, the piratical acts were punishable under the 1790 Act and the crew assumed the character of pirates, whereby they lost all claim to national character or protection (at 205).

‘Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amendable to the laws of all nations.’<sup>372</sup>

The criticism of *Palmer* and the omission which was subsequently discussed in *Klintock*, led Congress to enact a new Statute in 1819 (the 1819 Act),<sup>373</sup> much to the delight of John Quincy Adams, who wrote: ‘a new act was passed to patch over the enormous hole in the moral garment of this nation made by this desperate thrust of the Supreme Court, and general piracy was made expressly punishable by the circuit court’.<sup>374</sup> Section 5 thereof<sup>375</sup> provided:

‘*And be it further enacted*, That if any person or persons soever, shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States ... be punished with death.’<sup>376</sup>

Thus, while the jurisprudence of the period followed the custom of crimes being statutorily defined and their elements set forth with precision, Congress, in this instance, defined the crime through a direct reference to the ‘law of nations’.<sup>377</sup> Following from these cases, a further particularisation of the concept of piracy under the law of nations would become necessary. This arose at the trial of Thomas Smith and his shipmates in Richmond, Virginia, which was subsequently brought before the Supreme Court in the seminal<sup>378</sup> judgment reported as *United States v Smith*.<sup>379</sup> The facts appear very briefly from the indictment and

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<sup>372</sup> Judgment at 152.

<sup>373</sup> An Act to protect the commerce of the United States, and to punish the crime of piracy; 15<sup>th</sup> Cong., 2<sup>nd</sup> Sess., ch. 77 (3 March 1819).

<sup>374</sup> See fn 232 *supra* at 108.

<sup>375</sup> This section was only meant to be in force until the end of the next session of Congress, but §2 of 16<sup>th</sup> Cong, 1<sup>st</sup> Sess., ch. 113 (Piracy Act of May 15, 1820) provided that the section is ‘continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects as fully as if the duration of the said section had been without limitation’.

<sup>376</sup> With my emphasis.

<sup>377</sup> White (1989) at 733.

<sup>378</sup> Samuels (2012) at 322 *infra*, highlights the importance of the case in the development of international law in the United States, in terms of understanding how domestic law should treat international, and in particular, customary international law.

<sup>379</sup> 18 U.S. (5 Wheat.) 153 (1820) (reported directly after *Klintock* in the same volume). A comprehensive analysis of this case can be found in Samuels ‘The Full Story of United States v

special verdict of the jury,<sup>380</sup> but a detailed account of the evidence of the witnesses was recorded in a media journal of the period, *Niles Weekly Register*.<sup>381</sup> The episode arose out of the war for independence in South America, and is tied to the fates of the crews of two vessels: the *Creola* and the *Irresistible* which were commissioned by different colonies and antagonists at war with Spain, as they rendezvoused at the island of Margaritta in March 1819. By this time, various circumstances caused unhappiness in the crews of both vessels, and two crew members of the *Creola* led the crew in a mutiny.<sup>382</sup> This mutiny was with a view to seizing the *Irresistible*, an armed and faster vessel. In pursuance of this plan, the *Creola* mutineers took two smaller boats from their ship, sailed to the *Irresistible* and led a combined attack on and incitement to mutiny aboard that vessel.<sup>383</sup> Notwithstanding some of the reservations of the crew as to their true nature, believing they were still privateers with a legitimate commission, a few days later the crew had officially become pirates when the *Irresistible* proceeded upon a cruise, whereupon they boarded with *animus furandi* (although without reports of violence) 10 to 40 ships of various nationalities.<sup>384</sup> It appeared that after three months at sea, the crew simply wanted to return home and believed they could escape serious repercussions.<sup>385</sup> However, once on land, the crew dispersed, but it appeared they were quickly arrested and were charged under different indictments at different courts.<sup>386</sup>

Thomas Smith and others were indicted under the newly passed 1819 Act and were taken to Richmond for trial – and their appeals reached the Supreme Court in 1820. The Attorney-General contended that what was envisaged by piracy under the law of nations – as framed in the Constitution – was the definition of the offence given by writers on public law. He submitted that ‘all these writers concur in defining it to be, depredation on the seas, without the authority of a commission, or beyond its authority’.<sup>387</sup> He supported his submission by advancing that ‘there is no defect in the definition of piracy by the authorities to which we are referred by this act. The definition given by them is certain, consistent, and unanimous; and pirates being *hostis humani generis*, are punishable in the tribunals of all nations. All

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Smith: America’s Most Important Piracy Case’ 1 *Penn State Journal of Law and International Affairs* (2012) at 320-362.

<sup>380</sup> Judgment at 154.

<sup>381</sup> ‘Law Intelligence: Crew of the Irresistible’ Vol.16, 7 August 1819 at 390-395 (preserved at the University of California) and *cited* in Samuels (2012). The facts summarised in the main text hereinabove are drawn from the judgment at 154, and Samuels (2012) at 335-349.

<sup>382</sup> Samuels (2012) at 339-340.

<sup>383</sup> *Idem* at 341.

<sup>384</sup> *Idem* at 344-345.

<sup>385</sup> *Idem* at 346.

<sup>386</sup> *Idem* at 347.

<sup>387</sup> Judgment at 155.

nations are engaged in a league against them for the mutual defence and safety of all.’<sup>388</sup> Counsel for the appellants argued, however, that the offence could not be punished under the 1819 Act because Congress is bound to define the crime of piracy and is not at liberty to leave it to be ascertained by judicial interpretation.<sup>389</sup> He argued further that the writers on public law do not define the crime of piracy with precision and certainty, and therefore the very defect rendered it necessary that Congress should define it in terms before it proceeded to exercise the power of punishing the offence.<sup>390</sup>

With these issues at hand, Justice Story delivered the opinion of the Court. He holds that ‘[t]he power given to Congress is not merely to “define and punish piracies”; if it were, the words “to define,” would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime’.<sup>391</sup> The court then looked to ascertaining what the law of nations provides on a subject, and held that this can be found in: (i) consulting the works of jurists writing professedly on public law; or (ii) by general usage and practice of nations; or (iii) by judicial decisions recognising and enforcing that law.<sup>392</sup> The court, in footnotes, cited various writers like Jenkins and Blackstone, who have already been discussed in this chapter, and came to the conclusion as to the definition of piracy under the law of nations:

‘There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the *diversity of definitions*, in other respects, all writers concur, in holding, that robbery, or forceful depredations upon the sea, *animo furandi*, is piracy.’<sup>393</sup>

Justice Story also holds that the common law recognises and punishes piracy as an offence against the law of nations – which is a part of the common law.<sup>394</sup> As a result, the Court declared that:

‘[T]he general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons

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<sup>388</sup> Judgment at 156.

<sup>389</sup> Judgment at 157.

<sup>390</sup> *Idem*. In other words, he said that Congress must give a ‘distinct, intelligible explanation of the nature of the offence in the act itself’.

<sup>391</sup> Judgment at 158.

<sup>392</sup> Judgment at 159-160. Samuels comments that the manner in which modern courts determine what constitutes international law, can be traced directly to the Supreme Court’s analysis in *Smith* (Samuels (2012) at 354).

<sup>393</sup> Judgment at 161, with my emphasis.

<sup>394</sup> *Idem*.

whatsoever, with whom they are in amity, is conclusive proof that the offence is supposed to depend, not upon the provisions of any particular municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.<sup>395</sup>

My review of the doctrines and views of the principal writers, discussed earlier in this chapter, has however shown that while the element of robbery *animus furandi* is common to all conceptions of the crime, there are other elements and underlying doctrines and political circumstances which hindered the formulation of a universal definition under the law of nations. Indeed, the holding of Justice Story in *Smith* of the definition of piracy under the law of nations cited above, seems to not fully apply his earlier *dictum* in the judgment that:

‘Offences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish.’<sup>396</sup>

Justice Livingstone in *Smith* dissented<sup>397</sup> and expressed caution in this case about whether the lives of the appellants were at stake. He argues that the object of referring the definition to Congress ‘was, and could have been no other than, to enable that body, to select from source it might think proper, and then to declare, and with reasonable precision, what act or acts should constitute this crime.’<sup>398</sup> He commented on the difficulty of ascertaining the constitution of a crime when it has to be collected from a variety of writers, either in different languages or under the disadvantage of translations.<sup>399</sup> His principal objection is premised thus:

‘Although it cannot be denied that some writers on the law of nations do declare what acts are deemed piratical, yet it is certain that they do not all

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<sup>395</sup> Judgment at 162.

<sup>396</sup> Judgment at 159.

<sup>397</sup> This was one of only eight dissents published in his 17-year tenure on the bench (White (1989) at 734).

<sup>398</sup> Judgment at 180.

<sup>399</sup> Judgment at 182.

agree; and even if they did, it would seem unreasonable to impose upon that class of men, who are most liable to commit offences of this description, the task of looking beyond the written law of their own country for a definition of them.’<sup>400</sup>

Therefore, to Livingstone, the incorporation of an international law term into a domestic statute was insufficient to give it binding force.<sup>401</sup>

Chief Justice Marshall could not contribute to the judgment as he was on Circuit, but he wrote to his colleague Bushrod Washington, while the case was pending, about his concerns:

‘[i]n the trials at Richmond the evidence was perfectly clear & the case was unequivocally a case of piracy according to the laws of every civilized nation. The doubt I entertain is whether there is any such thing as Piracy as ‘defined by the law of nations’. All nations punish robbery committed on the high seas by vessels not commissioned to make captures yet I doubt seriously whether any nation punishes otherwise than by force of its own particular statute.’<sup>402</sup>

Had this view of Marshall prevailed, Samuels argues that Congress would have acted in haste to amend or redraft the piracy statute, and since the view did not prevail, Congress to this day<sup>403</sup> has never taken action to amend the statute and it remains on the Statute books.<sup>404</sup>

### 3.4 Summative remarks

In this section, an account of the development of the definition and early doctrines in Anglo-American jurisprudence were considered. Due to naval dominance, English jurisprudence provided an example of the most widely used legal system during the 19<sup>th</sup> Century prior to the codification process in the 20<sup>th</sup> Century. The policy and approach of English jurisprudence during the period can perhaps be seen as a precursor to contemporary concerns by states over the possibility of abuse – should the exercise of foreign jurisdiction

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<sup>400</sup> Judgment at 181. He found that a duty lay on Congress not to refer the citizens of the United States, for rules of conduct, to the statute or laws of a foreign country, with which it is not presumed they are not acquainted (the law of nations according to him in this instance must be regarded in the same light as a reference to any other foreign code) (at 182).

<sup>401</sup> White (1989) at 734.

<sup>402</sup> Hobson *The Papers of John Marshall* (1995) 8 at 374; Samuels (2012) at 352.

<sup>403</sup> Samuels wrote 192 years after the judgment in *Smith* was delivered.

<sup>404</sup> It was applied in the recent cases of *United States v Hassan* 747 F. Supp. 2d 642 (E.D. Va. 2010); and *United States v Said* 757 F. Supp. 2d 554 (E.D. Va. 2010).

be extended into their territorial waters in terms of the suppression of piracy. A conclusion can be reached from an analysis of the judgments in this section, that the conception of the high seas is markedly different from the present conception. If the dicta contained in the *Serhassan* and *Magellan* pirates are considered, then the high seas would be synonymous with the entire realm of the ocean up to the shore along the coast. In revisiting American jurisprudence, the intricacies in incorporating piracy *jure gentium* into domestic legal proceedings – in light of the lack of a precise definition of piracy under the law of nations – were paralleled in Kenyan jurisprudence in the 21<sup>st</sup> Century, as will be seen in the penultimate chapter of this thesis.

What fails to emerge from this revisit of doctrines and precedent prior to the codification process, is developments concerning the *locus* of the crime. Later in this chapter, it will be shown that the concept of the territorial sea developed over a long period of time – thus distinguishing acts that were committed within the territorial sea, and acts on the high seas. The jurisprudence in this chapter only reflects the definition of piracy as being committed on the high seas, with an extensive jurisdiction, and without cognisance of the emergence of the realm of the territorial sea and its implications.

With this broad overview of the development of the definition, the next two sections of this chapter narrow the focus toward the *locus* of piracy. This is done by first discussing the *sui generis* nature of the enforcement of municipal law over acts of piracy on the high seas through the exercise of universal jurisdiction. Secondly, the interface between the realm of the high seas and the territorial seas will be explored in greater detail and linked to the development of piracy law.

#### IV. A PENCHANT TOWARDS UNIVERSAL JURISDICTION

##### 4.1 Prefatory

In the previous section, through an analysis of precedents and of the works of jurists and writers, some light was shed on the development of a definition of piracy under the law of nations. The section considered the *actus reus* of piracy” a subspecies of robbery *animus furandi* or forcible taking on the seas. However, due to the *locus* of the crime, namely the high seas, and where no state has sovereignty, a discussion on the exercise of extraterritorial jurisdiction is vital.<sup>405</sup> While the law of nations provided a common parameter of piracy as

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<sup>405</sup> See Shnider ‘Universal Jurisdiction Over “Operation of a Pirate Ship”’: The Legality of the Evolving Piracy Definition in Regional Prosecutions’ 34 *North Carolina Journal of International Law and Commercial Regulation* (2012-3) 473 at 482, where he comments that ‘piracy is often

unlicensed robbery on the high seas, it fell to individual states which enacted piracy laws to implement and enforce the international norm<sup>406</sup> The principles vesting jurisdictional competence on the individual states must therefore be assessed, and this section will therefore consider the bases of jurisdiction and the origins and justification for the application of universal jurisdiction (hereafter UJ) over piracy. Historical cases that applied UJ will be considered and some of the criticisms of the place of UJ will also be presented in historical context. An appraisal of UJ is necessary in the analysis developing one of the aims of this thesis: the extension of the enforcement regime of UNCLOS into the territorial sea.

#### 4.2 Bases of jurisdiction and the concept of UJ

Jurisdiction over piracy has been a subject of discourse in numerous sources of international law. A seminal case and the work of an influential writer are cited here, at the outset, by way of a preface. In the *Steamship Lotus* case of 1927 (*France v Turkey*), the Permanent Court of International Justice set out a clear principle of international law, that a state cannot exercise its jurisdiction outside its territory unless customary international law or an international treaty permits it to do so.<sup>407</sup> Moore, J. (dissenting), however, held that:

‘Piracy by the law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate’s operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish...’<sup>408</sup>

The issue was also raised a century earlier by the Swiss philosopher Emerich de Vattel, who reasoned thus:

‘[A]lthough the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except

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studied as part of a process of the development and application of international criminal law, for which the most foundational questions are jurisdiction and elements of liability’.

<sup>406</sup> See Kontorovich (2004) at 191.

<sup>407</sup> See par. 45 of the judgment.

<sup>408</sup> *Publications of the Permanent Court of International Justice*, Series A, No. 10 at 70-71.

from this role villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundations of their common safety. Thus pirates are sent to the gibbet by the first into whose hands they fall.’<sup>409</sup>

To understand the implications of the assertions above, an examination is undertaken hereunder to firstly set out the general bases of jurisdiction.<sup>410</sup> Kontorovich states that international law regards criminal jurisdiction as a prerogative of sovereign nations, and, as a result, the traditional limits on national criminal jurisdiction are in consanguinity with the limits of national sovereignty.<sup>411</sup> Following from this, it is a common principle that a state’s authority to decide upon the reach of its penal power (*ius puniendi*) is limited, in particular, by the principle of non-intervention.<sup>412</sup> International law therefore has established principles for determining when a state may exercise authority over offences that also affect the interests of another state,<sup>413</sup> and also where offences are committed elsewhere (extraterritorial jurisdiction).<sup>414</sup> However, where a state chooses to exercise such extraterritorial jurisdiction, it could conflict or compete with the jurisdiction of another state, with the potential of threatening the stability of the international legal order.<sup>415</sup> Thus, Kontorovich explains that a nation can exercise extraterritorial jurisdiction over an offence – only when it has a clear *nexus* with the offence that gives it jurisdictional priority over

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<sup>409</sup> Emerich de Vattel *Law of Nations* (1833) I §233. A discussion of the passage can be found in Garrod ‘Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law’ 25(2) *Diplomacy and Statecraft* (2014) 195 at 206-207; and Kontorovich (2004) at 230-233.

<sup>410</sup> ‘Jurisdiction’ can refer to the power to lay down laws, the power to adjudicate, and the power to punish. See Kontorovich (2004) at 188, fn 19. Randall in ‘Universal Jurisdiction Under International Law’ 66 *Texas Law Review* (1988) 785 at 786, defines this more comprehensively as:

‘[A] state’s legitimate assertion of authority to affect legal interests. Jurisdiction may describe a state’s authority to make its law applicable to certain actors, events, or things (legislative jurisdiction); a state’s authority to subject certain actors or things to processes of its judicial or administrative tribunals (adjudicatory jurisdiction); or a state’s authority to compel certain actors to comply with its laws and to redress noncompliance (enforcement jurisdiction).’

<sup>411</sup> See Kontorovich (2004) at 188.

<sup>412</sup> Article 2 (7) of the Charter of the United Nations states that the United Nations has no authority to intervene in matters which are within the domestic jurisdiction of any State, while this principle shall not prejudice the application of enforcement measures under Chapter VII of the Charter. See Geiß and Petrig *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011) at 138.

<sup>413</sup> See Randall (1988) at 785.

<sup>414</sup> See Kontorovich (2004) at 188.

<sup>415</sup> *Idem* at 189. Randall (1988) at 785 explains that ‘under international principles, domestic jurisdiction rests on reconciling a state’s interest in a particular offence with other states’ interest in the offence’.

other nations.<sup>416</sup> The state seeking to exercise its *ius puniendi* must therefore set out such *nexus* according to the following jurisdictional bases:

- (a) *The territorial principle*: Brownlie states that courts of the place where the crime is committed may exercise jurisdiction and this is a principle that has received universal recognition.<sup>417</sup>
- (b) *The nationality principle*: This is where the offender is a national of the state,<sup>418</sup> and is generally recognised as a basis for jurisdiction over extraterritorial acts.<sup>419</sup>
- (c) *The passive personality principle*: This is where the victim is a national of the state.<sup>420</sup> Therefore, according to this principle, foreigners may be prosecuted for acts abroad which are harmful to the nationals of the prosecuting state.<sup>421</sup>
- (d) *The protective principle*: This is where an extraterritorial act threatens the state's security or a basic governmental function.<sup>422</sup> The state can, as a consequence, exercise jurisdiction over foreign nationals who commit acts in a foreign territory.<sup>423</sup>

As can be seen from the principles above, the common parameter contains a *nexus* between the state wishing to exert jurisdiction and the offender. This then brings us to the principal base of jurisdiction to be examined – namely universal jurisdiction – which transcends the *nexus* of territoriality and sovereign authority of the state.<sup>424</sup> It is an exception to the general principles listed above.<sup>425</sup> The principle holds that a state can exercise its *ius puniendi* over offences to which it has no connection at all,<sup>426</sup> regardless of the *locus* of the offence and the

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<sup>416</sup> *Idem* at 189.

<sup>417</sup> Brownlie *Principles of Public International Law* 5<sup>th</sup> ed. (1998) at 303. Randall (1988) at 787, fn 8 also summarises two subspecies of the territorial principle: *to wit* the “objective territorial principle” which refers to ‘jurisdiction arising where the offender intentionally has caused negative consequences within the state, although the offence itself occurs outside of the prosecuting state’s territory’ – in other words, where some constituent element of the crime is consummated on state territory (Brownlie at 304); and the “subjective territorial principle” which ‘may be used when an offence is commenced within the prosecuting state, but completed elsewhere’. Goodwin notes that in some circumstances, a further form of quasi-territorial jurisdiction exists based on the ‘flag-state’ principle, which states that a ship is an extension of the territory of its flag state: *see* Goodwin (2006) at 984-985; Kontorovich (2009) at 189; and Shnider (2012-3) at 483.

<sup>418</sup> Randall (1988) at 787.

<sup>419</sup> Brownlie (1998) at 306. *See, also*, Goodwin (2006) at 985.

<sup>420</sup> Randall (1988) at 787.

<sup>421</sup> *See* Brownlie (1998) at 306, where he states that this is the least justifiable, as a general principle, of the various bases of jurisdiction. *See, also*, Goodwin (2006) at 986.

<sup>422</sup> Randall (1988) at 788.

<sup>423</sup> Goodwin (2006) at 987, where he states that this has been the most controversial of the traditional bases of jurisdiction. *See, also*, Brownlie (1998) at 307 and Kontorovich (2004) at 189.

<sup>424</sup> *See* Shnider (2012-3) at 483.

<sup>425</sup> According to Randall (1988) at 793, it is also an exception to the general rule, limiting each state’s jurisdiction on the high seas to its own vessels and nationals.

<sup>426</sup> *See* Kontorovich (2004) at 183.

nationalities of the offender and the victim.<sup>427</sup> The jurisdiction is based solely on the nature of the offence. In other words, competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offence.<sup>428</sup> The Princeton Project which was a collaboration of working groups of experts, set out to derive principles that set out a uniform consensus on UJ. The first principle provides that:

‘[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.’<sup>429</sup>

With these foundational principles now set out, when revisiting the work of Vattel and the dictum in *Steamship Lotus*, it is clear that the underlying rationale is one of UJ. Definitively, piracy is seen as the quintessential UJ crime. Randall remarks that ‘every state has long had legislative, adjudicatory, and enforcement jurisdiction over all piratical acts on the high seas, even when neither pirates nor their victims are nationals of the prosecuting state and the offence has no specific connection to the prosecuting state.’<sup>430</sup> This was seen as the exception to the *nexus* requirement that was essential to the other bases of jurisdiction set out above. This is a view that was held by numerous other writers and courts and has acquired the force of customary international law.<sup>431</sup> It is an exception of long standing,

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<sup>427</sup> See Randall (1988) at 787.

<sup>428</sup> See ‘Article 9 ‘Universality – Piracy’ 29 *American Journal of International Law* (1935) Supplement: Research in International Law, 563 at 564.

<sup>429</sup> Macedo (ed.) ‘The Princeton Principles on Universal Jurisdiction’ *Princeton University* (2001) at 28. Note that according to Garrod (2014), there is no internationally codified definition of UJ (at 195).

<sup>430</sup> Randall (1988) at 791.

<sup>431</sup> See, for example, Geiß and Petrig (2011) at 143, who state that ‘It is well established that any nation may try pirates, even in the absence of a nexus between the pirate attack and the State claiming jurisdiction.’ They cite, at fn 588, several primary and secondary sources in support thereof. Kontorovich (2004) at 190, remarks that for as long as sovereignty-based jurisdictional principles have existed, any nation could try any pirates it caught, regardless of the pirates’ nationality or where on the high seas they were apprehended. Sorenson notes:

‘Universal jurisdiction over piracy has long been widely recognized both under customary international law and treaty; whatever the nationality of the offender or of the victim, and wherever on the high seas the offence was committed, any state which catches the pirate has jurisdiction to prosecute and punish for acts that amount to piracy by international law.’ (Sorensen *Manual of Public International Law* (1968) at 365).

Furthermore, Bassiouni remarks that ‘universal jurisdiction to prevent and suppress piracy has been widely recognized in customary international law as the international crime *par excellence* to which universality applies’ (Bassiouni ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ 42 *Virginia Journal of International Law* (2001) 81 at 110-111. Among the various precedents noted in the articles cited hereto, in *United States v The*

being the oldest offence that invokes UJ,<sup>432</sup> which for hundreds of years was only applied to the crime of piracy.<sup>433</sup> Accordingly, the Princeton Principles of UJ comment on the crimes covered under UJ, and find that: ‘[p]iracy is a crime that paradigmatically is subject to prosecution by any nation based on principles of universality, and it is crucial to the origins of universal jurisdiction, so it comes first’.<sup>434</sup>

A fundamental delimitation to the scope of UJ – according to Geiß and Petrig – is that it only provided over conduct which matches the piracy definition under international law.<sup>435</sup> In other words, they state that for acts defined as piracy under municipal law, which go beyond the definition of piracy under international law, UJ cannot be invoked.<sup>436</sup>

### 4.3 Rationale for UJ in the case of piracy

With a preface in the previous section, which established that piracy was the prototype and paradigmatic crime over which UJ had its genesis, the question of the reasons or rationale for UJ having such origins in piracy must be examined and set out here. This section therefore seeks, under the following sub-headings, to isolate what it was about piracy that made it universally cognisable:

4.3.1 *Heinousness*: International law treated piracy as being universally cognisable because of its heinousness.<sup>437</sup> Because of this heinousness, the offenders may be prosecuted by any state to protect the fundamental values

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*LaJeune Eugene* 26 F. Cas. 832, 843 (C.C.D. Mass 1822) (No. 15551), a federal judge in 1822 wrote that ‘no one can doubt that vessels and property in the possession of pirates may be lawfully seized on the high seas by any person, and brought in for adjudication’. It was held in *United States v Layton* 509 F. Supp. 212, 223 (N.D. Cal. 1981) that ‘[universal] jurisdiction had its origins in the special problems and characteristics of piracy’.

<sup>432</sup> Randall (1988) at 791.

<sup>433</sup> Kontorovich (2004) at 184.

<sup>434</sup> Macedo (ed.) (2001) 45; Geiß and Petrig (2011) at 143.

<sup>435</sup> Geiß and Petrig (2011) at 143.

<sup>436</sup> See Art. 9 ASIL – Commented Harvard Draft Convention on Jurisdiction with Respect to Crime, which provides that ‘A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by *international law*’ (my emphasis). See, also, Geiß and Petrig (2011) at 143. Kennedy, L.J. in *Bolivia v Indemnity Mutual Marine Assurance Co. Limited* (1909) 1 K.B. 875, commented on the distinction between piracy defined under international law and municipal law: ‘The authorities show that the word ‘piracy’ is one capable of various shades of meaning, and that, even when used strictly as a legal term, it may be held to cover different subject-matters according as it considered from the point of view of international or that of municipal lawyers.’ (at 802). See, also, *Shnider* (2012-3a) at 483-484.

<sup>437</sup> See Kontorovich (2004) at 185; Goodwin (2006) at 995; Garrod (2014) at 199. Geiß and Petrig (2011) at 145 cite the *Case Concerning the Arrest Warrant (Democratic Republic of Congo v Belgium)* I.C.J. Reports 2002 at 60-61: ‘[i]t is equally necessary that universal jurisdiction may be exercised only over those crimes regarded as most heinous by the international community. Piracy is the classic example.’ See, also, the *Tachiona*, 234 F. Supp. 2d at 416-417.

of the international community.<sup>438</sup> In 1932, scholars at Harvard University prepared *de lege ferenda* a draft convention on piracy (hereafter the Harvard Draft).<sup>439</sup> In the commentary to this draft, they commented on the common practice of referring to piracy as an offence against the law of nations. They found that this and other similar expressions have a ‘vituperative quality which emphasises the gravity of the former dangers of piratical enterprises to the sea-borne commerce of the world and the coasts of sea faring nations’.<sup>440</sup> They noted that ‘[e]xtravagant hyperboles though they are, they are used as reason for the legal rule that every state participates in a common jurisdiction to capture pirates and their ships on the high seas, and to prosecute and punish for piracy persons who lawfully are seized and against whom there is a proper ground for prosecution’.<sup>441</sup> Goodwin comments that it is obvious that pirates and piracy can be heinous, and cites examples thereof.<sup>442</sup> This perception of the dangers of piracy was also frequently reported in the media of various periods. For example, during the trial of Thomas Smith in the United States referred to earlier in this chapter, *Niles Weekly Register* commented that ‘[t]he scenes of outrages on the high seas which they develop [sic] belong to the history of times ... [w]e owe it to the civilized world to arrest such lawless outrages...’.<sup>443</sup> A proponent of this rationale is Randall, who argued that ‘[a] more accurate rationale for not limiting jurisdiction over pirates to their state of nationality relies on the *fundamental nature* of piratical offences. Piracy may comprise particularly *heinous* and wicked acts of violence and depredation’.<sup>444</sup> Therefore, according to Kontorovich, it was ‘the *substantive nature* of the parties acts – not the pirates’ status as private actors or the location of their crimes – that made them susceptible to universal jurisdiction’.<sup>445</sup>

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<sup>438</sup> Garrod (2014) at 195.

<sup>439</sup> The draft convention will be considered in some detail in the next chapter.

<sup>440</sup> Harvard Research in International Law, Draft Convention on Piracy, 26 *American Journal of International Law* (1932) Supplement 741 at 757.

<sup>441</sup> *Idem*.

<sup>442</sup> Goodwin (2006) at 995.

<sup>443</sup> *Niles Weekly Register*, 7 August 1819 (cited in Samuels (2012) at 355).

<sup>444</sup> Randall (1988) at 794 (with my emphasis). Randall only cites one case in support of this assertion – namely a dictum in *US v Brig Malek Adhel* 43 US (2 How.) 210 (1844) at 232: ‘a pirate is deemed, and properly deemed *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations without regard to any right or duty’. Goodwin is critical of Randall’s rationale and argues that he cited only one-half of the court’s reasoning, and misinterpreted jurisdiction (Goodwin (2006) at 199).

<sup>445</sup> Kontorovich (2004) at 205.

4.3.2 *De-nationalisation*: Earlier in this chapter, Blackstone was cited<sup>446</sup> for the proposition that an offender engaging in an act of piracy loses the protection and benefits of his nationality.<sup>447</sup> In other words, the pirate becomes an outlaw entirely outside any state's law, with no national character.<sup>448</sup> Goodwin remarks that 'if pirates are denationalised, then any traditional form of jurisdiction predicated on the nationality of the pirate will not apply'.<sup>449</sup> It is as a result of this jurisdictional gap that commentators have suggested that the need for UJ is apparent.<sup>450</sup> Geiß and Petrig mention that this rationale was not uncommon in earlier times, and refers, along with the framers of the *Harvard Draft*, to the writings of the 19<sup>th</sup> Century scholar Lorimer, who wrote:

'When [the law of nations] punishes pirates, it does not punish the citizens of the State to which the pirates belonged, but cosmopolitan criminals, whom it regards as having ceased to be State citizens altogether in consequence of their having broken the laws of humanity as a whole, and become enemies of the human race.'<sup>451</sup>

A precedent that supports this rationale is *United States v The Pirates*,<sup>452</sup> where Johnson J. held:

'... whether as an American, or a pirate ship, the offence committed from her was equally punishable, and the words of the act extend to her in both characters. But if it were necessary to decide the question, we should find no difficulty in maintaining that no man shall, by crime, put off an incident to his situation which subjects him to punishment. A claim to protection may be forfeited, by the

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<sup>446</sup> See Blackstone (1772) at 71. See, also, Twiss in 1 *The Law of Nations* 2nd ed. at 290-291, where it is stated that 'the Pirate has no National character. And to whatever country he may have originally belonged, he is *justiciable* everywhere, being reputed out of the protection of all laws and privileges whatsoever' (cited in the *Harvard Draft* (1932) at 828).

<sup>447</sup> See Blackstone (1772) at 71.

<sup>448</sup> Randall (1988) at 793.

<sup>449</sup> Goodwin (2006) at 988. Geiß and Petrig (2011) at 146 illustrate that the active personality (or nationality) and territoriality principle would not be operable as a result. Goodwin, *idem*, also states that if the ship is also denationalised, then the flag-state principle would not be operable. Contemporary instruments indicate that it is up to the domestic law applicable to the ship to decide whether the nationality of the ship is revoked (see Goodwin (2006) *idem*).

<sup>450</sup> Geiß and Petrig (2011) at 146.

<sup>451</sup> Lorimer 2 *Institutes of the Law of Nations* (1883) at 132 (cited in Geiß and Petrig (2011) at 146 and in the *Harvard Draft* (1932) at 828).

<sup>452</sup> 5 Wheat. (U.S.) 184 (1820).

loss of national character, where no rights are acquired, or immunity produced by that cause'.<sup>453</sup>

In *Tachiona*,<sup>454</sup> a U.S. federal court held that: '[t]he "enemy of all humankind" ... ranks as a different species from the ordinary tortfeasor of the typical case. Equally so is the class of universal rules that outcast the international outlaw, and thus declare him *unworthy of all sovereign protections*'.<sup>455</sup>

4.3.3 *Security of international commerce*: Earlier in this thesis much emphasis was placed on the importance and significance of the ocean as a conduit for international trade and commerce. Studies have been undertaken to show the commercial impact of piracy on the East African seaboard on global shipping.<sup>456</sup> The findings illustrated the indiscriminate nature of the pirate attacks, where subjects of various nations were victims – including South Africans. While this finding was confined to the East African seaboard region under review, the proposition that pirates engage indiscriminately is a long-standing one.<sup>457</sup> This indiscriminate approach meant that states in unison were potential victims, and thus the security of international commerce amongst nations is placed at risk. It was trite that the oceans needed to be free of depredations in order to allow commerce to flourish, and Garrod remarked that 'piracy stood as the antithesis of mercantilism: creating insecurity for vital trade routes and threatening to destroy trade routes'.<sup>458</sup> Recent commentators, Geiß and Petrig,

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<sup>453</sup> *Idem* at 194-195.

<sup>454</sup> 234 F. Supp. 2d at 416-417, cited in Kontorovich (2004) at 207.

<sup>455</sup> *Idem* (with my emphasis).

<sup>456</sup> *See*, for example, Bowden and Basnet 'The Economic Cost of Piracy' *One Earth Foundation* (2011).

<sup>457</sup> *See*, for instance, in Art. 9 ASIL – Commented Harvard Draft Convention on Jurisdiction with Respect to Crime (1935), where the commentators remark: 'Originating in a period when piratical depredations were a very real menace to all water-borne commerce and traffic, the competence to prosecute and punish for piracy was commonly explained by saying that the *pirate who preyed upon all alike was the enemy of all alike*' (with my emphasis).

<sup>458</sup> Garrod (2006) at 199. He also cites *idem* Vattel, who regarded trade as vital for a state's wealth, strength and security, and Grotius (at 203) who contended that 'in a state of nature, such as the high seas where judicial recourse is lacking, private individuals and sovereigns share the same powers under the fundamental "precepts" of the law of nature: self defence and the protection of trade', and that 'humanity is united trade' seeing it as a 'necessity for the human race' (*idem*). *See*, also, the *Harvard Draft* (1932) at 788, which cited the following comments from a report of the sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law: 'Piracy has as its field of operation that vast domain which is termed 'the high seas'. It constitutes a crime against the *security of commerce* on the high seas, where alone it can be committed ... [w]hen pirates choose as the scene of their acts of sea-robbery a place common to all

accordingly state that ‘every state is a potential victim of maritime depredations and that the interest in securing the free flow of international trade has always been a shared interest of the international community.’<sup>459</sup> This notion was then seen as supporting the exercise of UJ. Garrod’s research of legal scholarship confirms that ‘the disruption of navigation and trade on the high seas was treated as violating the law of nations and every state was permitted to enforce jurisdiction over “pirates” on the high seas’.<sup>460</sup> This rationale for UJ was supported in the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime, where the commentators remarked that ‘The competence [UJ] is perhaps better justified at the present time upon the ground that the punishable acts are committed upon the seas where all have interest in the safety of commerce and where no State has territorial jurisdiction. Notwithstanding the more effective policing of the seas in modern times, the common interest and mutual convenience which gave rise to the principle have conserved its vitality as a means of preventing the recurrence of maritime depredations of a piratical character.’<sup>461</sup>

#### 4.4 Antecedents of state practise of UJ over piracy

The above represents much of the scholarship surrounding UJ. However, Shnider notes that there are very few actual criminal cases in which the court asserted UJ over piracy in the absence of a *nexus* between the prosecuting state and the victims of perpetrators.<sup>462</sup> The *Harvard Draft* also found that ‘it is difficult to find cases of exercise of jurisdiction over piracy which could not be supported on one or more of the ordinary grounds. This is very rare’.<sup>463</sup> The Princeton Principles comment that ‘[i]n many legal systems, the national judiciary cannot apply universal jurisdiction in the absence of national legislation’<sup>464</sup> –

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men and when they attack all nations *indiscriminately*, their practices become harmful to the international community of all States” (with my emphasis).

<sup>459</sup> Geiß and Petrig (2011) at 147. *See, also*, Shnider (2012-3) at 490. Randall (1988) at 795 demonstrates the concern by noting that ‘[s]uch lawlessness was especially harmful to the world at a time when intercourse among states occurred primarily by way of the high seas, thus making piracy a concern of all states’. More generically, Kontorovich (2004) at 196-197, remarks that ‘universal jurisdiction extends to heinous acts that “damage vital interests; they impair the foundations and security of the international community [and] violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations”’. (*citing* the *Eichmann* case, 36 I.L.R at 291).

<sup>460</sup> Garrod (2006) at 196.

<sup>461</sup> Art. 9 – ASIL (1935) at 566.

<sup>462</sup> Shnider (2012-3) at 493.

<sup>463</sup> *Harvard Draft* (1932) at 761.

<sup>464</sup> Macedo (2001) 40.

which provides one explanation for the dearth of precedents of the exercise of UJ over piracy. What follows below is a brief exposition of four seminal municipal judgments that developed or applied UJ.

*Rex v Dawson*<sup>465</sup> is one of the earliest cases purportedly applying UJ. The case was introduced earlier in this chapter, and it is also now opportune to revisit some of the *dicta* that were cited in more detail earlier in the chapter. A record of the trial containing the charge of Sir Charles Hedges demonstrates wide-reaching extent of the jurisdiction of the Admiralty, which ‘is extended throughout *all* seas, and the Ports, Havens, Creeks, and Rivers beneath the first Bridges next the Sea, even unto the high Water-mark’.<sup>466</sup> With this wide-ranging admiralty jurisdiction, it was declared that ‘[t]he King of England ... [has] an undoubted jurisdiction and power, in *concurrency* with other Princes and States, for the punishment of *all* piracies...’.<sup>467</sup> As indicated earlier, the judgment was criticised by Rubin who felt that ‘the entire proceeding can be rationalised as the application of English *municipal law* to Englishmen through the normal processes of English judicial administration, and the unqualified assertions of wider authority [i.e. the purported UJ] are mere puffery’.<sup>468</sup> However, the *dictum* of Viscount Sankey, in *In re Piracy Jure Gentium*,<sup>469</sup> where it was remarked that ‘[i]nternational law was not crystallised in the 17<sup>th</sup> century, but is a living and expanding code’<sup>470</sup> is rather apt.

The second case under review here which applied municipal law to foreign suspected pirates, was the trial of Thomas Green in 1705 in the High Court of Admiralty of Scotland.<sup>471</sup> Captain Green was an English captain who was arrested with his crew upon arrival in Edinburgh under an indictment of piracy. The circumstances and facts were elaborate – as appeared in a publication of the period that contained the court records and other incidental documents.<sup>472</sup> From a jurisdictional standpoint, what was novel about the

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<sup>465</sup> See Everingham (1696)

<sup>466</sup> See Everingham (1696) at 6 (with my emphasis).

<sup>467</sup> *Idem* (with my emphasis).

<sup>468</sup> Rubin (1988) at 93.

<sup>469</sup> Henley (ed.) *Lloyd’s List Law Reports* 49 [9 August 1934] 12 at 411.

<sup>470</sup> *Idem* at 417.

<sup>471</sup> *R v Green* 14 How. St. Tr. 1199.

<sup>472</sup> See, generally, Anderson (printer) *The Tryal of Thomas Green and his Crew, Pursued before the Judge of the High Court of Admiralty of Scotland and the Assessor appointed by the Lords of Privy Council* (1705), available at the law library of the Library of Congress of the United States at: [http://www.loc.gov/law/help/piracy/piracy\\_trials.php](http://www.loc.gov/law/help/piracy/piracy_trials.php) (last retrieved on 18 October 2015). Rubin’s summary of the case illustrated that there were allegations that Captain Green had plundered another Scottish vessel near Calicut. Green and two others were convicted and hanged, and this was purported to appease the Scottish mob (Rubin (1988) at 93; Shnider (2012-3) at 493). It was later discovered, after the hanging, that the victims were alive in India, and the purported act of piracy had never in fact occurred (Rubin (1988) *idem*).

case was that the court did not rely on the traditional forms of jurisdiction (Green was not a Scottish national for the purposes of the *nationality principle*, the ship was not under the Scottish flag for the *flag-state principle*, the act did take place in Scottish waters for the *territorial principle*, and Scotland did not exercise jurisdiction on the *passive personality principle* based on the Scottish nationality of the victims)<sup>473</sup> – but rather entirely on the *locus deprehensionis* (the place where they were taken).<sup>474</sup> Rubin commented that ‘this logic represents an assertion of universality of jurisdiction in the case of “piracy” that goes far beyond the precedents’<sup>475</sup> and that ‘finding prescriptive jurisdiction in the place of physical detention with no other contact, is a giant leap supported in the pursuer’s logic only by the assertion that “piracy” is a crime against the law of nations and that all mankind have an interest in pursuing it’.<sup>476</sup>

In the third case, *People v Lol Lo and Saraw*,<sup>477</sup> an American court sitting in the Philippine Islands in 1922 confirmed a conviction for piracy. The facts concerned a boat with Dutch subjects transiting between the islands of Buang and Bukid in the then territorial waters of the Dutch East Indies. The boat was surrounded by *Moros*<sup>478</sup> and the case reports that they raided the cargo, attacked some of the men, and raped two women. They then sunk the boat with the crew on board. However, after ‘eleven days of hardship and privation’ they managed to reach safety. At the tribunal, counsel for the *Moros* contended that the court in the Philippines did not have jurisdiction. In a very sparse judgment, Malcolm J. held that:

‘Pirates are in law *hostes humani generis*. Piracy is a crime not against any particular state but against all mankind. It may be punished in the competent tribunal of any country where the offender may be found or into which he may

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<sup>473</sup> Rubin (1988) at 93.

<sup>474</sup> The tribunal found that ‘though the competency of the judge in criminals could be ordinarily said, to be found either *in loco delicti* (the place where the crime was committed) or *in loco domicilii* (place of habitation of the delinquents) or *in loco originis* (the place of their birth) yet there is a superior consideration, and that is the *locus deprehensionis* (place where they are taken) where the criminal is found and deprehended, which doth so over-rule in this matter, that neither the *locus domicilii* ... nor the *locus originis* ... doth found the judges competency, *nisi ibi reus deprehendatur* (except the criminal be apprehended there). And so it is that here the panels [defendants] were and are deprehended, which happening in the cause of piracy, a crime against the law of nations, and which all mankind have an interest to pursue, wherever the pirates can be found: the Procurator Fiscal’s [Prosecutor’s] interest to pursue is thereby manifest, and the panels being here deprehended, cannot decline the admiral’s jurisdiction as incompetent.’ (at 1224, *cited* in Rubin (1988) at 93-94).

<sup>475</sup> Rubin (1988) at 94.

<sup>476</sup> *Idem*.

<sup>477</sup> *The People of the Philippine Islands v Lol-Lo and Saraw*, 43 Phil. Rep 19 (S.C. 1922), available at: [http://www.lawphil.net/judjuris/juri1922/feb1922/gr\\_1-17958\\_1922.html](http://www.lawphil.net/judjuris/juri1922/feb1922/gr_1-17958_1922.html).

<sup>478</sup> The indigenous Muslim population of the Philippines.

be carried. The jurisdiction of piracy unlike all other crimes has no territorial limits. As it is against all so may it be punished by all.’

In the fourth case, *In re Piracy Jure Gentium*,<sup>479</sup> a number of armed Chinese nationals were cruising the high seas in two Chinese junks in January 1931. They pursued and attacked a cargo junk which was also a Chinese vessel.<sup>480</sup> The master of the cargo junk attempted to escape and a chase ensued. Fortunately for the cargo vessel two merchant vessels in the vicinity intervened, thus foiling the attack, and the pirate suspects were handed over to a British warship. The matter reached the Judicial Committee of the Privy Council from the British Tribunal of Hong Kong. Although the principal issue in the case was ‘whether an accused person may be convicted to piracy in circumstances where no robbery has occurred’,<sup>481</sup> matters pertaining to jurisdiction were dealt with briefly by the court. Sir Leslie Scott K.C. instructed on behalf of the Secretary of State for the Colonies that a state could not treat foreigners on the open seas as pirates unless they were pirates according to the law of nations.<sup>482</sup> The court referred to Chief Justice Cockburn, who said that this rule was ‘subject to the qualification that if the legislature of a particular country should think fit by enactment to render foreigners subject to its law with references to offences committed beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of international law with the Governments of other nations’.<sup>483</sup> Viscount Sankey, delivering the opinion of the court, dealt with jurisdiction briefly in the following paragraph of the judgment:

‘With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person

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<sup>479</sup> [1934] A.C. 586

<sup>480</sup> *Idem* at 414.

<sup>481</sup> *Idem*. To which the court answered: ‘Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium* (at 415).

<sup>482</sup> *Idem* at 413.

<sup>483</sup> *Idem*.

guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justiciable by any State anywhere.<sup>484</sup>

It can be seen from this paragraph that the reliance on UJ is based on the denationalisation rationale discussed in section 2(b) above.

Bearing in mind once again that, in practice, UJ was applied very rarely<sup>485</sup> and that absolute universal jurisdiction over piracy was dormant until the resurgence of piracy off the coast of Somalia,<sup>486</sup> the cases under analysis above, however, have set out UJ principles in very sparse terms – differing through the context of different centuries and socio-political circumstances. Notwithstanding this dearth of jurisprudence arising from the case law set out above, UJ has retained enough vitality to remain applicable in the present legal framework,<sup>487</sup> based on the strength of the rationales discussed above. What follows below is a critical analysis of these rationales for UJ in the case of piracy – in an attempt to appraise its continued relevance.

#### **4.5. Continued relevance of UJ**

The rationales for UJ in the case of piracy categorised above, have not been asserted without criticism among legal scholars.<sup>488</sup> Given the rarity of judicial precedent in the circumstances, a suitable alternative for analysis would be to examine legal scholarship and attempts at codification. This section presents a few remarks in support of a penchant toward UJ.

*4.5.1 Denationalisation:* The scholars discussed in the preceding paragraphs all contend that the idea that pirates and their vessels become stateless is nothing more than a ‘legal fiction’ and a ‘misleading hyperbole’, which

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<sup>484</sup> *Idem* at 415.

<sup>485</sup> Rubin (1988) cites fewer than five cases over the past 300 years (at 302), but Kontorovich (2004) is more cautious of these statistics and comments that those five cases were certainly not the only ones and that many cases were unreported, particularly in remote areas, and they did not include summary proceedings at sea (at 192).

<sup>486</sup> See Shnider (2012-3) at 495.

<sup>487</sup> This will be discussed in greater detail in the next chapter.

<sup>488</sup> As can be seen holistically from Goodwin (2006) 973 at 1002-1011 and Garrod (2014) at 195-2013.

has largely been eliminated.<sup>489</sup> They all draw their authority from the *Harvard Draft*, which comments that:

‘[A] state does not lose its claim of allegiance or any of its ordinary legislative, executive or juridical jurisdiction against its nationals because he has committed an act of piracy on the high sea ... Likewise if the pirate ship had a national character before it was engaged in piracy, its participation in piracy does not withdraw it from the ordinary jurisdiction and rights of its flag state without that state’s consent. The ordinary jurisdiction, because of the piracy, no longer excludes the common jurisdiction on the high sea, but it may still exist and be otherwise unaffected.’<sup>490</sup>

This comment was a purport to the substantive article 5 of the draft, which provided that: ‘[a] ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the state from which it was derived’.<sup>491</sup> This creates a potential denationalisation at the discretion of the flag state. From the article it is not definitive whether the denationalisation applies to the pirates themselves or the ship or both. The scholars mentioned above reject the denationalisation rationale on the strength of this article. However, while the article can be interpreted to reject an *automatic* denationalisation once an act of piracy is committed, it does leave such a revocation at the discretion of the flag state or state of origin. If the state elects to revoke nationality, this leaves a jurisdictional gap,<sup>492</sup> which can be best filled through the exercise of UJ. The *Harvard Draft*, as will be discussed in greater detail in the penultimate section of this chapter, was an exercise *de lege ferenda* and one of the first attempts at an international codification of the law pertaining to piracy. The draft articles were supported by a commentary setting out a general purport, together with extracts from scholars and precedents. The commentary contains a disparate collation of various sources and a short purport in generic terms.<sup>493</sup> A purport of more

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<sup>489</sup> See Randall (1988) at 794, Goodwin (2006) at 988, Shnider (2012-3) at 490, and Geiß and Petrig (2011) at 146.

<sup>490</sup> Harvard Draft (1932) at 825.

<sup>491</sup> *Idem*.

<sup>492</sup> As Geiß and Petrig (2011) at 146 note that the active personality (nationality) principle would not be operable.

<sup>493</sup> Part of this purport has been reproduced in the accompanying text to the Harvard Draft. One of the premises of the article is set out in a generic manner in the purport, which commented that:

substance that sets out cogent arguments should have been set out, rejecting contentions advanced by jurists such as Blackstone on the denationalisation rationale. Therefore, the exercise of UJ on the basis of this rationale can still have some applicability.

4.5.2 *Instigation of international tension in diplomatic relations:* In the introductory remarks to the Princeton Principles, it was commented that ‘[i]mproper exercises of criminal jurisdiction, including universal jurisdiction, may be used merely to harass political opponents, or for aims extraneous to criminal justice’.<sup>494</sup> Goodwin adopts this concern as a basis for his argument that the exercise of UJ in instances of piracy should be jettisoned. He writes: ‘[b]y allowing piracy to remain subject to universal jurisdiction, the concern of causing international tension remains as it is possible that states will prosecute individuals for piracy for less than legitimate reasons’.<sup>495</sup> This argument however falters when compared to other writers. Shnider is of the view that UJ becomes problematic when used in contemporary human rights crimes – which has the potential to interfere with the sovereignty of states, and leading to controversial political prosecutions.<sup>496</sup> He observes that piracy prosecutions have been less subject to such criticisms.<sup>497</sup> An explanation for this was made by Geiß and Petrig who found that ‘pirates are rarely perceived as “representing” or even acting on behalf of their State of origin which may explain why

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‘the fundamental postulates and the scope of the modern international law of piracy are quite different from those of the ancient law and even from those of the law of a few centuries ago which knew no legal freedom of the seas in the modern sense and no such universal fine apportionment of jurisdiction among “states” on a territorial and nationality basis as is familiar today’ (at 826).

Randall (1988) at 793 notes, however, that ‘[t]he freedom-of-the-high-seas principle, however, merely expands rights to navigate and does not constitute the basis of states’ authority to capture pirates and seize their vessels’.

<sup>494</sup> Macedo (2001) at 24-25. In this regard, Morris in ‘Universal Jurisdiction in a Divided World: Conference Remarks’ 35 *New England Law Review* (2001) 337 at 354-355, comments that this improper use of jurisdiction could be exercised in two ways: firstly ‘states may exercise universal jurisdiction as a means of gaining advantage over their opponents in interstate conflicts by prosecuting nationals of those opponent states for conduct carried out in the course of the conflict’, and, secondly, ‘states may exercise universal jurisdiction as a means of gaining advantage over states with whom they are in conflict by prosecuting nationals of those opponent states for conduct unrelated to the conflict between the two states’.

<sup>495</sup> Goodwin (2006) at 1003.

<sup>496</sup> Shnider (2012-3) at 491. He also cites Kissinger ‘The Pitfalls of Universal Jurisdiction’ 80 *Foreign Affairs* (July/August 2011) 86 at 88, who contended that ‘any universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores.’

<sup>497</sup> *Idem*.

the idea of exercising [UJ] vis-à-vis alleged pirates has met with little resistance compared to modern [UJ] crimes ... where States often perceive [UJ] as a potential interference in their internal affairs'.<sup>498</sup> The principal reason for this notion that pirates do not represent or act on behalf of their state could be traced back to early piracy jurisprudence which distinguished between 'pirates' who committed acts for private gain, and 'privateering' which was a form of state-sponsored piracy authorised by a letter of marque.<sup>499</sup> Morris noted that this distinction is significant in its inclusion of private acts and exclusion of official acts of states in the definition of piracy.<sup>500</sup> She comments further that '[b]y excluding state acts from the definition of piracy, the law of piracy was designed to prevent universal jurisdiction over piracy from becoming a source of interstate conflict'.<sup>501</sup> The findings of this thesis show that exercising UJ over the present East African seaboard would not pose significant interstate conflict in the manner envisaged by the Princeton Principles.

#### 4.6 Summative remarks

In this section the general bases of jurisdiction were traversed, leading to an introduction of UJ which requires no *nexus* between the state exercising UJ and the offender, and with piracy being regarded as the paradigmatic crime which was combatted through the exercise of UJ. The rationales for UJ over piracy were firstly: rhetoric and scholarship that considered piracy to be exceptionally heinous in nature,<sup>502</sup> secondly the denationalisation of a pirate suspect; and thirdly the need to secure the unhindered flow of maritime commerce on the oceans. With this basis, the leading historical municipal judgments are discussed – revealing very little probative value. This results in this section placing two contentions in support of UJ: an option on states to revoke the national character of its vessels which commit piracy and thus creating an opportunity for the exercise of UJ, and the submission that the UJ of piracy in contemporary law would not be a significant factor in raising tension in diplomatic relations.

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<sup>498</sup> Geiß and Petrig (2011) at 146.

<sup>499</sup> Morris (2001) at 339.

<sup>500</sup> *Idem*. In this regard, she (at fn 3) refers to the definitions of piracy in UNCLOS and the Geneva Convention on the High Seas, 29 April 1958.

<sup>501</sup> *Idem* at 339-340. She later (at 345) compares how UJ over war crimes and crimes against humanity could become a source and an instrument of interstate conflict – in a way that UJ over piracy was designed to avoid.

<sup>502</sup> The article by Kontovorich (2004), however, is devoted to rebuking this conception.

It is submitted that UJ has some enduring value when brought forward to the present day piracy off Somalia. As discussed previously,<sup>503</sup> the perception that every state is a potential victim of a piratical act lends credence to the shared interest which states have in the uninterrupted flow of maritime commerce. This was supported in one of the earliest piracy cases revisited in this chapter – *Rex v Dawson*<sup>504</sup>. Secondly, in the context of the present day piracy, Geiß and Petrig make an apt observation:

‘The fact that the perpetrator’s State might have turned a blind eye on piracy when it suited its interests might have further accentuated the perception that every State – not only the pirate’s “home State” – should be allowed to intervene.’<sup>505</sup>

What was clear from the preceding discussion, however, was that UJ applied to the definition of piracy under international law and not municipal law. As this thesis progresses, the argument to modify the application of the enforcement provisions of article 105 of UNCLOS into the realm of the territorial sea – comes into conflict with the prevailing municipal law of that territorial sovereign. The appropriateness of UJ in these circumstances would immediately be brought into question. A revisit of the doctrines, precedent and legal scholarship regarding the extent and juridical nature of the sovereignty over the territorial seas is a necessary exercise to support the argument of modifying the present application of UNCLOS-enforcement provisions to the territorial sea. The next section aims to critically revisit this aspect.

## V. THE *LOCUS DELICTI* OF PIRACY: THE REALM OF THE HIGH SEAS *VERSUS* THE TERRITORIAL SEA

### 5.1 Prefatory

As discussed at length in the previous section, the exercise of UJ is limited to acts that conform to the definition of piracy under the law of nations, or piracy *jure gentium*. When draftsmen converged at Harvard University in the 1930s to prepare a codification of piracy laws, the first matter that deserved immediate acknowledgement was the distinction between piracy *jure gentium* and piracy under municipal law. They recorded, at the outset,

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<sup>503</sup> Geiß and Petrig (2011) at 146.

<sup>504</sup> If pirates were not punished, piracy could lead to ‘the destruction of the innocent English in those countries, the total loss of the Indian trade, and thereby the impoverishment of this kingdom’ ((1696) 13 Howell’s State Trials 451 at 453; Goodwin (2006) at 981).

<sup>505</sup> *Idem* at 147. They refer to UN Security Council Resolution 1816 (preambular par. 7), which demonstrates Somalia’s Transitional Federal Government’s inaction or lack of capacity as a home state.

that ‘international law piracy is committed beyond all territorial jurisdiction. Municipal law piracy may include offences committed in the territory of the state. It is to be noted, then, that piracy under the law of nations and piracy under municipal law are entirely different subject matters’.<sup>506</sup> Furthermore, piracy is defined variously under the municipal law of different states.<sup>507</sup> The *locus* of the act is therefore definitive on whether it should be classified under municipal or international law. Johnson, writing in the mid Twentieth Century, commented that ‘the essential consequence of an act of piracy is the displacement of the normal rule that the ship in question is subject to the jurisdiction of *all states*, [and] it seems logical and proper to confine piracy to the *high seas*’.<sup>508</sup> He then goes on to contrast this with municipal piracy: ‘[w]here territorial waters are concerned, ships are already subject in some measure to the jurisdiction of the coastal State as well as of the flag state, but there seems *no good reason* to go further than that and authorize the international community as a whole to assume jurisdiction over acts that are clearly taking place within national territory’.<sup>509</sup> Standard textbooks on international law also supported this distinction: Oppenheim argued that ‘piracy as an [international crime] can be committed on the open sea only. Piracy in territorial coast waters has little to do with International Law as other robberies within the territory of a State ... [p]iracy is, and always has been, a crime against the safety of traffic on the open sea’.<sup>510</sup> A common parameter of all the doctrines and precedents, as presented and discussed hitherto in this chapter, is that the *locus* of piracy under the law of nations is on the high seas.

Distinguishing the realm of the territorial sea and places within the jurisdiction of a state from the realm of the high seas, is accordingly significant to any scholar or researcher in the discipline of piracy law. Under the present state of the law, ascertaining this distinction is not difficult. The UNCLOS sets out in detail the extent and competencies of the realms of the ocean. States have a right, under article 3, to establish the breadth of their territorial sea up to a limit not exceeding 12 nautical miles from the baselines on the low-water mark along the coastline. This belt of sea is regarded, under that article, as an extension of the sovereignty of the coastal state.<sup>511</sup> States have lesser rights in another belt of sea, to a maximum of 24 nautical miles from the baselines, in a zone described as the contiguous

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<sup>506</sup> See *Harvard Draft* (1932) at 749.

<sup>507</sup> *Idem*.

<sup>508</sup> Johnson ‘Piracy in Modern International Law’ 43 *Transactions of the Grotius Society (Problems of Public and Private International Law)* (1957) 63 at 71 (with my emphasis).

<sup>509</sup> *Idem* (with my emphasis).

<sup>510</sup> Oppenheim *International Law* 4<sup>th</sup> ed. (1926) at §277, cited in *Harvard Draft* (1932) at 789.

<sup>511</sup> Article 2(1) of UNCLOS provides that ‘the sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea’.

zone.<sup>512</sup> The exclusive economic zone which extends to a maximum of 200 nautical miles<sup>513</sup> from the baselines, as the name implies vests the coastal state with sovereign rights for exploring, exploiting, conserving and managing the natural resources within that realm.<sup>514</sup> For all other purposes, the exclusive economic zone is regarded as the high seas under article 58(2). It is within these rigid geographical zones with precise dimensions in nautical miles, that varying jurisdictional competencies lie. A mere variation of position of a few or even one nautical mile could mean that an act of piracy could be subjected to municipal law instead of international law and *vice versa*. The present definition of piracy under article 101 confirms the scholarship cited above, to the effect that it is exclusive to and can only occur on the *high seas or in a place outside the jurisdiction of any state*.<sup>515</sup>

In the present case study of piracy off the eastern seaboard of Africa, concentrated along the coastline of Somalia, any attack occurring within the territorial sea of that state would remain under its exclusive sovereign jurisdiction based on the current provisions of UNCLOS.<sup>516</sup> Furthermore, the attack within the territorial seas of this region would not accordingly classify as piracy under international law. The competence to prevent, suppress and prosecute acts of piracy vest solely with the coastal state - in this case study, Somalia.

Chapter 2 of this thesis provided a detailed analysis of the piracy manifesting off the coast of Somalia, and in the course of the analysis it was shown that during the period of the analysis conditions in the state were unstable – resulting in a *de facto* ineffective central government, a marginal police force, and a lack of accountability and judicial structures.<sup>517</sup> As a consequence, the ability to police the territorial waters was severely compromised. A resolution of the Security Council of the United Nations<sup>518</sup> recognised this situation by expressly taking into account:

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<sup>512</sup> See article 33 of UNCLOS. The coastal state in this zone may exercise control to prevent and punish infringement of its customs, and its fiscal, immigration, and sanitary laws applicable within its territory.

<sup>513</sup> See article 57 of UNCLOS.

<sup>514</sup> See article 56 of UNCLOS.

<sup>515</sup> See article 101 of UNCLOS, with articles 86, 88 and 89, which set out general provisions pertaining to the realm of the high seas.

<sup>516</sup> The legal regime of UNCLOS has acquired the force of customary international law. See, for example, arguments in support of this proposition at: <http://www.unclosdebate.org/>.

<sup>517</sup> See Doby 'Piracy Jure Gentium: The Jurisdictional Conflict of the High Seas and Territorial Waters' 41 *Journal of Maritime Law and Commerce* (2010) 561 at 562; Geiß and Petrig (2011) at 138.

<sup>518</sup> S.C. Res. 1816, U.N. Doc. S/RES/1816 (2 June 2008). This resolution *et seq* will be analysed in chapter 5.

‘[T]he crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters.’<sup>519</sup>

Chapter 2 of this thesis has also shown in detail that the region is the site of one of the busiest shipping corridors in the world with thousands of transits each year, and the costs and risks to the global shipping industry were also documented in detail. Because of this confluence of piracy and a busy trade route, Geiß and Petrig comment that ‘given the *de facto* absence of effective judicial structures in Somalia and its inability to prosecute armed robbery at sea occurring in territorial waters, the exercise of *extraterritorial* jurisdiction by third states plays a crucial role in the fight against piracy and armed robbery at sea’.<sup>520</sup>

The provisions of UNCLOS regarding the definition of piracy as occurring on the high seas or in a place outside the jurisdiction of any state<sup>521</sup> and the exercise of universal jurisdiction,<sup>522</sup> leaves no opportunity for a flexible interpretation. One cannot, from those provisions find an authorisation under international law for the exercise of foreign jurisdiction in the territorial sea of another coastal state. The sovereignty of the coastal state over its territorial sea is recognised fully and is sacrosanct. Recent UN Security Council resolutions, which will be discussed in the next chapter, also reaffirm ‘its respect for the sovereignty, territorial integrity, political independence and unity of Somalia’.<sup>523</sup>

This rigidity in the distinction between municipal law of a sovereign state and international law, separated through distinct realms of the ocean, has significant consequences on international and foreign initiatives to remedy and minimise piracy in the region of this study. Rembe, writing on African perspectives of the law of the sea, in 1980, commented that:

‘The concept of sovereignty contains some unfortunate implications: unfortunate because what falls within the “domestic jurisdiction” of any State

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<sup>519</sup> *Idem.*

<sup>520</sup> Geiß and Petrig (2011) at 138.

<sup>521</sup> As contained in article 101 (discussed in further detail in the next chapter). *See* Appendix.

<sup>522</sup> As contained in article 105, read with 100 (discussed in further detail in the next chapter). *See* Appendix.

<sup>523</sup> *See*, for example: S.C. Res. 1816, U.N. Doc. S/RES/1816 (2 June 2008).

may not be the concern of, or affect, only the territorial State, but the whole international community.’<sup>524</sup>

This comment could not have been more apt in the circumstances of the present study. The geographical limits of piracy under UNCLOS effectively mean that, notwithstanding Somalia’s inability to police and exercise its law over its own territorial sea, international and foreign navies lack any jurisdiction to enter the territorial sea of Somalia. As a result, foreign navies and international police forces have no legal authority under the UNCLOS to pursue, arrest and detain pirates in the territorial sea of the coastal state, and UJ has no application therein.<sup>525</sup> Foreign naval countermeasures to reduce or minimise and prevent piracy find no authority in the UNCLOS. An amendment to the articles in UNCLOS is accordingly necessary, in order to enable foreign extraterritorial jurisdiction.

It is evident that the realm of the territorial sea, as provided in UNCLOS, firstly recognises the sovereignty of the coastal state in the territorial sea, and prescribes the rights and obligations thereof – and it is because of this sovereignty that piracy *jure gentium* can have no application therein. It is this concept of maritime sovereignty and its legal development that will form the basis of the ensuing discussion and argument.

## **5.2 The concept of maritime sovereignty**

The legal concept of sovereignty can be found through a quick perusal of any standard scholarly work in the discipline of international law. For convenience of recollection, it states that internally and within its territorial boundaries, the independent state has both prescriptive and enforcement jurisdiction, with the power to establish and regulate its own internal affairs.<sup>526</sup> Rembe’s elucidation of this concept states that a corollary to this is the principle of respect for the sovereignty and territorial integrity of other states.<sup>527</sup> He cautions that sovereignty is not an absolute concept and that there are limitations imposed by customary international law, treaties and general principles of law.<sup>528</sup> Importantly, he further mentions that this limitation is an attribute of – rather than an abdication from – sovereignty.<sup>529</sup> Rembe’s analysis then draws towards the concept of the territorial sea,

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<sup>524</sup> Rembe *Africa and the International Law of the Sea: A study of the contribution of the African States to the Third United Nations Conference on the Law of the Sea* (1980) at 7.

<sup>525</sup> See Doby (2010) at 564, 569.

<sup>526</sup> Rembe (1980) at 5-6.

<sup>527</sup> *Idem.*

<sup>528</sup> *Idem.*

<sup>529</sup> *Idem.*

where he puts forward the proposition that the concept is perhaps the oldest and most controversial aspect of the law of the sea, particularly because of the conflicting themes of the sovereignty of the coastal state over the territorial sea and its restriction to preserve the freedoms of the high seas.<sup>530</sup> He succinctly summarises this conflict in the following way:

‘While the essential interests of coastal states should be protected and safeguarded, the traditional concept of sovereignty needs to be functionally considered in the light of the common heritage of mankind. The sovereign rights of coastal states over their territorial sea have to be matched by corresponding duties and obligations vis-à-vis the interests of the international community, and vice versa. A well balanced accommodation, in which the essential interests of the international community are secured, may offer additional safeguards and respect for the sovereign rights of the coastal States.’<sup>531</sup>

This conflict is applicable in the present study where the pursuit of trade and commerce through the sea lanes and via innocent passage through the territorial seas has become ubiquitous, and cooperation to safeguard this system and industry is of paramount importance. A final comment from Rembe’s work is that the realm of the territorial sea and the sovereignty thereof was predicated upon the notion that there is legal equality among nations. He carefully observed that:

‘[S]tates may be greatly unequal in size, population, economic and military capabilities; they may be endowed with uneven resources at different levels of development, yet before they law they are supposedly all equal. In this sense, equality is a legal fiction.’<sup>532</sup>

Rembe’s foresight on legal equality has a bearing on the present study. The current framework in UNCLOS appears to be founded on this notion of sovereign equality and the resultant ability to exercise such sovereignty. This is because there is no article which envisages a situation where a state cannot (because of a lack of capacity or resources) or will not take the necessary steps to regulate piratical acts within its territorial waters.<sup>533</sup>

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<sup>530</sup> *Idem* at 86.

<sup>531</sup> *Idem* at 87.

<sup>532</sup> *Idem* at 7.

<sup>533</sup> *See* Doby (2010) at 569.

Given these concerns about the ability and capacity of Somalia to effectively administer its territorial sea, and given the threats to international commerce combined with the inflexible provisions of UNCLOS stifling international naval action in the area highlighted above – it is surprising that the foundational conception of state sovereignty over territorial waters in this regard has not received extensive academic scrutiny. This could be attributed to the fact that the division in the breadth of the various realms and the extent of the jurisdiction thereof is clearly and unambiguously provided for in the articles of the UNCLOS. It appears to be a settled and inflexible proposition of law, and, accordingly, has received little critical attention in the plethora of scholarship advanced in recent years due to the Somali piracy epidemic. As was seen from the earlier sections of this chapter, in forging a definition of piracy issues which were critical concentrated on the nature of the act, i.e. the *actus reus* and distinguishing the act from privateering. It appeared to be a settled fact in the jurisprudence that the *locus* of the crime was always the high seas. Current commentators, as will be shown in the next chapter, advance a solution of simply effecting an amendment to the articles of UNCLOS or a protocol thereto, in order to authorise foreign intervention in the territorial sea of another state. Such an approach, as will be shown in this chapter, is not so straightforward, and obtaining the ratifications of nations when a possible curtailment of state sovereignty is at play would be difficult. Accordingly, a rationale or justification must be proposed to support such an amendment or protocol.

This section will now attempt to forge such a rationale through an argument that revisits the doctrines that originally established the extent and nature of the sovereignty of the territorial sea in the context of this study – thereby filling a gap in the present scholarship. The hypothesis of the argument, as was stated in the first chapter to this thesis, contends firstly that the extent of the territorial sea vis-à-vis the realm of the high seas has been the subject of much debate over the years, and was not always in a definitive state and with uniform consensus among nations. In simplistic terms, it could be said that what was a part of the realm of the high seas in previous centuries is not necessarily currently in that realm. Secondly, the nature of the sovereignty to be exercised in the territorial sea was also never of a settled nature and this persisted up until the early codification attempts of the Twentieth Century. Accordingly, the hypothesis will show that the rigid and settled articles of UNCLOS constituting the present legal regime, which restrict international naval interdiction and other countermeasures in the territorial sea, was based on a hollow foundation. It is because of this hollow foundation that the inflexibility of the UNCLOS provisions and resultant state practice are called into question. This hypothesis will be proven through a survey of the jurisprudence emerging from the works of jurists and

publicists from the Seventeenth to Nineteenth Century. Selected precedents will also be used to advance the hypothesis.

A few delimitations, however, must be set out here. The analytical exposition below does not aim to be a comprehensive exercise into the nature of the sovereignty and extent of the territorial sea.<sup>534</sup> The purpose is to merely provide evidence supporting the hypothesis. It is regretted that the historical conception presented here isn't a plain and clear-cut one. A critic of a historical survey could argue that juridical treatises on the law of the sea have become so numerous that it is better not to quote from them at all than to make arbitrary selections from various sources.<sup>535</sup> This chapter has shown, however, that the very nature of the jurisprudence of piracy has arisen from a complicated and often unclear reality. Indeed, when the Harvard Scholars were preparing the *Harvard Draft* and when they surveyed the works of writers, they commented:

‘[T]here is clearly no settled law of nations and a great deal of learned controversy ... [there is a ] paucity of pertinent cases and of evidence of modern state practise on the most important moot points in the law of piracy. Except for a few international cases, chiefly concerning the status of insurgent vessels or of irregular privateers, and a few municipal law cases, there are no official determinations which will help an investigator to cut a way through the jungle of expert opinion.’<sup>536</sup>

With these precautionary words, the survey will consider the primary arguments of the most influential writers and will discuss precedents that support this hypothesis. Works of writers, particularly from the Seventeenth and Eighteenth Century are cited, for convenience, through subsequent works of later writers – due to the original texts being written in Latin and inaccessible through library loans. While proposals for amendment to UNCLOS are furnished with some detail in the last chapter of this thesis, informed by the findings of this hypothesis other researchers in the discipline may adopt different approaches. Thus it is hoped that this historical survey, notwithstanding the faults inevitably adherent to it, will be of some use to those who wish to continue with this work.

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<sup>534</sup> For a fuller discussion, *see*, for example, Oudendjik *Status and Extent of Adjacent Waters: A historical Orientation* (1970)

<sup>535</sup> *Idem* at 147.

<sup>536</sup> *See* Harvard Draft (1932) at 764.

### 5.3 Exposition of the works of jurists and publicists on the nature and extent of the territorial sea

*'The sea has always been lashed by two major contrary winds: The wind from the high seas towards the land is the wind of freedom; the wind from the land towards the high seas is the bearer of sovereignties. The law of the sea has always been in the middle of these conflicting forces.'*<sup>537</sup>

#### 5.3.1 *The battle of the books and the empire of the sea*

Early conceptions of the sea and its jurisdictional realm can be drawn back to natural law concepts in primitive society – when humankind held all things in common.<sup>538</sup> Oudendijk, paraphrasing the works of Hugo Grotius,<sup>539</sup> comments on the impracticalities of appropriation of the sea:

'The sea is as unseizable as the air and because of its restlessness it resists all attempts at possession, like a wild animal does. It can't be trodden upon, so there is no *potestas standi ac sedendi*. Even the navigator doesn't really stand on it: he doesn't hold it, but is held by it and his ship leaves no traces behind. Consequently, as he doesn't occupy any part of it, he can't acquire possession or property.'<sup>540</sup>

She then refers to Grotius's *Defensio*,<sup>541</sup> which definitively declares:

'[n]o part of the sea, no matter how large or how small it is or where it is situated, can be exclusive property, for neither quantity nor situation makes any difference as to the substance, and when the substance is the same, the law must be the same, especially the law of nations which is universal. Moreover, why should property end at a certain line? If it is admitted up to a hundred miles, then why not up to a hundred and fifty or two hundred miles and so on?'<sup>542</sup>

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<sup>537</sup> Dupuy and Vignes 1 *A handbook on the new law of the sea* (1991) at 247.

<sup>538</sup> Oudendijk (1970) at 17.

<sup>539</sup> Cited therein as *Mare Liberium* at 30, 39, 40, and *Defensio* at 348-350, 353.

<sup>540</sup> Oudendijk (1970) at 20-21. Other writers also held similar views. See, for example, the Italian jurist Abbe Galliani's work *Dei Doveri de' Principi de Neutrali* (ch. 10, §1), as summarised by Azuni *The Maritime Law of Europe* (1806) at 221: 'But not being able to surround, nor strictly to defend the open sea, since no solid work can be erected on that element, it is impossible to guard it, and consequently it is by nature incapable of being occupied.'

<sup>541</sup> Cited therein as *Defensio* at 359.

<sup>542</sup> Oudendijk (1970) at 24.

Domencio Azuni (1749-1827), a famed Italian jurist, wrote an authoritative compilation, *Droit maritime de l'Europe*, in 1806, which summarised some of the key contentions of jurists of previous generations. The treatise coined the expression “territorial sea” and contains a chapter on this topic which he introduces with the following comment, paraphrasing the earlier jurist Cornelius van Bynkershoek (1673-1743):

‘[t]he face of the earth became changes by occupancy, and the rights of domain were introduced, the sea, which bathed its shores, was not abandoned to its natural liberty. Human affairs, in their commencement, proceed with the greatest simplicity. In the first ages of the world, the sea adjacent to the coast, belonged to the first occupier of the main land, as well on account of its utility for fishing and transportation, as because it was considered an appendage, or rather, an accession to it.’<sup>543</sup>

As this notion of appropriating the ocean became rooted, major controversies arose among jurists in the 17<sup>th</sup> Century, concerning ‘the empire of the sea’ as described by Azuni. In this “battle of the books”, one side of the controversy maintained the notions in the quotes above on the absolute liberty and freedom of the sea, whereas the other side contended that it might be subjected to the dominion of a particular nation.<sup>544</sup> Proponents of the latter – the Spanish and Portuguese – were determined to have the exclusive right of navigating the seas of the Indies and the Atlantic,<sup>545</sup> contrary to the perceptions of other maritime nations such as the Netherlands who advocated the freedom of the seas. Azuni commented how writers took up the pen to defend the interests of their respective countries with zeal, and, at times, animosity.<sup>546</sup>

This ‘battle of the books’ has been well documented in standard texts on international law.<sup>547</sup> Azuni’s authoritative summary, however, is worthy of recollection here. He comments that Grotius had undertaken to prove that neither Holland nor any other nation could be excluded from the navigation of the ocean, and the sea is in its nature not susceptible to sovereignty.<sup>548</sup> The Dutch asserted this freedom of navigation to advance

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<sup>543</sup> Azuni (1806) at 181-182

<sup>544</sup> *Idem* at 208.

<sup>545</sup> *Idem* at 210 and 190. See, generally, Dugard *International Law: A South African Perspective* (2006) at 366.

<sup>546</sup> Azuni (1806) at 208.

<sup>547</sup> See, generally, for example: Oudendijk and Verzijl *International Law in Historical Perspective* 4 (1971)

<sup>548</sup> Azuni (1806) at 209-210.

their case that it was lawful for them to fish in the English seas.<sup>549</sup> Azuni then recounts a contemporary of Grotius, the English Jurist John Selden (1584-1654), whose treatise in two books: *Mare Clausum*, maintained that the British seas belonged to the crown of England.<sup>550</sup> The first book argued that the sea is not common to all under the law of nations, but is susceptible to becoming the domain and property of a sovereign nation.<sup>551</sup> As to the battle of the jurists, Azuni remarked:

‘The two celebrated publicists, impelled by the interests of their respective countries, and by the glory of being leaders of literary factions, so entangled the subject, by their passionate opinions, that instead of elucidating and deciding the question, they involved it, by their useless learning, and equivocal arguments, in greater obscurity.’<sup>552</sup>

These writers however argued at opposite extremes of the spectrum, one advocating complete freedom of the seas and the other the possibility that the ocean itself can be subject to sovereignty. A balance of the two extremes was found in the works of Bynkershoek who defended both the freedom and sovereignty of the sea. Continuing with the summary by Azuni, who commented that Bynkershoek affirmed that the sea may be made subject to dominion, but that ‘there is not an instance, at the present day, of its being subject to any sovereign, where the surrounding territory did not at the same time, belong to him’.<sup>553</sup> Thomas Fulton (1855-1929), a modern British authority, in his treatise *The Sovereignty of the Sea*, also analysed the works of Bynkershoek. He found that Bynershoek accepted that the open ocean could not be entirely susceptible to appropriation, but however agreed with Selden that various nations had enjoyed such dominion, and the fluidity of the sea was not a bar to its occupation.<sup>554</sup> Bynkershoek reasoned that by taking possession of the sea, the same right was acquired, as was by taking possession of the land.<sup>555</sup> His works popularised the concept of the dominion of a state extending over the neighbouring sea – the territorial sea. Fulton commented that while there was a general movement of opinion and practice in modern times away from the complete sovereignty of the oceans, to it being free and open to all, there was also another movement by which exclusive rights of maritime states

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<sup>549</sup> *Idem* at 210. See Coke (1838) at 157 for a description of the English seas.

<sup>550</sup> *Idem* at 212.

<sup>551</sup> *Idem* at 213.

<sup>552</sup> *Idem*.

<sup>553</sup> *Idem* at 219.

<sup>554</sup> Fulton *The Sovereignty of the Sea: An historical account of the claims of England to the dominion of the British seas, and the evolution of the territorial waters, with special reference to the rights of fishing and the naval salute* (1911) at 555.

<sup>555</sup> *Idem*.

in coastal waters have come to be more clearly recognised and definitely incorporated into international law.<sup>556</sup> He states that, to this extent, all maritime countries now have sovereignty of the sea.<sup>557</sup> Even Grotius, who so passionately defended the freedom of the seas, agreed that the coastal state should have some control over their coastal waters in order to suppress crimes at sea.<sup>558</sup> Thus Fulton declares in his exposition of the evolution of the territorial sea, that it is now settled as indisputable – both by the usage of nations and the principles of international law – that the open ocean cannot be appropriated by one power.<sup>559</sup> More importantly, for the purposes of this discussion, he further concludes that it is firmly established that all states possess sovereign rights in those parts of the sea that wash their shores.<sup>560</sup> This is a view that now represents the present state of the law.<sup>561</sup>

### 5.3.2 *The extent of the realm of the territorial sea*

*'Far as the sovereign can defend his sway,  
Extends his empire o'er the wat'ry way;  
The shot send thundering to the liquid plain,  
Assigns the limits of his just domain.'*<sup>562</sup>

While the concept of the territorial sea became an established realm through state practice and the influence of jurists, the *extent* of the realm, until the recent codifications under the Geneva Conventions of the 1950s, was never settled. Azuni observed at the turn of the 19<sup>th</sup> Century:

‘...yet there is not an unanimity of opinion, and, much less, an universal agreement, among nations, (so necessary for the good order and interest of

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<sup>556</sup> Fulton (1911) at 537.

<sup>557</sup> *Idem.*

<sup>558</sup> See Grotius's *Inleidinge tot de Hollandsche rechts-geleerheid beschreven*, book II, part I, §19: 'However, in order to avert piracy and other crimes at sea it is necessary that the different governments by agreement make themselves responsible each for the safety of a certain part of the neighbouring seas. Thus it has been understood of old that the province of Holland and West-Friesland has jurisdiction up to the middle of the [north] sea.' (cited in Oudendijk (1970) at 33).

<sup>559</sup> *Idem.*

<sup>560</sup> *Idem.* Fulton (1911) at 538 argues further that even during the period of the battle of the books, there was a general recognition that every maritime state was entitled to exercise jurisdiction over some extent of the neighbouring sea. See, also, Azuni (1806) at 196, who also concluded that 'according to the consent of all maritime nations, it cannot be questioned, that the nation in possession of the shore, is, at the same time, sovereign of the adjacent sea'.

<sup>561</sup> See Brownlie (1998) at 178, where it is stated that the view is generally accepted by writers (see further authorities cited in fn 5 thereof), and this has found expression in Art. I of the Convention of the Territorial Sea of 1958 – namely that states have rights amounting to sovereignty over the territorial sea.

<sup>562</sup> Entitled *Del Diritto della Natura* by an anonymous author and cited in Azuni (1806) at 205, and is described as the 'cannon-shot rule' to determine the extent of the territorial sea (developed by Bynkershoek and discussed *infra*).

commercial states) either as to the nature or extent of this sovereignty. These opinions, moreover, have varied in different ages, as much as the different systems, adopted, as to the extent of the territorial seas'.<sup>563</sup>

Fulton, writing at the turn of the 20<sup>th</sup> Century had similar remarks about the uncertainty of this realm:

'...there has not, and has never been, universal agreement as to the precise nature of those rights, or as to the extent of the sea that may be thus appropriated<sup>564</sup> .... while the sovereign rights of a state over a part of the adjacent sea were recognised ... there was no agreement as to the extent which might be appropriated, and the various limits or boundaries have from time to time been proposed or adopted, by which the sea pertaining to a state might be divided off from that which was open and free to all'.<sup>565</sup>

In his authoritative treatise on international law, Oppenheim remarked that 'no unanimity exists as to the breadth of the belt, or the point on the coast from which it is to be measured'.<sup>566</sup> Fenn also commented that the writers do not agree on to the extent of the adjacent sea.<sup>567</sup>

That said, it is useful at this stage to chronicle some of the principal contentions that have been advanced by writers from time to time on the extent of this realm. As Fulton remarked, the realm was sometimes regarded as a direct remnant or residuum of the ancient claim of a sovereignty which was previously asserted by particular nations over whole seas or large parts thereof.<sup>568</sup> Azuni refers to Hübner's 1759 treatise *de la saisie des batimens neutres*<sup>569</sup> where he confessed how difficult it is to fix, with precision, the extent of maritime jurisdiction of the coastal nation.<sup>570</sup> In an earlier Seventeenth Century treatise cited by Oudendijk, *Discussionum historicarum libri duo*<sup>571</sup> by Pontanus (1571-1639), nothing in particular was said about geographical limits or juridical difference between the ocean, vindicated as free, and adjacent waters assigned to maritime nations.<sup>572</sup> Notwithstanding

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<sup>563</sup> Azuni (1806) at 196.

<sup>564</sup> Fulton (1911) at 537.

<sup>565</sup> *Idem* at 539.

<sup>566</sup> Lauterpacht (ed.) 1 *International Law – A treatise by L. Oppenheim* (1955) at 488.

<sup>567</sup> Fenn *The Origin of the right of fishery in territorial waters* (1926) at 200.

<sup>568</sup> *Idem* at 538.

<sup>569</sup> Cited in Azuni (1806) at 199-200 as tom.1, ch. 8, §10.

<sup>570</sup> Azuni (1806) at 200.

<sup>571</sup> Cited in Oudendijk (1970) at 67 as 168, 170, 171.

<sup>572</sup> Oudendijk (1970) at 67.

these reservations, some rules can be extrapolated from a survey of writers and jurists, and these will be presented below.

In this survey, some of the earliest proposals to assign limits to maritime jurisdiction can be found in the writings of Fourteenth Century Italian jurists. Bartolus of Saxo-Ferrato (1313-1357) was an Italian Professor of Law and was one of the most prominent continental jurists of medieval Roman law. He declared the extent to be a distance of 100 miles from the coast, or less than two days' journey from it.<sup>573</sup> His pupil, another eminent jurist, Baldus de Ubaldis (1327-1400), reduced the distance to 60 miles – which was reckoned to be equal to one days' journey from the coast.<sup>574</sup> Scottish jurist William Welwood (1578-1622) stated that the sea up to 100 miles from the shore must be considered as the territory and district of the government of the coastal state.<sup>575</sup> His contemporary, Gentilis, also stated that jurisdiction and dominion pertained to the neighbouring state as far as 100 miles from the coast.<sup>576</sup> French lawyer Claude-Barthélemy Morisot (1592-1661) was of the opinion that coastal states were competent to exercise jurisdiction and protection up to eyesight distance from their shores.<sup>577</sup> German jurist Samuel von Puffendorf (1632-1694) admits a maritime dominium of up to 60 miles from the shore.<sup>578</sup>

While the methods of delimitation set out above were drawing imaginary lines in the sea at a considerable distance from the coast, other principles were applied to demarcate the extent of maritime jurisdiction. Fulton describes the principle of the *mid-channel* where the entire extent of a sea stretching between territories belonging to the same state – however far apart these territories might be – was looked upon as being under the sovereignty of that state.<sup>579</sup> Fulton goes on to comment that this principle therefore covered the most extensive claims to maritime dominion, since it left hardly any part of the sea unappropriated.<sup>580</sup>

Both Azuni and Fulton refer to the Italian author Paolo Sarpi (1552-1623) who formulated the opinion that the extent of the territorial sea should not be fixed everywhere in an

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<sup>573</sup> Fulton (1911) at 539. Azuni (1806) at 197 submits that the greatest number of writers carry the extent of domination to the distance of 100 miles.

<sup>574</sup> Fulton (1911) at 539-540; Azuni (1806) at 196-197. Note, however, that Fulton (1911) at 541 states that there is no evidence that either of the boundaries prescribed by Bartolus or Baldus was sanctioned by the general use of nations.

<sup>575</sup> Oudendijk (1970) at 69.

<sup>576</sup> Fulton (1911) at 540-541.

<sup>577</sup> Oudendijk (1911) at 75.

<sup>578</sup> *Idem* at 87.

<sup>579</sup> Fulton (1911) at 542.

<sup>580</sup> *Idem*.

absolute manner – but rather should be made proportionate to the requirements of the adjoining state.<sup>581</sup> In his work, *Del dominio del mare Adriatico*, Sarpi explains:

‘The extent is equal to what may be wanted by a state for its own use, without injury to its neighbours. Thus, a large maritime city, possessing a large extent of territory, from which it draws its subsistence, will have but few citizens desirous of following the occupation of fishing, and will make little use of the sea. On the contrary, a small city, possessing only a very narrow territory, and deriving its subsistence from fishing, will have need of a large extent of sea.’<sup>582</sup>

Fulton also describes another principle which most likely had its origins in the practice of mariners, where the belt of sea between the coast and horizon or *vice versa* was considered as belonging to the adjoining state.<sup>583</sup> This would have to be determined by reckoning the range of vision, and Fulton describes how the Scottish would determine the range of vision from the sea to the land from the ‘main-top of the fishing smack’.<sup>584</sup> It was clear to Fulton that the method of determining the extent of the territorial sea by the range of vision was vague and open to obvious objections.<sup>585</sup> He cites van Bynkershoek, who pointed out that the distance would vary according to the position of the observer, the keenness of his vision, the climate, and also other circumstances.<sup>586</sup> Oudendijk also pointed out with regard to the range of vision, it could be reckoned from either the ship to shore or from shore to ship.<sup>587</sup> She cautions, however, that this was not one and the same thing, as the distance over which a flat coast can be seen from ship’s maintop may be roughly estimated to be twelve miles, and over which a ship can be seen from such a coast is about eight miles.<sup>588</sup>

These methods of delimiting the territorial sea, up to the end of the Seventeenth Century, were more or less arbitrary and Fulton correctly points out that they did not rest upon a natural basis capable of universal application.<sup>589</sup> He points out that during the Eighteenth Century, another principle gradually evolved which was ultimately accepted into customary international law: the maritime dominion of a state ended where its power of

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<sup>581</sup> Fulton (1911) at 547.

<sup>582</sup> Cited in Azuni (1806) at 201.

<sup>583</sup> Fulton (1911) at 544.

<sup>584</sup> Fulton (1911) at 545.

<sup>585</sup> Fulton (1911) at 546.

<sup>586</sup> *Idem.*

<sup>587</sup> Oudendijk (1970) at 141.

<sup>588</sup> *Idem.*

<sup>589</sup> Fulton (1911) at 549.

asserting continuous possession ended.<sup>590</sup> In amplification thereof, the principle contended that ‘the belt of sea along the coast which could be commanded and controlled by artillery on the shore thus came to be regarded as the territorial sea belonging to the contiguous state. Beyond the range of guns on shore the sea was common’.<sup>591</sup> This concept became the ubiquitous ‘cannon shot’ rule. Oudendijk recalls that this notion did have some early origins, having been mentioned as early as 1610 through a Dutch diplomatic mission sent to London.<sup>592</sup>

It was in the work of distinguished publicist Cornelius van Bynkershoek (1673-1743), whose treatise *De Dominio Maris Dissertatio* – published in The Hague in 1703 – propogated this principle. Thus, he laid down the principle that the dominion of the state extended over the neighbouring sea only as far as it was able to command and control it from the land, and the associated formula *terrae dominium finitur ubi finitur armorum vis* has been frequently cited since.<sup>593</sup> This notion derives from Bynkershoek’s conception of the laws of property. In his opinion, property is held only as long as it is actually occupied.<sup>594</sup> When considering the concept of the territorial sea, Bynkershoek enquired as to how far a nation or a prince could be said to have perpetual possession of the adjacent sea.<sup>595</sup> He identified two difficulties in this regard:

- (i) It could be inferred that the adjacent sea is possessed as far as it is constantly navigated upon.<sup>596</sup> However, it would require a constant presence of ships at the same distance from the shore, which would be practically impossible.<sup>597</sup>
- (ii) The reckoning of earlier writers as to the breadth of the territorial sea, such as a hundred miles from the shore, presented practical uncertainties: was the distance measured from the beach or from a castle and were glasses were to be used?<sup>598</sup>

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<sup>590</sup> *Idem.*

<sup>591</sup> *Idem.*

<sup>592</sup> It was reported that the Dutch mission commented:

‘Ffor that it is by the Lawe of nacions, no prince can challenge further into the Sea then he can Command with a Cannon except Gulfes within their land from one point to an other; ffor that the boundlesse and rowlinge Seas are as common to all people as the ayre which no prince can prohibite.’ Cited in Oudendijk (1970) at 34.

<sup>593</sup> Fulton (1911) at 558; and Oudendijk (1970) at 108.

<sup>594</sup> Oudendijk (1970) at 107.

<sup>595</sup> *Idem* at 108.

<sup>596</sup> *Idem.*

<sup>597</sup> *Idem.*

<sup>598</sup> *Idem.*

Bynkershoek then postulated that the possessor of a thing is the man who holds it in such a way that no other can get it without his consent.<sup>599</sup> Accordingly, exerting ownership or control of the adjacent seas would have to be done from ashore.<sup>600</sup> In practical terms, exercising control of the adjacent sea from the land is thus premised through the threat of artillery fire from the shore – most likely through cannon fire.

While the doctrine underlying the cannon shot rule had a logical foundation, the precise extent of such artillery range was not specified by Bynkershoek. In 1872, in a treatise<sup>601</sup> by the Italian illuminist, Ferdinando Galiani,<sup>602</sup> for the first time the extent of the cannon shot range appeared to be fixed independently of the actual calibre of the posted guns – at three miles.<sup>603</sup> While this three-mile limit derived from Galiani gained much recognition and acceptance in later years,<sup>604</sup> Oudendijk has suggested that it was based on a hollow foundation by Galiani, because: (i) he made a ballistic mistake in assigning too large a range to contemporaneous guns;<sup>605</sup> (ii) it is not definitive whether he founded the limit on his understanding of the prevalent state practice of the time;<sup>606</sup> and (iii) he did not restrict it exclusively to three miles as there are instances, in favourable circumstances, where the limit was increased to six miles.<sup>607</sup> Other influential writers such as Georg Friedrich von Martens gave the equivalent distance of Galiani as ‘three leagues’ – mistaking *lieues* for *milles*.<sup>608</sup>

Writers have advanced pragmatic concerns, however, about the efficacy of the cannon shot doctrine. Indeed, Fulton noted that for a long time the doctrine was neglected by publicists

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<sup>599</sup> *Idem*.

<sup>600</sup> Cited *idem* in the original text as *quam e terra illi imperati potest*. Fulton (1911) at 556 also cites Bynkershoek: ‘the dominion of the land ends where the power of arms terminates’.

<sup>601</sup> *De doveri principi neutrali verso i principi guerregianti e di questo verso i neutrali* (1782) at 422, cited in Treves ‘Historical Development of the Law of the Sea’ in Rothwell *et al* (eds) *The Oxford Handbook on the Law of the Sea* (2015) at 5.

<sup>602</sup> Referred to by Oudendijk (1970) at 125, as Ferrante Galiani.

<sup>603</sup> Fulton (1911) at 563; Oudendijk (1970) at 126, 128, 142; and Rothwell (2015) at 5. See generally a book review by McDougal ‘The Three-Mile Limit of the Territorial Seas’ 7 (October 1973) *The International Lawyer* 925 at 926. Azuni also followed Galiani’s reckoning, thus cementing the 3 mile rule before the close of the eighteenth century. Fulton (1911) at 565.

<sup>604</sup> See generally Fulton’s (1911) chapter ‘General adoption of the three-mile limit’ at 576-603.

<sup>605</sup> Oudendijk (1970) at 128. She indicated later (at 143) that in Galiani’s time, guns didn’t control distances of more than about 1715 metres while three nautical miles amount to 5556 metres.

<sup>606</sup> See Oudendijk (1970) at 142 read with 128.

<sup>607</sup> *Idem* at 126.

<sup>608</sup> Fulton (1911) at 563; Oudendijk (1970) at 143. He also stated that: a nation may occupy and extend its dominion beyond that distance and maintain it, if the security of the nation requires it, by a fleet of armed vessels. (at 564). Fulton (1911) later notes at 595 that “while the majority accepted Bynkerhoek’s principle of cannon range, comparatively few restricted it to the distance of three miles and many logically insisted that the extent must necessarily vary with the improvements in artillery.”

and statesmen, as it represented much too stringent a limitation of the territorial sea to receive general assent.<sup>609</sup> Treves argues that it has the drawback of being uncertain and subject to change in response to changes in weapon technology, and questions whether the rule was to be applied when real artillery was present on the land or was a consequence of the mere possibility of such a presence.<sup>610</sup> Fulton, while acknowledging the merits of the doctrine – to transfer in theory all parts of the adjacent coast with dominion – strictly speaking, it exists where forts or batteries were placed.<sup>611</sup> It is trite, without a comprehensive understanding maritime geography, that coastlines have varying features and areas, which can, at times, be inaccessible. Therefore, in such circumstances, it would be impractical to maintain dominion over the territorial sea by means of artillery on the shore and maintenance through coastguards and naval vessels.<sup>612</sup> The doctrine accordingly rests on a hypothesis. Oudendijk advanced more pragmatic questions such as which types of guns are to be taken into account and where were they supposed to be placed (at the shore or on elevated or projected cliffs or castles?)<sup>613</sup>

The next query in this survey is considering the eventual reception and adoption of the cannon shot and three-mile doctrine – notwithstanding the concerns and limitations noted above. Oudendijk questioned, however, whether the axiom that the cannon shot rule was based on general usage, accorded with reality.<sup>614</sup> She finds that in the 17<sup>th</sup> and 18<sup>th</sup> Century, state practice of the doctrine was connected either with completely territorial cannon sections, or with neutrality or safety belts which had a districtual character.<sup>615</sup> Proprietary zones such as exclusive fishing belts, limited at cannon shot distance, were exceptional.<sup>616</sup> She concludes that 18<sup>th</sup> Century writers thus generalised and simplified a complicated state of affairs.<sup>617</sup>

The adoption of the cannon shot doctrine and three-mile limit was given a comprehensive survey in Fulton's treatise.<sup>618</sup> Some of his findings are worth briefly reproducing at this stage. At the outset, he found that despite the variations in the extent of the limit, the principle of determining the general boundary of the territorial sea by the range of guns from the coast, became firmly established in the practice of nations before the end of the

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<sup>609</sup> Fulton (1911) at 550.

<sup>610</sup> Rothwell (2015) at 5.

<sup>611</sup> Fulton (1911) at 558.

<sup>612</sup> *Idem.*

<sup>613</sup> Oudendijk (1970) at 112.

<sup>614</sup> *Idem* at 136.

<sup>615</sup> *Idem.*

<sup>616</sup> *Idem.*

<sup>617</sup> *Idem.*

<sup>618</sup> *See, generally, Fulton (1911).*

Eighteenth Century.<sup>619</sup> He recalls the decisions of Lord Stowell at the turn of the 19<sup>th</sup> Century, which introduced the three-mile limit into English jurisprudence.<sup>620</sup> He also referred to French writer Joseph Latour, who was of the view that a nation is justified in exercising jurisdiction in the sea, as far as its security or interests render it necessary.<sup>621</sup> In a book review of Latour's 1889 treatise, *La Mer Territoriale*, Moore summarises a key contention of Latour, that 'in reality there is no rule open to greater exception and more likely to be the subject of modification in the future than that by which it is sought to confine the exercise of jurisdiction to a marine belt of three miles'.<sup>622</sup>

Having thus presented the contentions of influential writers and jurists in some detail – principally drawn from the treatises of Azuni, Fulton, and Oudendijk – it is apt to conclude with Fulton's summation:

'It is obvious from the review of the opinions of publicists in the first half of the last [nineteenth] century that *no complete agreement* had been reached in theory or principle respecting the *extent* of the territorial sea. Many of the writers held to the opinions expressed by Puffendorf, Wolff and Vattel, which allowed a more or less wide and vague jurisdiction in the neighbouring sea for the security of the state; and most of them refer to the cannon-range limit as the one usually adopted. Few, however, accept the three-mile boundary as an alternative to the range of guns; most of the authors indeed do not even mention it, and those who do appear to have been guided in the main by Lord Stowell's decisions.'<sup>623</sup>

Notwithstanding this uncertainty, Treves notes that a fixed limit for the extent of the territorial sea was recognised and adopted in the state practice of the Nineteenth and early Twentieth Centuries.<sup>624</sup> Even into the Twentieth Century, while the three-mile limit was the most frequently adopted by countries such as the United States, France and the United Kingdom, other states adopted different limits, such as: four miles for Denmark, Norway and Sweden; six miles for Spain, Portugal and Italy; and twelve miles for Russia, Venezuela and Guatemala.<sup>625</sup>

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<sup>619</sup> Fulton (1911) at 576.

<sup>620</sup> Fulton (1911) at 577, citing the *Twee Gebroeders* (1801) 3, C.Rob 336.

<sup>621</sup> Fulton (1911) at 595.

<sup>622</sup> Moore 'Review: *La mer territoriale au point de vue théorique et pratique*' 4 *Political Science Quarterly* (December 1889) at 705-705.

<sup>623</sup> Fulton (1911) at 603.

<sup>624</sup> Rothwell (2015) at 5.

<sup>625</sup> *Idem*.

From the foregoing detailed survey, it can be confidently concluded that the true extent of the territorial sea – from the point of universal application – has never been settled in international law, as demonstrated by the expositions of eminent writers and jurists. Jurists proposed wide-ranging extents from a hundred miles to the sight of the horizon. While the cannon shot doctrine and its subsequent delimitation to three miles was much later accepted in state practice in the Twentieth Century, this survey has highlighted its shortcomings and lack of universal acceptance among other jurists of the various periods under review. This uncertainty of the extent of the territorial sea proceeded well into the Twentieth Century, prior to the codification in UNCLOS.

This sound conclusion supports one of the hypotheses of this thesis set out *supra* – namely that which was part of the realm of the high seas in previous centuries is not necessarily in that realm in the present day and *vice versa*. As reviewed earlier in this chapter, the jurisprudence of piracy *jure gentium* or piracy under the law of nations, has always shown it to only take place on the high seas – so it is a significant omission that the delimitation of the territorial sea has not received closer scrutiny in earlier piracy cases and jurisprudence. The realm of the high seas never had a universally accepted definition, as was shown from the survey of early writers and cases in American and British jurisprudence. This is in stark contrast to the rigid regime set out by the UNCLOS regime – which has clearly defined delimitations of the various realms of the ocean. The concept of piracy *jure gentium* as taking place only on the high seas, as distinguished from territorial seas, finds its origin in jurisprudence as early as the Sixteenth Century, as was shown earlier in this chapter, and it continues to be an essential element of the definition of piracy. Yet, it has now been shown that the extent of the territorial sea has never had a universal application. It is submitted that while in the study of East African piracy the limitations caused by confining the crime under international law to the high seas was acknowledged, the doctrines that set out the extent of these distinct realms have not received a close academic synthesis with piracy jurisprudence. Thus, in demonstrating this large divergence in principles which delimited the territorial sea and the high sea over the centuries, and comparing the stagnant element of piracy under international law as occurring only on the high seas, it can be concluded that there has been a gap in the development of piracy jurisprudence concerning the element of the high seas. This gap in jurisprudence will be taken into account in the final chapter of this thesis, when proposals will be made concerning the UNCLOS piracy definition and its high seas' element.

A second leg of the survey is – with the acceptance of the realm of the territorial sea – to consider the development and genesis of the nature and extent of the sovereignty exercised over this realm. In simpler terms, the enquiry is to consider the reasons or rationale for a state exercising sovereignty over the adjacent belt of sea.

### 5.3.3 *The juridical nature of the territorial sea*

#### (i) *Essential nomenclature*

Before a comprehensive analysis on the juridical nature of the territorial sea is undertaken, essential nomenclature needs to be set out and defined in context. This encompasses concepts of ownership and sovereignty. In defining the term *sovereignty*, Ferreira-Snyman commented that its precise meaning is not clearly defined.<sup>626</sup> In Oppenheim's treatise on international law, he describes how the term was introduced by the French philosopher James Bodin (1530-1596) in his work *De la République* (1577) – as 'the absolute and perpetual power within a State'.<sup>627</sup> According to Bodin, such power is the 'supreme power within a State without any restriction whatever except the Commandments of God and the Law of Nature'.<sup>628</sup> Later writers such as Puffendorf contended, however, that although sovereignty is the supreme power in a State, it is not absolute and may be constitutionally restricted.<sup>629</sup> Through a review of international law writers, Ferreira-Snyman offers the following definition:

'Sovereignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchangeable power over a piece of territory and all the persons from time to time therein.'<sup>630</sup>

This has developed from the classical understanding of sovereignty which originated in the Peace of Westphalia in 1648. Shaw comments that the Treaties of Westphalia, taken as a whole, may be regarded as 'the first sustained attempt to establish a world order on the basis of States exercising untrammelled sovereignty over certain territories and

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<sup>626</sup> Ferreira-Snyman 'The evolution of state sovereignty: A historical overview' 12-2 *Fundamina* (2006) at 1.

<sup>627</sup> Lauterpacht (1955) at 120.

<sup>628</sup> *Idem*.

<sup>629</sup> *Idem* at 121. Lauterpacht (1955) also comments later (at 290) that 'like independence, territorial supremacy does not give an unlimited liberty of action. Thus by customary International Law, every State has a right to demand that its merchantmen may pass through the maritime belt of other States'.

<sup>630</sup> Ferreira-Snyman (2006) at 1. She concludes that the traditional understanding of sovereignty was often conceived as an absolute concept, with the implication that all states are independent with regard to all other states, and are above the rules of international law (*idem* at 9).

subordinated to no earthly authority'.<sup>631</sup> He comments further that this order involved the recognition of all independent states as having equal rights of sovereign jurisdiction over a determined territory.<sup>632</sup> Two fundamental principles emerge in this elucidation of sovereignty as a concept: first, the equality of states is one of the essential elements,<sup>633</sup> and second, the principle of non-intervention in the internal affairs of States applies.<sup>634</sup> Tanaka points out that the principle of sovereignty seeks to safeguard the interests of coastal states,<sup>635</sup> and comments further that this principle 'essentially promotes the extension of national jurisdiction into offshore spaces and supports the territorialisation of the oceans'.<sup>636</sup>

A report of the International Commission on Intervention and State Sovereignty (ICISS) commented, however, that sovereignty is more than just a functional principle of international relations, and iterate that 'for many states and peoples, it is also a recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny'.<sup>637</sup>

The concept of *territory* also needs to be considered at this point, as it is an essential element in the sovereignty of a particular society, and is pivotal in this analysis of the territorial sea. Shaw comments that territory itself is a geographical conception relating to physical areas of the globe.<sup>638</sup> Oppenheim describes it as 'that defined portion of the surface

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<sup>631</sup> Shaw *Title to Territory in Africa: International Legal Issues* (1986) at 2. Ferreira-Snyman (2006) also comments that this new world order was premised on the absolute sovereignty of its constituent members (at 9).

<sup>632</sup> *Idem*.

<sup>633</sup> Ferreira-Snyman (2006) at 11; Shaw (1986) at 7. See also the 1970 Declaration on Principles of Internal Law which emphasised that all States enjoy sovereign equality; and Article 3 of the Charter of the Organisation of African Unity (1963), which emphasised the: (i) sovereign equality of all member states, and (ii) respect for the sovereignty and territorial integrity of each State for its inalienable right to independent existence. See, also, article 2(1) of the Charter of the United Nations (1945).

<sup>634</sup> Ferreira-Snyman (2006) at 11; Shaw (1986) at 8 and 10. See Article 2(7) of the Charter of the United Nations (1945); and article 3 of the Charter of the Organisation of African Unity (1963).

<sup>635</sup> Tanaka, *The International Law of the Sea* 2<sup>nd</sup> ed. (2015) at 18.

<sup>636</sup> *Idem*. Tanaka (2015) also cites (*idem*, fn 50 and 51) Vattel, who stated that:

'When a nation takes possession of certain parts of the sea, it takes possession of the empire over them, as well as of the domain, on the same principle which we advanced in treating of the land (205). These parts of the sea are within the jurisdiction of the nation, and a part of its territory: the sovereign commands there; he makes laws, and may punish those who violate them; in a word, he has the same rights there as on land, and, in general, every right to which the laws of the state allow him.'

<sup>637</sup> 'The Responsibility to Protect' *Report of the International Commission on Intervention and State Sovereignty* (2001), clause 1.32. In recognition of this, the Commission refers to Article 2.1 of the UN Charter's principle that all states are equally sovereign under international law.

<sup>638</sup> Shaw (1986) at 1.

of the globe which is subjected to the sovereignty of the State'.<sup>639</sup> He emphasises that its importance lies in the fact that it is the space within which the state exercises its supreme authority, and, notably, a general rule applies that no foreign authority has any power within the boundaries of the home territory.<sup>640</sup> Kelson defines territory as 'that space within which a State is authorised by general international law to perform all acts provided by its national law or ... the space within which according to general international law the organs determined by a national legal order are authorised to execute this order'.<sup>641</sup>

Drawing these two concepts of territory and sovereignty together, *territorial sovereignty* over the belt of sea described as the territorial sea, could be extrapolated as follows. Shaw describes it as 'centred upon the rights and powers coincident upon territory in a geographical sense'.<sup>642</sup> Shaw further describes territorial sovereignty as having a positive and negative aspect. The former aspect relates to the exclusive competence of the state with respect to its own territory,<sup>643</sup> and the latter relates to the obligation to protect within the territory the rights of other states – such as their right to integrity and inviolability.<sup>644</sup> In a similar manner to the comment in the report of the ICISS set out above, Shaw explains that 'territorial sovereignty is the answer provided by international law as regards the needs for security, stability, and identity felt by a particular group within a certain area'.<sup>645</sup> He further explains that it 'constitutes the method by which a community may enter upon the international scene and by virtue of sovereign equality of States play a particular role in the development of the international system'.<sup>646</sup>

(ii) *Diversity of opinions*

With these concepts now set out and expounded, the inquiry that follows is to consider what precisely the *nature* of this sovereignty is over the territorial sea. It is apt to restate the comment of Azuni – cited earlier in this chapter – that 'it cannot be questioned, that the nation in possession of the shore, is, at the same time, sovereign of the adjacent sea, yet there is not an unanimity of opinion, much less universal agreement, among nations ... either as to the nature or extent of this sovereignty'.<sup>647</sup> Oppenheim, writing in the mid

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<sup>639</sup> Lauterpacht (1955) at 451.

<sup>640</sup> *Idem* at 542.

<sup>641</sup> *Cited* in Shaw (1986) at 14.

<sup>642</sup> Shaw (1986) at 10.

<sup>643</sup> Shaw (1986) at 11.

<sup>644</sup> *Idem*.

<sup>645</sup> Shaw (1986) at 16.

<sup>646</sup> *Idem*.

<sup>647</sup> Azuni (1806) at 196.

Twentieth Century, definitively stated that ‘no unanimity exists as to the nature of the jurisdiction of the littoral States’.<sup>648</sup>

Oppenheim summarises the views of most writers as being that coastal waters would actually be the state property of the littoral states – with certain limitations such as the right of innocent passage of foreign commercial vessels through these waters.<sup>649</sup> This view coincides with state practice.<sup>650</sup> The minority of the writers, according to Oppenheim, denied the territorial character of the adjacent belt of sea and only conceded to the littoral state (in the interest of the safety of the coast) *inter alia* limited powers of control, jurisdiction and policing – but not sovereignty.<sup>651</sup>

In this enquiry, a preliminary question that has been raised by writers related to whether the ocean – because of its inherent nature and fluidity – was capable of sovereignty or ownership. In this regard, Oudendijk, after reviewing the writings of Grotius, comments that:

‘The sea is as unsizeable as the air and because of its restlessness it resists all attempts at possession, like a wild animal does. It can’t be trodden upon, so there is no *potestas standi ac sedendi*. Even the navigator doesn’t really stand on it: he doesn’t hold it, but is held by it and his ship leaves no traces behind. Consequently, as he doesn’t occupy any part of it, he can’t acquire any possession or property.’<sup>652</sup>

Fenn, however, highlights an argument to the contrary:

‘Neither the immense size of the sea, nor its nature, is repugnant to jurisdiction and occupation. As to its size, it is true that the whole ocean cannot be

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<sup>648</sup> Oppenheim (1955) at 487.

<sup>649</sup> *Idem*.

<sup>650</sup> *Idem*.

<sup>651</sup> *Idem*.

<sup>652</sup> Oudendijk (1970) at 19-20. She also cites Grotius’s *Defensio* (at 24), where the jurist remarked: ‘no part of the sea, no matter how large or small it is or where it is situated, can be exclusive property, for neither quantity nor situation makes any difference as to the substance, and when the substance is the same, the law must be the same, especially the law of nations which is universal’. As to occupation, Grotius is also cited by Fenn (1926) at 165, remarking that ‘occupation can only take place in a thing which is bounded; the sea is not bounded; therefore occupation cannot take place in the sea. The sea, of course, not only is not, it cannot be bounded’. Fenn (1926) at 191 also summarises certain arguments based on this theory: (i) the ocean is always in motion and therefore is not adapted to private ownership; (ii) boundaries cannot be marked on it, without which there can hardly be private ownership; and (iii) by reason of its vast extent, it is sufficient for the needs of all men.

occupied. But that is only so because no people is strong enough to undertake the occupation. It does not follow from this that a part of it cannot be occupied. Therefore there is nothing to prevent it.’<sup>653</sup>

Following these contrasting arguments, it is necessary to look into the notion of ownership or sovereignty over the territorial sea from a more fundamental perspective – i.e. how it is acquired. Fenn, in his discussion on the distinction between *mare liberium* and *mare clausum*, explains that ownership was accomplished by taking possession of what was unoccupied.<sup>654</sup> He goes on to state that this was accomplished by: (i) express or tacit consent as the parties agree on terms of ownership which becomes binding on future generations; and (ii) the vacant land becomes the property of those who seized it by occupation.<sup>655</sup> Fenn then questions what was done with the sea in terms of ownership and possession. He asks whether a title to the sea could be acquired by occupation, or, in other words, whether the sea was susceptible to private ownership, just as and in the same way, that the land is.<sup>656</sup>

iii) *Dominium and imperium*

Therefore, to unpack the nature of the sovereignty exercised over the territorial sea entails an understanding of ownership, control, authority and possession. This can be achieved through revisiting the concepts of *imperium* versus *dominium*.<sup>657</sup> This distinction is not apparent from a plain reading of the present UNCLOS provisions which established the coastal states’ sovereignty over the territorial sea. These provisions of UNCLOS will be commented on in the chapter 4.

Fenn recounts that when ancient writers say that a certain sea belonged to the Roman people, ‘they must be understood to refer only to protection and jurisdiction; they themselves distinguish between the right of protection and that of ownership’.<sup>658</sup> He goes on to state later, however, that dominion in the sea, even private ownership of the sea, is sanctioned by Roman law.<sup>659</sup> At its most basic formulation, Oudendijk defines *dominium*

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<sup>653</sup> Fenn (1926) at 200. *See, also, idem* at 192.

<sup>654</sup> Fenn (1926) at 187.

<sup>655</sup> *Idem*.

<sup>656</sup> *Idem* at 188.

<sup>657</sup> *See* O’Connell, 1 *The International Law of the Sea* (1982) at 59, where he states that ‘Until the middle of the nineteenth century, there was only one theory of the nature of the territorial sea, based upon the coalescence of *imperium* and *dominium* in legal philosophy.’

<sup>658</sup> Fenn (1926) at 161.

<sup>659</sup> *Idem* at 190. He also comments at 189 that the ‘Roman people were lords of the sea, just as they were of their territory.’

as property and *imperium* as sovereignty.<sup>660</sup> This simple translation, however, is inadequate and writers have had divergent and contradictory opinions as to its formulation in relation to the adjacent waters. The natural connection between land territory and the adjacent coastal waters drew differing views from writers. Fenn refers to the writings of Welwood and sets out one proposition that: ‘[t]he relation of the land to the adjacent sea is so intimate that the ruler of the land may not alienate any part of the sea, or any use of it, just as he may not alienate any part of his kingdom, or a use of it’.<sup>661</sup> Therefore, it was contended that ‘it is as necessary that there should be jurisdiction over coastal waters as it is over the neighbouring territory. This jurisdiction should be exercised by the neighbouring Prince, so that both the land and the sea may be under a common jurisdiction’.<sup>662</sup> Oudendijk, on the other hand, refers to German Professor of Law, Franciscus Stypmann (1612-1650). She remarked that Stypmann:

‘rejects every natural connection between land territory and coastal waters. He denies that maritime jurisdiction results from occupation of the continent or that he who has occupied the land has also occupied the adjacent sea. The status of the sea has nothing to do with the land. Consequently it is by all means possible to exercise *imperium* in non-adjacent waters: he who sends a fleet into a still unoccupied sea acquires *dominium* there’.<sup>663</sup>

Fenn provided a detailed review of the works of Johannes Loccenius, who distinguished the two concepts. According to him *dominium* in its classic and proper meaning, refers to property and is permanent because that quality is inherent in its nature.<sup>664</sup> There are property rights in the sea and those rights are, according to him, permanent, even if the surface is controlled by an enemy.<sup>665</sup> Fenn states that the whole tenor of Loccenius’s exposition suggests the word “sovereignty” to mean *dominium*.<sup>666</sup> Loccenius’s contemporary, the Genoese writer Petrus Burgus, argued that where the sea is concerned, the word *dominium* has no definite meaning.<sup>667</sup> He argues that some people will not see more in it than jurisdiction and protection – but to others it indicates property, linked with jurisdiction, although only with regard to coastal waters.<sup>668</sup> Burgus rejects a maritime

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<sup>660</sup> Oudendijk (1970) at 27.

<sup>661</sup> Fenn (1926) at 177.

<sup>662</sup> *Idem*.

<sup>663</sup> Oudendijk (1970) at 82.

<sup>664</sup> Fenn (1926) at 209 and 211.

<sup>665</sup> *Idem*.

<sup>666</sup> *Idem*.

<sup>667</sup> Oudendijk (1970) at 73.

<sup>668</sup> *Idem*.

*imperium* which is devoid of *dominium*,<sup>669</sup> but Loccenius and Stypmann note it in the converse. Loccenius comments that *dominium* is acquired by the use of *imperium*,<sup>670</sup> while Stypmann comments that jurisdiction, as it is exercised by naval power, creates possession and occupation and this is the only way to acquire maritime *dominium*.<sup>671</sup>

We turn now to the concept of *imperium*, which Loccenius describes as the power to give protection and exercise jurisdiction.<sup>672</sup> According to Loccenius, *imperium*, as opposed to the permanency of *dominium*, is temporary because:

‘(For) an enemy can be more powerful with his fleet, and can be the victor (in war), or when his fortune changes, he loses (power/imperium), or when peace is made (power/imperium over the sea) is restored to the previous owner. Obvious examples of this appear in many places. However, ownership (*dominium*), from its very nature is perpetual.’<sup>673</sup>

According to German writer, Johannes Strauch (1612-1680), *imperium* was maintained by despatching fleets, establishing maritime officials, exacting naval salutes, levying port taxes, and enforcing the right of angary.<sup>674</sup>

It can be seen from this survey of the works of writers, primarily from the Seventeenth Century, that the nature of the power over the territorial sea vested in the form of sovereignty and jurisdiction, is encapsulated by the concept of *imperium* and ownership and property rights in the concept of *dominium*. The concept of sovereignty over the territorial sea, as set out in UNCLOS presently – does not emphasise or distinguish these

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<sup>669</sup> Oudendijk (1970) at 73.

<sup>670</sup> Fenn (1926) at 207.

<sup>671</sup> Oudendijk (1970) at 81.

<sup>672</sup> Fenn (1970) at 209 and 211. Prof. John Hilton, erstwhile Head of the Department of Classical Civilization at the University of KwaZulu-Natal (email communication: 19 March 2016), commented that *imperium* was the executive power of a magistrate, such as a Consul.

<sup>673</sup> See the treatise of Loccenius in Heineccius (ed.) *Scriptorum de iure nautico et maritime fasciculus: Io. Franc. Stypmanni ius maritimum et nauticum, Reinoldi Kuricke de adsecurationibus diatriben et Io. Loccenii ius maritimum complexus* (1740) at Book I, Chapter IV (*de imperio maris*) (on the command over the sea) at section V (*num protection et jurisdiction maris dominium adferat*) (on whether protection and jurisdiction brings about ownership of the sea). The original text of the quote is:

‘Accedit, quod protectio et iurisdictio, quae etiam temporaria esse postest, a proprietate maris distinguenda est. Potest item hostis classe potentior, et victor, imperium maris tenere; sed idem fortuna vertente amittere, vel pace facta priori domino resistuere. Quod obvia passim exempla docent. Dominium autem ex sua natura perpetuum est.’

Translated into English by Prof. John Hilton, fn 539 *supra*.

<sup>674</sup> Oudendijk (1970) at 90.

concepts, and this lacuna presents the problem identified in the hypothesis of this section. The dichotomy between these concepts raises some useful considerations in affecting an amendment to the present UNCLOS provisions.

The distinction advanced by Loccenius above is important, because, as cited one paragraph above, *imperium*, being the power to give protection and exercise jurisdiction, does not depend for its use upon the ownership of the area over which it is put into effect.<sup>675</sup> Fenn comments that it depends solely upon the physical mastery of the area in question.<sup>676</sup> Oudendijk also comments on how *imperium* and *dominium* are seemingly independent concepts. She refers to Burgus, and notes:

‘So the dominus of the sea area can regulate tax and foreign navigation and fishing as he likes, but it won’t derogate from his property or *dominium superius* if he renounces the usufruct or *dominium inferius* by permitting a foreigner to fish or navigate.’<sup>677</sup>

What can be extrapolated from these views is that – notwithstanding the *dominium* or ownership over the territorial sea – it is possible to grant a form of *imperium* or power for the purposes of protection, without derogating from the rights of the coastal state. This exercise of a foreign source of power over the territorial sea could occur in situations where there is an inability of the local power to exercise effective control, resulting in the intervention of a foreign power, or where there is a cession of rights as proposed by Oudendijk.

Indeed, Loccenius points out that this power to protect navigation and punish pirates is a common right (*jus commune*) which all free peoples have, and is not *ex proprio*.<sup>678</sup> He states:

‘But the disposition of fleets for the protection of those who sail, and punishing pirates, is not devolved by one’s own law but by common law, which other free nations can also have.’<sup>679</sup>

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<sup>675</sup> Fenn (1926) at 211.

<sup>676</sup> *Idem*.

<sup>677</sup> Oudendijk (1970) at 74.

<sup>678</sup> See Fenn (1926) at 209 and 211.

<sup>679</sup> See Heineccius *idem*. The original text is:

‘Sed et classes praesidio nauigantium disponere atque piratas punire, non ex proprio sed communi iure descendit, quod etiam aliae liberae gentes habere possunt.’

This distinction between *dominium* and *imperium* seemed to have lost significance to later writers such as Bynkershoek and De Martens.<sup>680</sup> It thus becomes pertinent, for the purposes of this discussion, to trace the development of the theories of the juridical nature of the territorial sea through the late Nineteenth, Twentieth and early Twenty First Centuries. Before this survey is undertaken, however, a short account will be provided in the section below on the early conceptions of the purpose of a territorial sea.

(iv) *An early conception of the purpose of a territorial sea*

Although the preceding section advanced a discourse on underlying notions of the juridical nature of the territorial sea, it is useful, at this stage, to point out from the writings of Azuni the following rationale for extending power over the territorial sea:

‘It is essential to their security, and the welfare of their dominions, that an unlimited freedom of approach to their territories should not be allowed to everyone, especially with ships of war, whose presence may prevent the access of commercial nations, and interrupt navigation ... the right of the sovereigns of the sea-coast, to interdict the ships of strangers from entering, or approaching, the harbours and roads, within their dominions, has been established without interruption.’<sup>681</sup>

(v) *Theories on the juridical nature of the territorial sea*

As described in the previous paragraphs, two propositions arise from this debate - to show the dual nature of the territorial sea:

The first proposition is a *territorialist* thesis that sees the territorial sea as a prolongation of a state’s land territory<sup>682</sup> – in which the state’s jurisdiction is restricted for limited purposes,<sup>683</sup> such as in the interest of international navigation. This thesis regards the territorial sea as the subject of both *imperium* and *dominium* by the coastal state.<sup>684</sup>

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<sup>680</sup> Oudendijk (1970) at 135.

<sup>681</sup> Azuni (1806) at 185.

<sup>682</sup> Dupuy and Vignes (1991) at 254.

<sup>683</sup> See Gidel *Le Droit international public de la mer* (1934) at 168, cited in Vrancken *South Africa and the Law of the Sea* (2011) at 16 and Dupuy and Vignes (1991) at 254.

<sup>684</sup> Vrancken (2011) at 16. Dupuy and Vignes (1991) also comment at 254 that: ‘Indeed, for coastal developing countries, *imperium* and *dominium* are mingled, in view of the fact that recognition has

*Imperium* was seen to be dependent on *dominium*, and sovereignty was seen as synonymous with ownership.<sup>685</sup> French Professor of International Law, Gilbert Gidel (1880-1958), expressed that the territorial sea was merely ‘submerged territory’.<sup>686</sup> Under this thesis is the *property theory* which views the coastal state as being entitled to exercise rights of ownership or property within the territorial sea.<sup>687</sup> This is acquired through possession that was measured by a reference to the capacity of the coastal state to project power from the shore.<sup>688</sup>

The needs of international navigation however necessitated placing limits on the powers of the coastal state.<sup>689</sup> The second proposition is a thesis which rejected the possibility of the territorial sea as being subject to the sovereignty of the coastal state, and, instead, views the territorial sea as *part of the high seas* – and in this thesis the coastal state exercises jurisdiction for specific purposes, as set out below.<sup>690</sup> Dupuy aptly points out that as the *territorialist thesis* recognised that there are certain limitations on state sovereignty in the interest of international navigation, there is a corresponding restriction which is to be placed upon the freedom of navigation – in order to protect the rights of coastal states<sup>691</sup> as part of the *high seas’ thesis*. The restrictions could be categorised into the following theories:

- (a) *The Police Theory*: This theory is seen as the corollary of the property theory.<sup>692</sup> Miles summarised that adherents of this theory considered that *imperium* and *dominium* could be divided such that the rights of the coastal state fell short of outright ownership.<sup>693</sup> An approach was taken in this theory to ‘disconnect territory from ownership as a legal concept and instead regard it merely as a bounded space in which the state could exercise rights of jurisdiction’.<sup>694</sup> The

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been given to a sovereignty having an economic purpose which, through the various types of space, is aimed at resources.’

<sup>685</sup> Miles ‘The Franconia sails on: Revisiting the intellectual history of the territorial sea in the United States, Canada and Australia’ 13 *Oxford University Commonwealth Law Journal* (2013) 347 at 352.

<sup>686</sup> Dupuy and Vignes (1991) at 254.

<sup>687</sup> See Miles (2013) at 353; O’Connell (1986) at 60; and Vrancken (2011) at 16.

<sup>688</sup> Miles (2013) at 353. O’Connell (1986) at 60 states that property rights are exercised by occupation.

<sup>689</sup> Dupuy and Vignes (1991) 253.

<sup>690</sup> Vrancken (2011) at 16; Dupuy and Vignes (1991) at 254.

<sup>691</sup> Dupuy and Vignes (1991) at 254, 255.

<sup>692</sup> O’Connell (1986) at 61.

<sup>693</sup> Miles (2013) at 354. He argues *idem* that: ‘the theory evolved out of concerns that the right of innocent passage for foreign ships through territorial waters fundamentally undermined any pretention to absolute sovereignty.’ See, also, O’Connell (1986) at 61.

<sup>694</sup> Miles (2013) 355. O’Connell (1986) at 61-62 states that: ‘territory ceased to be regarded as something owned, and came to be regarded as a spatial area within which the faculties of sovereignty could be exercised.’

territorial sea was accordingly seen as separate from the national domain.<sup>695</sup> This theory encompasses the notion by Twiss of “jurisdictional waters”, which are coastal waters within which a state has only a concurrent right to set law, and operating in parallel with international law.<sup>696</sup>

- (b) *The Conservation Theory*: This theory derived from the writings of Fauchille<sup>697</sup> who rejected the view that the sea has the status of *res communis* and based the powers of the coastal state in its territorial sea on that state’s right of conservation.<sup>698</sup> In other words, Dupuy notes that there is a competency granted to the state by international law for the protection and conservation of that sea.<sup>699</sup> O’Connell summarises the position, that when a state exercises and makes evident its authority in this realm, it is because ‘it has the right and duty to assure and guarantee its sovereignty and territorial independence, which are uniquely the elements of its existence as a state, and which it must preserve from all harm’.<sup>700</sup> This theory proposed that beyond such measures of conservation, the coastal sea like the high seas, must remain fully open to the usage of all.<sup>701</sup>
- (c) *The Competence Theory*: This was a theory developed by Georges Scelle,<sup>702</sup> who viewed the sea as an international public domain and that the state can have certain particular competences as a result of having a coast on that public domain.<sup>703</sup> Dupuy draws an analogy that, just as in domestic law where persons living by the side of the public highway have the right of access to that highway, so international law holds that a state situated on the coast has certain privileges.<sup>704</sup> In this theory, O’Connell refers to a treatise by a German writer, Harburger, who:

‘argued that sovereignty is not an equation of property: it is not a right of territory, but the right to rule over it. In this sense, there is sovereignty over

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<sup>695</sup> Miles (2013) at 355. He cites Théodore Ortolan *Règles Internationales et Diplomatic de la Mer* [Plan 1845] 173 at 175: ‘the right that exists over the territorial sea is not a property right; we cannot say that the State that owns the coast is also the owner of the sea’. See, also, O’Connell (1986) at 62.

<sup>696</sup> Miles (2013) 355.

<sup>697</sup> See *Traité de droit international public* (1921) I 147.

<sup>698</sup> Vrancken (2011) at 16.

<sup>699</sup> Dupuy and Vignes (1991) at 255. They state *idem* that this explains the fact that the state maintains military, health and customs control, and also fisheries privileges in the zone - in order to ensure that its economic needs are met.

<sup>700</sup> O’Connell (1986) at 73.

<sup>701</sup> *Idem*.

<sup>702</sup> Manuel élémentaire de droit international public (1943) 275.

<sup>703</sup> Dupuy and Vignes (1991) at 256; Vrancken (2011) at 16.

<sup>704</sup> Dupuy and Vignes (1991) at 256.

the territorial sea, but this does not impress on the territorial sea the incidents of territory. In German jurisprudence, the trend was now set in favour of the territorial seas being an area of the exercise of power rather than national domain.<sup>705</sup>

Also worth mentioning at this stage is O'Connell's reference to Stoerk, who was a proponent for the interdependence of states and notes that the coastal state exercises a freedom of action limited only to the extent to which this would collide with the interests of all other states.<sup>706</sup>

- (d) *The Servitude Theory*: This theory was presented in an article by Albert de la Pradelle in 1898.<sup>707</sup> O'Connell described la Pradelle's theory as 'the most ambitious attempt to disengage the theory of the territorial sea from the concept of the state, and to base it on a solid juridical principle that was independent of the ephemeral forms of government'.<sup>708</sup> In this theory, la Pradelle rejected the theories of property and sovereignty in favour of a theory of easements (*faisceau de servitudes*) or servitudes.<sup>709</sup> Miles summarised la Pradelle's theory, noting that 'the territorial sea did not represent a single consolidated claim with respect to maritime territory but rather an extension of specific jurisdictional rights with respect to, for example: fishing, customs regulation and national security'.<sup>710</sup> This theory posited that these servitudes are granted to the coastal state in order to enable it to maintain its own protection.<sup>711</sup> In fact, according to Dupuy, this theory provides the coastal state only with those competencies which are necessary to ensure its personal protection.<sup>712</sup> O'Connell remarks that each servitude – namely for neutrality, security, policing or revenue – might have a different special extent depending on the interest protected.<sup>713</sup> Whilst this theory was a significant departure from the property theory, O'Connell explains why it did not gain widespread acceptance: (i) the concept of a servitude was technically

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<sup>705</sup> O'Connell (1986) at 66.

<sup>706</sup> *Idem*.

<sup>707</sup> See 'Le droit de l'Etat sur la mer territoriale (1898) *Revue générale de droit international public*' 264 at 309.

<sup>708</sup> O'Connell (1986) at 68.

<sup>709</sup> O'Connell (1986) at 68; Miles (2013) at 356; Dupuy and Vignes (1991) at 255; Vrancken (2011) at 16.

<sup>710</sup> Miles (2013) at 356.

<sup>711</sup> Dupuy and Vignes (1991) at 255.

<sup>712</sup> *Idem*.

<sup>713</sup> O'Connell (1986) at 70. For example, he describes *idem* that the 'neutrality limit could expand commensurately with the increased range of artillery, or with the speed of modern warships, without the coastal state's exclusive fishery rights correspondingly altering'. Miles remarked [at 357] that this practical aspect 'partially circumvented the debate on the precise *width* of the territorial sea that was taking place in parallel to the disagreement as to its juridical character'.

inappropriate, as ‘one could not speak of the interests of the international community as being “servient” nor those of the coastal state as being “dominant”’;<sup>714</sup> and (ii) the “predatory instincts” of states vied for the concept of sovereignty over the territorial sea rather than servitudes, because the state’s authority to claim exclusive rights over the resources of the coastal sea would falter where there was no clear sovereignty.<sup>715</sup>

(vi) *Modern trends in the Twentieth and Twenty First Century*

What has been presented above represents traditional notions<sup>716</sup> of the nature of sovereignty – as manifested in the *territorialist* thesis and the *part of the high seas*’ thesis. Despite the erudition of the works of lawyers and academics set out above, however, there is a need at this stage to consider the notion of sovereignty through the prism of contemporary changes and in relation to modern conceptions of the political system.<sup>717</sup> The International Commission on Intervention and State Sovereignty commented on how new realities and challenges have emerged in the 21<sup>st</sup> Century – thus necessitating new expectations for action and new standards of conduct in national and international affairs.<sup>718</sup> They cite an example of how the terrorist attacks of 11 September 2001 on the World Trade Center in New York made it evident that the war against terrorism has no contested frontiers.<sup>719</sup> In the second chapter, the shipping industry and global trade were described as being highly

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<sup>714</sup> O’Connell (1986) at 71.

<sup>715</sup> *Idem*.

<sup>716</sup> In summation, Schermers in Kreijen (ed.) *State, Sovereignty, and International Governance* (2002) at 185, succinctly sets out the traditional view of the state having unlimited power and it being subjected only to those rules of international law which it has expressly accepted. A further aspect of this traditional approach, as highlighted by him (*idem*), is that neither other states or the United Nations have any right to intervene in matters which are essentially within the domestic jurisdiction of a state. See, also, Ferreira-Snyman (2006) at 9, par. 2.4. Jackson ‘Sovereignty – Modern: A new approach to an outdated concept’ 97 *American Journal of International Law* (2003) 782 at 789, also acknowledges that this principle of non-interference is closely linked to sovereignty, but he argues *idem* that: ‘yet today’s globalized world abounds in instances in which the actions of one nation ... constrain and influence the internal affairs of other nations’. It was seen in Chapter 2, herein, how the actions of Somali pirates presented difficulties for the global shipping industry.

<sup>717</sup> Schermer’s opening sentence in ‘Different Aspects of Sovereignty’ in Kreijen (ed.) *State, Sovereignty, and International Governance* (2002) at 187, states that: ‘Sovereignty has many different aspects and none of these aspects is stable.’

<sup>718</sup> *The Responsibility to Protect* (2001) Report of the International Commission on Intervention and State Sovereignty, at 3.

<sup>719</sup> *Idem*. See, also, Greig ‘International Community, Interdependence and All That ... Rhetorical Correctness?’ in Kreijen (ed.) *State, Sovereignty, and International Governance* (2002) at 521, where he cites a speech given by the British Prime Minister to the Labour Party Conference on 2 October 2001: ‘Today conflicts rarely stay within national boundaries. Today a tremor in one financial market is repeated in the markets of the world. Today confidence is global, either its presence or its absence ... I have long believed this interdependence defines the new world we live in.’

interconnected and interdependent. Jackson describes how reduced costs and time to transport goods and to communicate, have led to changes in production which in turn leads to interdependence.<sup>720</sup> He says that interdependence often renders the older concepts of sovereignty or independence fictional.<sup>721</sup> Ferreira-Snyman also comments that there remain few aspects of life which are not dependent on, or do not respond to, activities outside the states boundaries, and, accordingly, states can no longer act in isolation, and independently of each other.<sup>722</sup> She aptly notes that ‘States have come to realise there exists a need for co-operation in order to achieve the advancement of community goals and that all members of the international community must take into account the valid interests of the other members when exercising their sovereignty.’<sup>723</sup> This interdependence of states thus questions the traditional definition of sovereignty as an absolute concept of unlimited freedom and authority.<sup>724</sup> Gevorgyan similarly pointed out that ‘taking into account the strengthening of integration processes in interstate relations, the growing interconnectedness of states, as well as the steady increase in the number of problems the solution of which requires the joint efforts of the entire world community, some scientists ... directly call for the denial of the term “sovereignty”’.<sup>725</sup>

These movements towards globalisation and interdependence and cooperation have accordingly eroded the traditional approach to sovereignty as being an absolute and unlimited authority.<sup>726</sup> In addition to this, Gevorgyan highlights a proposition that when states enter into international agreements, there is a corresponding limitation on their sovereignty.<sup>727</sup> International law, he states further, coordinates and organises interstate relations, in order to establish a balance between the interests of individual states and the whole international community.<sup>728</sup> This cannot be effective in a situation where traditional notions of sovereignty prevail. Thus, Schermers contends that the current notion of sovereignty is ‘continuously changing, especially in recent years’.<sup>729</sup> In a report by the then

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<sup>720</sup> Jackson (2003) at 784.

<sup>721</sup> *Idem*.

<sup>722</sup> Ferreira-Snyman (2006) at 18.

<sup>723</sup> *Idem* 17-18. Jackson (2003) at 802 also notes that the world continues to experience trends towards interdependence and the need for cooperative mechanisms to enhance peace and security.

<sup>724</sup> *Idem*.

<sup>725</sup> Gevorgyan ‘Concept of State sovereignty: Modern attitudes’, Materials of a conference devoted to the 80<sup>th</sup> Anniversary of the Faculty of Law, Yerevan State University, YSU Press (2014) at 435-436.

<sup>726</sup> Ferreira-Snyman (2006) at 1 and 12. For a fuller treatment of this aspect, see van Staden and Vollaard ‘The erosion of State Sovereignty: Towards a Post-territorial World?’ in Kreijen (ed.) *State, Sovereignty, and International Governance* (2002) at 165-184.

<sup>727</sup> Gevorgyan (2014) at 438.

<sup>728</sup> *Idem*.

<sup>729</sup> Schermers ‘Different Aspects of Sovereignty’ in Kreijen (ed.) *State, Sovereignty, and International Governance* (2002) at 192. Jackson (2003) at 786, cites how a US government official,

United Nations Secretary-General Boutros Boutros-Ghali to the Security Council, it is remarked that '[r]espect for [the state's] fundamental sovereignty and integrity [is] crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.'<sup>730</sup>

With all this being said, however, writers have cautioned against the complete elimination of the concept of sovereignty.<sup>731</sup> Jackson observes that sovereignty remains an essential foundation for peace, democracy and prosperity,<sup>732</sup> and discarding it undermines international law and certain other principles of the international relations' system.<sup>733</sup> In any event, Gevorgyan's analysis concludes that no viable alternative to the system of state sovereignty has been presented.<sup>734</sup> Jennings states that 'what is needed is not so much a theory explaining the decline of national sovereignty but a theory explaining and justifying the present vital transformation of State sovereignty into the field of governmental activity on the international plane'.<sup>735</sup> Accordingly, through collective decisions or international government, sovereignty is not surrendered, but rather transformed into an influential and effective way of employing it.<sup>736</sup>

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Richard Haas, and President of the Council on Foreign Relations, succinctly defined the concept and its problem:

'Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. *What is significant today is that each of these components – internal authority, border control, policy autonomy, and non-intervention – is being challenged in unprecedented ways.*' (my emphasis)

<sup>730</sup> Cited in Jackson (2003) at 787.

<sup>731</sup> See Jackson (2003) at 789, where he states that elimination of the concept of sovereignty in international law would lose some important principles. See, also, Jennings 'Sovereignty and International Law' in Kreijen (ed.) *State, Sovereignty, and International Governance* (2002) at 31, who warns that 'current fashionable suggestions that State sovereignty is a thing of the past are to be understood with some caution and perhaps qualification'.

<sup>732</sup> *Idem.*

<sup>733</sup> Jackson (2003) at 801. Gevorgyan (2014) at 437 similarly commented that relationships between states are built on the basis of the principle of sovereignty, and it underlies the entire system of international organisations.

<sup>734</sup> Gevorgyan (2014) at 448. Jackson (2003) at 790 also emphasises that 'sovereignty is deeply interwoven into the fabric of international law, and to abandon, wholesale, the concept of "sovereignty" requires very serious thought about a substitute that could efficiently fill the gaps left by its absence'.

<sup>735</sup> Jennings (2002) at 38.

<sup>736</sup> Brus 'Bridging the Gap between State Sovereignty and International Governance: The Authority of Law' in Kreijen (ed.) *State, Sovereignty, and International Governance* (2002) at 6. Jennings (2002) also comments at 30, that 'State sovereignty is becoming less relevant to the needs of what is now commonly referred to as a 'global' international community.'

What remains then is a conflict between an erosion of traditional notions of sovereignty and a persistence in retaining sovereignty as a bedrock of international relations and governance. Brus theorises thus:

‘Two world views collide: the traditional view of the world consisting of sharply distinguished compartments (the national states) and a view of an independent world society with common values and with problems that can only be solved through common efforts and with respect for universal, hence supra-national, legal rules.’<sup>737</sup>

In light of this conundrum, it is suggested that the traditional concept of sovereignty must itself evolve and be redefined.<sup>738</sup> Through this process of rethinking sovereignty, a basis can be forged for international governance over the suppression of piracy in all realms of the ocean. Conceptually, Ferreira-Snyman remarks that ‘the principle of *absolute sovereignty* is thus replaced by a concept of *relative sovereignty*, where the freedom of each state is limited by the freedom of other states and the independence of a state is subjected to international law’.<sup>739</sup>

At the heart of this conundrum is a collision of the traditional concept of state sovereignty, and its erosion as it yields to international governance. Brus regards international governance as a fundamentally different basis for regulating international issues compared to the traditional sovereignty of states.<sup>740</sup> He defines international governance as ‘the process by which the international community on the basis of shared values and interests collectively manages resources, issues, conflicts in a world that is increasingly a “global neighbourhood”’.<sup>741</sup>

To add to this conundrum, Brus describes how much of the problems and violent conflicts that are prevalent today are related to an insufficient capacity and willingness of state governments to govern their territory with authority.<sup>742</sup> Schermers also describes how some states have no effective government, and different internal factions are fighting each other,

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<sup>737</sup> *Idem* at 3.

<sup>738</sup> In support of this notion, Brus (2002) at 22, draws attention to the idea that ‘State sovereignty is one of the concepts that have to be reinterpreted in order to allow a logical and coherent view on the actual developments that take place in the world and for perspectives on future development.’

<sup>739</sup> Ferreira-Snyman (2006) at 16 (with my emphasis). She also remarks *idem* that ‘states are required to sacrifice their individual interests as well as certain aspects of their sovereignty in favour of the common interest and the common good’.

<sup>740</sup> Brus (2002) at 5.

<sup>741</sup> *Idem*.

<sup>742</sup> Brus (2002) at 7.

and nobody has control over the state.<sup>743</sup> Brus accordingly observes that recent decades have witnessed the emergence of states which could hardly be said to belong to the category of sovereign states.<sup>744</sup> He shows how these states initially entered the international arena endowed with full external sovereign powers, but without having sufficient capacity for internal self-government.<sup>745</sup> In effect, sovereignty becomes a formal juridical notion<sup>746</sup> and practically the state becomes what is termed a ‘failed state’.<sup>747</sup> The erosion of state sovereignty is particularly prevalent in circumstances where there is a failed state with insufficient capacity to exert its law-enforcement powers. This has been demonstrated in chapter 2. Piracy flourished here in the context of an ineffective government – as described by Brus and Schermers above. Schermers also highlights an important question which is highly relevant and fundamental to this study: ‘whether sovereignty in the territory of a failed State is completely lost or whether it can be exerted by someone else’.<sup>748</sup>

## VI. CONCLUDING REMARKS

Goodwin remarked that ‘what the ancients considered piracy and what is now considered piracy are not the same’.<sup>749</sup> This chapter has highlighted the juridical and doctrinal development of piracy – providing examples of English and American jurisprudence. It has been shown in the chapter that, in early cases, the high seas appeared to encompass the entire realm of the ocean. As stated in part 5 of this chapter, in simple parlance, what was conceived in some early cases as being the high seas, would now fall into the realm of the territorial sea. These cases did not consider the concurrent development of the juridical nature and extent of the realm of the territorial sea.

Miles commented on this concurrent development of the territorial sea, and remarked that:

‘The juridical character of the territorial sea, although now no longer controversial, nonetheless occupied a privileged position in both international and domestic law for a period of over three centuries, and thus gives observers

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<sup>743</sup> Schermers (2002) at 191.

<sup>744</sup> Brus (2002) at 7

<sup>745</sup> *Idem.*

<sup>746</sup> *Idem.*

<sup>747</sup> Kreijen (2002) at 46 says: ‘externally the failed State is unable to have viable relations *vis-à-vis* the international community. Since in a failed State there is effectively no responsible agent left, it lacks the ability to exert its rights, whereas generally the international community is at a loss to exert any obligations ... consequently it [the failed state] is at odds with the State as a subject of international law’.

<sup>748</sup> Schermers (2002) at 191.

<sup>749</sup> Goodwin (2006) at 979.

a rare opportunity to examine the potential for interaction and misconception at the interface thereof.<sup>750</sup>

The development of piracy law, along with universal jurisdiction and the modern restriction based on the *locus*, have presented an occasion to revisit these doctrines that defined the extent and juridical nature of the territorial sea and to consider the interface with piracy law. The discussion in this chapter has revealed much ambiguity and uncertainty in academic opinions in the discipline of piracy law and in the juridical character and extent of the territorial sea. Accordingly, the present formulation of UNCLOS, while settled, was based on a hollow foundation and a lack of synthesis of two lines of jurisprudence: piracy and the territorial sea. This conclusion thus provides one of the grounds for challenging the contemporary restriction of *piracy jure gentium* to the realm of the high seas.

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<sup>750</sup> Miles 'The *Franconia* sails on: Revisiting the intellectual history of the territorial sea in the United States, Canada and Australia' 13 *Oxford Commonwealth Journal* (2013) 347 at 377.

# IV

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## THE INTERNATIONAL FRAMEWORK: DEVELOPMENT AND CODIFICATION

### I. INTRODUCTION

#### 1.1 Prefatory

Despite having a jurisprudence spanning several centuries, as seen in the previous chapter, the codification of the legal regime that both defines piracy and employs enforcement and adjudicatory jurisdiction occurred relatively recently.<sup>751</sup> As discussed in the second chapter, after 200 year of quiescence, piracy reemerged in the early 21<sup>st</sup> Century as a major economic and humanitarian problem,<sup>752</sup> and for nearly 30 years, the law and diplomacy of piracy had remained relatively placid until this re-emergence.<sup>753</sup> Kraska observes that ‘[a]s much progress occurred in the development of the international law of counterpiracy in the 100 days at the end of 2008 and January 2009, as had occurred in the previous 100 years.’<sup>754</sup> The previous chapter considered isolated judicial pronouncements and the opinions and commentaries of publicists. Such examples cannot constitute as evidence of a definition of piracy under customary international law – the conclusions of the previous chapter demonstrate that specificity and a uniform consensus on such a definition would be difficult to reach. Codification and progressive development of the law would thus have the most probative value in this analysis.

The present regime, contained in the United Nations Convention on the Law of the Sea (UNCLOS),<sup>755</sup> is the result of a process of codification and consensus over a period spanning 50 years during the 20th Century. Ambassador Koh of Singapore, while serving as the Conference President, declared that the treaty was a ‘constitution’ for the world’s

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<sup>751</sup> See Stepek ‘Challenges of Jurisdiction and Prosecution’ in Pedone and Hart *Piracy in Comparative Perspective: Problems, strategies, law* (2012) at 331, where he comments that: ‘Given its long history and treatment under international law, one might reasonably expect that legal infrastructure for addressing the crime of piracy would be well developed. Yet, if one looks at what is happening today, primarily in the Gulf of Aden and Indian Ocean, this is clearly not the case.’

<sup>752</sup> Scharf *et al Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (2015) at 1.

<sup>753</sup> Kraska *Contemporary Maritime Piracy* (2011) at 144.

<sup>754</sup> *Idem*.

<sup>755</sup> Arising from the Third United Nations Conference on the Law of the Sea concluded at Montego Bay on 10 December 1982. The treaty came into effect in 1994. The full set of provisions relevant to piracy is reproduced *et seq.* hereof in the appendices.

oceans.<sup>756</sup> There have been a series of codification attempts, which served as stewards in defining piracy. The regime in UNCLOS is now regarded as reflecting customary international law.<sup>757</sup> Of the 320 articles contained in the treaty, only seven deal with the subject of piracy. Having previously discussed the present framework under UNCLOS, this chapter highlights its restrictive application to the fight against present-day piracy, focusing especially on one of the restrictions: the geographical limitation to the high seas and its exclusion from application in territorial seas. The chapter outlines the consequences of this exclusion, and surveys the drafting history of the present framework to understand how this limitation was derived. The chapter will present an argument that this restriction should be reconsidered in light of the present instances of piracy, and that application should be present in territorial seas where state capacity is insufficient. In support of this argument, it will be shown that the drafting history of the present framework did not substantively consider this issue. The chapter highlights how, at each stage of the later codification process undertaken by the International Law Commission and the United Nations Conferences on the Law of the Sea, this issue was skirted. These deliberations are reviewed, and it is suggested that the issue be revisited and applied within an amended UNCLOS piracy framework.

## 1.2 The current framework under UNCLOS

To commence the discussion in this chapter, the following three articles in UNCLOS – forming part of the total seven articles that deal with piracy – are outlined below.

### *Article 100 – Duty to cooperate in the repression of piracy*

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any place outside the jurisdiction of any State.

### *Article 101 – Definition of piracy*

Piracy consists of any of the following acts:

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<sup>756</sup> Cited in Kraska (2011) at 122. He further comments, at 123, how UNCLOS was a breakthrough in resolving long-standing issues and the treaty replaced a plethora of competing claims with functional and universally accepted limits on coastal state sovereignty and jurisdiction. He notes, however, that these limits are vaguely crafted and sometimes poorly defined (*idem*).

<sup>757</sup> See Nandan *et al* *United Nations Convention on the Law of the Sea 1982: A commentary* (1995) 3 at par. 101.1, pg 197; International Maritime Organisation ‘Piracy: Elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982’ LEG 98/8/1 (February 2011) at par. 1; United Nations Security Council Resolution 1816 (2008), 2 June 2008. See, also, Hodgkinson ‘The Governing International Law on Maritime Piracy’ in Scharf *et al* (2015) at 17, 24; Kraska (2011) at 127.

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

*Article 105 – Seizure of a pirate ship or aircraft*

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

The geographical aspects of these provisions are read within the holistic structure of the treaty, wherein the oceans are divided into various realms, including the territorial sea,<sup>758</sup> the contiguous zone,<sup>759</sup> the exclusive economic zone<sup>760</sup> and the high seas.<sup>761</sup> These provisions serve two functions: first, piracy is defined for the purposes of international law; second, they provide universal enforcement jurisdiction that suppresses piracy.<sup>762</sup> Furthermore – as Isanga points out – under this framework, piracy is uniquely situated in relation to international law: ‘when a pirate is captured on the high seas outside the territory of a particular state, the municipal laws of the capturing state – not international laws – determine how the pirate will be punished.’<sup>763</sup> Geiß and Petrig observed that, ‘the intricacies inherent in this definition, arguably, also reflect the overly ambitious attempts to capture a criminal phenomenon in its entirety in one offence, while simultaneously making allowance for the preservation of State’s sovereign interests.’<sup>764</sup>

<sup>758</sup> See articles 2 and 3 of UNCLOS.

<sup>759</sup> See article 33 of UNCLOS.

<sup>760</sup> See articles 55-58 of UNCLOS. Article 58(2) is of particular importance and will be discussed *infra*.

<sup>761</sup> See article 86 of UNCLOS.

<sup>762</sup> See Churchill ‘The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose?’ in Koutrakos and Skordas *The Law and Practice of Piracy at Sea* (2015) at 9.

<sup>763</sup> Isanga ‘Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes’ 59 *American University Law Review* (2010) 1267 at 1274.

<sup>764</sup> Geiß and Petrig *Piracy and Armed Robbery at Sea* (2011) at 59.

### 1.3 The narrow application of the UNCLOS regime

Some points of controversy relating to the above definition have arisen within the corpus of scholarship pertaining to the codification of piracy. These points mirror the constituent elements of the definition. It is worth noting that, to date, the piracy provisions in UNCLOS have yet to be considered by an international court – only domestic courts have interpreted them in recent years.<sup>765</sup> Article 101 has come under unanimous criticism for its restrictive approach. For example, Birnie observed in 1987 that ‘the definitions adopted are narrow ones, not consonant with all states’ laws, and have been expressed in somewhat ambiguous terms’.<sup>766</sup> Collins and Hassan, writing in 2009, noted that ‘parts of the definition of piracy are now archaic. It is too narrow to include the majority of modern piratical acts. The methods employed by modern pirates differ from the methods that were common in the early 20<sup>th</sup> century.’<sup>767</sup> More recently, Wambua wrote in 2014: ‘at the international level, the most significant limitations to the legislative framework are posed by the restrictive definitional and jurisdictional scopes in the provisions of article 101 of UNCLOS.’<sup>768</sup>

As this chapter progresses, it will become evident that article 101 closely replicates article 39 of the International Law Commission’s (ILC) 1956 draft articles concerning the law of the sea. Published with an accompanying commentary, article 39 exhibited the Commission’s consideration of certain controversial points which emerged in relation to the essential features of piracy. A conclusion was reached, whereby:

- (i) The intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain;
- (ii) The acts must be committed for private ends;
- (iii) Save in the case provided for in article 40, piracy can be committed only by private ships and not by warships or other government ships;
- (iv) Piracy can be committed only on the high seas or in any place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea;
- (v) Acts of piracy can be committed not only by ships on the high seas, but also by aircraft, if such acts are directed against ships on the high seas;

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<sup>765</sup> Churchill ‘The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose?’ in Koutrakos and Skordas *The Law and Practice of Piracy at Sea* (2015) at 11.

<sup>766</sup> Birnie ‘Piracy: Past, present and future’ *Marine Policy* (July 1987) 163 at 165.

<sup>767</sup> Collins and Hassan ‘Applications and shortcomings of the law of the sea in combating piracy: A south east Asian perspective’ 40 *Journal of Maritime Law and Commerce* (2009) 89 at 95.

<sup>768</sup> Wambua ‘Prosecution of maritime piracy cases in Kenya: Testing the SUA Convention model on piracy prosecution’ Special Edition 1 *Acta Criminologica* (2014) 76 at 78.

- (vi) Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.<sup>769</sup>

Menefee, in similar terms, confirmed some of the fundamental issues surrounding the definition of piracy: (i) the question of whether all piracy under international law must occur outside a state's territorial jurisdiction; (ii) whether internal seizure of a ship from within by passengers, stowaways or crew may constitute piracy; (iii) whether, apart from the universally concept of piracy as a crime committed for private gain, state action outside the recognised constraints of the international legal system, maritime terrorism, and non-political terrorism may also qualify as piracy.<sup>770</sup>

Constituent elements can be derived from the definition contained in article 101 and the related material above, all of which have been well documented. These elements are:

- (i) *An illegal act/s of violence, detention or depredation*: The corollary of what constitutes a *legal act* is left open in the wording of the article.
- (ii) *Committed for private ends*: This element has been the subject of much scrutiny in scholarship. In a report prepared by the Legal Committee of the International Maritime Organisation in 2011,<sup>771</sup> which outlined the elements that could be included in national legislation on piracy pursuant to UNCLOS, the specific element pertaining to private ends was mentioned briefly, mirroring the commentary of the ILC in its 1956 draft articles mentioned above. Madden comments that while it is unusual to include a test of a perpetrator's motive into the definition of a crime, he postulates that such a measure was perhaps originally necessary at the level of international law in order to distinguish piracy from privateering.<sup>772</sup> As to why the private ends requirement persisted into the codification well after the incidence of privateering has clearly ceased, Madden theorises

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<sup>769</sup> Report of the International Law Commission covering work of its eighth session (A/3159), article 39 commentary, *Yearbook of the International Law Commission* 2 (1956) at 282 (hereafter referred to as the ILC Commentary). These points were also cited in the Virginia Commentary (III) at 197.

<sup>770</sup> Menefee *Contemporary Piracy and International Law* (1995) at 1.

<sup>771</sup> International Maritime Organisation 'Piracy: Elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982' LEG 98/8/1 (18 February 2011) at par. 13 (abbreviated in this section as the "IMO Report"). This document was appended to a circular letter (No. 3180, 17 May 2011) issued by the International Maritime Organisation.

<sup>772</sup> Privateering is essentially state-sponsored piracy. Madden 'Trading the shield of sovereignty for the scales of justice: A proposal for reform of international sea piracy laws' 21 *University of San Francisco Maritime Law Journal* (2009) 139 at 143.

that researchers in the early codification stage used an old definition of piracy – adopted during the privateering era – on the premise that this old definition was accepted as a part of customary international law, and was therefore employed for the sake of expediency.<sup>773</sup> Collins and Hassan offer a different theory: the private ends element ‘was not intended to require an intent to rob, but rather it was to exclude acts made by insurgents seeking independence for their state – a political aim.’<sup>774</sup> They also observed that, under customary international law, attacks on vessels with a public aim, such as highlighting a state’s struggle for independence, is a legitimate defence to piracy charges.<sup>775</sup> This appeared to be the context within which the early codification occurred in the 1930s: many former colonies were engaged in struggles for independence, and some nationalistic insurgents would resort to maritime terrorist tactics.<sup>776</sup> Extrapolating this argument would lead to the conclusion that all acts of violence that lack state sanction, are acts performed for private ends.<sup>777</sup>

- (iii) *Two-ships*: under article 101(a), the *actus reus* must be committed by the crew or passengers of a private ship and directed against *another ship* (the victim). This means that crew seizures, mutiny, or passenger takeovers of one and the same vessel are excluded from the ambit of the definition,<sup>778</sup> a concept which stems from the notion that any ship is always under the jurisdiction of its flag state. Therefore, any offence committed on board, as in the case of a mutiny, falls under domestic, and not international law.<sup>779</sup> The restriction created by this element has been well documented,

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<sup>773</sup> *Idem* 145.

<sup>774</sup> Collins and Hassan (2009) at 99. Geiß and Petrig (2011) at 61 also pose this theory, commenting that the private-ends element was originally included in the definition of piracy to acknowledge the historic exception for civil-war insurgencies that attacked solely the vessels of the government they sought to overthrow.

<sup>775</sup> Collins and Hassan (2009) at 99.

<sup>776</sup> *Idem*.

<sup>777</sup> Geiß and Petrig (2011) at 61. *See* Kraska (2011) at 127, where he states that pirates are not licensed to act on behalf of a government, but instead are private individuals. *See*, also, Pedone and Hart (2012) at 336; and Wambua (2014) at 80. Menefee in ‘Anti-piracy in the year of the ocean: Problems and opportunity’ 5 *ILSA Journal of International and Comparative Law* (1999) 308 at 311, states that ‘the private ends requirement appears to exclude attacks by maritime terrorists and arguably, environmental extremists, from being piracies, because of their public nature’.

<sup>778</sup> Geiß and Petrig (2011) at 61; Pedone and Hart (2012) at 336. The IMO Report (at par. 14) merely confirms this rule, citing the ILC’s commentary to its draft article 39 [A/CN.4/104 at 282].

<sup>779</sup> Murphy ‘Piracy and UNCLOS: Does international law help regional States combat piracy?’ in Lehr (ed.) *Violence at Sea: Piracy in the age of global terrorism* (2007) at 164.

especially as a result of the *Achille Lauro* incident – an event which resulted in the SUA Convention being adopted.<sup>780</sup>

- (iv) *Geographic limitation*: Article 101(a) sets a clear geographical limitation for the *locus* of an act of piracy. To constitute an act of piracy, the *actus reus* outlined in the article must be committed on the high seas *or* in a place outside the jurisdiction of any state. With respect to the latter, the ILC had ‘chiefly in mind acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory’.<sup>781</sup> Geiß and Petrig also comment on this latter limitation, their observations being especially relevant to the context of the present analysis. They observed that, despite frequent reference to Somalia as a failed state, with no government capable of exercising control over its territorial waters, ‘its sovereignty has nevertheless, remained unquestioned and Somalia’s territorial waters thus cannot qualify as “a place outside the jurisdiction of any State”’.<sup>782</sup> Thus, any further scrutiny of this limitation is of little consequence to the present study. The discussion henceforth will focus on the high seas, without further references to a place outside the jurisdiction of any state. The restriction of the commission to the high seas deserves detailed elaboration and a dedicated commentary – a discussion of the development of the juridical nature of this realm was critically revisited in the previous chapter. Under the present UNCLOS regime, however, the realm is defined in the negative – by what it does not constitute: article 86 of UNCLOS declares that ‘the provisions of this Part [the High Seas, Part VII] apply to 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’. It is clearly distinguishable from the territorial sea, which a coastal state could exercise sovereignty over, not exceeding 12 nautical miles measured from the baselines.<sup>783</sup> Thus, per article 101, acts of piracy are limited to a place outside the jurisdiction of a state or on the high seas. This excludes

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<sup>780</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted in 1988. See Geiß and Petrig (2011) at 61; see, generally, Halberstam ‘Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety’ 82 *American Journal of International Law* (1988) 269-310; Murphy (2007) at 164; Wambua (2014) 76-91.

<sup>781</sup> ILC Commentary: draft article 39 [A/CN.4/104] at 282.

<sup>782</sup> Geiß and Petrig (2011) at 62.

<sup>783</sup> See article 3 of UNCLOS. In the chapter 3, it was discussed how the extent of the breadth of the territorial sea was determined according to the cannon-shot rule, and was reckoned to be 3 nautical miles from the shore. The UNCLOS provisions increased the breadth to a maximum of 12 nautical miles from the baselines, which, in effect, shrunk the realm of the high seas.

from the definition of piracy any acts of the same *actus reus* which meet all the substantive requirements of article 101, but which occur within the territorial waters of a sovereign state. UNCLOS is silent on the regulation of piratical acts within territorial waters, entrusting enforcement and adjudicatory jurisdiction to the sole authority of the state that exercises sovereignty over said territorial waters. As indicated in the previous chapter, notwithstanding the substantive elements being the same: a piratical act committed on the high seas is termed under international law as piracy *jure gentium*, whereas a piratical act in territorial waters is termed *armed robbery*<sup>784</sup> or piracy under municipal law. Whilst the difference between the two acts is the *locus*, the consequences that arise are vastly different: enforcement and adjudicatory jurisdiction over armed robbery of ships in a state's territorial waters vest in that state alone.<sup>785</sup> Piracy *jure gentium* attracts universal enforcement jurisdiction, as appears in section 105 of UNCLOS:

‘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.’ (Emphasis added).

Such universal enforcement jurisdiction is limited to the high seas or a place outside the jurisdiction of a state, the result being its inapplicability within territorial waters.

Whilst article 86 defines the realm of the high seas as commencing beyond the limits of the exclusive economic zone, an exception is contained in

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<sup>784</sup> *Armed robbery against ships* is defined in article 2.2 of the Code of Practise for the Investigation of Crimes of Piracy and Armed Robbery Against Ships [Adopted 2 December 2009] IMO Assembly Resolution A.1025(26) as:

‘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;*’ (emphasis added).

*See, generally, Birnie (1987) at 165.*

<sup>785</sup> *See Dickinson (1925) at 339*, where it is noted that ‘piracy by municipal law, on the other hand, comprehends as much or as little as the law-making authority of the particular state may choose to make it, and pirates by municipal law’.

article 58(2):

‘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.’

The piracy articles fall within the parameters of this article, resulting in the import of piracy provisions that apply to the high seas, into the realm of the exclusive economic zone. Piracy *jure gentium* can therefore be committed in a state’s exclusive economic zone,<sup>786</sup> making the universal jurisdiction provisions of article 105 applicable. Although this appears to be the consensus from a plain reading of the provision,<sup>787</sup> and most commentators argue that piracy does not interfere with specific exclusive economic zone (EEZ) rights of the coastal state – as outlined in article 56 – <sup>788</sup> some commentators have expressed reservations. One such reservation was raised by Murphy: ‘because Article 58(3) states that in exercising the high seas rights that apply in the EEZ, that is, those permitted under Articles 88-115, states must pay due regard to the rights and duties, laws, and regulations of the coastal state insofar as these are not incompatible with the Convention’.<sup>789</sup> The argument proposes that the EEZ, in this respect, is more akin to territorial waters.<sup>790</sup> Another reservation was raised by Geiß and Petrig, who noted that ‘in *exceptional cases*, violence between private fishery vessels within the exclusive economic zone may lead to such incompatibility’ (emphasis added). However, as illustrated in the second chapter of this thesis, in the study and period, these were not exceptional but rather quite commonplace. Kraska presents a noteworthy view in support of this:

‘From a piracy perspective, the 200-nautical-mile EEZ of coastal states constitute the most important part of the

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<sup>786</sup> In other words, the geographic scope of article 101(a) should be read to include the exclusive economic zone of any state (*see* IMO Commentary at par. 12).

<sup>787</sup> *See*, for example, Collins and Hassan (2009) at 97, who comment that because the Part that deals with the rights and duties of coastal states and other users of the EEZ, is focused on resources such as fisheries and seabed minerals, it is thus generally accepted that the piracy provisions are not incompatible with the Part, and therefore operate within the EEZ. *See*, also, Murphy (2007) at 162.

<sup>788</sup> Geiß and Petrig (2011) at 64. *See*, also, Roach, in ‘Countering Piracy off Somalia: International Law and International Institutions’ 104 *American Journal of International Law* (2010) 397 at 399, who states that ‘[w]hat article 58(2) does do is emphasise that in the EEZ the coastal state has enumerated sovereign rights and jurisdiction, generally economic in nature, that must be respected by states engaged in combating piracy at sea’.

<sup>789</sup> Murphy (2007) at 162.

<sup>790</sup> *Idem*.

oceans. The EEZ is a resource-related zone adjacent to the territorial sea, but the close proximity of the land and density of people, ships, and resources makes the EEZ an epicenter of piracy. Nearly all commercial fishing is in the EEZ, and worldwide, more than 1 billion people depend on fish as their primary protein source.’<sup>791</sup>

Kraska’s comment is more commensurate with the analysis of the Somali region performed in the second chapter. Whilst the coastal state does not enjoy full rights of sovereignty over the EEZ, the rights that are enjoyed in this realm are substantial. Since a reading of article 58(2) clearly exemplifies universal enforcement powers over piracy in the EEZ as being vested in any state, notwithstanding a coastal state exercising significant rights over the act as pointed out by Kraska, an argument could be proposed that universal enforcement jurisdiction should extend to the territorial sea. By analogy, the incursion of the coastal state’s sovereign rights in the territorial sea through the exercise of universal enforcement jurisdiction would essentially be no different from the incursion of the coastal state’s sovereign rights in the EEZ. This argument must be supported by caveats, which will be developed as this chapter progresses.

Presented above, are the main elements of the piracy definition, which have been controversial, and in need of a more probative form of interpretation. While each of these elements merit scholarly analysis, for the purposes of the present analysis, the presentation of a critical appraisal of the first three elements is not crucial. Regarding the controversial element of private ends, Geiß and Petrig expressed the possibility that ‘suspects could argue that in attacking other vessels they acted with an exclusively political motivation, aiming to fight off illegal fishery or the dumping of waste’.<sup>792</sup> This, therefore, negates the private ends element. They added, however, that such lines of defence could easily be refuted because ‘without the authorisation of the Somali Transitional Federal Government for committing acts of piracy and armed robbery at sea, activities of Somali nationals could hardly be said to amount to public acts falling outside the ambit of the UNCLOS piracy definition.’<sup>793</sup> The payment of ransoms, as has been typical in the Somali region, could also

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<sup>791</sup> Kraska (2011) at 126.

<sup>792</sup> Geiß and Petrig (2011) at 62.

<sup>793</sup> *Idem*.

draw the inference of seeking a private end.<sup>794</sup> The high seas element, however, is crucial and forms the basis of the analysis conducted within this chapter.

## II. THE HIGH SEAS' LIMITATION

### 2.1 Distinguished from acts committed in the territorial sea

In the previous chapter, the jurisprudential development of the realm of the territorial seas vis-à-vis the high seas was considered in detail. The fluidity and unfixed nature of these jurisdictional regimes were expressed, as well as how the present rigid framework was ultimately built on this unstable foundation. This element, under the present framework, is problematic and highly relevant to the present context.<sup>795</sup> The rationale for the distinction between piracy *jure gentium* and piratical acts in territorial waters is based on the notion that: (i) responsibility for combatting piracy in the territorial sea and the exercise of enforcement and adjudicatory jurisdiction lies with the coastal state; (ii) there is an underlying concept of respect for the sovereignty of the coastal state over its adjacent waters.<sup>796</sup> Some commentators have elaborated on the first notion. Madden commented that if interference with shipping from piratical acts occurs, then the coastal state could resolve the situation by creating its own municipal legislation.<sup>797</sup> The jurisdictional competence is exclusive and, in the territorial sea, the concept of piracy *jure gentium* did not apply.<sup>798</sup> Birnie explained that this doctrine applies since crimes committed within the territorial jurisdiction are perceived as crimes against the state and not the international community.<sup>799</sup> A key factor is that this competence is based on a presumption of capability – Madden describes how, within customary international law, there was a presumption that states were capable of prescribing and enforcing laws within their territorial jurisdictions.<sup>800</sup> The piracy provisions in UNCLOS are silent on the legality of such acts committed within

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<sup>794</sup> In this regard, Collins and Hassan (2009) at 100, distinguish between acts of piracy and terrorism: pirates are motivated by pecuniary incentives and attempt to avoid attention, whereas, in contrast, terrorists seek attention in order to highlight their cause.

<sup>795</sup> See Geiß and Petrig (2011) at 63.

<sup>796</sup> See Haywood and Spivak *Maritime Piracy* (2012) at 95.

<sup>797</sup> Madden (2009) at 146. Birnie (1987) at 167 explains that the 'acceptance of the territorial sea doctrine settled part of the controversy concerning the relation between municipal and international piracy laws; municipal law applied exclusively in the territorial sea to nationals or ships registered in the state concerned and flying its flag'.

<sup>798</sup> Birnie (1987) at 167.

<sup>799</sup> *Idem.* See, also, Dickinson (1925) at 339, where he comments that 'pirates by municipal law are offenders only against the law of the state concerned'.

<sup>800</sup> Madden (2009) at 146. Isanga (2010) at 1288, similarly comments that 'by confining the scope of the definition of piracy to acts committed in specific geographical areas, the UNCLOS assumes the existence of a coastal sovereign state that is functional and capable of defending the territorial waters off its coast'.

territorial waters.<sup>801</sup> A consequence of this, as outlined by Isanga, is that ‘as long as international rules regarding piracy do not apply to territorial waters, responsibility to combat acts that would otherwise qualify as piracy belongs solely to the coastal state, even though such a state is unwilling or unable, for political, financial, or other reasons, to suppress robbery against vessels in its own sovereign waters’.<sup>802</sup>

## **2.2 Developments in the limits of the breadth of the territorial sea and its consequences**

This uncertainty in the breadth of the territorial sea is compounded by the fact that the final codification, which culminated in UNCLOS, added millions of square miles to the territorial waters when the limits of the breadth of the territorial sea was fixed at 12 nautical miles.<sup>803</sup> As indicated in the second chapter, the expansion of the limits of the breadth of the territorial sea under the UNCLOS regime means that fewer incidents of piracy occur in the retreated realm of the high seas today.<sup>804</sup> It is in this expanded realm of the territorial sea where most piratical acts occur, concentrated around straits of international importance.<sup>805</sup> As early as 1983, the secretariat of the United Nations Conference on Trade and Development (UNCTAD) recognised that piratical acts ‘are as likely to occur within a port area or territorial sea, where ships are waiting to enter a port or to traverse a strait, as they are to occur on the high seas.’<sup>806</sup> Birnie recognised in 1987 that only 7 to 15 percent of recent incidents previously classified as piracy would still be classified as piracy under UNCLOS.<sup>807</sup> As Menefee noted in 1999: ‘it has been estimated that the shift in the 1982 Convention throws upwards of 85-93% of all piracies into the jurisdiction of coastal states.’<sup>808</sup> A decade later, Isanga also observed that pirates target ships in territorial waters home to some of the most popular commercial shipping lanes, and furthermore, that most incidents of attacks on commercial vessels have occurred in territorial waters within the jurisdiction of the coastal state.<sup>809</sup> This was confirmed by the review of statistics conducted in the second chapter. Given this result, the high seas’ limitation, as stated by Collins and Hassan, forms a significant impediment to the effectiveness of the UNCLOS piracy regime. They further suggested an expansion of the geographical limit to the piracy definition to

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<sup>801</sup> Haywood and Spivak (2012) at 95. *See, also, Murphy (2007) at 155.*

<sup>802</sup> Isanga (2010) at 1288.

<sup>803</sup> This shrunk the realm of the high seas. *See Murphy (2007) at 158-159, 162.*

<sup>804</sup> Collins and Hassan (2009) at 98.

<sup>805</sup> Haywood and Spivak (2012) at 95.

<sup>806</sup> United Nations Conference on Trade and Development, *Review and analysis of possible measures to minimize the occurrence of maritime fraud and piracy*. TD/B/C.4/AC.4/2 (21 September 1983) at par. 43.

<sup>807</sup> Birnie (1987) at 173. *See, also, Murphy (2007) at 163, and Murphy (2007) at 165, who describes the epidemic of the present analysis as ‘the new (or renewed) form of piracy’.*

<sup>808</sup> Menefee (1999) at 315.

<sup>809</sup> Isanga (2010) at 1287. *See, also, Murphy (2007) at 157.*

include ‘at least a portion of waters currently defined as territorial waters’ in order to minimise the observed shortcoming.<sup>810</sup> It was also because of this shortcoming that Dubner wrote:

‘[I]f a “pirate” craft were to operate from the high seas against shipping within the territorial waters of a state which lacked the naval resources to put an end to these depredations, would the naval forces of a state, the merchant shipping of which had as yet been unmolested, have to stand helplessly by until its intervention were requested by the coastal state or by a state that had suffered damage?’<sup>811</sup>

Dubner’s question, posed in 1980, is one that is still relevant. The analysis, conducted in the second chapter, of piracy in the Somali region in the first decade of the 21<sup>st</sup> Century has shown that the presumption of the capacity of a state to administer and enforce its municipal law on piracy has faltered significantly. Isanga describes it aptly:

‘Somalia refutes this assumption in the extreme, as contemporary piracy is rampant there due to dysfunctional and failed government, a paucity of laws regulating piracy, and an inadequate system for legal enforcement.’<sup>812</sup>

### **2.3 Presumption of state capacity in the territorial sea**

Accordingly, in the face of the contemporary realities highlighted above, and in greater detail in the second chapter, the presumption that states can prescribe, administer and enforce municipal laws pertaining to piracy must be examined. The presumption, as pointed out by Madden, was perhaps valid in the Eighteenth Century, when states, particularly prominent colonial powers, had a strong coastal battery which was sufficient to deter pirates from operating within a state’s territorial sea. Furthermore, the realm of the high seas, at this time, spanned a greater area due to the more confined limit of the breadth of the territorial sea.<sup>813</sup> The key impediment which has the power to refute this presumption is that, some states, as in the case of the present analysis, might be incapable of combatting piratical acts within their territorial waters simply because of a lack of the requisite

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<sup>810</sup> Collins and Hassan (2009) at 98. Murphy (2007) at 165 also commented that contemporary piracy occurs in waters where the piracy provisions of UNCLOS have no effect.

<sup>811</sup> Dubner *The Law of International Sea Piracy* (1980) at 5. See, also, Klein *Maritime Security and the Law of the Sea* (2012) at 78, where a similar comment was made regarding encroachments on exclusive enforcement jurisdiction of the coastal state.

<sup>812</sup> Isanga (2010) at 1288. He highlights *idem* that ‘the incongruity here is apparent as an act may constitute piracy if it is committed on the high seas but will not be covered by international rules concerning piracy if it is committed in the internal or territorial waters of a coastal state’.

<sup>813</sup> Madden (2009) at 146.

resources.<sup>814</sup> Indeed, before the epidemic resurgence in the present case study, it was noted by the UNCTAD secretariat in 1983 that ‘reported incidents are centred in specific regions where there is a relatively high concentration of shipping traffic in combination with insufficient police enforcement, arising either from local economic and social conditions or because of the presence of extensive coastal areas not fully under central governmental control.’<sup>815</sup> This statement comprehensively describes the situation of the present analysis.

In chapter 3 it was shown that the juridical nature of the territorial sea developed from a theory that a coastal state ought to have a belt of water adjacent to its coast as a buffer zone to prevent pirates and other threats from operating in its waters. In these circumstances, the threat originated external to the state, and the coastal state was primarily concerned with protection and the exclusive exercise of its sovereignty. This is in contrast to contemporary piracy, as manifested in the present analysis, where the threat originates domestically. The state – through omission, incapacity, lack of resources or political will – fosters the conditions needed for piratical activities to flourish. In this instance, it is not the coastal state which is the primary victim, but the international commercial shipping industry operating in close quarters through narrow straits as they transit under innocent passage rules through the territorial sea. Perpetrators of the piratical acts retreat into their home state’s territorial waters and are shielded from international enforcement through the shield of sovereignty, along with corrupt government officials who may be complicit in their activities. This appears to conflict with the basis of international law establishing piracy *jure gentium*, which was to protect community interests in economic development and humanitarian standards.<sup>816</sup>

#### **2.4 Implications of the high seas’ limitation**

The interaction between the UNCLOS regime and the significant concentration of piratical acts in territorial waters against international merchant shipping has some implications: as stated briefly above, the high seas’ limitation has a repercussion on the reach of the universal enforcement powers vested by article 105 of UNCLOS.<sup>817</sup> States exercising their vested enforcement powers pursuant to this article on the high seas may engage in a hot pursuit of pirate suspects under article 111. In this regard, Isanga poses the following question: What happens when a suspected pirate vessel being pursued by a foreign government’s warship manages to escape into the territorial waters of a coastal state that is

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<sup>814</sup> *Idem.*

<sup>815</sup> UNCTAD (1983) at par. 44.

<sup>816</sup> Birnie (1987) at 164.

<sup>817</sup> See Geiß and Petrig (2011) at 60.

unwilling to continue pursuing the pirate vessel?<sup>818</sup> He points out that article 111 of UNCLOS expressly provides that the right of hot pursuit ceases as soon as the pursued ship enters the territorial sea of its own state or a third state. A further implication of the restrictiveness of the high seas' limitation is that it undermines the obligation in article 100 of UNCLOS, cited at the commencement of this chapter. The article contains no corresponding obligation of states to repress piracy that occurs in their territorial waters. Collins and Hassan observe that this enables states to skirt responsibility for pirates and piratical acts within their territorial waters, even if those pirates also prey upon ships on the high seas.<sup>819</sup> This lack of capacity and failure of coastal states to prevent piratical acts within their territorial waters against international merchant shipping is, according to Haywood and Spivak, 'a failure to project power over its own territory and to govern its territory at a level sufficient to meet its fundamental obligation to other states "to ensure that its territory is not used in any manner which would disrupt the political, economic and social stability of another state"'.<sup>820</sup>

Whilst all these reservations have been raised, it must be kept in mind that when interpreting the UNCLOS piracy regime, consideration must be given to the requirements of the Vienna Convention on the Law of Treaties (VCLT).<sup>821</sup> Article 31(1) thereof states that when interpreting these provisions, consideration must be given to their ordinary meaning, their context and the object and purpose of UNCLOS.<sup>822</sup> The preceding conferences and documents that ultimately led to the adoption of the UNCLOS regime, which will be analysed in the remainder of this chapter, could be said to be part of the 'preparatory work' of UNCLOS within the context of article 32 of the VCLT.<sup>823</sup> However, there is no ambiguity in the provisions of article 101(a) with respect to the high seas' limitation, and the provisions are given their ordinary meaning.<sup>824</sup> Given its shortcomings, the concluding chapter at the close of this thesis will present a recommendation for its revision *de lege ferenda*.

## 2.5 High seas' limitation being dismissed as an area of contention

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<sup>818</sup> Isanga (2010) at 1291.

<sup>819</sup> Collins and Hassan (2009) at 98.

<sup>820</sup> Haywood and Spivak (2012) at 92. They cite the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of State adopted at the 91<sup>st</sup> Plenary Meeting, 9 December 1981, Art. II(b) (UN General Assembly Document A/RES/36/103).

<sup>821</sup> 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

<sup>822</sup> See, also, Churchill (2015) at 11; and Bellish 'A high seas requirement for inciters and international facilitators of piracy *jure gentium* and its (lack of) implications for impunity' 15 *San Diego International Law Journal* (2013) 115 at 124-125.

<sup>823</sup> *Idem*.

<sup>824</sup> As set out in the IMO Commentary.

The criticism of the high seas' limitation, notwithstanding the concerns presented above, has not received much detailed academic scrutiny within the corpus of recent scholarship. Johnson, writing in 1957, observed:

'Where territorial waters are concerned, ships are already subject in some measure to the jurisdiction of the coastal state as well as of the flag state, but there seems no good reason to go further than that and authorise the international community as a whole to assume jurisdiction over acts clearly taking place within national territory.'<sup>825</sup>

As a prominent writer on the law of the sea, Churchill made a noteworthy comment in this regard:

'This criticism seems misplaced. If piracy could be committed in the territorial sea and was subject to universal enforcement jurisdiction that applies to piracy committed on the high seas or EEZ, it would cause potentially serious conflict with the rights and jurisdiction of the coastal state ... The suggestion that piracy should be extended to the territorial seas seems fraught with difficulty. If such an extension took place, it would mean the possibility of foreign warships entering a coastal state's territorial sea without its consent to arrest pirates. Such a situation seems a recipe for conflict. Extending piracy to the territorial sea is also unnecessary as there is nothing to stop a coastal state from criminalising quasi-piratical acts (i.e. armed robbery) in its territorial sea and arresting suspected offenders. Furthermore, the SUA Convention may also be applicable.'<sup>826</sup>

Churchill's comments, however, skirt over the main reservations about the high seas' limitation, particularly the enforcement capability of states. His line of argument about the extension of piracy *jure gentium* seems founded on notions of respect for state sovereignty. Birnie expressed a similar view:

'Although extending the scope of piracy *jure gentium* to encompass at least the territorial sea would also be advantageous, it seems unlikely that coastal states will accept this since they would regard it as an invasion of their

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<sup>825</sup> Johnson 'Piracy in Modern International Law' 43 *Transactions of the Grotius Society* (1957) 63 at 71.

<sup>826</sup> Churchill (2015) 22, 31.

sovereignty.’<sup>827</sup>

This rigid adherence to concepts of state sovereignty, however, has been dealt with in the previous chapter, shown to have a shallow foundation, and a suggestion made that such rigidity should yield to a more contemporary understanding of sovereignty and its limits.

Churchill’s suggestion of the SUA Convention<sup>828</sup> being applicable as a substitute for the shortcomings contained in UNCLOS merits some consideration. Article 3 of SUA contains a wide range of offences which fall within its ambit: it does away with the ‘two-ship’ element, and it has eliminated the controversy of the ‘private ends’ element in differentiating between the motives of different attackers, so that in instances where maritime terrorism and piracy overlap, the suspects can be prosecuted.<sup>829</sup> Whilst this may be the case, Collins and Hassan aptly point out that *numerous clausus* of offences contained in article 3, even if interpreted broadly, will only cover the most serious, but less common incidents of vessel hijacking, and not the most common forms of piracy and armed robbery at sea.<sup>830</sup> Relevant to the present analysis, are articles 4 and 6, which extend the geographical limits in comparison to the UNCLOS provisions: the offences under article 3 apply when committed in almost all areas of oceans, including territorial waters.<sup>831</sup> Whilst this may *prima facie* appear to be the solution to the high seas restriction of UNCLOS, there is a significant proviso to the extensive geographical ambit of SUA: it does not extend the universal enforcement jurisdiction to cover such offences. Under article 6, in order for a state to prosecute someone under SUA, the state must have a link or nexus to the offence.<sup>832</sup> Isanga illustrates that this ‘effectively undercuts the *jus cogens* and *erga omnes* character of the crime of piracy, which confers universal jurisdiction to prosecute the crime’.<sup>833</sup> Furthermore, the obligations under the SUA apply exclusively to states that are party to the treaty.<sup>834</sup> This restriction defeated anti-piracy interventions since many states where piracy is prevalent, such as Malaysia, Indonesia and Somalia, have not ratified the SUA.<sup>835</sup> Very few littoral Indian Ocean states have.<sup>836</sup> Collins and Hassan speculated as to

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<sup>827</sup> Birnie (1987) 173-174.

<sup>828</sup> Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988, 1678 UNTS 221 (1988) (“SUA Convention”). Relevant extracts of the Convention are reproduced *et seq.* hereof in the appendices.

<sup>829</sup> See Collins and Hassan (2009) at 107; Wambua (2014) at 81.

<sup>830</sup> Collins and Hassan *idem*.

<sup>831</sup> See discussions in Isanga (2010) at 1292; Haywood and Spivak (2012) at 96; Collins and Hassan (2009) at 107.

<sup>832</sup> See, for example, discussion in Wambua (2014) at 81.

<sup>833</sup> Isanga (2010) at 1293.

<sup>834</sup> See article 6 of the SUA.

<sup>835</sup> Haywood and Spivak (2012) at 96.

<sup>836</sup> Stepek (2012) at 360. These have not changed to date hereof.

the reason why the ratification of SUA by states has not been so forthcoming: they note that the SUA places vast obligations on signatory states to co-operate, the onerous provisions having sometimes acted as a deterrent to some nations in ratifying the treaty.<sup>837</sup> They also noted that the provisions can be interpreted as permitting ‘dominant naval powers to undermine the authority of regional powers ... [compromising] a small state’s national security – perhaps even permitting foreign maritime forces to enter their territorial waters’.<sup>838</sup> In other words, they surmised that the ‘main impediment to widespread regional ratification of the treaty is the strict cooperative provisions, which are viewed as permitting larger states to infringe a smaller state’s sovereignty’.<sup>839</sup> This observation is an interesting one: Churchill’s rejection of the criticism of the high seas’ limitation in UNCLOS in favour of the sanctity of a state’s sovereignty and the avoidance of conflict at the forefront, appears to be the same reason for the lack of ratification of the SUA.

It follows, then, that an enquiry into the high seas’ limitation is warranted. UNCTAD reported that the ‘restriction of the term piracy in international law to only the high seas may be viewed as an unfortunate limitation removing a large number of otherwise includable acts’.<sup>840</sup> The previous chapter exhibited, in detail, the historical shortcomings in the development of the definition of piracy, and the extent and nature of the juridical realms at sea. It remains undisputed that writers and draftsmen have experienced great difficulty in defining piracy at the international level.<sup>841</sup> Codification and progressive development occurred during the 20<sup>th</sup> Century, which exposed these shortcomings in contemporary resurgences.<sup>842</sup> The UNCTAD secretariat described this situation aptly:

‘The treatment of piracy by international law has at times been considered to be an insufficient response to the actual problem currently being experienced. Generally the criticisms relate not directly to the powers granted to States but indirectly via the definition of the term, which in turn controls the operation of the extraordinary powers granted to states by article 105. Specifically, the definition has been criticised as being too restrictive in referring only to acts on the high seas.’<sup>843</sup>

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<sup>837</sup> Collins and Hassan (2009) at 109.

<sup>838</sup> *Idem*.

<sup>839</sup> *Idem* at 110.

<sup>840</sup> UNCTAD (1983) at par. 216.

<sup>841</sup> Birnie (1987) at 167.

<sup>842</sup> Birnie (1987) at 165 describes how UNCLOS ‘further confounded matters since the definitions adopted are narrow ones, not consonant with all states’ laws and have been expressed in somewhat ambiguous terms’.

<sup>843</sup> *Idem* at 215.

Had this observation, made in 1983, received further scrutiny, the international community might have been better equipped to respond to the epidemic subject to the present analysis. The issue is ripe for analysis and progressive development. Given that the source of presenting proposals for a progressive development of the piracy provisions lies in a scrutiny of the definition, this will be the aim of the remainder of the chapter, with the sole focus being the high seas' limitation.

The inquiry that forms the basis of the remainder of the chapter is: first, to ascertain why the definition did not progressively develop to effectively apply to contemporary piracy; second, during the codification process, what were the critical factors or considerations that were raised but were eventually disregarded or omitted in the final stages of codification; and third, whether any of these factors could find application or relevance to contemporary piracy.

## **2.6 Lack of progressive development on the high seas' limitation**

When the crime of piracy is considered in historical perspective, as was the objective of the previous chapter, it becomes apparent that the positive international law codifying and regulating maritime piracy did not overlap with history as significantly as one would expect.<sup>844</sup> Two reasons could be advanced for this: first, as legal experts at the Harvard University in the 1930s explained:

‘[P]aucity of pertinent cases and of evidence of modern state practice on most of the important moot points in the law of piracy. Except for a few international cases, chiefly concerning the status of insurgent vessels or of irregular privateers, and a few municipal law cases, there are no official determinations which will help an investigator cut a way through the *jungle of expert opinion*. Indeed the lack of adjudicated cases and of pertinent instances of state practise is the occasion for the *chaos of expert opinion*.’<sup>845</sup>

The choice of language emphasised above by the Harvard legal experts is apt: they explain that the reason for this lack of precedent, at the time of them presenting their draft articles on piracy, can be attributed to the fact that:

‘[L]arge-scale piracy disappeared long ago and that piracy of any sort on or

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<sup>844</sup> See Bellish ‘A high seas requirement for inciters and intentional facilitators of piracy *jure gentium* and its (lack of) implications for impunity’ 15 *San Diego International Law Journal* (2013) 115 at 119.

<sup>845</sup> Harvard Research in International Law: Draft Convention on Piracy 26 *American Journal of International Law Supplement* (1932) 743 at 764 (emphasis added).

over the high sea is sporadic except in limited areas bordered by states without naval forces to combat it. Piracy lost its great importance in the law of nations before the modern principles of finely discriminated state jurisdictions and freedom of the seas became thoroughly established.<sup>846</sup>

This directly leads to the second reason, which is that most of the positive international law dealing with piracy – as will be outlined in this chapter *et seq* – was codified when the incidence of piracy was rare, scattered and sporadic.<sup>847</sup> Much of the scholarship on the matter waned during the periods of codification. This statement is supported by the following line graph prepared by Google’s *Ngram* service, which is a tool that allows researchers to track the use and frequency of a given phrase as it appears in around eight million of the approximately twenty million books scanned by Google.<sup>848</sup> The word inputted into the tool was ‘maritime piracy’ and the period under review was 1800 to 2016.



Figure 3<sup>849</sup>

The period during which the various codification proceedings took place was between 1926 and 1982. The graph demonstrates that this period of codification coincided with a period of relative inactivity in scholarship. The confluence of codification attempts during a period of waning scholarly material dealing with the crime did have a consequence: it will be shown below that delegates at the earliest codification conferences, possibly influenced by the lack of incidents of piracy and the low level of interest in scholarship on the matter, questioned whether the crime was even deserving of more than one article devoted to it in the codification process. Another consequence is what could be termed a ‘*motivational*

<sup>846</sup> *Idem.*

<sup>847</sup> This graph was first illustrated and commented on in Bellish (2013) at 119-120.

<sup>848</sup> *Idem.*

<sup>849</sup> Google Books Ngram viewer: available at:

[https://books.google.com/ngrams/graph?content=maritime+piracy&year\\_start=1800&year\\_end=2008&corpus=15&smoothing=3&share=&direct\\_url=t1%3B%2Cmaritime%20piracy%3B%2Cc0](https://books.google.com/ngrams/graph?content=maritime+piracy&year_start=1800&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Cmaritime%20piracy%3B%2Cc0) (retrieved on 25 October 2016).

*malaise*', and is described best by Menefee:

‘When the problem is low-level, it is not worth considering. When it flares up, as in the case of the China Sea controversies or the *Achille Lauro*, it becomes controversial, but may alienate key State players whose acquiescence is necessary for a solution. Repeatedly on the international level, one sees a national fear of loss of sovereignty, even in areas where numerous incidents suggest that its exercise is minimal at best. This remains a major stumbling block to progress.’<sup>850</sup>

Modern piracy has shown the need for the revitalisation of piracy law – a concluding comment made by Dickinson in 1924, a period when the subject of piracy was grossly under-discussed, was that piracy ‘belonged to the law in reserve rather than to the law in history.’<sup>851</sup>

With these considerations in mind, the chapter continues with a second major enquiry, entailing a discussion of the various codification attempts, outlined in a chronological sequence, in order to identify the critical factors raised during the deliberations relating to the high seas’ limitation. This will be achieved through an analysis of the official documents of these codification proceedings. While the analysis seeks to identify sources to support the primary argument of this thesis relating to the high seas’ limitation, it is best presented with background context and a holistic overview of its features and provisions.

### III. THE LEAGUE OF NATIONS CODIFICATION CONFERENCE AND THE MATSUDA REPORT (1926)

#### 3.1 Background

Pursuant to an intergovernmental effort to promote the codification and development of international law, the Assembly of the League of Nations passed a resolution on 22 September 1924, formally requesting the Council of the League to convene a ‘Committee of Experts for the Progressive Codification of International Law’.<sup>852</sup> According to the extant International Law Commission, this was the ‘first attempt on a worldwide basis to codify and develop whole fields of international law rather than simply regulating

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<sup>850</sup> Menefee *Contemporary Piracy and International Law* (1995) at 65.

<sup>851</sup> Dickinson ‘Is the crime of piracy obsolete’ 38 *Harvard Law Review* (1924-25) 334 at 360.

<sup>852</sup> Publications of the League of Nations, V. LEGAL, 1926, V.5, C.P.D.I. 16 (revised) at 1, Geneva, 9 February 1926. See, also, Rubin at 305; Guilfoyle ‘Piracy and Terrorism’ in Koutrakos and Skordas *The Law and Practice of Piracy at Sea: European and International Perspectives* (2015) at 37.

individual and specific legal problems'.<sup>853</sup> The Committee, by its terms of reference, was required "to prepare a provisional list of subjects of international law, the regulation of which by international agreement would seem to be most desirable and realisable at the present moment".<sup>854</sup> Piracy was one of the topics selected for action on the list. Questionnaire no. 6, adopted by the Committee at its second session held in January 1926, posed the following issue:

‘Whether, and to what extent, it would be possible to establish by an international convention, appropriate provisions to secure the suppression of piracy.’<sup>855</sup>

### **3.2 The Matsuda Report and key draft provisions**

Pursuant thereto, a sub-committee was established, consisting of M. Matsuda as Rapporteur, and Chinese representative M. Wang Chung-Hui. Following the committee’s deliberations, a report was prepared on the 26 January 1926, and circulated to governments for their comments on 29 January 1926. It is worth commenting on some of the key provisions of his draft piracy articles and their preface, as this purported codification attempt was the forerunner of the subsequent attempts discussed below.

Matsuda’s report commences with a form of preamble which states that: ‘Authors of treaties on international law often differ as to what really constitutes this international crime’. He goes on to explain the reason for the confusion in his conclusions as being ‘due to the failure to draw a clear distinction between piracy in the strict sense of the word, as defined by international law, and piracy coming under the private laws and treaties of individual States’.<sup>856</sup> Rubin’s comment on this report reveals that this explanation ‘is not traced to doctrinal differences or the changing perceptions of states over time or any other of the sources of differing opinion analysed above’.<sup>857</sup> The preceding chapter has shown that this observation of Rubin is critical and that doctrinal differences and changing perceptions had an impact on the evolution of the definition of piracy.

Matsuda presents his draft articles with the view that it would be preferable for the Committee to adopt a clear definition of piracy which would be applicable to all states in

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<sup>853</sup> See the website of the International Law Commission: [legal.un.org/ilc/league.shtml](http://legal.un.org/ilc/league.shtml) (retrieved on 17 November 2016).

<sup>854</sup> See Publications of the League of Nations (1926) at 1.

<sup>855</sup> *Idem*.

<sup>856</sup> Publications of the League of Nations (1926) at 4. See, also, Rubin (1988) at 306.

<sup>857</sup> Rubin (1988) at 306.

virtue of international law in general.<sup>858</sup> Rubin further observes that this reflects the assumption that there is a single conception of piracy in the international legal order reflecting a stable natural law that did not change over time.<sup>859</sup> It is worth noting in this regard, however, that Matsuda's report was not supported by scholarly citations or commentary, evidence of state practice or judicial precedent, seemingly distancing the entire corpus of jurisprudence presented at length in the previous chapter hereof.<sup>860</sup> Attempts, as in the case of the present thesis, to analyse or interpret the draft articles are hindered by the fact that Matsuda does not furnish any detailed purport of his drafting choices and underlying conceptual framework.

The work of the Committee of Experts on piracy was brief.<sup>861</sup> Matsuda's report itself consists of a brief discussion in section [A] dealing with piracy in international law, and section [B] discussing piracy in terms of treaties and special laws of states. The draft provisions are thereafter contained in eight articles.<sup>862</sup>

Turning now to aspects of the report that are relevant to the primary focus of the present thesis – relating to the high seas' limitation – Matsuda makes three significant statements in section [A] which precede his presentation of the draft articles:

3.2.1 *First*, he comments on the *locus* of piracy:

'Piracy has as its field of operation that vast domain which is termed "the high seas". It constitutes a crime against the security of commerce on the high seas, where alone it can be committed. The same acts committed in the territorial waters of a State do not come within the scope of international law, but fall within the competence of the local sovereign power.'<sup>863</sup>

This notion was incorporated into article I of the draft provisions (emphasis added):

'Piracy occurs only on the *high sea* and consists in the commission for private end of depredations upon property or acts of violence against persons.

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<sup>858</sup> Publications of the League of Nations (1926) at 4.

<sup>859</sup> Rubin (1988) at 306.

<sup>860</sup> This was observed by Rubin (1988) at 306 and Guilfoyle (2015) at 37. Rubin (at 307) offers a way around this criticism of a lack of reference to historic and juridical analysis, which is to interpret the draft articles as being presented *de lege ferenda* – i.e. as a proposal for a new law regardless of history and theory. He notes that this approach was permissible as a progressive codification within the terms of reference of the Committee, and 'thus with the focus being forward, the consistency of the new proposal with history and theory became unimportant'.

<sup>861</sup> Guilfoyle (2015) at 37.

<sup>862</sup> These articles are reproduced in full in the appendix *et seq.*

<sup>863</sup> Publications of the League of Nations (1926) at 2.

It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.’

Two presumptions, as derived from Mastuda’s comments, fall flat when considered within the context of present-day Somali piracy. The first relates to the scene of international commerce as the high seas. It has been shown, in detail, in the second chapter of this thesis, that significant volumes of the international merchant marine transit territorial waters. Whilst he points out that the same acts occurring in the territorial seas would fall into the competence of the local coastal state, it was not envisaged that capacity and resources would be vital factors in enabling the coastal state to exercise such competence.

3.2.2 *Second*, Matsuda incorporates the epithet of the pirate as the enemy of the human race and, as a consequence, the pirate losing his nationality:

‘When pirates choose the scene of their acts of sea-robbery a place common to all men and when they attack all nations indiscriminately, their practices become harmful to the international community of all States. They become the enemies of the human race and place themselves outside the law of peaceful people ... By committing an act of piracy, the pirate and his vessel *ipso facto* lose the protection of the State whose flag they are otherwise entitled to fly.’

This latter comment is embodied in article II of the draft provisions:

‘in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies.’

This line of thought closely follows the earlier discussion in the previous chapter, where a pirate was conceived as the illegitimate enemy who loses the benefits and protection of his nationality. The non-recognition of the nationality of the pirate was shown as being one of the gateways to the application of universal jurisdiction in the previous chapter.

3.2.3 *Third*, reverse hot-pursuit is considered:

‘May a warship pursue and arrest pirates in the territorial waters of a foreign Power without thereby violating the sovereign rights of that

Power? Under normal circumstances, the sovereign of the territory alone has the right, in territorial waters, to protect national and international interests; but in the case of acts intended to safeguard international relations, it would appear reasonable to assume that the Government of the territory tacitly consents if it is not in a position to continue the pursuit successfully; otherwise, if the coastal State could not take the necessary measure to carry through the pursuit in time the result would be to facilitate the flight of the pirate and enable him to escape punishment. In such cases, however, the right to try for piracy devolves upon the State to which the territorial waters belong. It is the recognition due to its sovereignty.’<sup>864</sup>

This is embodied in article V of the draft provisions:

‘If the crew of a ship has committed an act of piracy, every warship has the right to stop and capture the ship on the high sea.

On the condition that the affair shall be remitted for judgment to the competent authorities of the littoral state, a pursuit commenced on the high sea may be continued *even within the territorial waters* unless the littoral state is in a position to continue such pursuit itself.’ (emphasis added).

For the purposes of this thesis, this provision and Matsuda’s preface have the most probative value. At the outset, he recognises the sovereignty of a state, which it exercises exclusively over its realm, qualifying this power as being under normal circumstances. The exception is where there is a need to safeguard international relations. This can be read as extending to encompass the need to protect international commercial shipping. He also recognises that the state has an obligation in this regard, and for the first time there is a consideration about the capacity of a state to suppress piracy and fulfil its obligation. Where there is incapacity, the state tacitly consents to the incursion of a foreign naval power into its territorial sea for the purposes of pursuing a pirate vessel. The coastal state, however, is given the exclusive power to prosecute the pirates and exercise adjudicatory jurisdiction. Whilst the foreign naval vessel is engaged in hot pursuit and enforcement jurisdiction on the high seas, it is acting pursuant to *international law*. When it engages in hot pursuit in the territorial sea of a foreign state, with its tacit consent as provided for in Matsuda’s draft, it is still doing so by exercising enforcement jurisdiction under the auspices of *international law* and not *municipal law*. One way of interpreting this permutation is that piracy *jure*

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<sup>864</sup> *Idem* at 3.

*gentium* can, therefore, be applied in the territorial sea. This contention will be revisited and adapted in the presentation of recommendations in the final chapter of this thesis.

Rubin makes an interesting observation regarding these provisions. In the previous chapter, an account was given on the *Huascar* incident, where British naval vessels captured pirate suspects in Peruvian territorial waters. He speculates that these provisions were drafted to look ‘as if somebody was trying to present as if a rule of established law some assertions of principle that would cover the British action without unduly upsetting the Government of Peru or those scholars, including eminent British scholars, who found the actual British position as presented publicly to be argumentative and unconvincing.’<sup>865</sup> However, this is a subject of conjecture in the absence of an official commentary.

### 3.3 Responses to the draft provisions

There were numerous lengthy replies from Governments to the report in which serious questions were raised. Furthermore, the varied nature of the replies made by Governments makes the formation of an accurate analysis difficult.<sup>866</sup> Twenty-nine states replied to the questionnaire that was the subject of Matsuda’s report.<sup>867</sup> Eighteen of these states recognised the possibility and desirability of an international convention: nine replied in the affirmative and the remaining nine replied in the affirmative, albeit with reservations and observations.<sup>868</sup> Three states did not think the regulation relating to the proposed question was especially urgent or important, but they did not object to it being embodied in an international agreement.<sup>869</sup> Two states thought that the conclusion of a convention was neither possible nor desirable.<sup>870</sup>

The Portuguese Permanent Commission presented the following comment and proposal:

‘The report (A,I) says that piracy has as its field of operation only on the high seas; the inference is that the same acts, committed in the territorial waters of a State, do not fall under international law. But history teaches that the attacks of pirates in ancient times and in the Middle Ages were almost always

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<sup>865</sup> Rubin (1988) at 307.

<sup>866</sup> Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation 22(1) *American Journal of International Law* (January 1928) 4 at 25.

<sup>867</sup> *Idem*.

<sup>868</sup> *Idem*.

<sup>869</sup> *Idem*.

<sup>870</sup> *See*, for example, the reply of the United States of America (at 33): ‘it is the view of the Government of the United States that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject, as one to be regulated by international agreement’.

committed near the coasts, and that, generally, the pirates landed and attacked villages, plundering, looting, and murdering, and kidnapping the inhabitants. It was thus that the Norman pirates acted on the western coasts of Europe, and later the Barbary pirates in the Mediterranean, through the latter, it must be said, preferred to attack on the open sea. It is true that nowadays piracy in either form has become rare. But from time to time piratical acts are still committed, either on the high seas or on the coasts, especially in the Far East, and there appears to be no great difference in the gravity of the offence wherever the scene of the robbery.<sup>871</sup>

Portugal's submission to the Committee of Experts was therefore to add the following phrase (inserted here in italics) into Article I: 'Piracy occurs only on the high seas *or on the coasts* and consists in the commission for private end of depredations upon property or acts of violence against persons.' As mentioned below, the topic of piracy was eventually dropped from the agenda of the proposed codification conference, and the comment made by Portugal above did not receive further analysis. The comment however, is relevant and can be still raised in the present context.

### 3.4 Rejection

Nicholas Politis, the Rapporteur for one of the sub-committees, states, with regard to piracy, that the issue 'on which the conclusion of a universal agreement seems somewhat difficult at the present time, is [not] important enough to warrant ... insertion in the agenda of the proposed Conference.'<sup>872</sup> Rubin added that nothing more came of Matsuda's report or the documentation it provoked.<sup>873</sup>

### 3.5 Summative comments

This purported codification has not received much scholarly analysis, apart from the comments by Rubin,<sup>874</sup> since its removal from the agenda of the League's proposed codification conference. However, in revisiting this codification attempt: (i) the affirmation of the pirate as *hostis humani generis*, stripped of its nationality; and (ii) the extension of the application of universal jurisdiction (derived through the application of piracy *jure*

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<sup>871</sup> Report to the Council of the League of Nations (1928) at 29-30.

<sup>872</sup> Publications of the League of Nations, V. LEGAL. 1927.V.28, reproduced in 22 Special Supplement *American Journal of International Law* (1928) 345 at 346, cited in Rubin (1988) at 308.

<sup>873</sup> Rubin (1988) *idem*.

<sup>874</sup> See, generally, Rubin (1988) at 305-308. Geiß and Petrig (2011) refer to this codification attempt in a brief paragraph at 37-38, and Guilfoyle (2015) refers to the same in the context of analysis between piracy and terrorism.

*gentium*) into the territorial sea through a hot pursuit by descent from the high seas under the tacit consent of the coastal state, are both of particular value and relevance to the present analysis. Accordingly, as this thesis progresses into the presentation of recommendations to amend the framework, the factors raised by Matsuda in this report will be adapted.

#### IV. THE HARVARD UNIVERSITY DRAFT (1932)

##### 4.1 Background

Whilst the Matsuda report evaded further scrutiny, the faculty at the Law School of Harvard University drove their own research initiative to independently contribute to the League's codification conference. A committee was formed to research piracy under international law. The reporter, Professor Joseph Bingham, presented the results of the research effort of the committee in the form of a full draft convention consisting of nineteen articles. An initial observation made of the draft convention illustrated that the drafters regarded it as not merely 'codifying, but also blending the international law of piracy into the system of legal relationships that they believed applied in the world of their time.'<sup>875</sup> Unlike Matsuda's report, the Harvard committee accompanied their draft articles with a voluminous commentary and a list of citations. This makes a probative analysis feasible.

##### 4.2 Holistic merits of the draft

Whilst some writers, like Birnie, suggested that the draft was the first to formalise or crystallise the customary law,<sup>876</sup> Bingham definitively cautions that:

'In studying the content of the article, it is useful to bear in mind the chaos of expert opinion as to what the law of nations includes, or should include, in piracy. There is no authoritative definition. Of the many definitions which have been proposed, most are inaccurate, both as to what they literally include and as to what they omit.'<sup>877</sup>

Rubin's comment that the draft must be 'evaluated on its own merits as a legislative proposal, and cannot be supported as a reflection of a scholarly analysis of precedent and theory'<sup>878</sup> must therefore be kept in mind.

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<sup>875</sup> Rubin (1988) at 308-309.

<sup>876</sup> Birnie (1987) at 169.

<sup>877</sup> Harvard Research in International Law: Draft Convention on Piracy 26 Supplement *American Journal of International Law* (1932) 743 at 769 (hereafter the Harvard University Draft). See, also, Rubin (1988) at 313, and Menefee (1995) at 3-4.

<sup>878</sup> Rubin (1988) at 313.

A perusal of the draft reveals a convoluted architecture present in its commentary and use of scholarship.<sup>879</sup> Commentaries on the articles appear as a quilt work consisting of numerous quotations, most sources being European publicists from the 19<sup>th</sup> Century. Rubin is critical of this approach and aptly observes that ‘there is no apparent attempt to evaluate those writings by jurisprudential view or any other clue as to relative persuasiveness; there is no chronological consistency’.<sup>880</sup> There is no categorisation according to hierarchy with primary sources, namely: state practice, diplomatic correspondence, municipal cases and secondary sources in the form of opinions and commentaries by publicists.

The approach adopted by Bingham and his committee was more of a progressive codification rather than a declaratory form of the customary definition.<sup>881</sup> This is acknowledged in the draft, which recognizes that society is not static:

‘The use of traditional ideas of the nature of piracy and the scope of the common jurisdiction should be tempered and controlled by the realization of the great changes that have occurred through the centuries in the conditions of commerce and travel and in offences affecting them outside territorial jurisdiction, in the actual relations of states, and in fundamental postulates of the law of nations pertaining to our topic.’<sup>882</sup>

It goes on to reveal that law must be commensurate with this progression of society and its institutions:

‘The doctrine of the freedom of the seas and the modern fine apportionment of jurisdiction among states on territorial nationality, and protection of interest bases, are of late growth, and if the modern law of piracy is to be well fitted into this scheme it may be necessary to discard or modify some of the notions which characterized the law of piracy of an age with a very different adjustment of international relations.’<sup>883</sup>

It is apt to rekindle this notion from the basis of amending the present legal framework, as this thesis has shown *inter alia*, in the previous chapters, fundamental changes in the *modus*

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<sup>879</sup> See the discussion in Rubin (1988) at 312-313.

<sup>880</sup> *Idem.* His criticism of the Draft (at 312) centres on the view that ‘in their use of earlier scholarship in general, however, the Harvard Researchers themselves seemed somewhat confused. Long quotations from Stiel are preceded or followed with what appear to be supporting quotations from a variety of sources addressing different problems from different jurisprudential perspectives and at different times.’

<sup>881</sup> See Menefee (1995) at 4.

<sup>882</sup> Harvard University Draft (1932) at 787.

<sup>883</sup> *Idem.*

*operandi* of contemporary pirates off the coast of the Horn of Africa, and the decolonisation of Africa and its impact on the creation of the EEZ in the present UNCLOS regime with its definitive jurisdictional realms.

### 4.3 Rationale of the drafters

The drafters commenced by setting out a clear distinction between piracy under international law, which is committed *beyond all territorial jurisdiction*, and municipal law piracy which may include offences committed *in the territory of the state*.<sup>884</sup> From the placement of emphasis in the foregoing distinction, it becomes readily apparent that the *locus* is a primary consideration in determining the nature of the act.

They observe that in municipal law, piracy is principally a crime.<sup>885</sup> They do not draw the same observation in respect of piracy under international law because:

‘the law of nations is a law between states only, and limits their respective jurisdictions. Private individuals are not legal persons under the law of nations. The rights, duties, privileges, and powers which it defines are only those of states. There is no legal universal society of private persons regulated by international law.’<sup>886</sup>

They further noted that there was no super-government and no international tribunal to administer international civil or criminal justice against private persons, and it was only through voluntary action of some states that pirates were captured, prosecuted and sentenced to punishment.<sup>887</sup> The conclusion that they reached was that piracy is not a legal crime or offence under international law, as documented in this comment:

‘Since, then, pirates are not criminal by the law of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offence was committed outside the state’s ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offence by the law of nations’.<sup>888</sup>

Rubin found that two schools of jurisprudential thought permeate the discourse of the

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<sup>884</sup> Harvard University Draft (1932) at 749. *See*, also, the observation by Rubin (1988) at 309.

<sup>885</sup> *Idem* 751.

<sup>886</sup> *Idem* 754.

<sup>887</sup> *Idem* 755.

<sup>888</sup> *Idem* 756.

drafters, the first of these being a naturalist view which classifies piracy as a ‘valid set of rules established by universal reason and immediately applicable to individuals but enforced only through the intermediacy of states, implying universal jurisdiction’.<sup>889</sup> The second is a positivist view which denies ‘the very existence of an international law of “piracy,” but asserting the existence of merely a subset of the municipal maritime laws of many states by which jurisdiction over foreigners could be asserted on the basis of the nationality of the victim of a depredation that did not occur solely within a single vessel or other specific jurisdiction that could be claimed to be exclusive’.<sup>890</sup> Rubin’s analysis of the drafter’s commentary shows that the latter view prevailed as its jurisprudential basis.<sup>891</sup>

Given that the drafters rejected piracy being defined as a *crime* under the law of nations, they also found that it was not the purpose of the draft convention to unify the various municipal laws, or to provide uniform measures for punishing pirates.<sup>892</sup>

The question, then, of categorising piracy under international law was answered by the drafters in the following way:

‘International law piracy is only a special ground of state jurisdiction – of jurisdiction in every state...it is the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons, and to seize and dispose of property, for factual offences which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests.’<sup>893</sup>

Rubin also commented that this jurisprudential basis followed a positivist view.<sup>894</sup> He noted that this conclusion was founded per argumentative secondary analyses, much of which was undertaken by scholars who did not seem to do much primary research either.<sup>895</sup> Be that as it may, the draft articles itself, for example: article 3, which outlines the definition, has been seen as the ‘recognizable ancestor’<sup>896</sup> of the definition enshrined in UNCLOS, as documented earlier. An analysis of some of the key provisions of the draft is therefore an important exercise for the purposes of this study.

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<sup>889</sup> Rubin (1988) at 310.

<sup>890</sup> *Idem*.

<sup>891</sup> *Idem* at 310-311.

<sup>892</sup> Harvard University Draft (1932) at 760.

<sup>893</sup> *Idem* at 759-760.

<sup>894</sup> Rubin (1988) at 311.

<sup>895</sup> *Idem*.

<sup>896</sup> In the words of Menefee (1995) at 3.

#### 4.4 Key provisions

The drafters prepared a draft convention consisting of nineteen articles, each accompanied by a commentary. For the sake of completeness, the full text of the draft convention is appended *et seq.* The key provisions relating to the definition and jurisdiction are presented below:

4.4.1 *Article 2* states ‘Every state has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy. This jurisdiction is defined and limited by this convention.’

The article above outlines the common jurisdiction and confines it within the limits of the draft convention. It provides the framework for the special basis of jurisdiction, namely universal jurisdiction.

4.4.2. *Article 3* provides: ‘Piracy is any of the following acts, committed in a place *not within the territorial jurisdiction of any state*:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act of voluntary participation in the operation of a ship with knowledge of facts, which make it a pirate ship.
3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.’

These three subsections are not a core focus of the present study, but there are some points raised by the drafters pertaining to the *locus* which will be collated and emphasised here. They cite two prominent writers in international law, Oppenheim<sup>897</sup> and Wheaton.<sup>898</sup> as authorities on the view that piracy can only be committed on the high seas. Oppenheim’s

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<sup>897</sup> Cited at 789: ‘Piracy as an ‘international crime’ can be committed on the open sea only. Piracy in territorial coast waters has as little to do with International Law as other robberies within the territory of a State. Some writers maintain that piracy need not necessarily be committed on the open sea, but that it suffices that the respective acts of violence are committed by descent from the open sea. They maintain, therefore, that if a body of pirates land on an island unappropriated by a civilized Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy. With this opinion I cannot agree. Piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore it cannot be committed anywhere else than on the open sea.’

<sup>898</sup> Cited at 789: ‘To constitute piracy *jure gentium* it is necessary, 1st, That the offence, being adequate in degree – for instance, robbery, destruction by fire, or other injury to persons or property – must be committed on the high seas, and not within the territorial jurisdiction of any nation.’

view was that piracy has always been a crime against the safety of traffic on the open sea. Furthermore, he disagrees that piracy could be committed by descent from the open seas. At face value, his reference to piracy as a crime contradicts the premise of the draft referred to above, and moreover, it is not apparent that the term ‘open seas’ is synonymous with ‘high seas.’ His rejection of the view that piracy could be committed by descent from the high seas is contradicted by another writer, cited by the drafters, Hall, who stated:

‘[P]iracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the state through descent from the sea, by a body of men acting independently of any politically organised society’.<sup>899</sup>

Evidently included as an afterthought, the drafters state within the commentary of that section:

‘In some parts of the world, where it is peculiarly difficult to suppress violence and depredation against commerce in territorial waters, special agreements providing for concurrent police jurisdiction may be needed (See Articles 17 and 18). These special cases, of course, cannot be covered by a draft convention designed for general adoption.’<sup>900</sup>

The type of scenario above – where there are difficulties in suppressing violence in territorial waters – envisaged by the drafters in this comment is indeed inclusive of the present-day piracy as analysed in the second chapter of this thesis. It is common and widespread, and is proposed not as being special cases, but rather existing as an inherent characteristic of contemporary piracy. The argument advanced by this thesis is that it is possible to extend such concurrent police jurisdiction to amend the existing framework for general adoption. The limitation of the definition of piracy to a place *not within the territorial jurisdiction of any state* by the drafters was based on a brief selection of quotes from writers of international law, with the drafters further admitting that this article is the most important and difficult one of the draft convention. Akin to the introductory comments, they seem to go to great lengths to mention how ‘instead of a single relatively simple problem, there are a series of difficult problems which have occasioned a great diversity of professional opinion’.<sup>901</sup> Even though there has been such a diversity of

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<sup>899</sup> Cited at 789.

<sup>900</sup> Harvard University Draft (1932) at 790.

<sup>901</sup> *Idem* 769. They go on to emphasise once again: ‘In studying the content of the article, it is useful to bear in mind the chaos of expert opinion as to what the law of nations includes, or should include, in piracy. *There is no authoritative definition.* Of the many definitions which have been proposed,

professional opinion, the drafters attempt no further synthesis or analysis of these contradictory views or interrogation of the primary sources referred to. It is proposed that this constitutes a significant shortcoming in the work of the drafters, and the overall probative value of the commentary.

4.4.3 *Article 6* provides: ‘In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.’

The commentary on this article is sparse. The article proposes that enforcement jurisdiction could be exercised in two realms, namely: outside the jurisdiction of another state – the high seas, and in the territorial waters of the seizing state.

4.4.4. *Article 7* provides (emphasis added):

- ‘1. In a place *within* the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; *except* that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, *unless* prohibited by the other state.
2. If a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of this article, the state making the seizure shall give prompt *notice* to the other state, and shall tender possession of the ship and other things seized and the custody of persons seized.
3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high sea.’

The architecture of article 7(1) outlines, first, the general rule that enforcement jurisdiction cannot take place in the jurisdiction of another state, and goes on to provide that an exception to this rule occurs where there is a ‘reverse hot pursuit’ scenario, wherein pursuit commenced in the high seas or in the territorial sea of the pursuing state. Once there is such an instance, as highlighted by the use of language within the provision, there is no limitation on the authority of the pursuing state – the rights exercised would be the same as if on the high seas. This authority is described by the drafters as a ‘special privilege and power’.<sup>902</sup> The provision shifts the burden to the territorial sovereign to prohibit such a pursuit. Article

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most are inaccurate, both as to what they literally include and as to what they omit. Some are only impromptu, rough descriptions of a typical piracy.’ (my emphasis).

<sup>902</sup> *Idem* at 832.

7(1) is similar to article V of the Matsuda draft discussed above. In this context, it is useful to reiterate Matsuda's comment that it would be 'reasonable to assume that the Government *tacitly* consents if it is not in a position to continue the pursuit successfully'.<sup>903</sup> The drafters state, however, that professional opinion is not uniform on the subject matter of this article.<sup>904</sup>

When considered against present day piracy, the usefulness of this provision becomes apparent: it is deferential to the rights of the territorial sovereign, and contains an element of notification seen in article 7(2). Read together with articles 8<sup>905</sup> and 9,<sup>906</sup> there is evidence of protection of the coastal state's sovereignty through the provision of damages and reparations for abuses of power. More importantly, it allows for the exercising of emergency rights of pursuit into foreign territories, which, if hindered by an absolute deference to the sovereign rights of the coastal state, could result in the suspects eluding pursuers with significant adverse consequences to the security of international commerce through the merchant marine.

#### 4.5 Summative remarks

It was evident, even within the text of the draft itself, that the draft cannot be evaluated as a codification or a legal analysis of customary law, judicial precedents, and state practice together with a collation of academic commentary. However, notwithstanding the shortcomings of the draft which were pointed out by Rubin in the aforementioned paragraphs, for the purposes of this study, the draft has some value when it is evaluated as an innovative legislative proposal. The Harvard University draft is often viewed in academic scholarship and commentary as a precursor to the current legal framework, but, apart from an analysis by Rubin, has received little scrutiny of the draft provisions themselves. It is proposed that articles 7 to 9, building on the work of the Matsuda draft, can be adapted to apply to present-day piracy. This will be revisited in the concluding

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<sup>903</sup> Publications of the League of Nations (1926) at 3.

<sup>904</sup> They caution (at 833) that: 'Some writers assert that the law of nations authorizes the pursuit of pirates into foreign territorial waters, at least if the littoral state has not a force at hand to make the capture and does not prohibit the pursuit. Some argue that the pursuit is legal even against the protest of the littoral state. Although in some cases war ships have pursued and captured pirates in foreign territorial waters, there is no determining precedent on the matter.'

<sup>905</sup> This article provides that: 'If a pursuit is continued or a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of Article 7, the state continuing the pursuit or making the seizure is liable to the other state for any damage done by the pursuing ship, other than damage done to the pirate ship or the ship possessed by pirates, or to persons and things on board.'

<sup>906</sup> This article provides that: 'If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.'

chapter of this thesis.

## V. THE WORK OF THE INTERNATIONAL LAW COMMISSION (1955-56)

### 5.1. Background

A statute was adopted by the United Nations General Assembly in 1947 which established the International Law Commission (ILC) in order to undertake the mandate of the Assembly under article 13(1)(a) of the Charter of the United Nations to ‘initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification’.<sup>907</sup> The commission consisted of 34 experts in the field of public international law.<sup>908</sup> In 1954, as pursuant to Resolution 899 (XI)<sup>909</sup> of the UN General Assembly, the ILC was mandated to prepare a text that would form the framework for an international agreement on the law of the sea.<sup>910</sup> Later that year, a text prepared by Dutch Rapporteur J.P.A. François, entitled ‘Regime of the High Seas’, was published containing six articles pertaining to piracy.<sup>911</sup> The text, produced in French, was essentially a translation of the Harvard University draft articles.<sup>912</sup>

### 5.2. The working drafts of the ILC

At its 290<sup>th</sup> meeting on 12 May 1955, the ILC began its discussion of the text by François.<sup>913</sup> Rubin summarized the mood at the time: ‘it was apparent from the very beginning that the word *piracy* had such an overlay of emotion and conflicting meaning that many political compromises would have to be made’.<sup>914</sup> A discussion was opened to debate article 23 of the François text. As a special Rapporteur, François relied heavily on the work of the Harvard University researchers. As mentioned earlier, article 23 is a reproduction of article 3 of the Harvard University draft, which contained the definition of piracy. François mentioned that the article is founded on three important principles: (i) *animus furandi* did not have to be present; (ii) only acts committed on the high seas could be described as piracy; (iii) acts of piracy were necessarily acts committed by one ship against another ship

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<sup>907</sup> See the website of the Commission: <http://legal.un.org/ilc/>.

<sup>908</sup> See article 2(1) of the Statute of the ILC.

<sup>909</sup> United Nations, General Assembly, G.A. Res. 899 (IX), U.N. Doc. A/RES/899 (IX) (14 December 1954) at par. 2.

<sup>910</sup> See, also, Geiß and Petrig (2011) at 39; Kraska (2011) at 117.

<sup>911</sup> *Yearbook of the International Law Commission* 1954(2) Sixth session, Doc. A/CN.4/79 (for convenience, referred to as the François text).

<sup>912</sup> Geiß and Petrig (2011) at 39.

<sup>913</sup> The record of the meeting is contained in the *Yearbook of the International Law Commission* (1955) 1 at 37. Doc. A/CN.4/SR.209.

<sup>914</sup> Rubin (1988) at 320.

– ruling out acts committed on board a single vessel.<sup>915</sup> The second principle or element is relevant for the purposes of this discussion. In four short paragraphs, he indicates that the element of the high seas’ limitation was the view adopted by the Harvard University draft, and that it has been followed by the majority of states and writers.<sup>916</sup> He cites the Harvard drafters’ reference to Oppenheim,<sup>917</sup> and the dissenting view of Hall.<sup>918</sup> The last comment made by François was an interpretation of the words “territorial jurisdiction”, which he emphasised were to be ‘construed in their narrowest sense as comprising the land territory, the inland waters, and the territorial sea of a State, but not ships flying the flag of that State’.<sup>919</sup>

The discussion of the Harvard University draft has shown conclusively that it could not exist as a codification of existing jurisprudence due to the diversity of academic opinion and state practice. The draft, rather, was evaluated as an innovative legislative proposal *de lege ferenda*. François’ attempt to present a codification was therefore hindered due to his exclusive reliance on this draft without caveats or further commentary – a perusal of the minutes contained in the report reveals that the commissioners presented clear reservations. Some were directed at the second principle relating to the high seas’ limitation and the restrictiveness of some aspects of the Harvard University draft:

Mr Liang (secretary to the commission) noted that Professor Bingham, the principal drafter, ‘considered piracy only in relation to the jurisdiction of States on the high seas; it had not been his intention to study piracy as a crime against the law of nations, or to report on international criminal law’.<sup>920</sup> The recorded minutes exhibited the view of Mr Scelle of France, who:

‘deplored the tendency to formalism. He would be unable to support a provision defining piracy by reference to jurisdiction and not the nature of the act. Article 23 as at present drafted was based on a methodological error. According to such a text the Barbary corsairs would not have been pirates, because their acts had been committed on land.’<sup>921</sup>

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<sup>915</sup> The record of the meeting is contained in the *Yearbook of the International Law Commission* (1955) 1 at 37, Doc. A/CN.4/SR.209 at 39, par. 32.

<sup>916</sup> *Idem* at 41, par. 48.

<sup>917</sup> Harvard Draft (1932) 790.

<sup>918</sup> The record of the meeting is contained in the *Yearbook of the International Law Commission* (1955) 1 at 37, Doc. A/CN.4/SR.209.

<sup>919</sup> The record of the meeting is contained in the *Yearbook of the International Law Commission* (1955) 1 at 37, Doc. A/CN.4/SR.290 at 41, par. 51.

<sup>920</sup> *Idem* at 41, par. 58.

<sup>921</sup> *Idem* at 43, par. 70.

Regrettably, it seems that Mr Scelle's thesis was circumvented at the meeting:

'Mr. Scelle, in his keen concern to establish an international police, considered that acts committed on land should be treated on the same footing as acts committed on the high seas, thereby departing from the doctrine held by most authorities whereby States could only take steps against acts of piracy committed on the high seas. The acceptance of the new idea propounded by Mr Scelle would only serve to complicate the issue.'<sup>922</sup>

François then presented a redrafted working document, which was subsequently discussed at the ILC's 292<sup>th</sup> meeting on 16 May 1955.<sup>923</sup> The relevant extract from his revised article 23 reads as follows:

'Piracy in the sense of these rules is any act of violence or depredation, committed for private ends by the crews or the passengers of a private vessel against another vessel *on the high seas*, with intent to rob, rape, wound, enslave, imprison or kill a person, or with intent to steal or destroy property'.<sup>924</sup>

The enforcement provision is contained in article 26 of his redraft.<sup>925</sup> Swedish commissioner, Mr A.E.F. Sandström, immediately made a counterproposal, the relevant extracts of which are as follows:

*Article 23*

'1. Any State may seize *on the high seas* a ship on or from which an act of piracy has been committed or which is intended for piracy (pirate ship) and possessed by pirates, the ship or ships taken by the pirates and the persons or things on board the ships'.

*Article 24*

'For the purposes of the present rules, piracy shall be understood to mean: "(a) Any act of violence or depredation committed with intent to rob, wound, enslave, imprison, or kill, or with intent to steal or destroy property, and undertaken by private persons for private (non-political) ends, provided that

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<sup>922</sup> *Idem* at 43, par. 79.

<sup>923</sup> The record of the meeting is contained in the *Yearbook of the International Law Commission* (1955) 1 at 51, Doc. A/CN.4/SR.292.

<sup>924</sup> *Idem* at 51, par. 4 (with my emphasis).

<sup>925</sup> The article provides: 'Every State may seize by its public vessels, in a place not within the territorial jurisdiction of another State, ships committing acts of piracy, and things or persons on board. The State may exercise jurisdiction over them.'

such act is connected with an *attack at sea or an attack on land made from a pirate ship*”.<sup>926</sup>

François observed that the main difference between his draft and Sandström’s proposal was that the latter proposed to include, within the definition of piracy, attacks by pirates on a coast.<sup>927</sup> This can be interpreted to read as an attack within the territory of a state. Sir Gerald Fitzmaurice also suggested incorporating areas that are *res nullius* (such as certain islands) as places that are not within the territorial jurisdiction of a state.<sup>928</sup>

In responding to this contradictory view, François indicated that there were three schools of thought on this issue:

- (i) first, piracy could only take place on the high seas;
- (ii) second, piracy could only occur in a place not within the territorial jurisdiction of any State, a definition which included not only the high seas, but also unoccupied lands such as had been mentioned by Sir Gerald Fitzmaurice;
- (iii) third, a view held by few writers of international law, W. E. Hall, for example, was that piracy could consist of acts of violence within the territory of a state after descent from the sea.<sup>929</sup>

François contends that ‘the Harvard report, together with whole weight of jurisprudence, was in favour of the limitation embodied in his own revised draft’.<sup>930</sup> It is proposed that this view had been misconstrued, given the earlier discussion about the diversity of academic opinion on the subject. François does not furnish any citations to cases or accepted legal principles which could apply by analogy. The three views listed above are what were envisaged at the time, but, in keeping with the trends of contemporary piracy, a fourth view, broadly related to the third view above, could have been posed, namely where piracy is committed solely within the territory of the coastal state against international commercial shipping which transited those waters.

Sandström, supported by Scelle, argued in support of the third view, as was minuted:

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<sup>926</sup> *Yearbook of the International Law Commission* 1(1955) 51. Doc. A/CN.4/SR.292 at 52, par. 6 (with my emphasis).

<sup>927</sup> *Idem* at 52, par. 9.

<sup>928</sup> *Idem* at 52, par. 12.

<sup>929</sup> *Idem* at 52, par. 13.

<sup>930</sup> *Idem* at 53, par. 14.

‘Mr. SANDSTROM said that in drafting his text he had had more in mind the Commission's duty to promote the progressive development of international law rather than its codification, and found it inadmissible that a warship meeting a pirate vessel on the high seas should be obliged to refrain from seizure because the act of piracy had been committed in territorial waters or on land.’<sup>931</sup>

The process undertaken by the committee would be to vote on the principles and then appoint a drafting committee to prepare a final text.<sup>932</sup> Sandström's text was put to a vote and was rejected by six votes to four, with one abstention. This meeting also debated other aspects of article 23, which have not been reproduced and analysed here as it is not essential to the present research focus of this thesis. However, it is worth noting that the entire meeting lasted a total of two hours and the agenda was complex. Through a voting process, the views of François were adopted, without effectively engaging with the concerns of Sandström and Scelle in that both that meeting, and the preceding 290<sup>th</sup> meeting. The opportunity to carefully scrutinise the *locus* of piracy and all considerations that acts of piracy could occur within territorial waters was circumvented in a setting that resembled a legislative session rather than a codification process.

### **5.3 Culmination of the work of the ILC**

The ILC held its seventh session in Geneva from 2 May to 8 July 1955. The report of the ILC covering its work during this session contained a chapter relating to the regime of the high seas, which was a product of the drafting committee.<sup>933</sup> The report contained eight articles devoted to piracy. It is in these articles, that the genesis of the present UNCLOS provisions emerged. The relevant provisions are reproduced here:

#### *Article 13*

‘All States shall co-operate to the fullest possible extent in the repression of

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<sup>931</sup> *Idem* at 53, par. 16. Mr Zourek (at par. 18) queried whether ‘the Special Rapporteur excluded from his definition of piracy attacks made on the coast by vessels descending from the high seas. The consequence of such a limitation would be that once those vessels had returned to the high seas they could not be pursued.’ François replied by saying (at par. 19): ‘unless pursuit had started in the territorial sea, once the vessel had reached the high seas nothing could be done’.

<sup>932</sup> *Idem* at 52, par. 10.

<sup>933</sup> Doc. A/2934: Report of the International Law Commission covering the work of its seventh session, 2 May – 8 July 1955.

piracy on the high seas.’

Despite the peremptory language contained in this article, especially by the use of the word ‘shall’, the commentary notes that ‘the state must be allowed a certain latitude as to the measures it should take to this end in any individual instance’.<sup>934</sup> Critical to this analysis is the definition of piracy, which has been recorded in the next article as follows (emphasis added):

*Article 14*

‘Piracy is any of the following acts:

1. Any illegal act of violence, detention, or any act of depredation directed against persons or property and committed for private ends by the crew or the passengers of a private vessel or a private aircraft:
  - (a) Against a vessel *on the high seas* other than that on which the act is committed, or
  - (b) Against vessels, persons or property in *territory outside the jurisdiction of any State*.
2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts which make the ship or aircraft a pirate ship or aircraft.
3. Any act of incitement or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.’

What is immediately evident from this article is the substantial deviation from the text of the original Harvard University draft, and the working drafts by François. There are no published records of the reasons or rationale behind the changes. The commission considered six controversial elements, as cited in the preceding pages of this chapter.<sup>935</sup> The element which needs to be restated here is that ‘piracy can be committed only in the high seas or in a place outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea’.<sup>936</sup> In relation to this element, the commission recorded the following short commentary:

‘[T]he Commission considers, despite certain dissenting opinions, that where

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<sup>934</sup> *Idem* at 25.

<sup>935</sup> See the text accompanying fn 19 *supra*.

<sup>936</sup> Doc. A/2934: Report of the International Law Commission covering the work of its seventh session, 2 May–8 July 1955 at 25.

the attack takes place within the territory of a State, including its territorial sea, the general rule should be applied that it is a matter for the State affected to take the necessary measures for the repression of the acts committed within its territory. In this the Commission is also following the line taken by most writers on the subject.<sup>937</sup>

Some issues emerge from this commentary that remain open to question, namely, whether there was a discussion on the extent of such dissenting opinions (as outlined in the previous chapter of this thesis).<sup>938</sup> Furthermore, in light of the commentary of the Harvard researchers, the exclusive reliance on ‘the line taken by most writers on the subject’, without published evidence of a probative analysis, is superficial. Whilst provision is made for cooperation in the repression of piracy on the high seas,<sup>939</sup> there is no corresponding provision made for cooperative measures in the territorial sea under this framework, the scenario under consideration being where a state, acting pursuant to this framework, engages a vessel suspected of committing piracy and makes a seizure in the territory of a foreign state with the consent and cooperation of that state. Under this framework, would a state be required to exercise enforcement jurisdiction without any foreign assistance? This lacuna in the conceptual framework would result in a scenario where a flotilla of foreign naval forces could cooperate and coordinate naval interdiction measures effectively on the high seas and within the exclusive economic zone, but the coastal sovereign would be solely responsible for repressing piracy against international commercial shipping in its waters.

Article 18 contains enforcement jurisdiction provisions, and universal jurisdiction was limited to the high seas or in a place outside the jurisdiction of any state.<sup>940</sup> The provision is replicated in the present article 105 of UNCLOS.

This draft and commentary were distributed to governments by the ILC for further discussion, and their responses considered by the commission at its 343<sup>rd</sup> meeting on 9 May

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<sup>937</sup> *Idem.*

<sup>938</sup> *See*, for example, the case of *People v Lol-Lo and Saraw* (1922) referred to in chapter 3.

<sup>939</sup> *See* article 13, cited in the text *supra*.

<sup>940</sup> The article provided (with my emphasis): ‘On the *high seas or in any other place not within the territorial jurisdiction of another State*, any State may seize a pirate ship or aircraft or a ship taken by piracy and under the control of pirates, and property or persons on board. The courts of that state may decide upon the penalties to be imposed, and determine the action to be taken with regard to the property, subject to rights of third parties acting in good faith.’

1956.<sup>941</sup> In the minutes of the meeting, regarding article 13, Mr Radhabinod Pal asked whether, if the proposal was adopted, ‘a State in whose territorial waters an act of piracy was committed would allow vessels of another State to intervene’.<sup>942</sup> To this question, the Chairman pointed out ‘that an essential condition of piracy was that it should be committed outside the jurisdiction of any State. A vessel so captured would be subject to the jurisdiction of the State of the vessel effecting the capture.’<sup>943</sup> This response is another instance of the presumption of state capacity in exercising enforcement jurisdiction within its waters, and, as one Commissioner reaffirmed, ‘international co-operation could be ensured only on the high seas’.<sup>944</sup> Mr Sandström, whose suggestions were outvoted in previous sessions, once again urged that ‘it was surely an obligation of States to suppress piracy wherever it was committed’.<sup>945</sup> It is worth noting Rubin’s observation that the bulk of the Commission’s energy was spent discussing the desirability of including aircraft within the definition.<sup>946</sup> Taking into consideration the responses from governments, the ILC adopted a final text and commentary at its eighth session in 1956, as articles 38 to 45.<sup>947</sup>

## VI. THE FIRST UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (1958) AND THE BUILD UP TO UNCLOS (1982)

### 6.1 Convention on the High Seas of 1958

In 1957, the United Nations General Assembly decided to convene a conference on the law of the sea.<sup>948</sup> The conference, with participants from 86 states, was held in Geneva and commenced on 24 February 1958, and ended nine weeks later in the late hours of 27 April 1958. It became apparent from the deliberations that piracy did not receive much attention. Contextually, during this period, piracy was seen as a historical curiosity, and, to this end, at the 11<sup>th</sup> meeting of the conference on 17 March 1958, the following was raised:

‘Although the experience of recent years had shown that piracy was by no means a thing of the past, the Czechoslovak delegation considered that the provisions concerning piracy in the draft articles occupied a disproportionate

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<sup>941</sup> 343<sup>rd</sup> Meeting, Wednesday, 9 May 1956. Chairman: Mr F.V. Garcia-Amador; Rapporteur: Mr J.P.A. François, reported in the *Yearbook of the International Law Commission* 1 (1956) at 45.

<sup>942</sup> *Idem* at 46.

<sup>943</sup> *Idem*.

<sup>944</sup> *Idem*.

<sup>945</sup> *Idem*.

<sup>946</sup> Rubin (1988) at 332.

<sup>947</sup> The report appears in *Yearbook of the International Law Commission* 2 (1956) at 282-283. The definition of piracy appears in article 39.

<sup>948</sup> United Nations, General Assembly, G.A. Res 1105 (XI), U.N. Doc. A/RES/1105 (XI) (21 February 1957).

amount of space.’<sup>949</sup>

Moreover, other delegates further supported this view. At the 27<sup>th</sup> meeting on 27 April 1958, there was a consideration of the draft articles adopted by the ILC. Uruguay proposed:

‘[T]he deletion *in toto* of articles 38 to 45 because piracy no longer constituted a general problem, and its suppression was already the subject of numerous international treaties with which the Commission’s articles might conflict’.<sup>950</sup>

Against this context, Czechoslovakia proposed that the entire regime pertaining to piracy be reduced to a single article in the following terms:

‘All States are bound to take proceedings against and to punish acts of piracy, as defined by present international law, and to co-operate to the fullest possible extent in the repression of piracy.’<sup>951</sup>

Were this proposal adopted, it would have meant the entire corpus of piracy jurisprudence, conflicting and convoluted though it may have been, being reduced to a single article. Fundamental statutory interpretation rules would immediately reveal patent flaws in the architecture of this article, for example: where multiple states are involved in the seizure of suspects, which penal code would be applied? Furthermore, the article defines piracy by referencing the ‘present international law’, meaning customary international law. The comprehensive analysis conducted during the preceding chapter, and in the course of this chapter, has shown that there was no standard definition for piracy under customary international law. In relation to the context of the present discussion, this article makes no mention of the *locus* of piracy. Although it could be argued that the *locus* could be ascertained by reference to customary international law, the delegates proposing this article stated that the ILC was mistaken in excluding attacks made in the territorial sea. It is useful to reproduce their submission concerning this proposed article (emphasis added):

‘Mr. CERVENKA ... pointed out that the definition of piracy in article 39 of the Commission’s draft did not accord with existing rules of international law

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<sup>949</sup> *United Nations Conferences on the Law of the Sea: Official Records* 4-5 (1980) at 25. This volume covered the work of the second committee (High Seas: General Regime).

<sup>950</sup> *Idem* at 78. The Romanian delegation (at 78-79) supported this view, and ‘considered that the International Law Commission had been mistaken in devoting so many articles to piracy, which was no longer a very real problem. He had therefore been impressed by the Uruguayan representative’s argument. States could be relied upon to take the necessary steps for protecting navigation on the high seas.’ It is noteworthy that the delegation also based their assertions on the concept of state capacity.

<sup>951</sup> *Idem* at 128. Doc. A/CONF.13/C.2/L.46 (12 March 1958). This was a joint proposal by Albania and Czechoslovakia.

and failed to enumerate all the categories of acts which in theory and practice were encompassed by that concept. Furthermore, the definition erroneously included acts committed on *terra nullius*, and was *equally mistaken in excluding attacks made in the territorial sea or on the mainland made by vessels coming from the high seas and afterwards escaping thither ...* In fact, the notion of piracy put forward in articles 39 to 42 was an obsolete one, and no attempt had been made to legislate for the dangerous forms which it could take in the present time. Though it would have been desirable to elaborate on a new definition, his delegation realized that it would be impossible in the time available'.<sup>952</sup>

From this comment, it is evident that delegates considered that a progressive development of the law would be required instead of a codification of existing law. The dynamics of these meetings are also evident, where time constraints placed a restriction on engaging in a deeper analysis – the reference to attacks committed in territorial waters was not debated further.

The streamlined proposal above did not prevail, but the ILC's draft provisions itself did not receive any extensive discussion either. Ultimately, the ILC draft, in an amended form, was inserted into the Geneva Convention on the High Seas of 29 April 1958. They appeared as articles 14 to 21.<sup>953</sup>

## **6.2 The United Nations Convention on the Law of the Sea, 1982 (UNCLOS)**

UNCLOS was the culmination of the third United Nations Conference on the Law of the Sea, held between 1973 and 1982 (UNCLOS III). The articles adopted at the 1958 Geneva Conference were inserted with unexplained minor changes into UNCLOS and appear in that Convention as articles 100-107, as presented in section 1.2 of the opening pages of this chapter. Geiß and Petrig observe that there is widespread agreement that the piracy regime contained in UNCLOS reflects customary international law in the present day.<sup>954</sup> In article 101, which contains the definition of piracy, the requirement in subparagraphs (a)(i) and (ii) – that piracy take place on the 'high seas' or 'in a place outside the jurisdiction of any State' – excludes foreign action within the territorial sea of a state. At the conference, this provision found its basis in article 39 of the ILC draft article and endorsed its commentary.

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<sup>952</sup> *Idem* at 78.

<sup>953</sup> These articles are reproduced *et seq* in the appendix.

<sup>954</sup> Geiß and Petrig (2011) at 41. *See, also*, Nandan and Rosenne (eds) *United Nations Convention on the Law of the Sea 1982: A commentary* 3 (1995) at 197, where the commentary to article 101 (definition) states that this is a general definition under public international law.

There was no further interpretation at UNCLOS III.<sup>955</sup> At the 1971 session of the Sea-Bed Committee, Malta made a proposal regarding the wording of article 101, which read (emphasis added):

‘Piracy consists of any of the following acts:

- (a) Any illegal acts of violence, detention or any act of depredation committed by the crew or passengers of a private vessel or private aircraft, and *directed anywhere in ocean space* or in the superjacent atmosphere against another vessel or aircraft, or against persons or property on board such vessel or aircraft’.<sup>956</sup>

This provision was not adopted, however. It is worth noting that this broadened the scope of the provision to apply to all areas on or above the sea, or on the seabed beyond internal waters.<sup>957</sup>

This lack of further analysis of the piracy provisions of UNCLOS III could be explained in relation to the decline of pirate activity in the Mid-Twentieth Century, resulting in piracy being disregarded as an acute or potential threat. Under the present regime, therefore, piracy *jure gentium* cannot be committed in the territorial sea of a state and universal enforcement jurisdiction does not apply in this realm.

## VII. CONCLUDING REMARKS AND SUMMARY OF KEY FINDINGS

The Security Council, in all their resolution relating to the suppression of piracy off the coast of Somalia, explicitly affirms that: ‘international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to combatting piracy and armed robbery at sea’.<sup>958</sup> Having outlined said framework in this chapter, it was argued that this framework was restrictive, the relative geographical limitations of the articles being highlighted and placed in context. The high seas’ limitation placed a restriction on the exercise of universal enforcement jurisdiction within territorial seas. The restriction came to the fore in the fight against piracy off the coast of Somalia and the waters of the western Indian Ocean. It was shown how this framework relies on the presumption that a state, left to its own devices, is capable of combatting piracy committed against international commercial shipping in their territorial

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<sup>955</sup> See Nandan and Rosenne (1995) at 201.

<sup>956</sup> A/AC. 138/53, article 18, reproduced in SBC Report 1971, at 105, 123 (Malta), and cited in Nandan and Rosenne (1995) at 197.

<sup>957</sup> *Idem* at 198.

<sup>958</sup> See, for example, S.C. Res. 1916, preambular par. 4.

sea, and was based on a respect for the territorial sovereignty of the coastal state. It was further argued that contemporary writers did not see the high seas' limitation as an area of contention – this chapter rejects that view.

This chapter sought to ascertain how this conceptual framework arose, and to understand how this limitation developed during the codification process. A critical survey of the drafting history of the codification process of the piracy regime was undertaken in a chronological order, surveying the attempts of the League of Nations, the Harvard University research in international law, the International Law Commission, the Geneva Convention on the High Seas of 1958, and the UNCLOS in 1982. In traversing each of these codification attempts, the present researcher tracked the issue of the high seas' limitation and analysed the deliberations at each stage.

It was proposed that the Matsuda Draft was the first drafting attempt, but that it had no link to the enormous corpus of piracy jurisprudence set out in the previous chapter of this thesis. Some useful articles relating to the hot pursuit in the territorial seas were highlighted, which, if adopted into the current framework, would have assisted in the fight against contemporary piracy. The Harvard University research draft carried this pioneering codification work further, and was supported by a voluminous commentary. A review of this commentary demonstrated, however, that the historical and jurisprudential principles upon which the draft rested were based on a deficient analysis of the historical position, and could not be regarded as a codification of customary international law. The provisions relating to pursuit and seizure in territorial waters, particularly within article 7, similar to the Matsuda draft, were seen as particularly useful in the present context.

It was found that these useful provisions were not carried over into the codification process undertaken by the ILC. No explanation in published minutes or reports were given regarding the deliberations to remove these useful provisions from the framework. This is seen as a significant shortcoming in the development of the framework, and has not been the subject of scrutiny within any of the present scholarship and academic commentary. Accordingly, this chapter has highlighted the gap in developing piracy jurisprudence by considering deliberations in the codification attempts, which have not been revisited in recent scholarship, especially in light of the circumstances of present-day piracy.

Furthermore, a detailed review of the work of the ILC, Geneva Convention, and UNCLOS III revealed that, at each stage, commissioners raised queries about the high seas' limitation

and these queries, without a substantive or probative analysis, were rejected in the process. Holistically, the process failed, as Rubin describes:

‘The International Law Commission failed throughout its deliberations concerning article 14 to focus on the evolving patterns of jurisprudential thought and political and economic activity that lay behind the writings of some of the Commissioners seem to have found persuasive; that instead primary reliance for background information was placed on the Harvard Research.’<sup>959</sup>

Rubin also makes an apt observation: ‘the final version appears to be at least as much the product of exhaustion and the dynamics of a group drafting committee as of logic or a knowledge of jurisprudent and history’.<sup>960</sup> The dearth of incidents of both piracy and scholarship on the subject during the mid Twentieth Century also significantly contributed to deliberations, whereby the relevance of even inserting piracy rules in the codification process of the international law of the sea was doubted at the time. The work of the ILC, Geneva Convention, and UNCLOS III contained no substantive commentary on the high seas’ limitation and ultimately placed its foundation on the Harvard University research draft, which was flawed.

Ultimately, this chapter reveals that the present framework contained in UNCLOS was premised on a hollow foundation, and suggests that some of the provisions identified in the Matsuda and Harvard University drafts could be adapted and incorporated in an amended UNCLOS framework, which would assist the fight against piracy in the present day. The final chapter of this thesis will recommend a redrafted UNCLOS provision in the light of both these findings, and the findings concerning sovereignty in the previous chapter. This redrafted provision will argue for the inclusion of territorial waters applying to the international framework, thereby making a distinctive contribution to the ongoing deliberations on piracy law.

In the following chapter, this framework will be presented with relation to African context, and will be undertaken in two parts. First, the effect of the resolutions to combat piracy passed by the United Nations Security Council off the coast of Somalia, as well as its implication on the high seas’ limitation of UNCLOS will be considered. Second, the national application of this international framework will be reviewed against the South

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<sup>959</sup> Rubin (1988) at 333.

<sup>960</sup> *Idem.*

African legal system, with a comparison of Kenyan domestic prosecution cases and framework.

# V

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## LEGAL FRAMEWORKS APPLICABLE TO THE EAST AFRICAN SEABOARD

*“You cannot control what you cannot patrol”*<sup>961</sup>

### I. INTRODUCTION

#### 1.1 Prefatory

Having adumbrated the nature and extent of piracy and armed robbery committed off the east African seaboard in the second chapter, and having set out a probative analysis of the origins, development and present state of the international framework to combat piracy, this chapter now considers the application of the various legal frameworks to the east African seaboard in this context. The chapter traverses in detail the international responses, continental and regional initiatives as well as municipal approaches to combating piracy in the region. In the second chapter, the statistical analysis revealed that piratical acts do occur in territorial waters and this fact is the stimulus that underscores references in the course of this chapter to the notion of universal enforcement jurisdiction within territorial waters of coastal states.

#### 1.2 Flow of the chapter

This chapter is presented in three broad parts:

- 1.2.1 The first part commences with a discussion of *international and regional* responses applicable to the east African seaboard due to the circumstances of piracy set out in the second chapter. As was discussed in the introductory chapter, a key provision in the international framework is article 105 of UNCLOS. For ease of reference, this article is briefly outlined and divided into its constituent elements: The first element of the article provides: ‘*On the high seas, or in any other place outside the jurisdiction of any State*’. This element unambiguously restricts enforcement measures, as outlined in the next element, to the realm of the high seas and the exclusive economic zone (EEZ), and prevents action from being taken in territorial waters. The second element of the article states: ‘*every State may seize a pirate ship ... or a ship ... taken by piracy and under the control of pirates, and arrest the*

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<sup>961</sup> Cited in Kings ‘SA all at sea over illegal fishing’ *Mail and Guardian* (20 May 2016) at 8.

*persons and seize the property on board*'. This is the clause that makes provision for universal jurisdiction and details that enforcement measures must be carried out by individual states. The third element provides: '*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 ... or property, subject to the rights of third parties acting in good faith.*' Here, it is proposed that a discretionary power must be held by states to prosecute the suspects according to the domestic law of the capturing state. There is some debate as to whether this clause vests this power exclusively with the capturing state. Roach presents the state of affairs with regard to prosecution in the following way:

'Traditionally, pirates have been held accountable through prosecution in national courts. At present, no treaty expressly requires states to criminalize piracy, no agreement has been reached on what such laws should contain, and no international court has jurisdiction to try pirates.'<sup>962</sup>

This section considers the application of this enforcement regime in light of the fact that piratical acts occur in territorial waters, outside the bounds of the application of article 105. The *international* response to circumvent the restriction contained in article 105 was exemplified through the United Nations Security Council that issued a series of resolutions that allows states to engage in enforcement jurisdiction within the territorial waters of Somalia in an *ad hoc* and *sui generis* deviation from the provision of article 105. The section unpacks and analyses these resolutions and discusses its limitations and restrictions. Turning then to a *regional* response, a complementary instrument, the Djibouti Code of Conduct, is analysed and its merits are highlighted.

- 1.2.2 The second part of the chapter then shifts to discuss the approaches to anti-piracy measures in municipal law. Two prominent states on the east African seaboard, South Africa and Kenya are selected as a sample study. Although the domestic law of states are of minimal import assessing or revisiting the framework of international counter-piracy measures, Miles notes that '[s]tates remain the dominant transacting entities on the international plane and it is states' conceptions

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<sup>962</sup> Roach 'Countering Piracy off Somalia: International Law and International Institutions' 104 *American Journal of International Law* (2010) 397 at 414.

of their own rights and duties that shape the modern contours of the discipline.’<sup>963</sup> It would thus not be unwarranted to consider in some detail the approach of influential states along the east African seaboard in its reception of the international framework and its domestic policy.

1.2.3 The final part of the chapter turns to a detailed treatment of the continental approach to anti-piracy measures. The analysis will survey the work of the Organisation of African Unity and its successor, the African Union. In surveying the work of this organisation, the discussion will traverse how maritime security reached to the forefront of AU policy making following the surge of piracy in the region under analysis between 2009 and 2010. The measures and decisions taken by the AU to combat piracy are set out in a chronological sequence leading to a survey of two key instruments: the 2050 Africa Integrated Maritime Strategy and the African Charter on Maritime Security, Safety and Development in Africa. Following this survey, this section lastly sets out some observations on the general tenor and development of the nascent African continental framework pertaining to piracy and presents a case for the introduction of universal enforcement jurisdiction for anti-piracy measures in territorial waters of AU member states. The compatibility of this submission with the developing jurisprudence of the AU is then tested.

The findings of the chapter are then presented holistically and sets the scene for the recommendations which are proposed in the final chapter of this thesis.

## II. INTERNATIONAL AND REGIONAL FRAMEWORKS

### 2.1 Effect of the resolutions of the Security Council of the United Nations

#### 2.1.1 *The need for an additional enforcement remedy*

The preceding two chapters considered *in extenso* the origins of the geographical limitation of universal enforcement jurisdiction to the high seas, or a place outside the jurisdiction of a state. When applied to the present piracy off the coast of Somalia, the limitation becomes an apparent obstacle to the enforcement regime. As Guilfoyle points out, ‘the enforcement jurisdiction granted to all States in international waters does not extend to pursuing pirate

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<sup>963</sup> Miles ‘The *Franconia* sails on: Revisiting the intellectual history of the territorial sea in the United States, Canada and Australia’ 13 *Oxford Commonwealth Journal* (2013) 347 at 377.

vessels into the territorial sea of any State'.<sup>964</sup> Klein further illustrates how foreign warships or state vessels have no policing powers within the territorial sea or internal waters of another state, without the consent of the coastal state.<sup>965</sup> She proposes that this lack of power is underlined by the limitations that inhere to the right of innocent passage,<sup>966</sup> and further says that the termination of the right of hot pursuit 'as soon as the pursued vessel enters the territorial sea of its own or a third state reinforces the lack of policing powers of other state in the territorial sea, even if pirates, the enemies of all human kind, are being pursued'.<sup>967</sup>

The consequence of this was observed by Guilfoyle, who remarked: 'the ability of pirates to evade pursuit by crossing into territorial waters remains a real problem, particularly in the waters off Somalia'.<sup>968</sup> Accordingly, Roach illustrates that, 'prior to June 2008, the inapplicability of the international law of piracy in the territorial sea afforded pirates a safe haven, to the frustration of counterpiracy naval forces'.<sup>969</sup>

It was within this context of geographical limitations that the United Nations Security Council (SC) passed a series of resolutions, which *inter alia* expand the scope of enforcement powers to allow for a more effective suppression of piracy in the region.<sup>970</sup>

In December 2007, the International Maritime Organisation (IMO) passed a resolution, which *inter alia* called on the Transitional Federal Government (TFG) of Somalia to:

'advise the Security Council that ... it consents to [foreign] warships or military aircraft ... entering its territorial sea when engaging in operations against pirates or suspected pirates and armed robbers endangering the safety of life at sea ... specifying any conditions attached to the consent given'.<sup>971</sup>

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<sup>964</sup> Guilfoyle 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' 57 *International and Comparative Law Quarterly* (2008) 690 at 694.

<sup>965</sup> Klein *Maritime Security and the Law of the Sea* (2012) at 304.

<sup>966</sup> *Idem*. She explains that under article 19(2) of UNCLOS, foreign vessels are prohibited from conducting a range of military activities – as well as any other activity not having a direct bearing on passage.

<sup>967</sup> *Idem*.

<sup>968</sup> Guilfoyle (2008) at 694. Geiß and Petrig (2011) at 70 similarly comment that in the case of Somalia, 'the repercussions of the ... geographical limitations inherent in UNCLOS' piracy definition could potentially be of particular impact'.

<sup>969</sup> Roach 'Countering Piracy off Somalia: International Law and International Institutions' 104 *American Journal of International Law* (2010) 397 at 400.

<sup>970</sup> Geiß and Petrig (2011) at 70.

<sup>971</sup> IMO Doc. A 25/Res 1002 (6 December 2007) at par. 6. See Guilfoyle (2008) at 694.

Accordingly, a letter was handed to the President of the SC by the Permanent Representative of the Somalia Republic to the United Nations on 27 February 2008, which conveyed the consent of the TFG.<sup>972</sup> Subsequently, the SC had two options, as described by Geiß and Petrig:

‘To draft a comprehensive and region-specific enforcement regime from scratch, tailored specifically towards the repression of the criminal phenomenon encountered in the Gulf of Aden, or to build upon the existing enforcement regime contained in UNCLOS and to remedy its shortcomings so as to better target piracy off Somalia’s coast.’<sup>973</sup>

They added that the SC ‘understandably and without any realistic alternative’ chose the latter option.<sup>974</sup> At the behest of France, Panama and the United States, on the 2 June 2008, the SC, acting under Chapter VII of the UN Charter, passed Resolution 1816 with the consent of the TFG of Somalia.<sup>975</sup>

#### 2.1.2 Operative provisions of the UN SC resolutions

Of particular relevance to this study is that the resolution, subject to the caveats discussed below, remedied the territorial limitation of the enforcement measures contained in article 105 of UNCLOS. The full text of this resolution is appended to this thesis *et seq*, and, while this resolution has been renewed in a series of further resolutions, the content of this particular resolution will be analysed here. Operative paragraph 7 provides (emphasis added):

‘*Decides* 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.’

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<sup>972</sup> See the preambular paragraphs of S/RES/1816 (2008).

<sup>973</sup> Geiß and Petrig (2011) at 70.

<sup>974</sup> *Idem*.

<sup>975</sup> United Nations Security Council S/RES/1816 (2008), 2 June 2008. 5902<sup>nd</sup> Meeting.

Considered in isolation, the provision, firstly, allows states operating within the parameters of the resolution to pursue pirate vessels from the high seas into Somalian territorial waters and, secondly, to counter violence against or on board vessels occurring within Somalia's territorial sea.<sup>976</sup> This provision, when the safeguards and limitations discussed below are excluded, is a dramatic deviation from the clear geographic limitation outlined in UNCLOS. The types of enforcement measures envisaged to repress acts of piracy would be: pursuing, stopping and boarding the vessel, searching the vessel, seizing the vessel or the property therein, and arresting the persons on board.<sup>977</sup> The caveat, which appears in subsection (a) and (b), namely '... in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law', has been interpreted to show that the resolution does not, in fact, authorise means and measures beyond the UNCLOS enforcement regime.<sup>978</sup> A question immediately arose following analysis of this provision: do the resolutions import the enforcement provisions of article 105 of UNCLOS into the Somali territorial waters? Treves provides an affirmative response to this by stating:

'The basic effect of these provisions is to make the rules of international law concerning piracy on the high seas applicable also to territorial waters, inter alia permitting pursuit from the high seas into these waters and clarifying that states acting under these rules within the territorial waters of Somalia may use 'all necessary means.'<sup>979</sup>

However, Geiß and Petrig are more circumspect in their analysis of the provision and highlight that, based on the wording 'consistent with' and the reference to UNCLOS, that 'it can be inferred that the Council did not in any way intend to extend the direct (geographical) application of UNCLOS to the territorial waters of a singular State'.<sup>980</sup> Guilfoyle definitively states that the resolution does not make the international law of piracy directly applicable to the Somalian territorial sea.<sup>981</sup> His argument is that, under the enforcement provisions on the high seas under article 105 of UNCLOS, it is the capturing warship that 'determines where pirates will be tried and may try them before its own courts

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<sup>976</sup> Guilfoyle (2008) at 695. *See, also*, Roach (2010) at 401, who comments that 'it seems clear that this authority includes capturing suspects who had committed acts of piracy seaward of the territorial sea and were seeking safe haven ashore'.

<sup>977</sup> Geiß and Petrig (2011) at 76-77.

<sup>978</sup> *Idem* at 76.

<sup>979</sup> Treves 'Piracy, Law of the Sea, and use of force: Developments off the coast of Somalia' 20 *European Journal of International Law* (2009) 399 at 404.

<sup>980</sup> Geiß and Petrig (2011) at 71.

<sup>981</sup> Guilfoyle *Shipping Interdiction and the Law of the Sea* (2011) at 66.

without consulting others'.<sup>982</sup> Under the resolution, however, he argues that there is only a grant of enforcement jurisdiction (pursuit and arrest), and not any authority to prosecute the suspects.<sup>983</sup> Given the general tenor of the document, it seems likely that the content of the provisions of article 105 of UNCLOS are applied in Somalia as a whole, rather than rendering the article directly applicable to Somali territorial waters.<sup>984</sup>

It is worth noting that the term 'piracy' is used in the resolution, referring to the regime under UNCLOS as the framework to combat piracy.<sup>985</sup> As detailed in the previous chapter, article 101 of UNCLOS defines piracy, confining the act to the high seas or a place outside the jurisdiction of any state. Accordingly, piratical acts committed in the territorial sea are subject to the jurisdiction of the coastal state to define and punish – the acts in most instances would be classified as armed robbery. The use of the term 'piracy' in the resolution lends credence to the possibility of the applicability of piracy in the realm of the territorial sea as a principle, while the reference to *armed robbery* in the resolution is not accompanied by a definition of the term.<sup>986</sup> Geiß and Petrig observe that the terminology of the resolution, especially in relation to this phrase, is highly inconsistent,<sup>987</sup> and that the definitional elements of armed robbery at sea are 'far from settled under international law'.<sup>988</sup> They provide an observation and interpretation relating to the use of the phrase, 'piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia' in the resolution, which is pertinent to the context of this study. They find that the resolution is 'not entirely clear as to whether the main distinction between piracy and armed robbery at sea is indeed the *locus delicti* ... Potentially, this wording could be read as eliminating the distinction between piracy and armed robbery, along the lines of whether the act is committed on the high seas or in the territorial waters'.<sup>989</sup> They conclude that piracy, as referred to in the resolution, should be construed as referring to piracy as defined

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<sup>982</sup> Guilfoyle (2008) at 696. As article 105 of UNCLOS provides 'The courts of the State which carried out the seizure may decide upon the penalties to be imposed...'.  
<sup>983</sup> *Idem*. He submits (at 697) that 'given that States exercising this power are meant to be cooperating with Somalia, it seems most likely the UNSCR leaves the question of disposition to Somalia'.  
<sup>984</sup> See Geiß and Petrig (2011) at 71.  
<sup>985</sup> See the 4<sup>th</sup> preambular paragraph of the Resolution.  
<sup>986</sup> The International Maritime Organisation, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, IMO Doc. A22/ Res. 922 (22 January 2009) defines armed robbery as 'any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board a ship, within a State's jurisdiction over such offences'. See Geiß and Petrig (2011) at 73. See *idem* at 74, where they observe that 'conduct taking place on the high seas, outside the jurisdiction of any state, cannot constitute armed robbery at sea, according to these definitions'.  
<sup>987</sup> Geiß and Petrig (2011) at 72.  
<sup>988</sup> *Idem* at 73.  
<sup>989</sup> Geiß and Petrig (2011) at 74.

in article 101 of UNCLOS, and that the concept of armed robbery should be construed as encompassing acts of violence against a ship<sup>990</sup> committed in territorial waters.<sup>991</sup>

### 2.1.3 Limitations of the UN SC resolutions

With the introductory remarks on the operative parts of the resolution dispensed with, commentators have noted how cautiously the SC framed the resolution.<sup>992</sup> Guilfoyle remarks that the restrictions upon the powers conferred by the resolution are readily apparent.<sup>993</sup> Regarding these limitations, Treves observes that they make the provisions adopted ‘less revolutionary than they might appear, and seem aimed, in particular, at fending off possible criticism of the Council acting as a ‘legislator’’.<sup>994</sup> These limitations or restrictions can be summarised in the following way:

- (a) The authorisation given under the resolution is given a limited *ratione temporis*.<sup>995</sup> the opening line of paragraph 7 of the resolution confirms that those provisions apply ‘for a period of six months from the date of this resolution’ with a possibility of renewing the provisions.<sup>996</sup>
- (b) The authorisation is also given a limited *ratione loci*.<sup>997</sup> paragraph 9 of the resolution provides that the authorisation ‘applies only with respect to the situation in Somalia’, and that the operation provision gives authorisation ‘to enter the territorial waters of Somalia’ only and no other state. This is notwithstanding the possibility of piratical attacks against international commerce traversing the territorial waters of neighbouring states such as Kenya, Tanzania, Yemen and the Seychelles.
- (c) Following from the limitation above, a further caveat in the architecture of the wording is the emphasis placed on the *ad hoc* nature of the provisions, preventing it from establishing a precedent or customary international law: paragraph 9 of the resolution provides that it ‘shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and

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<sup>990</sup> Under the definitions of armed robbery, the ‘two-ship’ requirement is not an element.

<sup>991</sup> Geiß and Petrig (2011) at 75.

<sup>992</sup> Treves (2009) at 404.

<sup>993</sup> Guilfoyle (2008) at 695. These restrictions are also cognisant of the preservation of other rights exercised by states within the territorial sea - such as the right of innocent passage (par. 8 of the Resolution).

<sup>994</sup> Treves (2009) at 404.

<sup>995</sup> See *idem*. See Guilfoyle (2008) at 695.

<sup>996</sup> See pars 12 and 15 of the Resolution. These operative provisions have since been periodically reviewed. See section 2.4 hereof *et seq.*

<sup>997</sup> See, generally, Treves (2009).

underscores in particular that it shall not be considered as establishing customary international law'. Treves comments that this caveat corresponds with the concerns of developing states regarding maintaining the integrity of UNCLOS.<sup>998</sup>

- (d) The resolution expressly notes that this authorisation is predicated upon the *consent* of the Somali TFG. Paragraph 9 thereof stipulates: 'this authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG'. Because consent is the *sine qua non* of the granting of the authorisation, Treves observes that this takes away 'all, or much of, the revolutionary content of the resolutions'.<sup>999</sup> Indeed, he argues that the kind of authorisation in the resolution could be granted by the coastal state in the absence of a SC resolution,<sup>1000</sup> further providing a useful observation in this regard: 'Under international law, states are free to dispose of their rights in their territorial seas, for instance by allowing other states to conduct police activities in them.'<sup>1001</sup> The peculiar circumstances of the Somali situation presented the need for intervention by the SC, especially since not every member of the SC recognised the TFG, given the limited territory over which it exercises effective control.<sup>1002</sup> Therefore, a dual justification for authorisation needed to be enacted for those state parties who did not recognise the authority of the TFG.<sup>1003</sup> Those state parties found their authority in the SC's invocation in the resolution of chapter VII of the UN Charter.<sup>1004</sup> Treves observes that state consent is not necessary for action under chapter VII, one of the reasons he attributes to the importance of the coastal state's consent being to 'pay homage to state sovereignty'.<sup>1005</sup>

The discussion under (c) and (d) above effectively, as Hodgkinson argues, 'prevented these resolutions from allowing a state practice to develop that could expand the authority of UNCLOS more broadly in the future through the development of customary international law'.<sup>1006</sup>

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<sup>998</sup> Treves (2009) at 405. *See, also*, Klein (2012) at 281.

<sup>999</sup> Treves (2009) at 406.

<sup>1000</sup> *Idem.*

<sup>1001</sup> *Idem.*

<sup>1002</sup> Roach (2010) at 401.

<sup>1003</sup> *Idem.*

<sup>1004</sup> *Idem.*

<sup>1005</sup> Treves (2009) at 407.

<sup>1006</sup> Hodgkinson 'The Governing International Law on Maritime Piracy' in Scharf *et al* (eds) *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (2015) at 20.

#### 2.1.4 Observations

Although the resolution was passed in 2008, with the option to renew it for a further period, it has since been renewed in 12 month cycles,<sup>1007</sup> and is currently in force under Resolution 2316 [2016]<sup>1008</sup> until 8 November 2017. The longevity of the provisions of the resolution is a testament to usefulness and need for the enforcement regime in UNCLOS to be extended to the territorial sea. Although the draft resolution was adopted unanimously by the state delegates to the SC,<sup>1009</sup> some states ensured that their reservations were ultimately incorporated into the wording of the document, which was thereafter accepted. Two observations can be made:

*First*, as Geiß and Petrig note, these state delegates to the UN SC had ‘viewed the Council’s tampering with an enforcement regime applicable exclusively within Somalia’s territorial waters with scepticism’.<sup>1010</sup> Houghton’s view is that the resolution ‘departed from precedent by granting permission, notwithstanding controlled circumstances, to violate the sanctity which every nation attached to its own territory’.<sup>1011</sup> Klein similarly noted that, ‘despite concerns about the extent of piratical acts (armed robbery) occurring in areas under coastal state sovereignty, there has been little willingness to move away from a position that prioritises the legal rights of the coastal state’.<sup>1012</sup> Hodgkinson emphasises this jealous protection of state sovereignty by noting that ‘States may well be reluctant to cede any authority or control over their sovereign waters unless they are unable to address the acts of piracy on their own’.<sup>1013</sup>

The views of these commentators find support in the minutes of the meeting that led to the adoption of the resolution.<sup>1014</sup> At the SC meeting in which the resolution was adopted, the representative for Indonesia remarked that his country ‘strongly believes that the principle of respect for sovereignty and territorial integrity, as enshrined in the Charter, has to be espoused by the Council at all times’.<sup>1015</sup> They contended that the resolution should be

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<sup>1007</sup> The resolution was renewed by: S/RES/1897(2009), 30 November 2009, par. 7; S/RES/1950(2010), 23 November 2010, par. 7; S/RES/2020(2011), 22 November 2011, par. 9; S/RES/2077(2012), 21 November 2012, par. 12; S/RES/2125(2013), 18 November 2013, par. 12; S/RES/2184(2014), 12 November 2013, par. 13; S/RES/2246(2015), 10 November 2015, par. 14.

<sup>1008</sup> S/RES/2316(2016), 9 November 2016, par. 14.

<sup>1009</sup> UN Security Council, 5902<sup>nd</sup> meeting (2 June 2008) S/PV. 5902 at 4.

<sup>1010</sup> Geiß and Petrig (2011) at 77.

<sup>1011</sup> Houghton ‘Walking the Plank: How the United Nations Security Council Resolution 1816, while progressive, fails to provide a comprehensive solution to Somali piracy’ 16 *Tulsa Journal of Comparative and International Law* (2009) 253 at 280.

<sup>1012</sup> Klein (2012) at 304.

<sup>1013</sup> Hodgkinson (2015) at 24.

<sup>1014</sup> UN Security Council, 5902<sup>nd</sup> meeting (2 June 2008) S/PV. 5902.

<sup>1015</sup> *Idem* at 3.

consistently formulated with two fundamental principles, namely: (i) consistency with UNCLOS, wherein the resolution would not become a basis for customary international law for the suppression of piracy;<sup>1016</sup> and (ii) the resolution be applied exclusively to the unique situation in Somalia and the waters off its coast, and only applying to the territorial waters of Somalia, predicated upon its consent.<sup>1017</sup> They emphasise the maintenance of the integrity and sanctity of UNCLOS<sup>1018</sup> to the extent that they believe that state parties ‘have legal obligations to preserve the rights, obligations and responsibilities of Member States derived from [UNCLOS]’.<sup>1019</sup> Indonesia’s view was not in isolation – Libya noted that the resolution ‘would not touch in the sovereignty of other countries or run counter to the principles of international law or the law of the sea’.<sup>1020</sup> China commented that it has ‘always respected the sovereignty, independence and territorial integrity of Somalia’.<sup>1021</sup> They were of the view that because piracy is an issue that links to the rights and interests of state delegates, the SC must act with ‘great prudence’.<sup>1022</sup> China further made remarks similar to Indonesia, especially with regard to the exclusive applicability of the resolution to the Somali situation and adherence to existing international law and the consent of countries concerned.<sup>1023</sup> These selected extracts provide a persuasive indication of states’ rigid adherence to the notion of sovereignty as a near-absolute concept. There is no indication from these extracts, or from the academic commentary cited above, of any growing acceptance of a broader framing of the concept of sovereignty along the lines of argument detailed in chapter three of this thesis. It provides a precursor to the challenges that could potentially be faced should a process commence to amend the UNCLOS regime, which provides a permanent application of the action envisaged by the resolution. However, some argumentative points could be advanced which support the overall argument of extending the application of the UNCLOS enforcement regime into the territorial sea, namely: (i) prolonging the application of the resolution from an initial period of six months to almost eight years is demonstrative of the necessity of such a framework, together with the analysis of statistics presented in chapter two, which showed a dramatic decline in piratical activity in the region following naval intervention; (ii) there is a willingness amongst states to share information about armed robbery and piracy – Klein notes how multilateral anti-piracy agreements have made information-sharing a centrepiece

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<sup>1016</sup> *Idem* at 2.

<sup>1017</sup> *Idem*.

<sup>1018</sup> *Idem*.

<sup>1019</sup> *Idem*. They furthermore feel duty-bound to express reservations if the acts or instruments passed by the SC could lead to ‘modifying, rewriting or redefining UNCLOS’.

<sup>1020</sup> *Idem* at 4.

<sup>1021</sup> *Idem* at 5.

<sup>1022</sup> *Idem*.

<sup>1023</sup> *Idem*.

of their efforts,<sup>1024</sup> indicating that, within a cooperative environment, predicated closely on consent and consultation, extension of the UNCLOS piracy regime could be feasible; (iii) Klein observes that ‘coastal states are obliged to alert shipping of any known danger to navigation within its waters and arguably may be held responsible for a failure to protect international shipping’<sup>1025</sup> – states could avert sole responsibility for such a failure if cooperation amongst states were to be extended into territorial seas.

*Second*, the South African delegation to the SC made a notable submission at the meeting: ‘we should be clear that it is the situation in Somalia, not piracy in and of itself, that constitutes a threat to international peace and security. Piracy is a symptom of the situation in Somalia.’<sup>1026</sup> Klein explains the rationale for this, namely that there should not be a drive to ‘ostensibly create a broader precedent for the Security Council stepping in to deal with other serious or endemic situations of piracy and armed robbery at sea in specific regions’.<sup>1027</sup> It was the threat to international peace and security that was the driving force behind the genesis of the resolution, and not piracy *per se*. During the period of the resolution’s enactment, it was clear that piracy was viewed as a by-product of the situation that thrived in the circumstances created by the fact that Somalia was a failed state, ultimately necessitating the formulation of the resolution. Klein remarks:

‘it seems likely that ongoing, or particularly violent acts of, piracy and armed robbery at sea could be viewed as a threat to international peace and security enabling the Council to act under Chapter VII if there was sufficient political will to do so’.<sup>1028</sup>

This scenario envisages piracy occurring on a larger scale, and thus meriting the attention of the Council act, and begs the question: What would become of scenarios where pirate attacks are less frequent or sporadic? Piracy is an opportunistic crime – the statistics at the time of writing this thesis show a decline in the instances of piracy which were epidemic at during the passing of the resolution, but the statistics and reports of the IMO still confirm sporadic instances of piracy. It is likely that these isolated incidents will continue in the foreseeable future without the enforcement framework under UNCLOS in territorial seas, especially once the resolution has lapsed. What is needed is a framework that is cognisant of this modern characteristic of piracy.

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<sup>1024</sup> Klein (2012) at 304.

<sup>1025</sup> *Idem* at 302.

<sup>1026</sup> UN Security Council, 5902<sup>nd</sup> meeting (2 June 2008) S/PV. 5902 at 4.

<sup>1027</sup> Klein (2012) at 280.

<sup>1028</sup> Klein (2012) at 280.

Ultimately, notwithstanding the progressive step taken by the SC through its resolutions, it is the limitations and restrictions in the resolutions that hinder the extension of UNCLOS enforcement provisions within territorial seas beyond the parameters of the resolution. Hodgkinson succinctly summarises the *status quo*: ‘accordingly, the high seas requirement in the UNCLOS piracy definition remains an element that limits the applicability of the UNCLOS to acts of piracy occurring in or emanating from within the territorial seas or the territory of a sovereign state’.<sup>1029</sup> The observations noted above, however, contain some useful lessons for the purposes of the present research objective. These considerations will be applied in the formulation of the revised framework in the concluding chapter of this thesis.

## 2.2 The Djibouti Code of Conduct

As has been observed throughout the course of this thesis, piracy is not confined to a particular realm, and the *actus reus* of piracy manifests itself in all jurisdictional realms of the ocean. As Wambua contends, ‘the transnational nature of maritime issues highlights the need for regional maritime cooperation between maritime states’.<sup>1030</sup> Accordingly, commensurate with the international and national framework, combatting piracy is an issue which would find its way into regional partnerships and initiatives. In Africa, regional cooperation agreements and partnerships, for example, throughout the African Union, have been documented in some detail.<sup>1031</sup> Wambua has highlighted, however, how attempts made by African states regarding regional cooperation in the governance of maritime interests have been ‘hindered by their national policies and legislation, often conflicting and marred by duplicity.’<sup>1032</sup> Furthermore, he observes that ‘States are often so fixated on national interests that it is to the disadvantage of the regional common good’.<sup>1033</sup> That being said, Vrancken aptly counters that ‘States have long realised that one of those common interests was to combat piracy’.<sup>1034</sup> In this section, an influential regional initiative, the Djibouti Code of Conduct is considered.

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<sup>1029</sup> Hodgkinson (2015) at 21.

<sup>1030</sup> Wambua ‘Enhancing regional maritime cooperation in Africa: The planned end state’ 18 *African Security Review* (2009) 45 at 46 (cited herein at Wambua [2009a]).

<sup>1031</sup> See, for example: Vrancken ‘The role of the African Union in combating piracy’ Special Edition 1 *Acta Criminologica* (2014) 53-75. A basic discussion can be found in Fouché ‘Policing of piracy and armed robbery perpetrated against ships: The role of interstate partnerships in Africa’ 20 *Acta Criminologica* (2007) 110-122; Meyer and de Vries ‘The role of Interpol in combating maritime piracy’ Special Edition 1 *Acta Criminologica* (2014) 108-120; and Fouché ‘Harmonised legal framework for Africa as an instrument to combat sea piracy’ in Petrig (ed.) *Droit de la piraterie maritime* (2010) at 141-159.

<sup>1032</sup> Wambua (2009a) at 53.

<sup>1033</sup> *Idem* at 54.

<sup>1034</sup> Vrancken (2014) at 54.

### 2.2.1 Background

The IMO, at its 25<sup>th</sup> session, adopted Resolution A.1002(25) on ‘Piracy and Armed Robbery against ships in waters off the coast of Somalia’, on 27 November 2007, which *inter alia* ‘called upon Governments in the region to conclude, in cooperation with the IMO, and implement as soon as possible, a regional agreement to prevent, deter and suppress piracy and armed robbery against ships’.<sup>1035</sup> To this end, a ‘sub-regional meeting on piracy and armed robbery against ships in the Western Indian, Gulf of Aden and Red Sea area was organised by the IMO in Dar es Salaam from the 14 to 18 April 2008’.<sup>1036</sup> The objective was two-fold: first, ‘to enhance the level of awareness of Governments in the region on the wide range of issues relating to piracy and armed robbery against ships’; and second, to ‘prepare a draft regional agreement’.<sup>1037</sup> At this meeting, a draft Memorandum of Understanding was prepared (and is hereafter referred to as the draft code). The concept of the draft code was modelled on the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against Ships in Asia (ReCAAP),<sup>1038</sup> and was later considered at a meeting in Djibouti with various stakeholders on 29 January 2009. As a result of the deliberations, the ‘Code of conduct concerning the repression of piracy and armed robbery against ships in the western Indian Ocean and the Gulf of Aden’ was adopted (hereafter referred to as the Code of Conduct).<sup>1039</sup>

The preambular paragraphs of the Code of Conduct commence by noting the concerns of participant countries regarding ‘the crimes of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden and the grave dangers to the safety and security of persons’. This phrase, however, notably omits any reference to the safety and security of commerce transit at sea. It also reaffirms that ‘international law, as reflected in UNCLOS, sets out the legal framework applicable to combating piracy and armed robbery

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<sup>1035</sup> ‘Code of Conduct concerning the repression of piracy and armed robbery against ships in the western Indian Ocean and the Gulf of Aden’ (hereafter the ‘Djibouti Code of Conduct’), Preambular paragraphs.

<sup>1036</sup> International Maritime Organisation Council Doc. C 100/7 (25 April 2008) ‘Protection of Vital Shipping Interests’ at 1.

<sup>1037</sup> International Maritime Organisation Council Doc. C 100/7/Annex (25 April 2008) at 3.

<sup>1038</sup> *Idem* at 2. See, also, Geiß and Petrig (2011) at 49.

<sup>1039</sup> South Africa became the 19<sup>th</sup> signatory to the Djibouti Code of Conduct on 15 May 2012, around the time the first incidents of piracy started to emerge in the Mozambique Channel – prompting operation Copper. See ‘South Africa signs Djibouti Code of Conduct anti-piracy agreement’ *Defence Web* (17 May 2012).

Available at: [http://www.defenceweb.co.za/index.php?option=com\\_content&view=article&id=25619:south-africa-signs-djibouti-code-of-conduct-anti-piracy-agreement&catid=51:Sea&Itemid=106](http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=25619:south-africa-signs-djibouti-code-of-conduct-anti-piracy-agreement&catid=51:Sea&Itemid=106).

Wambua (2010) at 10, noted that Kenya had reviewed its legislation to meet the requirements of the Code of Conduct.

at sea'.<sup>1040</sup> The Code of Conduct is clear on its deference to the sovereign rights of states, as evident by its promotion of 'mutual respect for the sovereignty, sovereign rights, sovereign equality, jurisdiction, and territorial integrity of States'.<sup>1041</sup> Geiß and Petrig observe how the Code of Conduct has already been 'praised as a milestone development and a central instrument in the development of regional capacity to combat piracy'.<sup>1042</sup> Furthermore, the UN SC, in Resolution 1918, welcomed 'the progress being made to implement the IMO Djibouti Code of Conduct, and calls upon its participants to implement it fully as soon as possible'.<sup>1043</sup>

### 2.2.2 Key provisions

The full text of the Code of Conduct is reproduced *et seq* in the annexures to this thesis, and defines piracy by adopting article 101 of UNCLOS, and inserting a definition of armed robbery. The purpose and scope is then outlined, whereby participants intend to cooperate to the fullest possible extent in the repression of piracy and armed robbery, which *inter alia* would entail: sharing and reporting relevant information; interdicting ships suspected of engaging in piracy or armed robbery against ships; and ensuring that persons committing or attempting to commit piracy or armed robbery against ships are apprehended and prosecuted.<sup>1044</sup>

What is evident, even from the title being a 'code of conduct', is that it is not a legally binding instrument,<sup>1045</sup> and not open for accession by any state.<sup>1046</sup> Article 4 lays out the enforcement measures to repress piracy which is focus of the present study, and article 4(4) is representative of the UNCLOS enforcement provision:

'Any Participant may seize a pirate ship beyond the outer limit of any State's territorial sea, and arrest the persons and seize the property on board.'

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<sup>1040</sup> This paragraph supersedes the equivalent in the draft code which distinguished customary international law from UNCLOS: 'Bearing in mind the importance of the [UNCLOS] and of the customary international law of the sea' International Maritime Organisation Council Doc. C 100/7/Annex (25 April 2008) at 8.

<sup>1041</sup> Code of Conduct at 4.

<sup>1042</sup> Geiß and Petrig (2011) at 48-49.

<sup>1043</sup> UN Security Council Resolution 1918, UN Doc. S/Res/1918 (27 April 2010) at par. 3. *See* Geiß and Petrig (2011) at 49.

<sup>1044</sup> Code of Conduct, Article 2. *See*, also, Roach (2010) at 411.

<sup>1045</sup> Article 15(a) provides that 'Nothing in this Code of conduct is intended to (a) create or establish a binding agreement...'

<sup>1046</sup> *See* Geiß and Petrig (2011) at 50.

Article 4(5) provides for enforcement jurisdiction to extend into the realm of the territorial sea, but expressly states that such measures may not take place without the permission of, and being under the authority of the territorial sovereign:

‘Any pursuit of a ship, where there are reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue such a ship in or over the territory or territorial sea of any coastal State without the permission of that State.’

The limitations of this provision thus clearly do not extend the UNCLOS enforcement jurisdiction, and resemble, to some extent, the provisions of the Harvard Draft Convention on piracy as discussed in the previous chapter. Furthermore, article 15(j) reinforces the affirmation of the authority of a state in its territory:

‘Nothing in this Code of conduct is intended to:

...

(j) entitle a Participant to undertake in the territory of another Participant the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Participant by its national law.’<sup>1047</sup>

It is worth noting that the draft code contained a more detailed process on the enforcement and hot pursuit measures into the territorial sea,<sup>1048</sup> however, these additional clauses were

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<sup>1047</sup> Similarly, article 4(7).

<sup>1048</sup> Article 4(5) as it appears in the draft code is reproduced here with the deleted aspects in italics: ‘Any pursuit of suspect ships extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue a suspect ship in or over the territory or territorial sea of any coastal State without the permission of that State. *In those exceptional circumstances when a law enforcement or other authorized ship of a Participant (“the Pursuing Participant”) commences pursuit of a suspect ship seaward of any State’s territorial sea and the suspect ship enters or manifests intent to enter the territorial sea of a Participant coastal State, then:*

a. *the Pursuing Participant should notify the focal point of the Participant coastal State (as designated pursuant to Article 8 of this Understanding) of the pursuit and estimated time and location of arrival at the territorial sea; and*

b. *the focal point of the Participant coastal State should notify the Pursuing Participant whether:*

i. *a law enforcement or other authorized ship from that State is available to respond and intends to relieve the Pursuing Participant of the pursuit; or*

ii. *upon receipt of the Participating coastal State’s permission, the Pursuing Participant may pursue the suspect ship into the Participating coastal State’s territorial sea and the Participating coastal State may provide any specific instructions as to the actions that the Pursuing Participant may take.’*

removed from the final Code of Conduct without any substantive commentary explaining the rationale for this position. The deleted clauses provided a mechanism for a channel of communication between a ‘focal point’<sup>1049</sup> in the coastal state, and the participant state about to engage in pursuit of a suspect ship in the coastal state.

While the Code of Conduct emphasises cooperation to the fullest possible extent to repress piracy and is seen as a progressive measure that goes a long way towards complimenting the UNCLOS provisions, the emphasis on respect of sovereign rights, territorial integrity, and the clear restriction and safeguards regarding foreign naval interdiction in territorial seas effectively means that the Code of Conduct does depart from the restrictive application of the UNCLOS enforcement regime. The aforementioned deleted provisions, including the concept of establishing focal points of contact, are useful and will be revisited in the recommendations at the close of this thesis.

### III. MUNICIPAL FRAMEWORKS: SOUTH AFRICA

#### 3.1 Policy framework: background

In turning the discussion towards a South African context, a few considerations must be made – a useful starting point being the prevailing seascape in South Africa. The shoreline of South Africa is one of the largest in Africa, with an approximate length of 3 924 kilometres at the high-water line.<sup>1050</sup> Being party to UNCLOS, South Africa also has the largest Exclusive Economic Zone, with an area of 1 553 000 square kilometres.<sup>1051</sup> South Africa is located at the confluence of three oceans – the Atlantic, the Indian and the Southern Oceans – and is at a maritime choke point for international commercial shipping. According to the *South African Defence Review* of 2015, published by the Department of Defence, ‘the maritime interests of South Africa are derived from its geographic location, economic infrastructure and geo-political aspirations and obligations as a regional maritime power’.<sup>1052</sup> A founding premise of South African policy and rhetoric is contained in an address by former President Nelson Mandela, made in 1997 at the 75<sup>th</sup> anniversary of the South African Navy where he said:

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<sup>1049</sup> Article 8 of the Code of Conduct, titled ‘Coordination and Information Sharing’, provides that ‘Each Participant should designate a national focal point to facilitate coordinated, timely, and effective information flow among the Participants consistent with the purpose and scope of this Code of conduct.’

<sup>1050</sup> See: *South African Defence Review* (2015) at par. 12. Available at: <http://www.dod.mil.za/documents/defencereview/Defence%20Review%202015.pdf>

<sup>1051</sup> *Idem* at par. 13.

<sup>1052</sup> *Idem* at par. 12.

‘The sea is a vital national interest, and that is why we maintain a navy. Just as we believe that all people should be free, so too as a nation we believe in the freedom of the seas. That is a matter of national strategic interest. We are a maritime nation trading all over the world. We accept our obligation to combine with other maritime nations to uphold the freedom of the seas and to protect our national interests through naval power.’<sup>1053</sup>

With this vast ocean realm surrounding the land territory of South Africa, it is apt to name South Africa a maritime nation. The threat of piracy during the period under review in this thesis has been expressly acknowledged in South African policy and rhetoric. The *South African Defence Review* in 2015 noted that ‘the substantial increase in acts of maritime crime along Africa’s coastline threatens the security and stability of the continent’.<sup>1054</sup> Two consequences arise from South Africa’s geo-political position in the context of the threat of maritime crime, namely South Africa’s international obligations, and its own national interests.

First, with regard to its international obligations, it is stated in the *South African Defence Review* that ‘South Africa lies along a strategic major international trade route, is located far from its key trade partners whom it reaches by sea, and has international obligations for providing safety of navigation and ships, ensuring freedom of the seas and security of shipping’.<sup>1055</sup> Lewis, citing an address by the then Minister of Transport, Mr. Sibusiso Ndebele, comments further on this obligation: ‘South Africa’s maritime strategic interests bring with them huge obligations that include providing for the safety and security of navigation’.<sup>1056</sup> Lewis illustrates that these obligations derive from *inter alia* South Africa being a member of both the International Maritime Organisation, the International Hydrographic Organisation, a subscriber to UNCLOS, and a signatory to the convention on the Safety of Life at Sea (SOLAS).<sup>1057</sup> South Africa is furthermore a key-role player in the African Union and the Southern African Development Community (SADC). Lewis’

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<sup>1053</sup> Cited in Kasrils ‘Sea Power for Africa Symposium’ *Ministry for Intelligence Services* 29 August 2005. Available at: <http://www.polity.org.za/article/kasrils-sea-power-for-africa-symposium-29082005-2005-08-29>.

<sup>1054</sup> *South African Defence Review* (2015) at par. 28. The *Review* notes *idem* how Somali pirates have operated ‘as far south as the Mozambique Channel’ and ‘as a direct consequence of the piracy along the east coast, many shipping companies have had to use the Cape Sea Route instead of the Suez Canal.’

<sup>1055</sup> *Idem* at par. 14.

<sup>1056</sup> Lewis (ed.) *Mapping Counter Piracy Actors* (2013) at 40.

<sup>1057</sup> *Idem* at 41.

analysis concludes that there is a ‘growing pressure on the country to play an active role in counter-piracy missions ... due to its status as a leading power in the region’.<sup>1058</sup>

Second, with regard to national interests, the *South African Defence Review* concisely summarises South Africa’s position:

‘South Africa has in essence an ‘island economy’ that is almost totally dependent on maritime transport. The bulk of the country’s GDP is generated through trade, with 90% of exports and imports being transported by sea. As such South Africa has an “obligation to cooperate with other maritime nations to uphold the freedom of the seas and to protect its national interests”.’<sup>1059</sup>

Minister Kasrils also emphasised the importance of maritime and naval power in maintaining maritime stability, especially since: (i) ‘Africa depends heavily on seaborne trade’; (ii) ‘offshore oil and gas are important resources’; (iii) ‘much of the world’s oil and other cargo moves along our coasts’; (iv) ‘African fishing grounds are important sources of protein for many countries in other parts of the world’.<sup>1060</sup>

Thus, in having international obligations and maintaining South African sovereign interests, Lewis makes a critical observation: ‘sovereign right is balanced with a responsibility to protect the area for the international community and so the country must be seen to be playing an active role in counter-piracy operations’.<sup>1061</sup>

### 3.2 Piracy and South African interests

Acts of piracy can directly affect South African interests in a number of ways, the first of which results from the being act committed within the South African territorial sea. Historically, there have been very few instances of piracy directly off South Africa’s coastline. Bulpin records the first known pirates to operate off the coast of Southern Africa as arriving from Europe in 1508,<sup>1062</sup> with his account further revealing a slight peak in pirate activity around the Cape of Good Hope when pirates looted well-laden East-Indiaman ships sailing into Table Bay during the early 18th Century.<sup>1063</sup> During the 19<sup>th</sup>

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<sup>1058</sup> *Idem* at 40.

<sup>1059</sup> *South African Defence Review* (2015) at par. 32.

<sup>1060</sup> Kasrils (2005).

<sup>1061</sup> Lewis (2013) at 41.

<sup>1062</sup> Bulpin ‘Pirates and Piracy’ in Potgieter (ed.) 8 *Standard Encyclopaedia of South Africa* (1973) at 581; Vrancken *South Africa and the Law of the Sea* (2011) at 457.

<sup>1063</sup> *Idem* at 583.

Century, there were scattered instances of mutiny and treason, as depicted in the section 3.4 below, while throughout the 20<sup>th</sup> Century, there were no accounts of piracy in the South African territorial sea. Maritime crime manifested in other forms in South Africa, however, namely in the early 1970s when there was an oil embargo against the Apartheid government, wherein South Africa circumvented the blockage by sourcing illegal shipments through an international network of maritime crime.<sup>1064</sup> Fouché perused records of the International Maritime Bureau, which contained a record of three instances of piracy in South Africa in 2000, 2001 and 2003 respectively,<sup>1065</sup> and, after interviewing members of the South African police, he concluded that one act qualified as theft, and that the other two qualified as attempts to interfere with the safe passage of a ship through the territorial sea, not falling within the definition of piracy.<sup>1066</sup>

A second example of a threat to South African interests is when its nationals fall victim to acts of piracy, for example: in November 2010, when a couple from Durban – Bruno Pelizzari and Deborah Calitz – were hijacked by Somali pirates in their yacht off the coast of Kenya.<sup>1067</sup> The pirates demanded a ransom of R34 million for their release and they were held hostage for 20 months.<sup>1068</sup>

A third example is exemplified where South Africa's interests are jeopardised by piratical acts in areas outside the jurisdiction of South Africa, an example being the cruise liner industry in South Africa being adversely affected by piracy along the East African coast. One media report in particular contained a comment by one of the cruise operators: 'piracy was having a negative impact on South Africa as his company was no longer able to offer passengers an East African cruise between Mombasa, Kenya and Cape Town'.<sup>1069</sup>

Incidents of piracy in the territorial seas of South Africa are rare, however, and therefore currently do not present an area of significant contention. What is relevant is the exercise of South African naval power in law enforcement activities that combat piracy in waters outside the jurisdiction of South Africa. South African approaches to naval power in its

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<sup>1064</sup> See, generally, Desai 'The present in the past: Maritime crime off the coast of Durban, South Africa' 29 *Acta Criminologica* (2016) at 171.

<sup>1065</sup> Fouché 'Policing Piracy and Armed Robbery of Ships in South Africa's Territorial Waters and Contiguous Zone' Unpublished DTech thesis, Tshwane University of Technology (2006) at 13.

<sup>1066</sup> *Idem* at 14.

<sup>1067</sup> Fourie 'Pirates halve ransom demand for couple' *Natal Mercury* (14 April 2011) at 1.

<sup>1068</sup> 'Pirate ordeal was hell - SA hostages' (27 June 2012).

Available at: <http://www.news24.com/SouthAfrica/News/Pirate-ordeal-was-hell-SA-hostages-20120627>.

<sup>1069</sup> Cole 'Piracy is costing SA: East Coast cruise liners hurt' *Daily News* (12 May 2011) at 5.

newer democratic dispensation find expression in a National Defence White Paper issued by the Minister of Defence on 8 May 1996.<sup>1070</sup> Some of the key provisions are:

‘Ch. 2:§ 11.2: South Africa shall pursue peaceful relations with other states. It will seek a high level of political, economic and military co-operation with Southern African states in particular.

Ch.4:§ 12: South Africa will encourage the development of a multi-lateral common security approach in Southern Africa. In essence, the SADC states should shape their political, security and defence policies in co-operation with each other.

Ch.4:§ 13: A common approach to security in Southern Africa is necessary for a number of reasons. First, many of the domestic threats to individual states are shared problems and impact negatively on the stability of neighbouring countries.

Ch 4.§ 16: Common security arrangements would have many advantages in this context. They could facilitate the sharing of information, intelligence and resources; the early warning of potential crises; joint problem-solving; implementing confidence and security-building measures; negotiating security agreements and treaties; and resolving inter-state conflict through peaceful means.

Ch. 4.§ 29: Finally, South Africa has a common destiny with Southern Africa. Domestic peace and stability will not be achieved in a context of regional instability and poverty. It is therefore in South Africa’s long term security interests to pursue mutually beneficial relations with other SADC states and to promote reconstruction and development throughout the region.’

With such a strong orientation towards cooperation, coupled with the underlying by-product of fostering stability in the region, it would be beneficial for South Africa to become an anti-piracy actor for the continent and to play a leading role.<sup>1071</sup> An issue arises, however, when considering how well equipped South Africa is in exercising enforcement

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<sup>1070</sup> Available at: <http://www.gov.za/documents/national-defence-white-paper>.

<sup>1071</sup> See, for instance, a media report quoting the Commanding Officer of the Naval Base at Durban, Commander Dieter Jones, who stated that ‘given the transnational nature of the crime (piracy) and the non-discriminatory nature of its effect, it is of the utmost importance that all States, littoral and landlocked, become involved, acknowledge a shared responsibility and tackle the crime as a collective’. Cited in Helfrich ‘An insight into South Africa’s counter-piracy operation’ *Defence Web* 2 February 2016.

Available at:

[http://www.defenceweb.co.za/index.php?option=com\\_content&view=article&id=42215:an-insight-into-south-africas-counter-piracy-operation&catid=111:sa-defence&Itemid=242](http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=42215:an-insight-into-south-africas-counter-piracy-operation&catid=111:sa-defence&Itemid=242).

jurisdiction, and when further considering what domestic legal framework is in place to facilitate this. The two issues will be considered in turn below.

### 3.3 Enforcement capability

Notwithstanding international condemnation of the upsurge of piracy at the time of the UN SC Resolution to combat piracy in 2008 and calls for international co-operation, Otto observed that ‘South Africa became involved as a counter-piracy actor rather late in the day’.<sup>1072</sup> According to a media report, South African Navy spokesperson, Jaco Theunissen, said that ‘SA does not provide patrols or support outside South African waters unless assistance is requested from a neighbouring African government. So far it has not been asked to help.’<sup>1073</sup> Otto further observed that it was not until the ‘ballooning effect of the pirates’ reach began to extend southwards towards the Mozambican Channel, that South Africa’s interest was suitably piqued’.<sup>1074</sup> During 2010, it was reported that ‘at least three SADC-registered vessels were attacked. These were the Tanzanian-registered MV *Barakaale*, the South African-owned SY *Choizil*, and Mozambique’s FV *Vega 5*.’<sup>1075</sup> In a statement issued by the Department of Defence in response to this security threat,<sup>1076</sup> it was mentioned that the South African Defence Force deployed warships in 2011 to Mozambique in a deployment called ‘*Operation Copper*’, the frigates’ mission being to maintain a permanent presence in the northern Mozambique Channel on a rotation basis.<sup>1077</sup> In a media report, Navy Fleet media liaison officer, Commander Adrian Dutton, said ‘all four frigates – SAS *Amatola*, SAS *Isandhlwana*, SAS *Mendi* and SAS *Spioenkop* – as well as the Navy’s replenishment vessel, SAS *Drakensberg*, and two of its offshore patrol vessels (OPVs), SAS *Galeshewe* and SAS *Isaac Dyobha*, have done time on station in the Mozambique Channel’.<sup>1078</sup> Pursuant to this engagement, the counter-piracy initiatives

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<sup>1072</sup> Otto ‘South Africa’s Engagement in Counter-Piracy’ *Maritime Security Review*, 10 November 2014. Available at: <http://www.marsecreview.com/2014/11/south-africas-engagement-in-counter-piracy/>.

<sup>1073</sup> Baumann ‘Piracy on east coast is creeping closer’ *Business Day* (28 July 2010) at 4.

<sup>1074</sup> Otto (2014).

<sup>1075</sup> ‘SADC responds to maritime piracy threat’ *South African News Features*: 12, no. 2, January 2012.

Available at: <http://www.sardc.net/en/southern-african-news-features/sadc-responds-to-maritime-piracy-threat/>. See, also, Otto (2014) and Lewis (2013) at 45; Coelho ‘Southern African Maritime Security: Problems and prospects’ in Niewkerk and Hofmann (eds) *Southern African Security Review* (2013) at 122.

<sup>1076</sup> Otto (2014) remarks that South Africa was ‘not acting on its own recognizance, but rather generously acquiescing to Mozambique’s request for assistance’.

<sup>1077</sup> ‘Operation Copper – Maritime Security on the Mozambican Channel’, Statement issued by the Department of Defence.

Available at: [http://www.dod.mil.za/operations/international/operation\\_copper.htm](http://www.dod.mil.za/operations/international/operation_copper.htm). See, also, Otto (2014); Coelho (2013) at 122; and Lewis (2013) at 45.

<sup>1078</sup> Martin ‘Operation Copper now only with SA and Mozambique’ *Defence Web*, 20 March 2014. Available at:

become formalised in a trilateral Memorandum of Understanding (MoU) signed by South Africa, Mozambique and Tanzania in February 2012. Particulars of the MoU were issued by the South African Department of Defence regarding the objectives of the operation:

‘The trilateral agreement will see the three countries working together in securing territorial waters of each respective country. This includes the three parties sending members to participate in the combined maritime operations aimed at searching and interdicting bases of pirates and any other illegal activities in the territorial waters.’<sup>1079</sup>

This statement is significant in the context of this study, as an enforcement measure to suppress piracy is extended into territorial waters. This is clearly predicated on an agreement which excludes the framework of UNCLOS. The powers granted to the navies under the MoU are to, ‘among other things, patrol, search, arrest, seize and undertake hot pursuit operations on any maritime crime suspect or piracy’.<sup>1080</sup> Under the UNCLOS regime, such measures can only take place on the high seas. A media report noted that the SAS Drakensberg was involved in a piratical incident ‘when she was requested to take up a stopper position by the European Union Naval Force to prevent a suspected pirate ship from escaping EU pursuit in April 2012’.<sup>1081</sup> The ongoing operation has been successful, and the Department of Defence issued a statement saying that ‘the success of Operation Copper is evident in that there have been no further pirate attacks in Southern African waters, the local fishing fleets are back at sea and tourism is flourishing again because of the increased security’.<sup>1082</sup> In terms of the cost of the operation, Otto states that in 2013, the allocation to Operation Copper was R585 million from a total annual budget of R40 billion.<sup>1083</sup> The operation was designed to continue until such time as the Commander-in-

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[http://www.defenceweb.co.za/index.php?option=com\\_content&view=article&id=34071:operation-copper-now-only-with-sa-and-mozambique&catid=108:maritime-security](http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=34071:operation-copper-now-only-with-sa-and-mozambique&catid=108:maritime-security).

<sup>1079</sup> ‘Minister Sisulu signs MoU on Maritime Security Cooperation with Tanzania and Mozambique’.

Available at:

[http://www.dod.mil.za/ministry/media\\_statements/2012/moutanzani MOZambique.htm](http://www.dod.mil.za/ministry/media_statements/2012/moutanzani MOZambique.htm).

<sup>1080</sup> *Idem*.

<sup>1081</sup> Martin (2014). *See*, also, ‘South Africa signs Djibouti Code of Conduct anti-piracy agreement’ *Defence Web* (17 May 2012), where it was reported that the South African Navy was one of navies from four different countries to pursue a pirate mother ship in the Mozambique Channel, after the ship had unsuccessfully attempted to attack a Filipino merchant ship.

<sup>1082</sup> ‘Operation Copper – Maritime Security on the Mozambican Channel’, Statement issued by the Department of Defence.

Available at: [http://www.dod.mil.za/operations/international/operation\\_copper.htm](http://www.dod.mil.za/operations/international/operation_copper.htm).

<sup>1083</sup> Otto (2014); Martin (2014). Lewis (2014) at 46, notes that defence spending in South Africa ‘is just 1.3% of GDP ... approximately 7 per cent of its budget is allocated to the Navy’s operational budget ... Such figures somewhat undermine the increasing naval rhetoric of promises to fulfill anti-

Chief of the Defence Force, President Zuma, decides to withdraw.<sup>1084</sup> While South Africa was able to allocate the resources to engage in the operation, questions of policy must be answered on the sustainability of, and need for such operations. The policy could potentially venture in one of two directions: a practical consideration, and a strategic consideration.

In terms of practical consideration, one could enquire as to why South Africa spent such a high proportion of its annual defence budget on this endeavour. Lewis describes a ‘guns versus butter’ debate and asks ‘whether South Africa can justify spending on its military when it has disproportionately vast numbers of its citizens in poverty emanating in part from its earlier colonial and apartheid eras’.<sup>1085</sup> Otto asks whether one ‘might conclude that the expenditure on counter-piracy operations is a frivolous expense, given the state’s primary responsibility of protecting its territory – a place to which pirates have yet to venture’.<sup>1086</sup> Furthermore, Coelho makes two comments regarding this direction of policy. He first notes the ‘practical difficulties involved in maintaining such a force so far from its base, maintenance challenges, and the budgetary demands, which have already provoked political discomfort in the South African parliament’.<sup>1087</sup> Second, he notes how the sharp decrease in Somali piracy in southern African waters has created a growing disparity between a threat which is now hardly visible and the means allocated to respond to it’.<sup>1088</sup> The operation would provide a fertile training ground for exercises in combat readiness, and in learning to engage pirate suspects more effectively in the field. Another issue raised under this practical consideration is the capacity of South Africa’s Defence Force. South Africa spends quite far under the global average of 2% of GDP on defence, at 1.05%.<sup>1089</sup> Kings, in a 2016 media feature citing the *2014 Defence Review*, reports that ‘this spending is at odds with the importance the ocean has to South Africa. Most of its imports and exports come across the ocean. The ocean economy brings in R60 billion a year.’<sup>1090</sup> He reports that ‘SA Navy vessels can no longer be made combat ready to execute the full range of missions they were designed for’,<sup>1091</sup> meaning that ‘South Africa has little capacity to patrol. The navy has four new frigates, three ancient offshore patrol vessels and three

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piracy missions and will undoubtedly have negative repercussions on the stemming of pirate activity in the area.’

<sup>1084</sup> Martin (2014).

<sup>1085</sup> Lewis (2014) at 47.

<sup>1086</sup> Otto (2014).

<sup>1087</sup> Coelho (2013) at 128. Lewis (2014) at 46 notes that ‘South Africa has priorities beyond those of maritime security’.

<sup>1088</sup> *Idem.*

<sup>1089</sup> Kings (2016) at 8.

<sup>1090</sup> *Idem.*

<sup>1091</sup> *Idem.*

inshore patrol vessels to respond to any illegal fishing and piracy across 1.5 million square kilometres.<sup>1092</sup> Coelho concludes that ‘whilst rhetoric clearly illustrates the importance that South Africa places in the ability to secure both its waters and the waters of the continent more generally, serious doubt has been placed on its ability to do so’.<sup>1093</sup>

Strategic considerations, on the other hand, call for continued engagement in counter-piracy operations when they arise. Otto remarks that such considerations could be a worthy exercise in foreign policy employing foresight.<sup>1094</sup> She remarks that South Africa has an implied foreign policy objective of ‘being the foremost African actor participating in the international space – the go-to partner on the continent who leads by example where issues of African security are concerned’.<sup>1095</sup> These can be seen in the extracts from the White Paper on National Defence cited above. Coelho remarks how South Africa has ‘grand geostrategic motives and a self-appointed status as rescuer of the region that requires the support of a modern blue-water navy, despite what appear to be major problems in maintaining it’.<sup>1096</sup> Quite separate from these strategic foreign policy motives, and given the nature of South Africa’s island economy and globalised interests, the consequences of piracy would directly impact on South Africa’s interests even if piratical acts never occur in its territorial waters.

These two policy directions mean that South Africa has to carefully balance its domestic needs and developmental challenges with its maritime strategic interests. While in the past decade there has been a global emphasis placed on responding to the consequences and the threat of piracy off the East African seaboard, South Africa, as a developing nation, remains at a crossroads where there are differing priorities when considering the context of low military budgets and a poor economic environment,<sup>1097</sup> and the need to assert its role as a regional power on the African continent.

With this policy background in mind, the legislative framework in South Africa needs to be considered. The discussion now turns to the law relating to piracy in South Africa, and commences with an overview of the developing jurisprudence, subsequently outlining the contemporary framework. When presenting the legal framework of South Africa, some indication will be provided regarding its strengths in fostering an enforcement jurisdiction

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<sup>1092</sup> *Idem*.

<sup>1093</sup> Coelho (2013) at 45.

<sup>1094</sup> Otto (2014).

<sup>1095</sup> Otti (2014).

<sup>1096</sup> Coelho (2013) at 128.

<sup>1097</sup> Lewis (2013) at 39 and 47.

regime outside South Africa's territorial waters, and in the waters of neighbouring African states.

### 3.4 Historical background of piracy and the law in South Africa: an excursus

It is not surprising, considering the sparse and scattered historical accounts above, that piracy has not received much attention in the courts, legislation, and academic scholarship. Given this dearth of primary and secondary sources specific to South Africa, this section makes an attempt to explore and gather possible sources in order to trace the developing jurisprudence in the country before looking at the contemporary legal landscape specific to piracy. A search through the records contained in the National Archives of South Africa<sup>1098</sup> reveals the existence of a piracy court in the Cape of Good Hope at the turn of the 19<sup>th</sup> Century, when two prisoners at the Castle of Good Hope – James Mortlock and Michael Franklin Brooks – were charged in a ‘court of piracy summoned for that purpose’ on 16 April 1801. The archival record contains two petitions, the first being to the then Governor of the Cape Colony, Sir George Yonge, to have the case transferred to England, and ‘referred to the opinion of the twelve Judges of England’, accompanied by a request for permission to proceed to England under escort.<sup>1099</sup> The second petition, dated 27 May 1801, was addressed to Major General Francis Dundas, the then Governor of the Cape Colony, requesting permission to obtain a copy of the proceedings against them.<sup>1100</sup> There is no record on file of the circumstances which gave rise to the proceedings, nor of the actual proceedings in the piracy court. However, the first petition contains an extract of the judgment: ‘You, the prisoners at the Bar are guilty of adhering to, aiding and comforting his Majesty’s enemies.’<sup>1101</sup> This, therefore, appeared to be a case of treason held in an *ad hoc* piracy court.

A few years later, on 27 September 1807, the Governor of the Cape Colony, the Earl of Caledon (‘Lord Caledon’), despatched a communication to ‘Lord Viscount Castlereagh’, Secretary of State, requesting receipt of instructions for the establishment of a piracy commission.<sup>1102</sup> On 13 April 1809, Lord Caledon received instructions from the Secretary of State in London, under orders from the Lords Commissioners of the Admiralty empowering him, together with others specified therein, with a commission to hold a court for the trial of pirates.<sup>1103</sup>

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<sup>1098</sup> The present researcher makes no claim to this archival perusal being comprehensive.

<sup>1099</sup> Western Cape Provincial Archives: KAB/BO/120/01/16/1.

<sup>1100</sup> Western Cape Provincial Archives: KAB/BO/120/01/24/1.

<sup>1101</sup> Western Cape Provincial Archives: KAB/BO/120/01/16/1.

<sup>1102</sup> Western Cape Provincial Archives: KAB/GH/1/123/00/1911/1.

<sup>1103</sup> Western Cape Provincial Archives: KAB/GH/23/2/00/66/1.

During this period, the British had re-occupied the settlement at the Cape of Good Hope in 1806, and they realised the need to re-establish a local Vice-Admiralty Court.<sup>1104</sup> In 1806, Lord Caledon received an Admiralty Commission, constituting him as the Vice Admiral of the Colony.<sup>1105</sup> Van Niekerk describes a ‘Vice Admiralty Court’ as an instrument of British imperial design, established to ‘control the activities and protect the interests of British citizens in colonial waters’.<sup>1106</sup> He explains that, ‘although existing alongside ordinary, colonial courts and even utilising their facilities and personnel, they were separate, imperial courts, external to the local judicial system and unaffected by the creation or jurisdiction of local courts’.<sup>1107</sup> It would be apt for the Vice Admiralty Court in the colony to have been vested with jurisdiction to prosecute matters pertaining to piracy,<sup>1108</sup> however, Van Niekerk, in describing the features of the Vice Admiralty Court, distinguished the court from a piracy commission, an example being the one issued in 1809:

‘the permanent Cape Vice-Admiralty Court should be distinguished from an *ad hoc*, temporary court, generally known as a Piracy Court or Commission Court ... but also confusingly referred to simply as an Admiralty Court. This Court had criminal jurisdiction over (serious) offences committed on the high seas, including, therefore, piracy, and was made up on seven Commissioners, the judge of the local Vice-Admiralty Court being but one of the Commissioners.’<sup>1109</sup>

It is worth noting that Van Niekerk’s analysis above included piracy on the basis of it being an offence of the high seas. The substance of the piracy commission must then be considered – these *ad hoc* courts did not appear to have been constituted frequently.<sup>1110</sup> The South African national archives contain a despatch from the Secretary of State, London, ‘renewing the Commission for Piracy on the High Sea’ on 1 September 1838.<sup>1111</sup> The despatch containing this commission is reproduced in the appendix *et seq*, the preambular

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<sup>1104</sup> Van Niekerk ‘Denis O’Byrne (nominally) Second Marshal of the Vice-Admiralty Court of the Cape of Good Hope, 1806-1832’ 21 *Fundamina* (2015) 142 at 143.

<sup>1105</sup> *Idem*.

<sup>1106</sup> Van Niekerk ‘The Natal Vice Admiralty Court: A brief historical introduction with specific reference to its constitutional “crisis” of 1864’ 10 *Fundamina* (2004) 224 at 225.

<sup>1107</sup> *Idem*.

<sup>1108</sup> Van Niekerk states *idem*, at 227, that ‘Vice Admiralty Courts also exercised a criminal jurisdiction, for instance in trying those accused in the colonies of piracy or criminal transgressions of English maritime and merchant-shipping legislation.’

<sup>1109</sup> Van Niekerk (2015) at 146-147.

<sup>1110</sup> *Idem* at 146, fn 20.

<sup>1111</sup> Western Cape Provincial Archives: KAB/GH/1/123/00/1911/1.

paragraphs of which, cite the suite of British legislation pertaining to piracy, and empowers the commission to ‘diligently discharge the respective Duties of taking Informations, and of Apprehension, Commitment, and Bailment’ in matters of *inter alia* piracy.<sup>1112</sup> Of particular importance is the clause regarding how the offence of piracy may be committed:

‘whomsoever, and howsoever done or committed, or hereafter to be done or committed, upon the Sea, or in any Haven, River, Creek, or Place where the Admiral has Power, Authority, or Jurisdiction’.<sup>1113</sup>

As is explicit in this clause, the jurisdiction is wide and does not appear to be hindered by the geographical distinction between the high seas and territorial seas. The jurisdiction closely parallels the early English jurisprudence set out in the third chapter of this thesis.

The Vice Admiralty Courts in the Cape and Natal colonies, on the other hand, were never busy,<sup>1114</sup> and the piracy commissions were not frequent. The question of whether there were any instances of piracy that were adjudicated a piracy commission in either the Cape or Natal, or any of the colonial courts, has not been investigated thus far in academic scholarship. Although, as Fouché concludes, ‘[i]t can thus be accepted that to date [2006] no incidents of piracy have taken place in South Africa’,<sup>1115</sup> the present researcher’s perusal of archival records reveals one unreported case which merits a discussion here.

On 25 September 1850, William Porter, the Attorney-General of the Cape Colony, issued an indictment against John Burgin, Archibald Currie, Allan Munro, James Smith, Horam Leavitt, Archibald Leitch, Jules Dufant, Pierre Marie Pinnochet, James Ferguson, John Adams, John Nelson and Thomas Crocker for the crime of piracy under the English Statute:<sup>1116</sup> An Act for the more effectual Suppression of Piracy of 1700,<sup>1117</sup> and assault in the alternative. The facts of the indictment reveal that on 6 July 1850, the accused were

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<sup>1112</sup> *Idem* at 99.

<sup>1113</sup> *Idem*.

<sup>1114</sup> Van Niekerk (2015) at 145, comments that the ‘Court [Cape Vice Admiralty Court] was never really busy and the possibility of its discontinuance was even raised.’ He also comments in Van Niekerk (2004) at 241, that the ‘Natal Vice Admiralty Court was never very busy’, and at 242 explains that the main reason for this was that ‘there was no major war in progress during the Court’s lifetime and hence it could never exercise the jurisdiction most frequently exercised by the Vice Admiralty Courts, namely prize jurisdiction’. His research into the Vice Admiralty Court in Natal shows (at 247) that the Court only heard six cases: two were reported in the law reports and four unreported judgments were contained in archival records – none of which pertained to piracy.

<sup>1115</sup> Fouché ‘Policing Piracy and Armed Robbery of Ships in South Africa’s Territorial Waters and Contiguous Zone’ Unpublished DTech thesis, Tshwane University of Technology (2006) at 14.

<sup>1116</sup> 11 & 12 William III c. 7 (1700); 4 Statutes at Large (1769 ed.) 40; Rubin (1988) at 362.

<sup>1117</sup> Western Cape Provincial Archives: KAB/CSC/1/2/1/46.

servicing as mariners on board a British vessel, *India*, when they conducted a revolt on the vessel, assaulting the Master, William Campbell, confining him in the cabin, and assuming command of the ship for a period of three days. The matter was transferred on 6 September 1850 from the Supreme Court of the Cape Colony to an ordinary Circuit Court for the Division of Uitenhage. Judgment was delivered by the Honourable Mr Justice Menzies on 25 September 1850. The case was heard before a jury, who found all the accused, except Dufant and Furguson, guilty. The sentence imposed on some of the accused was one year with hard labour, and the others were sentenced to four months with hard labour. No judgment was issued on the merits of the case, nor was a transcript of the proceedings kept on file. From the scant information regarding the incident, it is evident that this was a case of mutiny, and, if applied to the present definition of piracy under UNCLOS, this would not constitute an act of piracy for want of the ‘two-ship’ requirement. However, under the Statute cited, an act of mutiny also qualified as an act of piracy.<sup>1118</sup> The indictment states that the act occurred approximately 20 miles (17 nautical miles) from ‘Cape L’Agulhas’ in the Cape Colony, and that this position was simply recorded as being on the ‘high sea’. No reference was made to any conception of territorial waters of the colony, or the breadth thereof.<sup>1119</sup>

During the Twentieth Century, at roughly the same time that the work of the Harvard Researchers commenced on preparing a draft convention, Stanley Morrison, a Professor of Law at Stanford University, prepared a collection of piracy laws of various countries with the purpose of rendering assistance in the preparation of the draft convention on piracy.<sup>1120</sup> The entry for the Union of South Africa reads:

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<sup>1118</sup> See article IX of 11 & 12 William III c. 7 (1700). The domestic Defence Act, 42 of 2002, in section 24(2), contains a clause which brings within the ambit of piracy, any piratical acts committed by the crew of a warship or government ship that has mutinied and taken control of the ship. See article 102 of UNCLOS.

<sup>1119</sup> The preambular paragraph of the Statute *idem* contains this wide jurisdiction clause: ‘That all Piracies, Felonies, and Robberies committed in or upon the Sea, or in any Haven, River, Creek, or Place where the Admiral or Admirals have Power, Authority, or Jurisdiction, may be examined, inquired of, tried, heard and determined, and adjudged, according to the Directions of this Act’. With respect to this period of British rule at the Cape Colony, Vrancken in ‘The Marine Component of the South African Territory’ 127 *South African Law Journal* (2010) 207 at 212, states that it is ‘unclear whether the waters adjacent to the Cape formed part of its territory’, and he cites *idem* a dictum from a US Supreme Court judgment in *United States v California* 332 US 19 that: ‘the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to [the American] settlers, nor the treaty of peace with England, nor any other document to which [the court] was referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership.’

<sup>1120</sup> Morrison ‘Part V: A Collection of Piracy Laws of Various Countries’ 26 Supplement: Research in International Law *American Journal of International Law* (1932) 887.

‘No laws relating to the subject of piracy appear to have been passed by any South African legislature, either before or subsequent to Union. The British legislation controls.’<sup>1121</sup>

Lansdown and Gardiner,<sup>1122</sup> who discuss piracy in South African law post Union in their seminal work on South African criminal law procedure, confirm this position.<sup>1123</sup>

To sum up the developing piracy jurisprudence in South Africa is thus not a complicated task: prior to the unification in South Africa, the two colonies with maritime interests – the Cape Colony and Natal – acted under instructions from London and applied English statutes, notably with the wide jurisdiction contained therein. There were too few instances of piracy to enable domestic courts or tribunals to significantly develop any legal principles unique to the situation in Southern Africa. South Africa has played a role by making submissions during the various stages of the codification process, as outlined in the previous chapter, but this did not make any significant impact on the domestic legal regime. As indicated in the previous section, the first three quarters of the twentieth century saw little or no academic scholarship or legal developments in South Africa pertaining to piracy. Vrancken and Pike remarked that ‘the law of the sea lacked any noteworthy scholarly attention until the early 1970s when an interest in the field was generated mainly by the convening of UNCLOS III’.<sup>1124</sup>

### 3.5 The present legal framework

With very little historical jurisprudence to draw upon, a framework which incorporated international law concerning piracy into the domestic regime did not occur until quite recently. Furthermore, there have been no cases brought before South African courts, pursuant to any transfer agreement, to prosecute pirates.<sup>1125</sup> The discussion below considers

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<sup>1121</sup> *Idem* at 942.

<sup>1122</sup> Lansdown and Gardiner 2 *South African Criminal Law and Procedure* 3<sup>rd</sup> ed. (1930).

<sup>1123</sup> *Idem* at 726. It is also noteworthy that they cited the work of Hall (at 727), who put forward the view (with my emphasis) that ‘piracy consists in acts of violence done upon the ocean or unappropriated lands, or *within the territory of a State through descent from the sea*, by a body of men acting independently of any politically organised society’. They reject this view and suggest that the definition by Hall is ‘too wide and it would embrace acts which, though criminal, would certainly not be regarded as piracy’ (*idem*). Despite these contrary views, they recognised that piracy *jure gentium* has no universally recognised definition.

<sup>1124</sup> Vrancken and Pike ‘Marine and Maritime Law in South Africa’ in Funke *et al* (ed.) *Reflections on the State of Research and Technology in South Africa’s Marine and Maritime Sectors* (2015) at 29.

<sup>1125</sup> The only recent matter, according to the information available to the present researcher, brought before the South African courts involving piracy, was a civil application to set aside the deemed arrest *in rem* of a vessel. The arrest was affected pursuant to s 3(4)(a) of the Admiralty Jurisdiction Regulation Act, 105 of 1983 – to enforce a maritime lien for its crew members’ unpaid wages while

the existing legislation and the framework it creates for South African anti-piracy measures. The discussion will be considered from three perspectives: (i) the legal position regarding piratical acts in South African territorial waters; (ii) the legal position regarding piratical attacks on the high seas and the implications for enforcement and adjudicatory jurisdiction; (iii) the position regarding piratical acts in the territorial waters of another state and the implications for enforcement and adjudicatory jurisdiction. Each of these considerations will be looked at in turn below.

### 3.5.1 Acts in South African territorial waters:

The first point of discussion to be had at the outset, as worded by Vrancken, is to determine ‘how far at sea the state has actually extended its territory in terms of domestic law’.<sup>1126</sup> Given that international law provides that the territorial sea is part of the territory of the coastal state, and international law is part of South African law,<sup>1127</sup> Friedman, J in *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* held:

‘According to international law, if the municipal law of a State does not by a statute extend its jurisdiction over its maritime belt, its Courts ought to presume that since by the law of nations the jurisdiction of a State does extend over its maritime belt, their sovereign has tacitly consented to that wider range of its jurisdiction ... By international law the territory of a State consists in the first place of the land within its boundaries, but to this must be added, in the case of a State with a sea coast, certain waters which are within or adjacent to its land boundaries. These waters include its territorial waters.’<sup>1128</sup>

With a broader approach to interpreting the juridical nature of the territorial waters as forming part of the territory of South Africa,<sup>1129</sup> the Maritime Zones Act<sup>1130</sup> in section 4(2) provides that: ‘[a]ny law in force in the Republic, including the common law, shall also apply in territorial waters’. Therefore, South African law extends to piratical acts

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they were hijacked and held hostage by Somali pirates for a ransom: *Windrush Intercontinental SA v UACC Bergshav Tankers AS* (556/2015) [2016] ZASCA 199 (6 December 2016).

<sup>1126</sup> This issue was considered in detail in Vrancken (2010) at 208. See, also, Soni ‘Territorial waters and jurisdiction’ 12 *Comparative and International Law Journal of Southern Africa* (1979) 199-205; Botha ‘Municipal jurisdiction over territorial waters’ 4 *South African Yearbook of International Law* (1978) 177-178.

<sup>1127</sup> See *South Atlantic Islands Development Corporation Ltd. v Buchan*, 1971 (1) SA 234 (C) at 238; Sanders ‘The applicability of customary international law in South African law – the Appeal Court has spoken’ 11 *Comparative and International Law Journal of Southern Africa* (1978) 198-207.

<sup>1128</sup> 1977(4) SA 682 (C) at 695 E-F; Vrancken (2010) at 210 and 218.

<sup>1129</sup> Vrancken (2010) 217-223.

<sup>1130</sup> 15 of 1994.

committed in its territorial waters. Vrancken and Hoctor note that there was no specific crime of piracy in erstwhile domestic legislation, because such ‘acts which may have fallen within the ambit of piracy could be prosecuted on other grounds for liability. These could either take the form of the common-law crimes of robbery, assault or murder as the case may be, or statutory offences’.<sup>1131</sup>

Fouché notes that: first, ‘a pirate attack on a ship in South Africa’s EEZ would be considered an attack on a ship in a place within the jurisdiction of a state and in terms of South African legislation would be dealt with as robbery and not piracy’;<sup>1132</sup> and second, the EEZ has the effect of ‘shrinking considerably the area formerly known as the high seas, and the only area in which piracy can be committed’.<sup>1133</sup> It is submitted that such a findings are incongruous with the provisions of article 58(2) of UNCLOS, which reserves the EEZ for an enumerated list of competencies, and for which all other purposes, the EEZ is treated in the same manner as the high seas.<sup>1134</sup>

### 3.5.2 Acts on the high seas or places outside the jurisdiction of South Africa

Earlier in this chapter, much was said about South Africa’s role in anti-piracy activities and enforcement of the UNCLOS regime. The powers vested in the South African National Defence Force must therefore be placed in a legal context. South Africa ratified UNCLOS on 23 December 1997,<sup>1135</sup> and thereby began a process to domesticate the provisions of UNCLOS into legislation. This was achieved by the enactment of certain provisions of the Defence Act 42 of 2002 (hereafter referred to as the DA).<sup>1136</sup> Salient provisions of the DA pertaining to piracy are contained in chapter four, which provides for ‘law enforcement powers of Defence Force at sea’. An overview of these provisions is herein outlined.<sup>1137</sup>

Section 24(1) replicates the provisions of article 101 of UNCLOS, with a few immaterial changes,<sup>1138</sup> while section 24(2) incorporates the provisions of article 102 of UNCLOS, especially relating to acts of piracy committed by the crew of a warship or government

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<sup>1131</sup> Vrancken and Hoctor ‘The contribution of the Defence Act to the fight against piracy’ 31 *Obiter* (2010) 428 at 429.

<sup>1132</sup> Fouché (2006) at 200.

<sup>1133</sup> *Idem* at 201-202.

<sup>1134</sup> As discussed in the previous chapter, at length.

<sup>1135</sup> See: [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm).

<sup>1136</sup> A full treatment of the piracy provisions of the DA was undertaken in Vrancken and Hoctor (2010) at 428-433.

<sup>1137</sup> A full reproduction of this section appears in the annexure appended *et seq.*

<sup>1138</sup> See Vrancken and Hoctor (2010) at 430. They note *idem* that the inclusion of the ‘Master’ as a member of the crew for the purposes of section 24(1)(a), was because domestic law ‘regarded the master separately from ... other persons serving on board’.

ship, which seized control of said ship through mutiny. Section 24(3) vests authority in South African courts to prosecute suspects who commit the offence of piracy.<sup>1139</sup> When compared to the piracy prosecutions conducted by Kenya, as outlined below, a key impediment was observed, namely the absence of the equivalent provisions of section 24 of the DA in Kenyan domestic legislation at the time.

Section 25 of the DA deals with enforcement jurisdiction,<sup>1140</sup> and provides that this would be done in accordance with articles 105 and 107 of UNCLOS. This is a domestication of the UNCLOS enforcement regime, and, as discussed in the prefatory to this chapter, applies to acts of piracy committed on the high seas or places outside the jurisdiction of any state. The adjudicatory aspect of article 105 of UNCLOS, which provides that '[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith', has received differing interpretations, particularly with regard to transfer agreements whereby foreign navies which capture pirates hand them to a third party state (in this instance Kenya) for prosecution. Geiß and Petrig note that 'some scholars maintain that the second sentence of Article 105 UNCLOS provides the competence to criminally prosecute piracy suspects *exclusively* to the seizing state, i.e. that only the State arresting the pirates would be granted adjudicative jurisdiction over the alleged offenders'.<sup>1141</sup> Gathii, at the time of piracy prosecutions in Kenya where the pirates were transferred for prosecution by third party capturing states, argued that the 'prosecutions are arguably illegal under Article 105 of [UNCLOS]'.<sup>1142</sup> However, Geiß and Petrig oppose this limited interpretation of Article 105, and find that, on this basis, 'domestic criminal law defines the crime, procedure and sanction; while the universal competence to criminally prosecute pirates is provided under customary international

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<sup>1139</sup> The section provides that '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.'

<sup>1140</sup> The section provides:

(1) An officer of the Defence Force may seize a ship or aircraft and the property on board, and arrest any person on board, in accordance with articles 105 and 107 of UNCLOS;

(2) Any officer of the Defence Force who exercises any power referred to in this section inside or outside the Republic, must be regarded as being a peace officer as defined in section 1 of the Criminal Procedure Act, 1977;

(3) Any ship, aircraft or property seized, or any person arrested, in terms of this section, must as soon as possible be brought to the Republic or to any other authority determined by the Minister of Foreign Affairs, with the concurrence of the Ministers of Defence and of Justice, to be dealt with in accordance with applicable law.'

<sup>1141</sup> Geiß and Petrig (2011) at 148 and 197.

<sup>1142</sup> Gathii 'Jurisdiction to prosecute non-national pirates captured by third states under Kenyan and International Law' 31 *Loyola of Los Angeles International and Comparative Law Review* (2009) 373 at 375.

law'.<sup>1143</sup> Returning focus back to the DA, these reservations about transfers seem to be addressed in section 25(3), which provides that the arrested suspect or seized property '*must be brought to the Republic or to any other authority*'.<sup>1144</sup> Also worth noting is the peremptory orientation of the provision by the obligation of South Africa to bring the suspects and property to South Africa, or to facilitate a hand-over to another authority, especially by the use of the term 'must', whereas the wording of article 105 of UNCLOS is permissive by use of the word 'may'.<sup>1145</sup>

### 3.5.3 Acts in foreign territorial seas

Customary international law on piracy or piracy *jure gentium*, as reflected in UNCLOS, clearly stipulates that the powers conferred therein on states to exercise universal jurisdiction in anti-piracy measures, are limited to the high seas or a place outside the jurisdiction of any state. Accordingly, no provision provides a general mandate to enter the territorial waters of another state to repress piracy. It follows, therefore, that no corresponding provision exists in South African legislation, which confers this power to the South African National Defence Force to exercise enforcement jurisdiction in the territorial waters of another state. It has been seen in aforementioned sections that, pursuant to Memoranda of Understanding with neighbouring states, South Africa engaged in enforcement jurisdiction in the territorial waters of states in the Mozambique Channel, as predicated on consent and cooperation. The DA facilitates this approach: section 22(3) provides: 'No enforcement outside the territorial waters of the Republic may take place- (a) in the territorial waters of a foreign state, unless it takes place on board a South African ship or in pursuance of an agreement on co-operation in law enforcement with that state'. Furthermore, measures to facilitate cooperation in interdiction measures can be found in section 29 of the DA.<sup>1146</sup> These provisions can be seen as a strength in fostering an enforcement regime external to South Africa's territorial waters.

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<sup>1143</sup> Geiß and Petrig (2011) at 148. Roach (2010) at 404 also notes that '[t]he argument that only the state of the capturing force has international jurisdiction to try the pirates is inconsistent with the strong duty of cooperation in the international law of piracy articulated by Article 100'.

<sup>1144</sup> Vrancken and Hooft (2010) at 432, note that '[i]t is unclear whether the "other authority" must be a South African authority which may only exist in exceptional circumstances ... or whether it may, and would in most instances be, a foreign authority'.

<sup>1145</sup> This could be interpreted to mean that the practice of 'catch and release' would be contrary to the provisions of this section. In any event, a missive issued by the Department of Defence stipulates: '[t]he current practice of 'catch-and-release' of pirates should be stopped since it allows experienced pirates to execute more sophisticated acts of piracy. Therefore SADC should strengthen and harmonise regional and domestic legal frameworks for arrest, awaiting trial detention, prosecution and imprisonment or repatriation of pirates.'

See: [http://www.dod.mil.za/operations/international/operation\\_copper.htm](http://www.dod.mil.za/operations/international/operation_copper.htm).

<sup>1146</sup> The section provides: 'Co-operation with foreign states

### 3.6 Summative remarks

Notwithstanding a scant historical jurisprudence to combat piracy, as seen in the *excursus* to this section, the DA, as the primary piece of legislation in engaging in enforcement measures and ensuing prosecution,<sup>1147</sup> is consistent with the present international framework. South Africa, by virtue of sections 231-233 of its Constitution,<sup>1148</sup> would be bound by the provisions of article 100 of UNCLOS, which requires that '[a]ll 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'. Based this incorporation of customary international law into domestic law, changes to the UNCLOS regime, as will be proposed in this thesis, can be integrated into the DA regime. It has been shown that anti-piracy measures are needed in territorial waters. South Africa's problems, however, do not lie with its legal framework, but rather with policy considerations and its ability to manage differing priorities in the context of its developing economy, low military spending, and the need to assert its role as a regional power on the African continent.

## IV. MUNICIPAL FRAMEWORKS: KENYA

### 4.1 Kenyan jurisprudence

Unlike in South Africa, according to Wambua, the word piracy was 'unknown to many Kenyan legal scholars and indeed was of little significance to most Kenyan legal

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(1) Subject to subsection (2), any officer of the Defence Force serving on a warship or military aircraft of the Defence Force or any other 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).

(2) An action contemplated in subsection (1) may only be taken-

(a) in pursuance of a reciprocal agreement on co-operation in law enforcement at sea between the Republic and the relevant foreign state;

- (b) if the law enforcement measure taken, is consistent with the agreement;

and

(c) if the relevant foreign state may take the law enforcement measures contemplated in subsection (1) (a) to (e) under international law.'

<sup>1147</sup> While the DA is the primary piece of legislation, it is noteworthy that the offences listed in article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988), has been domesticated in the Protection of Constitutional Democracy against Terrorist and related activities Act 33 of 2004.

<sup>1148</sup> The Constitution of South Africa, 1996.

practitioners until 2006'.<sup>1149</sup> While Kenya was not a major role-player in exercising naval countermeasures within the region, as pursuant to UN SC Resolution 1816, it was a major player in the second leg of article 105 of UNCLOS – dealing with the prosecution of pirates who were captured,<sup>1150</sup> and thus merits a review in this section of the thesis. While the primary enquiry of this thesis regards the extension of the enforcement regime into the territorial sea, the direct result of such enforcement jurisdiction, namely the discretion to prosecute the captured suspects, deserves some attention here. Particular attention will be placed on aspects of Kenyan law, and the opinions of the principal commentators on Kenya's legal system, especially as it pertains to pirates.

A starting point would be to cite the now repealed section of the Penal Code of Kenya, which criminalised the offence of piracy:

‘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.’<sup>1151</sup>

This provision, deceptively short and vague,<sup>1152</sup> raises an interesting question on the *locus* of piracy. The reference to piracy *jure gentium* is a reference to customary international law, which is generally accepted as having been codified in UNCLOS.<sup>1153</sup> The UNCLOS provisions, as set out in numerous places in this thesis, is confined to the high seas or a place outside the jurisdiction of a state. The wording of the provision extends the notion of piracy to territorial waters,<sup>1154</sup> thus expanding the ambit of the UNCLOS provision. Although it is understood as referring to Kenyan territorial waters,<sup>1155</sup> the provision does not explicitly define the ‘territorial waters’ to be exclusively that of Kenya. Furthermore, it was held by the Kenyan High Court that the provision does not provide an express

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<sup>1149</sup> Wambua ‘The legal framework for the adjudication of piracy cases in Kenya: Review of the jurisdictional and procedural challenges and the institutional capacity’ in Petrig (ed.) *Sea Piracy Law: Selected National Frameworks and Regional Legislative Approaches* (2010) at 3.

<sup>1150</sup> Hodgkinson (2015) at 45. See, also, Sterio ‘Incorporating International Law to establish jurisdiction over piracy offences’ in Scharf *et al* (ed.) *Prosecuting Maritime Piracy* (2015) at 97.

<sup>1151</sup> Section 69(1) of the Penal Code, Chapter 63, *The Laws of Kenya* (2009) at 43.

<sup>1152</sup> Gathii (2009) at 373, considers that the provision provides ‘prosecutorial authorities with little guidance on what the elements of the crime of piracy *jure gentium* are’.

<sup>1153</sup> See the discussion in chapter 4 at section 6.2. In *Ex Parte Mohamud Mohamed Hashi and others* MISC. Application no. 434 of 2009 (9 November 2010), however, the Judge (at 39) held that ‘the offence of piracy [adapting the provisions of article 101 of UNCLOS] in section 371 of the new Act [Merchant Shipping Act of 2009, discussed *infra*] is a *new offence* and separate and distinct from the “*piracy jure gentium*” which came into existence centuries ago and found its way into our law in 1967.’

<sup>1154</sup> Gathii (2010) at 421-422; Sterio (2015) at 96.

<sup>1155</sup> See Gathii (2009) at 372.

definition of what constitutes the high seas.<sup>1156</sup> Gathii observes that this provision ‘presumably creates universal jurisdiction meaning that a pirate’s contacts with Kenya are totally irrelevant when determining whether or not a Kenyan court has jurisdiction to prosecute the pirate’.<sup>1157</sup>

Pursuant to certain Memoranda of Understanding,<sup>1158</sup> Kenya agreed to prosecute captured pirates in its courts. The pirate suspects were not nationals of Kenya, and none of the pirates being tried were captured by the Kenyan military.<sup>1159</sup> The first matter was brought before the Chief Magistrate’s Court in Mombasa in 2006, and the accused, Hassan Ahmed and nine others, were charged and convicted for piracy under the Penal Code cited above for the hijacking of the Indian-flagged MV *Safina al Bisarat* on the high seas. As to jurisdiction, the Magistrate found that she had jurisdiction to hold the trial under the Penal Code, which is in accordance with international law.<sup>1160</sup> She also held that ‘piracy is a crime against mankind which lies beyond the protection of any state’.<sup>1161</sup>

They appealed their conviction to the High Court before Azangalala J. One of the grounds of appeal was that the Magistrate erred in law in her finding that she had jurisdiction to try the case. The basis of contention was that none of the parties involved were Kenyan, and that the offence was committed on the high seas. Azangalala J was satisfied with the act committed constituting piracy, which is justiciable under the Penal Code.<sup>1162</sup> In the alternative, the judge held that, even if the Penal Code were silent on the offence of piracy, the court *a quo* would have been guided by article 101 of UNCLOS,<sup>1163</sup> whose provisions would have applied if there had been deficiencies in the Penal and Criminal Procedure Code.<sup>1164</sup> The judge accepted the version of counsel on both sides that UNCLOS had been

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<sup>1156</sup> *Ex Parte Mohamud Mohamed Hashi* and others at 24.

<sup>1157</sup> Gathii (2009) at 372. *See, also*, Wambua (2009) at 18-19.

<sup>1158</sup> Acts adopted under title V of the EU treaty: council decision 2009/293/CFSP of 26 February 2009, *Official Journal of the European Union* (2009) at L79/47-59. *See* Surbun ‘The developing jurisprudence to combat maritime piracy: A crime of the high seas?’ 43 *Comparative and International Law Journal of Southern Africa* (2010) 1 at 8; Geiß and Petrig (2011) at 276 (containing excerpts); and Hodgkinson (2015) at 46.

<sup>1159</sup> For a complete discussion on this, *see* Gathii (2009) 363-404; Roach (2010) 397-416; Gathii ‘Kenya’s Piracy Prosecutions’ 104 *American Journal of International Law* (2010) 416-436; Wambua (2010) 14-19; Wambua ‘Prosecution of maritime piracy cases in Kenya: Testing the SUA Convention Model on piracy prosecution’ 2014 Special Edition 1 *Acta Criminologica* 76-91; Sterio (2015) 95-99; and Hodgkinson (2015) 45-47.

<sup>1160</sup> *Cited* in the appeal judgment: *Hassan M. Ahmed v Republic* (2009) eKLR at 3.

<sup>1161</sup> *Idem*. The use of the term ‘crime against mankind’ is synonymous with the phrase *hostis humani generis* discussed in chapter 3 of this thesis. *See, also*, Gathii (2010) at 423.

<sup>1162</sup> *Idem* at 5.

<sup>1163</sup> *Idem*.

<sup>1164</sup> *Idem*. Gathii (2010) at 425, comments that ‘the LOS Convention is used to affirm the existence of universal jurisdiction over piracy as an independent basis for exercising jurisdiction over non-

domesticated in Kenyan law.<sup>1165</sup> She held further that, ‘even if the Convention had not been ratified and domesticated, the Learned Principal Magistrate was bound to apply international norms and instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations’.<sup>1166</sup>

The judgment as a whole was brief with very little probative analysis,<sup>1167</sup> but it provides a binding precedent, which gave Kenyan Magistrates’ courts the jurisdiction to hold piracy prosecutions against non-nationals captured outside the country. The case was a departure from Kenya’s traditional dualist stance.<sup>1168</sup> Gathii observes that ‘Kenyan courts have adopted an especially expansive understanding of their jurisdiction to prosecute these pirates without addressing the problems posed by the fact that article 105 of the UNCLOS presupposed jurisdiction primarily belongs to States which actually capture pirates’.<sup>1169</sup>

In 2009, Kenya passed a new Merchant Shipping Act<sup>1170</sup> (MSA) ‘in order to provide a precise definition of the offence and incorporate the provisions of [UNCLOS] and [SUA]’.<sup>1171</sup> The MSA helped ensure Kenyan domestic law compliance with international law.<sup>1172</sup> Wambua summarises the effect of the MSA, which ‘not only extended the jurisdiction of the Kenyan Courts to try piracy committed by non-nationals on the High

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Kenyan nationals charged with committing offences on the high seas. Thus, international law, rather than domestic law, is invoked not simply to fill a statutory gap or to help in interpreting a statute but as a legal justification establishing the piracy jurisdiction of Kenyan courts over non-nationals who had committed the offense extraterritorially and been captured by foreign forces.’

<sup>1165</sup> Wambua (2014) at 85, finds that this position taken by the judge was erroneous. He states that ‘Kenya is a dualist state and therefore parliament had to pass enabling legislation to give effect to international conventions which the country has signed, acceded or ratified.’

<sup>1166</sup> *Idem* at 6. The judge cites *idem* a ‘Text book on International Law by Martin Dixon NA at page 76’, which states that ‘It seems clear that piracy, war crimes and crimes against humanity are crimes susceptible to universal jurisdiction under customary international law.’

<sup>1167</sup> Wambua (2009) at 17.

<sup>1168</sup> For an overview of the dualist and monist debate, see Wambua (2014) at 79.

<sup>1169</sup> Gathii (2009) at 423.

<sup>1170</sup> Entry into force: 1 September 2009, Part XVI [Maritime Security]. Gathii (2010) at 429, observes that the MSA ‘definitively established jurisdiction in Kenyan courts over non-nationals captured on the high seas.’ See, also, Gathii (2009) at 390.

<sup>1171</sup> See UN Doc. S/2011/30 [25 January 2011] at par. 51.

<sup>1172</sup> Hodgkinson (2015) at 47; Sterio (2015) at 98. Sterio (2015) cites two judgments following the enactment of the MSA: the first was where a trial-level judge ‘ordered the freedom of several suspected pirates in 2010, declaring that the [MSA] gave Kenya jurisdiction only over piracy cases in its own territorial waters’ (at 98, citing a media report: Machuchi ‘AG Files appeal against ruling on piracy cases’ *Daily Nation* (11 April 2011)). Sterio cites further how this judgment was overturned on appeal with the appellate court holding that ‘Kenyan courts have jurisdiction to prosecute suspected pirates regardless of the geographic location of their alleged criminal acts and regardless of the suspects’ nationalities’ (*idem* at 98, citing a media report: DiLeonardo ‘Kenya Appeals Court allows jurisdiction over international piracy cases’ *Jurist* (18 October 2012)).

Seas, it also defines more extensively and comprehensively the offense of piracy than was previously defined under the repealed section'.<sup>1173</sup>

Section 369 adopts and domesticates the UNCLOS definition of piracy in article 101, and also defines 'armed robbery against ships'.<sup>1174</sup> Section 370 adopts the offences of hijacking and destruction of ships in article 3 of SUA, with that same section going further than SUA with the inclusion of subsection 370(4):

- 'Subject to subsection (5), subsections (1) and (2) shall apply –
- (a) whether the ship referred to in those subsections is in Kenya or elsewhere;
  - (b) whether any such act as is mentioned in those subsections is committed in Kenya or elsewhere; and
  - (c) whatever the nationality of the person committing the act.'

Wambua<sup>1175</sup> and Gathii<sup>1176</sup> both find that this subsection confers a jurisdiction wider than the SUA. A further development in the Kenyan system is the move towards a monist state with a clause in its new Constitution which indicates that 'the general rules of international law shall form part of the law of Kenya', and 'any treaty of convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.<sup>1177</sup> Having defined the offences of piracy and armed robbery, section 371 provides:

- 'Any person who –
- (a) commits any act of piracy;
  - (b) in territorial waters, commits any act of armed robbery against ships
- shall be liable, upon conviction, to imprisonment for life.'

These provisions of the MSA constitute Kenya's legislative regime on piracy. What has not been commented on, however, regarding the incorporation of article 101 of UNCLOS

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<sup>1173</sup> Wambua (2014) 82.

<sup>1174</sup> 'armed robbery against ships', according to the section, means 'any unlawful act of violence or detention or any act of depredation, or threat thereof, *other than an act of piracy*, directed against persons or property on board such a ship, *within territorial waters or waters under Kenya's jurisdiction*' (my emphasis).

<sup>1175</sup> (2014) at 82.

<sup>1176</sup> (2009) at 382.

<sup>1177</sup> Kenya Constitution, article 2(5) and 2(6) (2010); *See Sterio* (2015) at 95.

in the MSA in section 369, is the omission of the *locus* on piracy. The section adopts UNCLOS as follows, with the parts of the omitted UNCLOS wording in parenthesis:

“piracy” means—

- (a) any [illegal] act[s] of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed—
  - (i) [on the high seas] against another ship or aircraft, or against persons or property on board such ship or aircraft; or
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State’.

If read in isolation, section 369(1)(a)(i) proposes that piracy can occur anywhere and not solely on the high seas. Since the first piracy prosecution in 2006, Kenyan courts and legislature have engaged with the jurisdictional complexities, with the judicial officers often noting the dearth of jurisprudence in Kenya on piracy. The *locus* of the crime in this context, raised questions regarding the extraterritorial application of Kenyan law before the passing of the MSA. It remains to be seen, however, whether the omission of the term ‘high seas’ in the MSA definition of piracy will have any further consequence.

#### **4.2 Summative remarks**

Kenya has made a progressive step in the enactment of the MSA, and its monist stance under its new Constitution allows for an easier incorporation of potential amendments to the UNCLOS regime. Of particular value to the present discussion has been Kenya’s extended jurisdiction under section 369 and 370 when compared to the provisions of UNCLOS. In comparing the South African and Kenyan position relating to piracy off the East African seaboard, the South African emphasis has been on enforcement, while Kenyan emphasis has been on prosecution. It has been shown how the *locus* of a piratical act has been a critical element in forging an enforcement and prosecutorial regime.

## V. AFRICAN CONTINENTAL FRAMEWORK

### 5.1 Prefatory

To assess the regime pertaining to piracy from a continental perspective, it is necessary and useful to traverse Africa's position on maritime matters holistically, before specific strategies pertaining to maritime security and ultimately piracy are examined. The section will firstly consider the approach of the Organisation of African and Unity (OAU) and thereafter consider the efforts of its successor, the African Union (AU).

### 5.2 Antecedents of continental perspectives pertaining to the law of the sea: a brief general survey

On a Wednesday morning, on 1 November 1967 at a meeting of the First Committee of the UN General Assembly,<sup>1178</sup> the Permanent Representative of Malta to the UN, Dr. Arvid Pardo delivered a seminal address<sup>1179</sup> which startled the international community and was described in later years as 'prophetic' by the UN<sup>1180</sup> and well documented in subsequent scholarly commentary.<sup>1181</sup> He called upon delegates to consider the resources of the ocean, particularly the deep sea bed, as the common heritage of all mankind.<sup>1182</sup> He spoke in detail about the undiscovered riches and resources of the ocean<sup>1183</sup> and how major technological developments were making the seabed accessible and exploitable.<sup>1184</sup> He observed that the '[c]urrent international law encourages the appropriation of this vast area by those who have the technical competence to exploit it'.<sup>1185</sup> Writing during the period of the Cold War, he highlighted the grave consequences of the state of affairs and bemoaned that:

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<sup>1178</sup> The agenda for the meeting was: "[An] Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."

<sup>1179</sup> United Nations *Official Records* (XXII) First Committee, 1515<sup>th</sup> Meeting (1 November 1967). The full text of the speech can be accessed at:

[http://www.un.org/depts/los/convention\\_agreements/texts/pardo\\_ga1967.pdf](http://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf).

<sup>1180</sup> See United Nations Press Release SEA/1619 (1999).

Available at: <https://www.un.org/press/en/1999/19990716.SEA1619.html>

<sup>1181</sup> See for example Anand (ed) 3 *Law of the Sea: Caracas and Beyond* (1980) at 1 and Rembe (1980) at 39.

<sup>1182</sup> He asks at par 64: "...[I]t is clear that the sea-bed beyond the 200-metre isobaths will soon be subject to exploitation. The only question is, will it be exploited under national auspices for national purposes, or will it be exploited under international auspices and for the benefit of mankind?"

<sup>1183</sup> See for example at par. 26 of his address.

<sup>1184</sup> See for example at par. 44 of his address.

<sup>1185</sup> Par. 90 of his address.

‘[s]ome countries may therefore be tempted to use their technological competence to achieve near unbreakable world dominance through predominant control over the sea-bed and ocean floor. This, even more than the search for wealth, will impel countries with the requisite technical competence competitively to extend their jurisdiction over selected areas of the ocean floor. The process has already started and will lead to a competitive scramble for sovereign rights over land underlying the world’s seas and oceans, surpassing in magnitude and in its implication last century’s colonial scramble for territory in Asia and Africa. The consequences will be very grave: at the very least a dramatic escalation of the arms race and sharply increasing world tensions, cause also by the intolerable injustice that would reserve the plurality of the world’s resources for the exclusive benefit of less than a handful of nations’.<sup>1186</sup>

Pardo’s call for a regime to effectively administer the resources of the oceans was well received and created the impetus towards UNCLOS III and ultimately the regime created by the adoption of UNCLOS.<sup>1187</sup> For the purposes of this discussion however, it is not the global attention garnered by his address, but rather the interest of African states, which merits further analysis here. Akintoba observed that ‘Pardo’s speech found an especially receptive audience among African states because it specifically expressed concern for the plight of developing countries and mankind as a whole. It also represented the initiative of a developing country, one whose developmental priorities dovetailed neatly with those of the African bloc’.<sup>1188</sup> It reinforced the feeling of African nations at the time regarding the resources of the ocean in general. Frank Njenga of Kenya, who conceived the concept of the EEZ<sup>1189</sup> remarked that ‘Africa had been watching as the supposedly inexhaustible fishery resources off her coast were being ruthlessly and callously decimated by

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<sup>1186</sup> Par. 91 of his address.

<sup>1187</sup> See United Nations Press Release SEA/1619 (1999).

Available at: <https://www.un.org/press/en/1999/19990716.SEA1619.html>.

Pardo was thus unsurprisingly referred to as the “Father of the Law of the Sea Conference.” See also Anand (ed.) (1980) at 2.

<sup>1188</sup> Akintoba *African States and Contemporary International Law: A case study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone* (1996) at 4.

<sup>1189</sup> At the 1972 Geneva session of the UN Sea-bed Committee, Kenya submitted the “Draft Articles on Exclusive Economic Zone Concept.” UN Doc. A/C 138/SCII/L.10. Njenga’s *raison d’être* for the proposal was: ‘The exclusive economic zone concept is an attempt at creating a framework to resolve the conflict of interests between the developed and developing countries in the utilization of the sea. It is an attempt to formulate a new jurisdictional basis which will ensure a fair balance between the coastal states and other users of neighbouring waters.’ See Asian-African Legal Consultative Committee (AALCC) *Report of the 13<sup>th</sup> Session* (January 1972) at 24. See generally Akintoba (1996) at 72-72; Rembe (1980) 116-123.

irresponsible activities of long-distance factory ships, industries of developed countries'.<sup>1190</sup>

Accordingly Akintoba observed that Pardo's address 'supplied a significant impetus that propelled African interests forward and compelled collective African action and participation in UNCLOS III. Joining with Latin American states in claiming resource zones off their coast, African states began the process of reassessing their position on ocean-related issues'.<sup>1191</sup> The OAU, as a continental organisation, was the vehicle with which to harmonise and unify the African position on these ocean-related issues. Its task was not as easy one however. Njenga commented on the realities and context that African states found themselves facing at the time. He remarked that:

'They were confronted with an existing Law of the Sea, which...had evolved over centuries to cater to the interests of maritime powers, a law which had never concerned itself with African interests since Africa had played no role in its formation. On the contrary most of the principles that had evolved were inimical to Africa. The principle of freedom of the sea had been the channel for the degradation of African resources over the centuries. It was used to further the most barbaric crime against humanity – the slave trade – and also to colonize and subjugate a whole continent to foreign domination'.<sup>1192</sup>

Rembe, also similarly commented that:

'Most of the African States did not participate in devising the Geneva Conventions, and favoured a new law which would reflect their views and interests, particularly a law that would accelerate their economic and social development, and reduce the inequalities between the developed and developing countries'.<sup>1193</sup>

The position was against the backdrop of a continent with a vast maritime realm adjacent to its coast<sup>1194</sup> which had many diverging interests. Njenga, for example, described these

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<sup>1190</sup> Njenga 'Historical Background of the Evolution of the Exclusive Economic Zone and the Contribution of Africa' in Pontecorvo *The New Order of the Oceans: The Advent of a Managed Environment* (1986) at 133.

<sup>1191</sup> Akintoba (1996) at 6.

<sup>1192</sup> Njenga (1986) at 132-133.

<sup>1193</sup> Rembe (1980) at 122.

<sup>1194</sup> See Akintoba (1996) at 62 for a detailed description of the geographical dimensions of the continent's maritime domain. See also Rembe (1980) at 3-4.

diverging interests existing between landlocked and coastal states, states with broad continental shelves and those states with a negligible continental shelf, and states with rich fisheries and those without.<sup>1195</sup> The geostrategic importance of the continent was readily apparent with confluences of merchant shipping transiting important shipping lanes around the continent from the Straits of Gibraltar, the Cape of Good Hope, and the Mozambique Channel to the Bab el Mandeb. Akintoba rightly commented that ‘Africa stands at the crossroads of five continents’.<sup>1196</sup>

At the time of Pardo’s address, the fledgling OAU, which was formed only a few years prior, did not contain any seminal instrument or policy pertaining to maritime matters. Its Charter<sup>1197</sup> contained no express provisions pertaining to maritime matters. It is noteworthy, however, that one of the objectives of the Charter was ‘[t]o defend their [African states] sovereignty, their territorial integrity and independence’.<sup>1198</sup> Furthermore, this notion was duplicated in one of the principles of the Charter, namely the ‘[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence’.<sup>1199</sup> In the same vein, another purpose of the Charter is an obligation on member states to coordinate and harmonise their general policies in the field of cooperation for defence and security.<sup>1200</sup>

The ‘Lusaka Statement on the Sea-bed by Non-Aligned Countries’<sup>1201</sup> which was issued in September 1970 and submitted to the UN General Assembly echoed the earlier sentiments of Pardo that the seabed and ocean floor beyond the limits of national jurisdiction are the common heritage of mankind and the area shall be used for peaceful purposes. They also supported the convening of a conference on the law of the sea to deal holistically and comprehensively with all the maritime zones and regimes. Akintoba noted that statement represented the ‘first substantive input of African countries to the law of the sea debate’.<sup>1202</sup>

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<sup>1195</sup> Njenga (1986) at 141.

<sup>1196</sup> Akintoba (1996) at 63.

<sup>1197</sup> 479 UNTS 39, adopted in Addis Ababa on the 25 May 1963 and entered into force on the 13 September of that year.

<sup>1198</sup> See article II (1)(c).

<sup>1199</sup> See article III (3).

<sup>1200</sup> Article II (2)(f).

<sup>1201</sup> NAC/CONF. 3/Res 11. The African member states included: Algeria, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Ethiopia, Ghana, Kenya, Lesotho, Liberia, Libya, Mali, Mauritania, Morocco, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaire and Zambia. See Rembe (1980) at 209; Akintoba (1996) at 70. See also South African Institute of International Affairs *Resolutions of the Third Conference of Non-Aligned States: with selected Conference Statements and Comments* (1971) at 15.

<sup>1202</sup> Akintoba (1996) at 70.

In 1971, two resolutions were adopted by the OAU<sup>1203</sup> and in 1972 a further resolution, titled 'Resolution on the Law of the Sea' was adopted at the nineteenth ordinary session of the OAU Council of Ministers.<sup>1204</sup> The resolution boldly asserted that 'the Law of the Seas at present in force does not take into account the interests of African countries...'<sup>1205</sup> and saw the need for '...OAU Member States to concert on all the points and to harmonize their positions in order to present a common front on the occasion of any confrontation on the Law of the Sea'.<sup>1206</sup> Also in 1972, the African States' Regional Seminar on the Law of the Sea adopted the Yaoundé Conclusions.<sup>1207</sup> Rembe observed that the Yaoundé Conclusions were 'the first comprehensive attempt by African States to put together areas of consensus and departure on the law of the sea'.<sup>1208</sup>

These developments were then articulated in the OAU Declaration on the Issues of the Law of the Sea,<sup>1209</sup> which was a unified continental strategy and response on matters pertaining to the law of the sea in Africa.<sup>1210</sup> Although the declaration covered a wide range of matters, they were in response to and conformed to the context and general political sentiment prevailing in the continent at the time. Thus, the declaration made no reference to matters pertaining to security generally and piracy specifically. The OAU passed several

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<sup>1203</sup> *Resolution on Fisheries* OAU Doc. CM/Res. 250 (XVII) and *Resolution on the Permanent Sovereignty of African Countries over their Natural Resources* OAU Doc. CM/Res. 245 (XVII). Akintoba (1996) at 71 commented that although 'these actions and resolutions predated formal introduction of the EEZ concept, various attributes of the concept were clearly beginning to emerge at this time.'

<sup>1204</sup> *Resolution on the Law of the Sea* OAU Doc. CM/Res. 289 (XIX).

<sup>1205</sup> *Idem*, third preambular paragraph.

<sup>1206</sup> *Idem*, seventh preambular paragraph.

<sup>1207</sup> Report of the African States' Regional Seminar on the Law of the Sea, Yaounde, Cameroon (June 1972): UN General Assembly *Official Records* Supplement 21: A/AC. 138/79. *Reproduced* in Rembe (1980) at 217 and *International Legal Materials* 12 (January 1973) at 210. *See also* Akintoba (1996) at 72. The statement was issued with recommendations under the following heads: (1) on the territorial sea, the contiguous zone and the high seas; (2) on historic rights and historic bays; (3) on the biological resources of the sea, fishing and maritime pollution and (4) on the continental shelf and sea-bed. The last paragraph stated that 'The participants expressed the unanimous wish that these recommendations should be notified to all African States and the OAU. The following African states participated in the seminar: Algeria, Benin, Cameroon, Central African Republic, Cote d'Ivoire, Egypt, Equatorial Guinea, Ethiopia, Kenya, Mauritania, Nigeria, Senegal, Sierra Leone, Tanzania, Togo, Tunisia and Zaire.'

<sup>1208</sup> Rembe (1980) at 120.

<sup>1209</sup> OAU Doc. A/CONF.62/33 (1974). *Reproduced* in UN 3 *UNCLOS III: Official Records* (1974) at 63-65 and Rembe (1980) at 220.

<sup>1210</sup> The declaration emphasized that 'African countries have a right to exploit the marine resources around the African continent for the economic benefit of African peoples' (ninth preambular paragraph). The declaration was set out very briefly under nine heads, namely: territorial sea and straits; regime of islands; exclusive economic zone concept including exclusive fishery zone, regional arrangements, fishing activities in the high seas, training and transfer of technology, scientific research, preservation of the marine environment; and an international regime and international machinery for the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.

resolutions on law of the sea matters during the 1970s and these *inter alia* emphasized the 1974 OAU declaration and the need for a harmonised approach as African nations continued their negotiations in the various sessions of UNCLOS III.<sup>1211</sup>

Thus, the role of Africa in UNCLOS III was solidified. The input of African states were novel, as Njenga commented: ‘If we go to the 1973 Conference steeped in the old concepts of the law of the sea, we are bound to fail. We must find new concepts to resolve existing conflicts of interests in the sea, so that a fair and equitable framework for the exploitation of the seas is created’.<sup>1212</sup> Rembe also observed that the input of the African states was ‘not advanced on purely legal principles; it had been infused with moral arguments, economic, political and scientific factors’.<sup>1213</sup> African states foresaw that through promoting the EEZ in the UNCLOS III deliberations, they were forging a ‘just legal and social order which will reflect the modern technological, economic and political realities, and replace past abuses and inequities’.<sup>1214</sup>

Despite these positive developments, subsequent to conclusion of UNCLOS III, the OAU engaged with minimal policy-making relating to the law of the sea matters.<sup>1215</sup> Indeed, Njenga, writing a few years later in 1986, lamented that: ‘hardly any African country – for that matter the OAU – is doing anything to realise the immense resources potential of the seas around Africa, which are its economic zone’.<sup>1216</sup>

With all the above said, is not surprising, however, that maritime security with a focus on piracy did not feature explicitly in any of the instruments passed by the OAU during its existence. Firstly, Akintoba reflected on the aspirations of African coastal states during this period which were ‘to secure greater employment and income of their people, as well as to

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<sup>1211</sup> A list of the most pertinent resolutions (between 1971 and 1980) were:

OAU Doc. CM/Res 238 (XVI)(1971) *Problems of the Seabed*; OAU Doc. CM/Res 289 (XIX) (1972) *Resolution on the Law of the Sea*; OAU Doc. CM/Res 382 (XXIII) (1974) *Resolution on the Law of the Sea*; OAU Doc. CM/Res 520 (XXVII) (1974) *Admission of the People’s Republic of Angola to [UNCLOS III]*; OAU Doc. CM/Res (XXVII) (1976) *International Zone Extending Beyond National Jurisdiction*; OAU Doc. CM/Res 570 (1977) *Resolution on the Law of the Sea*; OAU Doc. CM/Res 745 (XXXIII) (1979) *Resolution on the Law of the Sea*; OAU Doc. CM/Res 795 (XXXV) (1980) *UN Conference on the Law of the Sea*; OAU Doc. CM/Res (XXXVII) (1981) *UN Conference on the Law of the Sea*; OAU Doc. ECM/Res. 1 (XII) (1979) *Resolution Concerning Future Sessions of [UNCLOS III]*; OAU Doc. ECM/Res (1979) *Resolution on the Law of the Sea*.

<sup>1212</sup> AALCC *Report of the 13<sup>th</sup> Session* (January 1972) at 209; See also Akintoba (1996) at 72.

<sup>1213</sup> Rembe (1980) at 120.

<sup>1214</sup> *Idem* at 121-122.

<sup>1215</sup> The *African Maritime Transport Charter* was adopted in 1994 and was an instrument primarily responsible for the development of the maritime transport sector. Because the charter never came into force and was focused on shipping, it is of little import for the purposes of this analysis.

<sup>1216</sup> Njenga (1986) at 146.

obtain government revenues and foreign exchange earnings from more viable fishing and processing plants'.<sup>1217</sup> References to maritime security were scant or not at the forefront of the discourses at the time.<sup>1218</sup> Secondly, the preoccupation was mostly on landward security<sup>1219</sup> and finally, until the resurgence of piracy in 2006, there had been no significant incidents of piracy off the African coast that merited continental or global concern about maritime security in the region. The task of securing Africa's waters thus fell upon the OAU's successor, the AU.

### 5.3 The contemporary work of the African Union and the salience of maritime security<sup>1220</sup>

Vrancken remarked that '[w]hen the Constitutive Act of the AU was adopted in 2000, the dreams and aspirations which spurred the adoption of the OAU Charter remained largely unfulfilled'.<sup>1221</sup> Waweru commented that '[t]he OAU was constituted around the idea of 'Pan-Africanism' where all member states were to be equal partners and respect for the sovereignty of member nations was paramount'.<sup>1222</sup> He went on to comment that a key feature was that '[m]ember States declared and affirmed their adherence to the principle of non-interference in the internal affairs of States'.<sup>1223</sup> He painted a grim picture of the subsequent state of affairs when he observed that 'the plan invariably served to entrench dictators and protect them from external interference by neighbouring African nations, and in effect rendering the OAU incapable of dealing with internal conflict situations in Africa'.<sup>1224</sup> Although in the 1990s, one of the OAU's objectives was realised with the dismantling and end of the apartheid regime in South Africa in 1994, the attention of the world was also drawn that same year to the genocide in Rwanda. Through much of that

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<sup>1217</sup> Akintoba (1996) at 90.

<sup>1218</sup> However, the after a long hiatus in the 1980s, OAU did pass a Convention on the Prevention and Combating of Terrorism in 1999, which came into force in 2002 and in 2000 the OAU Assembly adopted the 'Solemn declaration on security, stability, development and co-operation in Africa. OAU Doc. AHG/Decl. 4 (XXXVI) (2000).

<sup>1219</sup> See Vreÿ 'Turning the Tide: Revisiting African Maritime Security' 41 *Scientia Militaria: South African Journal of Military Studies* (2013) 1 at 2. See Bueger 'Communities of Security Practice at Work? The Emerging African Maritime Security Regime' 6 *African Security* (2013) 297 at 298 where he observed that: 'Maritime security has been a long-neglected stepchild of African security politics.'

<sup>1220</sup> Unless otherwise cited, the instruments adopted by the various bodies of the AU that are discussed in this chapter were sourced from the website of the AU at: <https://au.int/>. and more specifically the link therein to 'peace and security': <http://www.peaceau.org/en/>.

<sup>1221</sup> Vrancken 'The Role of the African Union in Combating Piracy' 1 *Acta Criminologica: Southern African Journal of Criminology* (2014) 53 at 55.

<sup>1222</sup> Waweru *The Role of the African Union in Addressing Maritime Piracy in Eastern Africa* unpublished Master of Management in Security dissertation (University of the Witwatersrand) (2014) at 18. The hypothesis of the dissertation was answered through a quantitative analysis.

<sup>1223</sup> *Idem.*

<sup>1224</sup> *Idem.*

decade, political crises and wars proliferated many reaches of the continent from civil wars in Sierra Leone and Liberia to Somalia and it became apparent that the OAU was ill-equipped to meet the challenges which the continent would face in the following century. On the eve of its fortieth anniversary, in July 2002 at the Durban summit, African Heads of State oversaw the birth of the AU. The Constitutive Act<sup>1225</sup> of the AU was adopted two years earlier, at the Lomé summit in 2000. The AU described itself as ‘[shifting] focus from supporting liberation movements in the erstwhile African territories under colonialism and apartheid, as envisaged by the OAU since 1963 and the Constitutive Act, to an organisation spear-heading Africa’s development and integration’.<sup>1226</sup> The AU Commission<sup>1227</sup> noted that:

‘The adoption of the Constitutive Act marked a radical shift from the cardinal OAU principle of national sovereignty and non-intervention in national affairs. Although the Constitutive Act upholds the principle of non-interference, it also reserves the right of the Union “to intervene in a Member State in respect of grave circumstances namely: war crimes, genocide and crimes against humanity”’.<sup>1228</sup>

The role of the AU in combatting piracy and particularly the enforcement jurisdiction to combat piracy, merits a detailed comment in this section. Being a continental organisation, the reach of AU initiatives would cover the entire eastern African seaboard, which is the contextual basis for the present study. The survey below would consider the AU’s recognition of maritime security and piracy and set out and amplify the pertinent decisions from the various bodies of the AU in this regard, in a chronological sequence.<sup>1229</sup> The survey will conclude with an assessment of the extent to which AU mechanisms could complement the extant international framework and whether enforcement jurisdiction under the auspices of the AU to combat piracy could extend into territorial waters of member states.

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<sup>1225</sup> *United Nations Treaty Series* 2158 (2003) at 3. Cited hence as the ‘Constitutive Act.’

<sup>1226</sup> African Union ‘AU in a Nutshell’ available at: <https://au.int/en/history/oau-and-au>.

<sup>1227</sup> This organ of the AU is described in the section *et seq.*

<sup>1228</sup> African Union Commission [Peace and Security Department] *African Peace and Security Architecture Roadmap: 2016-2020* (2015) at 12-13.

<sup>1229</sup> By setting out developments in a chronological sequence, an assessment can be made about the developing salience of maritime security and piracy, as perceived by the AU.

### 5.3.1 Overview of the institutional framework of the AU

Before this survey is undertaken, it would not be unwarranted to briefly describe the institutional framework of the AU<sup>1230</sup> and a key feature, the African Peace and Security Architecture (APSA). The framework is derived from the Constitutive Act and contains the following branches:

- (i) The Assembly: The Assembly is described as the supreme organ of the AU<sup>1231</sup> and it is composed of Heads of State or Government or their duly accredited representatives.<sup>1232</sup> It has a number of functions which *inter alia* comprises the power to ‘determine the common policies of the Union’<sup>1233</sup> and to ‘give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace’.<sup>1234</sup>
- (ii) The Executive Council: The Executive Council reports to the Assembly and generically considers issues which are referred to it.<sup>1235</sup> The Council is composed of ‘Ministers of Foreign Affairs or other such Ministers as designated by the Governments of Member States’.<sup>1236</sup> The functions of the Council are to ‘coordinate and take decisions on policies in areas of common interest to Member States’<sup>1237</sup> which includes *inter alia* transport and communications.<sup>1238</sup>
- (iii) The Specialised Technical Committees: These committees were created to address sectoral issues and are at a Ministerial level. They assist the Council with a number of functions<sup>1239</sup> with two committees being relevant to the purposes of maritime security and piracy, firstly the Committee on Transport, Transcontinental and

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<sup>1230</sup> See also Vrancken (2014) at 55-59; Waweru (2014) at 18-27.

<sup>1231</sup> Article 6(2) of the Constitutive Act.

<sup>1232</sup> *Idem* article 6(1).

<sup>1233</sup> *Idem* article 9(1)(a).

<sup>1234</sup> *Idem* article 9(1)(g).

<sup>1235</sup> *Idem* article 13(2).

<sup>1236</sup> *Idem* article 10(1).

<sup>1237</sup> *Idem* article (13)(1).

<sup>1238</sup> *Idem* article 13(1)(f).

<sup>1239</sup> These functions as listed in article 15 of the Constitutive Act are: ‘(a) Prepare projects and programmes of the Union and submit in to the Executive Council; (b) Ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the Union; (c) Ensure the coordination and harmonization of projects and programmes of the Union; (d) Submit to the Executive Council either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provision of this Act; and (e) Carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of this Act.’

Interregional Infrastructures, Energy and Tourism<sup>1240</sup> and secondly the Committee on Defence, Safety and Security.<sup>1241</sup>

- (iv) The Permanent Representatives' Committee: This committee is designated to prepare the work of the Council and acts on the Council's instructions.<sup>1242</sup>
- (iv) The Commission: This is the secretariat of the AU<sup>1243</sup> with *inter alia* a policy formulation role.<sup>1244</sup> The commission is led by a chairperson and a deputy together with eight commissioners allocated to eight portfolios.<sup>1245</sup>
- (v) The Pan African Parliament and the Court of Justice: These are established in terms of article 17 and 18 respectively.<sup>1246</sup>

It was a logical course of action during the genesis of the AU to promote peace and security, given the scourge of conflicts on the continent at the time.<sup>1247</sup> Its predecessor, the OAU, did establish a Mechanism for Conflict Prevention, Management and Resolution<sup>1248</sup> for this purpose with limited success. The AU Commission recounted that 'the scope and gravity of the conflicts, as well as their complex nature, soon revealed the limitations of the Mechanism, which among other things, was not equipped with the means for the deployment of peace keeping operations, a responsibility left exclusively to the United Nations'.<sup>1249</sup> Article 5(2) of the Constitutive Act gave the AU Assembly the power to establish any further organisations and pursuant thereto, the Assembly adopted the Protocol Relating to the Establishment of the Peace and Security Council of the African Union in 2002.<sup>1250</sup> It established the Peace and Security Council (PSC) as a 'standing decision-

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<sup>1240</sup> See 'Decision on the specialized technical committees' AU Doc. Assembly/AU/Dec. 227 (XII) (2009) at 2(4).

<sup>1241</sup> *Idem*.

<sup>1242</sup> Article 21 of the Constitutive Act.

<sup>1243</sup> *Idem* article 20.

<sup>1244</sup> See 'Statutes of the Commission' AU Doc. ASS/AU/2(I) (2002) at article 3(2).

<sup>1245</sup> The relevant portfolios to this study are: namely 'Peace and Security (Conflict Prevention, Management and Resolution, and Combating Terrorism...)' (Article 12(1)(a) of the Statutes of the Commission); and 'Infrastructure and Energy (Energy, Transport, Communications, Infrastructure and Tourism...)' (Article 12(1)(c)). The details of the portfolio which are contained in parenthesis after the listing in article 12 of the Statues of the Commission end with ellipses, which can be interpreted to mean that the list is not a *numerous clausus*).

<sup>1246</sup> These organs will not be canvassed for the purposes of the present study.

<sup>1247</sup> The eighth preambular paragraph of the Constitutive Act states: 'CONCIOUS [sic] of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda.' Article 3(f) thereof states that one of the objectives of the AU is to 'promote peace, security and stability on the continent'.

<sup>1248</sup> See OAU Doc. AGH/Decl 3 (XXIX) (June 1993) at par. 11.

<sup>1249</sup> AU Commission (2015) at 12.

<sup>1250</sup> Adopted at the first ordinary session of the Assembly on 9 July 2002 (referred to hence as the 'the Protocol'). It came into force in August 2003. See also AU Doc. AHG/Dec 160 (XXXVII) (July 2001).

making organ for the prevention, management and resolution of conflicts'<sup>1251</sup> and further provided that the PSC 'shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa'.<sup>1252</sup> Its objectives are *inter alia* to promote peace, security and stability in Africa<sup>1253</sup> and also to develop a common defence policy for the Union.<sup>1254</sup> Whilst the PSC maintains the principle of respect for the sovereignty, integrity and non-interference in the internal affairs of member states,<sup>1255</sup> it goes further by allowing the Union to intervene in member states in two circumstances, to wit: firstly pursuant to a decision of the Assembly in respect of grave circumstances (war crimes, genocide and crimes against humanity)<sup>1256</sup> and secondly where a member state requests the intervention from the Union in order to restore peace and security.<sup>1257</sup> Piracy is thus precluded from the first ground of intervention and the second ground implies that enforcement jurisdiction to combat piracy within the territory of a member state could be exercised at the request or consent of the member state. However, the Solemn Declaration on a Common African Defence and Security Policy<sup>1258</sup> expanded on the first ground above with an additional ground of intervention where there is '...a serious threat to legitimate order, in order to restore peace and stability to the Member States of the Union, upon the recommendation of the Peace and Security Council'.<sup>1259</sup> Strydom comments that the reference to the restoration of peace and stability involves the issue of peace enforcement.<sup>1260</sup> A submission will be raised in the concluding chapter of this thesis that during 2009, the peak of the piracy epidemic off the eastern African seaboard would have constituted a serious threat to the security and stability of the maritime region, thereby falling within the ambit of the grounds for intervention laid out above.

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<sup>1251</sup> Article 2(1) of the Protocol. The PSC has been described as 'the centre of major decision-making on the continent and is viewed as such by the international community.' *See* AU Commission (2015) at 14.

<sup>1252</sup> *Idem*.

<sup>1253</sup> Article 3(a) of the Protocol.

<sup>1254</sup> Article 3(e) of the Protocol read with article 4(d) of the Constitutive Act. Strydom, in his inaugural lecture at the Rand Afrikaans University in 2003 remarked that 'the architects of the council had in mind a role which goes beyond security issues *strictu sensu*...[t]his combining of peace and security functions proper with police functions (preservation of life and property) and economic measures (sustainable development), makes it rather difficult to arrive at a proper demarcation of the PSC's intended role, as well as of its powers and functions *vis-à-vis* other organs of the AU.' *See* Strydom 'Peace and security under the African Union.' 28 *South African Yearbook of International Law* (2003) 59 at 62.

<sup>1255</sup> Article 6(e) and (f) of the Protocol.

<sup>1256</sup> Article 4(j) of the Protocol, read with article 4(h) of the Constitutive Act.

<sup>1257</sup> Article 4(k) of the Protocol, read with article 4(j) of the Constitutive Act.

<sup>1258</sup> Adopted at the second extraordinary session of the Assembly on 28 February 2004.

<sup>1259</sup> *Idem* article 11(f). It is also significant to note another one of the principles of the policy in article 12: 'The indivisibility of African States: the security of one African country is inseparably linked to the security of other African countries, and the continent as a whole.' The former article also appeared in article 4 of the Protocol on Amendments to the Constitutive Act of the African Union (adopted in July 2003).

<sup>1260</sup> Strydom (2003) at 71.

In addition to the establishment of the PSC, the Protocol provides *inter alia* the following mechanisms: the Panel of the Wise,<sup>1261</sup> the Continental Early Warning System<sup>1262</sup> and the African Standby Force (ASF).<sup>1263</sup> The ASF is directly mandated under article 13(3)(c) of the Protocol to intervene in a member state to restore peace and stability in the circumstances prescribed under the Constitutive Act. Under this framework, the ASF would therefore be the most appropriate mechanism through which enforcement jurisdiction to combat piracy can be exercised. Collectively, these mechanisms established by the Protocol constitute the pillars of the APSA. The Common African Defence and Security Policy is also complemented by the AU Non-Aggression and Common Defence Pact,<sup>1264</sup> the implementation of which is vested with the PSC under the authority of the Assembly.<sup>1265</sup> It would be apt at this stage to note a few of the articles from the Pact which are pertinent to the present study: article 5(b) provides that '[e]ach State Party shall prevent its territory and its people from being used for encouraging or committing acts of subversion, hostility, aggression and other harmful practices that might threaten the territorial integrity and sovereignty of a Member State or regional peace and security'. The *actus reus* of piracy would fall within the ambit of this article. Article 5(b) goes on to state that: '[e]ach State Party shall prohibit the use of its territory for the stationing, transit, withdrawal or incursions of irregular armed groups, mercenaries and terrorist organizations operating in the territory of another Member State'. Applying the *eiusdem generis* rule of statutory interpretation, the *modus operandi* of Somali pirates, described in the second chapter hereof, could be read into the provisions of the article. Lastly, article 6(a) provides that: '[s]tate Parties undertake to extend mutual legal and all other assistance in the event of threats of terrorist attack or other organized international crimes'. The article is silent on whether 'other assistance' could encompass peace enforcement and enforcement jurisdiction and the *locus* of such action or assistance.

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<sup>1261</sup> Article 11(3) of the Protocol provides that '[t]he panel of the Wise shall advise the [PSC] and the Chairperson of the Commission on all issues pertaining to the promotion, and maintenance or peace, security and stability in Africa.'

<sup>1262</sup> Under article 12 of the Protocol, this is an information and intelligence gathering network designed to facilitate the anticipation and prevention of conflicts. The information is assessed by the chairperson of the Commission to advise the PSC of potential conflicts and threats to peace and security in the continent and recommend the best course of action.

<sup>1263</sup> See Article 13 of the Protocol.

<sup>1264</sup> Adopted by the assembly at its fourth ordinary session in January 2005 (referred to hence as the Pact).

<sup>1265</sup> Article 9 of the Pact.

Having set out the continental institutional framework, and cited the key framework instruments in general terms, the survey will describe how the AU approached the piracy pandemic through its decisions, declarations and other instruments.

### 5.3.2 *Recognition of maritime security*

In the Constitutive Act of the AU, there is no explicit reference to maritime matters in general or maritime security specifically. Baker noted however, that ‘[i]f Africans hope to realize a prosperous future as stake-holders in an emerging market or even as global market leaders, they will need first to master the maritime domain’.<sup>1266</sup> In principle, a key impediment to overcome was ‘sea blindness’ or a lack of recognition of the strategic importance of Africa’s maritime realm. Baker commented that ‘for too long governments and institutions have turned blind eyes toward the African seas and allowed security problems, corruption, bureaucracy, and weak infrastructure to rob Africans and their honest partners of food, energy, wealth and prosperity’.<sup>1267</sup> In a discussion paper prepared by the Brenthurst Foundation, it was similarly observed that ‘[p]rotecting Africa’s resources, waterborne trade and citizenry is vital, but it is clear that limited resources and perhaps a lack of recognition of the importance of this sector, have constrained the continent’s ability to effectively protect its waterways from a variety of threats’.<sup>1268</sup>

The proliferation of threats to Africa’s security, particularly in the maritime domain, as amplified by the scourge of piracy and the attractive opportunity to sustainably exploit maritime resources and opportunities underscored the need for a continental maritime strategy. Baker outlined this need in the following terms:

‘[T]he international community needs an African *strategy* for maritime development, a plan to tie together existing and future actions, to help establish an African maritime economy that creates wealth from the sea for Africans, and to mobilize international instruments so as to assist in implementing African maritime initiatives toward good governance. In short, we need to find a way collectively to revolutionize the African maritime sector and to chart a course toward an African maritime economy’.<sup>1269</sup>

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<sup>1266</sup> Baker ‘Toward an African Maritime Economy’ 64 *Naval War College Review* (2011) 39 at 40.

<sup>1267</sup> *Idem*.

<sup>1268</sup> The Brenthurst Foundation ‘Maritime Development in Africa: An Independent Specialists’ Framework’ *Discussion Paper* (2010) 3 at 7.

<sup>1269</sup> Baker (2011) at 40. He highlights the need for a continental strategy to tie together and unify initiatives to counter the then *status quo* of regional initiatives that were not comprehensive of

Similarly, the research undertaken by the Brenthurst Foundation in 2010 similarly found that ‘Africa is the only region in the world that does not have its own maritime policy or strategy, despite the acknowledged importance of this component of any national or regional economy’.<sup>1270</sup>

Integral to any proposed maritime continental strategy is the creation of a security architecture bespoke to *maritime security*. The impact of a comprehensive maritime security strategy was highlighted by Baker who aptly observed that: ‘[s]afety and security create confidence in a market, by reducing physical risks, cutting insurance costs, and improving operating timelines’.<sup>1271</sup> The Brenthurst Foundation also noted that: ‘a collaborative security architecture, would allow the conduct of free trade, i.e in a safe and secure environment. It would require the enforcement of maritime legislation to remove those factors that would negatively affect the free flow of goods. Maritime legislation would, in turn strengthen the maritime institutions which are crucial for a maritime strategy. The combination of strengthened and coherent legislation and institutions would ... enhance the policing of, and prosecution for, illegal acts, e.g. piracy...’.<sup>1272</sup>

Maritime security first found a formal expression in the AU in a decision of the Executive Council in 2003.<sup>1273</sup> The Council recognised ‘safety and security of maritime activities in general and in particular maritime transport as vital for the orderly and regular development of maritime economies of African States’.<sup>1274</sup> It further recognized the ‘importance of seaborne trade in the economies of African countries’.<sup>1275</sup> The decision requested the Commission to ‘carry out the revision of the African Maritime Charter<sup>1276</sup> and the Model Maritime Legislation with a view to adapting them to the prevailing conditions’.<sup>1277</sup>

However, the first tangible steps toward the creation of a continental *maritime strategy* was seen when the AU Commission collaborated with the South African based Brenthurst

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complimentary of initiatives in other regions. For example he cites how some countries like Nigeria ‘have made improvements in port efficiency’ however ‘their advances are offset by poor security.’ (at 42).

<sup>1270</sup> Brenthurst Foundation (2010) at 6.

<sup>1271</sup> Baker (2011) at 43.

<sup>1272</sup> Brenthurst Foundation (2010) at 8.

<sup>1273</sup> AU Doc. EX/CL/Dec 60 (III) (July 2003).

<sup>1274</sup> *Idem* at par. 2.

<sup>1275</sup> *Idem* at par. 3.

<sup>1276</sup> Adopted in 1994.

<sup>1277</sup> *Idem* at par. 5.

Foundation<sup>1278</sup> and the African Centre for Strategic Studies in Washington with the task of formulating such an overarching strategy. A draft strategy was presented in a detailed discussion paper<sup>1279</sup> produced in 2010. The strategy underscored the importance of maritime trade with maritime security as a ‘key component of collective security’.<sup>1280</sup> It notes that whilst the security regime involves partnerships with international stakeholders, there was nothing that was ‘truly African owned or that is designed *primarily* for the benefit of Africans at the continental level’.<sup>1281</sup> The goals embodied in the draft strategy were *inter alia* ‘strengthening Africa’s collective security architecture to *ensure safe passage*’<sup>1282</sup> and to ‘ensure that Africa is well represented in international maritime law...[with] its own maritime law framework...[that] would complement international law, while allowing for specific provisions relevant to African needs and capacities’.<sup>1283</sup> The draft strategy identified current and future challenges to African security and growth, broadly categorised these into growth challenges, environmental challenges and security challenges. In respect of security challenges, piracy was identified. The primary challenge in relation to piracy was insufficient coastal protection capacity.<sup>1284</sup> An issue to be addressed, as identified by the strategy was ‘penalties for piracy, for example, must be the same wherever the offence is committed in African waters’.<sup>1285</sup>

This strategy was never taken forward and developed into an instrument under the auspices of the AU. It thus remains merely a white paper. It was conceded in the draft strategy that ‘[t]he lack of resources and of a comprehensive African-owned maritime security strategy has obliged Africa to “outsource” many aspects of its maritime security to international or “external” organizations in order to provide for its needs’.<sup>1286</sup> It can be speculated that because formulating a draft strategy was outsourced, it ironically was never adopted or incorporated into an instrument promulgated under the AU. Baker observed that ‘since no

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<sup>1278</sup> A think tank which *inter alia* prepares policy advice.

See generally: <http://www.thebrenthurstfoundation.org/>

<sup>1279</sup> See Brenthurst Foundation (2010) *supra*.

<sup>1280</sup> *Idem* at 3. The strategy emphasized that maritime security ‘forms part of the foundation for any economic development through the improvement of global competitiveness for its goods and services. However, Africa has yet to decide on the relative importance of its maritime environment against competing priorities – and allocate the requisite resources to ensure that it remains an asset’ (*idem*). It also concluded that ‘vast stretches of Africa’s coastline are, in effect, ungoverned spaces’ (*idem* at 16).

<sup>1281</sup> *Idem* at 10-11.

<sup>1282</sup> *Idem* at 12 (with my emphasis).

<sup>1283</sup> *Idem*.

<sup>1284</sup> *Idem* at 14 where the paper cites a former chief of the Nigerian Navy who admitted that ‘in its present state, [the navy] could not protect the nation’s territorial waters because it was ill-equipped and underfunded.’

<sup>1285</sup> *Idem* at 27.

<sup>1286</sup> *Idem* at 8.

commission within the AU participated in its creation, once again a noble effort has failed to gain a sense of ownership among various actors within the African Union itself'.<sup>1287</sup>

### 5.3.3 *The piracy impetus and developments between 2009-2010*

Earlier in this thesis, an analysis was presented of the incidence of piracy off the eastern African seaboard between 2006 and 2016. It was shown how incidents dramatically spiked in 2006 from a relative dormancy. It was only in 2009 however, when the specific issue of piracy was deliberated before the various organs of the AU. In a report prepared by the Chairperson of the AU Commission in June 2009, it was noted that:

‘The issue of maritime security and safety has taken on a higher profile in the past year, largely as a result of the resurgence of piracy off the coast of Somalia. Individual countries and intergovernmental organizations have deployed important sea assets to tackle the trend of piracy off the coast of Somalia’.<sup>1288</sup>

In terms of acting to counter this trend, the Commission intended to ‘create a coastguard network for Eastern and Southern Africa to monitor and deter all illegal activities in those areas’.<sup>1289</sup> The commission also emphasised ‘the need to adopt a multifaceted comprehensive approach, including in-land capability and capacity building, to tackle the phenomenon of piracy off the coast of Somalia’.<sup>1290</sup>

Piracy was also appeared in the agenda of the PSC, and in July 2009, it expressed its:

‘Serious concern at the mounting insecurity in the maritime spaces around Africa, and Somalia in particular, and strongly condemns all illegal activities in these regions, including piracy...The Assembly welcomes the initiatives undertaken by the Commission to develop a comprehensive and coherent strategy to combat these scourges...’.<sup>1291</sup>

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<sup>1287</sup> Baker (2011) at 46.

<sup>1288</sup> AU Doc. EX.CL/520 (XV) (June 2009) at par. 160.

<sup>1289</sup> *Idem* at par. 256.

<sup>1290</sup> *Idem* at par. 160.

<sup>1291</sup> AU Doc. Assembly/AU/Dec. 252 (XIII) (July 2009) at par. 18. This paragraph was first measure adopted by the AU towards the development of a comprehensive maritime strategy.

This decision of the Assembly affirmed its desire to have an overarching continental strategy to deal with maritime security. The Assembly in general terms expressed its ‘grave concern over the growing phenomenon of piracy, hostage taking and the resultant demands for ransom’.<sup>1292</sup>

During this period, Libya made a proposal for the establishment of an African Defence Council and an ‘African Agency for the *Protection of Territorial and Economic Waters of African Countries*’.<sup>1293</sup> This proposal received the attention of the Assembly a month later with a decision underscoring ‘the need for Africa to have an effective instrument to help countries of the continent protect its own *regional waters*...’.<sup>1294</sup> The Assembly decided to ‘include the functions of the African Agency to protect regional waters and the economies of African countries into the functions of the African Union Authority’.<sup>1295</sup> It is not clear from these decisions whether ‘protection’ encompasses enforcement jurisdiction pertaining to piracy and armed robbery and whether the use of the term ‘regional waters’ includes the territorial sea and the exclusive economic zone.

In August 2009, a special session of the Assembly was convened to consider the resolution of conflicts on the continent, and amongst the measures to be taken in a plan of action, piracy was expressly mentioned and it was decided:

‘[t]o convene an international conference to discuss the adoption of an international convention on the phenomenon of maritime piracy and its underlying causes, as well as the promotion of effective international cooperation, which, in conformity with the Convention on the Law of the Sea, ensures the freedom of maritime navigation and preserves the right of States on their Exclusive Economic Zone and their territorial waters, as well as that of local populations to benefit from the resources therein’.<sup>1296</sup>

A burgeoning set of developments took place shortly thereafter in October 2009 at the second AU conference for Ministers Responsible for Maritime Transport in Durban. An overhauled African Maritime Transport Charter was adopted,<sup>1297</sup> which, contrary to the first Maritime Transport Charter of 1994, contained several references to maritime security. The general tenor of these references relate to cooperation: the preamble refers to ‘the

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<sup>1292</sup> AU Doc. Assembly/AU/Dec. 256 (XIII) (July 2009) at par. 1.

<sup>1293</sup> AU Doc. EX.CL520 (XV) Rev.2 (June 2009) at par. 1 (with my emphasis).

<sup>1294</sup> AU Doc. Assembly/AU/Dec. 259 (XIII) (July 2009) at par. 2 (with my emphasis).

<sup>1295</sup> *Idem* at par. 3.

<sup>1296</sup> AU Doc. SP/Assembly/PS/PLAN (I) (August 2009) at par. 3 (xi).

<sup>1297</sup> See AU Doc. AU/MT/MIN/1 (II) (October 2009).

importance of cooperation in the implementation of maritime conventions and regulations, particularly in the areas of safety, security, protection of the marine environment and maritime labour'.<sup>1298</sup> One of the principles of the charter is '[s]afe, secure and efficient shipping on clean oceans...'.<sup>1299</sup> There is a general article on cooperation which provides that '[m]ember States agree to cooperate at regional, continental and international levels to prevent and control maritime pollution in order to protect and conserve the marine environment and to suppress all unlawful acts, piracy, terrorism, etc'.<sup>1300</sup> There is further article on sharing of information and mutual assistance.<sup>1301</sup> The charter requires member states to harmonise their legislation and take other necessary measures to give effect to the charter and other relevant international instruments.<sup>1302</sup> In particular, the charter obliges member states to 'adopt effective measures to combat acts of piracy, armed robbery and other unlawful acts against shipping through co-operation with other international bodies'.<sup>1303</sup>

A complementary instrument, marked as the Durban Resolution on Maritime Safety, Maritime Security and Protection of the Marine Environment in Africa was also adopted at this conference of ministers.<sup>1304</sup> The resolution condemned and deplored 'all acts of piracy and armed robbery against vessels in waters of the coast of Somalia and the Gulf of Aden'.<sup>1305</sup> It recognised the 'importance of cooperation and capacity building in the implementation of maritime instruments, particularly in areas of safety, security, protection of the marine environment and facilitation of international maritime traffic'.<sup>1306</sup> The resolution envisaged member states taking a role of supporting international<sup>1307</sup> and

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<sup>1298</sup> *Idem* 7<sup>th</sup> preambular par.

<sup>1299</sup> *Idem* at article 4(3)(d).

<sup>1300</sup> *Idem* at article 12(4).

<sup>1301</sup> *Idem* at article 24 which provides that: '(1) Member States undertake to put in place an efficient maritime communication network in order to make optimum use of mechanisms for control, follow-up and intervention at sea and ensure better organization of maritime traffic. (2) Member States should strive to create a strategic framework for the exchange of information and mutual assistance in order to enhance measures that can improve the safety, security and preventions systems and make it possible to combat unlawful acts perpetrated at sea.'

<sup>1302</sup> *Idem* at article 26(1).

<sup>1303</sup> *Idem* at article 26(2).

<sup>1304</sup> AU Doc. AU/MT/MIN/DRAFT/Res.(II) (October 2009). The articles in this resolution are not numbered.

<sup>1305</sup> *Idem* at 3. It also acknowledges that UNCLOS 'sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.'

<sup>1306</sup> *Idem* at 1.

<sup>1307</sup> *Idem* at 3: 'Support the efforts of the [IMO] and [UNSC] in coordinating an international response to the scourge of piracy along the coast of Somalia including the establishment of piracy information Centers and building of sub-regional capacity and capabilities.'

regional counter piracy efforts<sup>1308</sup> and harmonising their domestic legislation.<sup>1309</sup> The resolution invited member states to ‘put in place an efficient communication network in order to make optimal use of the mechanisms for control, follow-up and intervention at sea and ensure better facilitation of international maritime traffic’.<sup>1310</sup> The resolution was endorsed by the Executive Council of the AU in 2010.<sup>1311</sup>

Following from the decision of the Assembly in July 2009 welcoming the development of a comprehensive strategy to combat threats to the maritime domain, the AU Commission<sup>1312</sup> organised a meeting and workshop of experts from member states on maritime security and safety on the 6-7 April 2010 in Addis Ababa.<sup>1313</sup> The Concept Note for the workshop stated that it was ‘expected to result in the adoption of a Declaration on an African strategy in the area of Maritime security and safety, as well as a Plan of Action outlining the measures to be taken and the timelines for their implementation.’<sup>1314</sup> The workshop consisted of four sessions.<sup>1315</sup> In the welcome address, Dr. Elham Ibrahim<sup>1316</sup> remarked that ‘[i]t is obvious that the rapid escalation of piracy activity off the coast of Somalia and the Gulf of Guinea has alarmed African states and served as a wake-up call to the leadership in Africa to take concrete action to rid the continent of these scourges which are undermining economic activity and the image of the continent.’<sup>1317</sup> The chair of the AU, H.E. Mr. Ernest Makawa, in his lengthy opening statement highlighted the threats and vulnerabilities of Africa’s maritime domain, which included piracy. He indicated that maritime security ‘would be the condition that reflects the ability of public and private entities to conduct legitimate activities such as territorial protection, resource extraction,

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<sup>1308</sup> *Idem*: ‘Encourage the implementation of the Djibouti Code of Conduct... for those countries that are party to it.’

<sup>1309</sup> *Idem*: [E]nact national legislation where appropriate and take all necessary measures to give full effect to relevant international instruments in the area of maritime, port safety and security in order to ensure safe, secure, efficient, and environmentally friendly shipping.’

<sup>1310</sup> *Idem* at 4.

<sup>1311</sup> AU Doc. XL/Dec. 542 (XVI) (February 2010) at par. 2-4.

<sup>1312</sup> Particularly the Peace and Security Department with Lt. Com. Samuel Kamé-Domguia as a key figure for spearheading a maritime security and safety strategy.

<sup>1313</sup> See AU Commission: Division of Communication and Information: Press Release No. 47/2010 ‘Maritime Security and Safety in Africa: Moving from talking to taking concrete action.’ See also: AU *Nota Verbale* PSD/101/2/A/095.10 (12 January 2010).

<sup>1314</sup> Unmarked AU Document ‘Concept Note: Towards the elaboration of an African strategy for maritime security and safety’ (January 2010).

<sup>1315</sup> Unmarked AU Document ‘Draft Programme’ (April 2010). The sessions were divided into the following thematic groups: (i) threats and vulnerabilities in Africa’s maritime domain; (ii) ongoing maritime security initiatives in Africa at continental and regional levels; (iii) international efforts on maritime security and safety and (iv) workshop report and recommendations.

<sup>1316</sup> AU Commissioner for Infrastructure and Energy.

<sup>1317</sup> Unmarked AU Document ‘Speech of Dr. Elham M.A. Ibrahim, Commissioner for Infrastructure and Energy of the African Union at the opening of the workshop on maritime security 6-7 April 2007 [sic], Addis Ababa, Ethiopia’ at par. 6.

trade, transport and tourism, free of threats or losses from illegal acts or aggression, for an integrated and prosperous Africa.<sup>1318</sup> He suggested the establishment of several expert working groups, which *inter alia* consisted of (i) Chiefs of African Navies/Coast Guards to ‘scrutinize issues of situational awareness in the whole African maritime domain and to uphold cooperative efforts between Navies/Coast Guards of the AU member States’<sup>1319</sup> and (ii) experts to ‘technically define the outer delimitation of the Combined Exclusive Maritime Zone of Africa (CEMZA) which will serve as the space-framework of all African maritime strategic actions.’<sup>1320</sup>

Makawa suggested a three-fold test must be passed in developing the AIM-strategy:<sup>1321</sup> The first test relates to suitability (i.e. ‘will it achieve the desired Ends, i.e. to protect and allow efficient exploitation of Africa’s maritime domain for the benefit of the people of Africa?’).<sup>1322</sup> The second test relates to acceptability (i.e. does it have Member States and regional support? Is it worth the cost?).<sup>1323</sup> The third test relates to feasibility (i.e. do we have the means to execute the ways?).<sup>1324</sup> A final noteworthy point from Makawa’s address was his statement that ‘[d]ue to the trade of slaves and colonialism, these oceans have always been considered as threats, instead of opportunities.’<sup>1325</sup> To counter this, as he drew his address to a close, he suggested a pan-African ‘no more sea-blindness’ campaign which would aim to also enhance political will at the various decision-making platforms.<sup>1326</sup>

At the workshop<sup>1327</sup>, Mr. Vita Onwuasoanya<sup>1328</sup> delivered a presentation on maritime security in the context of UNCLOS.<sup>1329</sup> He reaffirmed that UNCLOS provides preventative and enforcement measures regarding unlawful acts at sea and that there are different enforcement rights in the different maritime zones.<sup>1330</sup> Apart from highlighting the relevant

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<sup>1318</sup> Unmarked AU Document ‘Opening Statement by the country chairing the African Union (Malawi) H.E. Mr. Ernest M. Makawa’ (April 2010) at 3.

<sup>1319</sup> *Idem* at 7.

<sup>1320</sup> *Idem* at 8. It was also stated *idem* that the Africa Nuclear Weapon-Free Zone Treaty will be extended to the CEMZA which will be ‘an additional African move to help improve global security standards.’

<sup>1321</sup> The comprehensive maritime strategy envisaged by AU decision 252 *supra* was later termed as the AIM Strategy which refers to ‘Africa Integrated Maritime’ strategy.

<sup>1322</sup> *Idem*.

<sup>1323</sup> *Idem*.

<sup>1324</sup> *Idem*.

<sup>1325</sup> *Idem* at 1.

<sup>1326</sup> *Idem* at 8.

<sup>1327</sup> At the third session on day two.

<sup>1328</sup> Associate Law of the Sea/Ocean Affairs Officer, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations.

<sup>1329</sup> See generally <http://www.un.org/Depts/los/index.htm>. A copy of the slide presentation is available through: <http://slideplayer.com/slide/4277554/>.

<sup>1330</sup> *Idem* at slide 4.

articles in UNCLOS pertaining to piracy, he confirmed that ‘piratical acts within the territorial sea are considered armed robbery at sea and, are subject to the jurisdiction of the coastal state.’<sup>1331</sup> Accordingly, there was no indication from the findings and recommendations of this workshop of deliberations relating to the extension of universal enforcement jurisdiction for piratical acts within the realm of the territorial sea.

Lastly, a key recommendation of the workshop, with a reference to piracy was the need ‘to promote holistic approaches to address the issue of piracy. Such approaches should be informed by a proper understanding of this phenomenon and the context in which it is taking place, and involve both security measures at sea and efforts to promote land based initiatives.’<sup>1332</sup>

Following this workshop, the Assembly in July 2010 considered the matter of piracy once more at an ordinary sitting. The relevant paragraph of the record of the session stated that the Assembly:

‘[Reiterates its deep concern] over the persistence and spread of maritime piracy, which is an international crime pursuant to relevant international instruments, including resolution 1918 (2010), and [welcomes] the holding in Addis Ababa, on 6 and 7 April 2010, of a workshop on Maritime Security and Safety. The Assembly [lends its support] to the efforts being made by the Commission towards the implementation of the conclusions of the Workshop, including the elaboration of a continental strategy for the management of the continent’s maritime domain and the involvement of the ASF in efforts to promote maritime security and safety, and [stresses], in this context, the importance of adequate protection of the African maritime domain...against organized crime... The Assembly [reiterates its call], as contained in the Tripoli Plan of Action, for the convening, within the framework of the United Nations, of a conference to develop an international Convention on Piracy’<sup>1333</sup>

On a different platform within the AU, the Specialized Technical Committee on Defence, Security and Safety requested the Ministers of Defence of member states in January 2011

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<sup>1331</sup> *Idem* at slide 6.

<sup>1332</sup> Unmarked AU Document: ‘Experts workshop on maritime security and safety: Conclusions and Recommendations’ (April 2010) at par. 10 (iv).

<sup>1333</sup> AU Doc. Assembly/AU/Dec. 294 (XV).2 (July 2010) at par. 27.

to ‘explore the possibility of establishing a Standby Force to fight piracy on Africa’s costs [sic] including [the] Indian Ocean, the Golf [sic] of Guinea [and the] Horn of Africa’.<sup>1334</sup>

## 5.4 A bespoke maritime security framework

### 5.4.1 *The 2050 African Integrated Maritime Strategy (AIMS)*

Pursuant to the decisions of the Assembly cited above<sup>1335</sup> in which it was decided that ‘a rational and coordinated policy for maritime and coastal activities with a view to making the best of the Continent’s maritime wealth’,<sup>1336</sup> the AU Commission took on the challenge of elaborating and formulating the AIMS.<sup>1337</sup> In formulating the strategy, two conferences of African Ministers in charge of Maritime Affairs were held in Addis Ababa in April and December 2012 and was preceded by three workshops of experts in April and December 2011 and in December 2012.<sup>1338</sup> The strategy was adopted by a Ministerial Declaration on 6 December 2012 at the second conference of African Ministers responsible for Maritime-related Affairs.<sup>1339</sup> The Assembly adopted the strategy in 2014.<sup>1340</sup>

Before traversing the relevant components and objectives of the strategy which are relevant for the purposes of this study, its status in law is noteworthy. It is a soft law instrument and is complementary to extant instruments. It provides that the strategy shall ‘be interpreted and implemented in conjunction with all relevant AU, national and international regulatory frameworks and on-going maritime initiatives in Africa...’<sup>1341</sup> and notes that ‘[n]othing in this document shall be construed or applied contrary to the sovereignty of any of the AU Member States in accordance with the principles of international law.’<sup>1342</sup>

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<sup>1334</sup> AU Doc. EX.CL/Dec. 626 (XVIII) (January 2011) at par. 6 (ii).

<sup>1335</sup> Namely AU Doc. Assembly/AU/Dec. 252 (XIII) (July 2009) and AU Doc. Assembly/AU/Dec. 294 (XV) (July 2010).

<sup>1336</sup> See AU Doc. EX/CL/826 (XXIV) Add 1 (January 2014) at par. 6.

<sup>1337</sup> Referred to interchangeably in this section as ‘the strategy’.

<sup>1338</sup> *Idem* at par. 8.

<sup>1339</sup> AU Doc. DECL/M/II/CAMRMRA/2012 (December 2012) at 3. The declaration also recognized (*idem* at 1) ‘the importance of inter-agency and cross-border cooperation in the development and implementation of maritime policies, particularly in the areas of safety, security, protection of the marine environment and maritime labour.’ The declaration further endorsed (*idem* at 4) ‘the proposal to establish, within the AU Commission, a fully-fledged Department of Maritime Affairs to comprehensively address cross-cutting and multifaceted inland waterways, oceans and geostrategic challenges and opportunities.’

<sup>1340</sup> AU Doc. Assembly/AU/Dec. 496 (XII) (January 2014). The full text of the strategy is reproduced for convenience and ease of reference in the appendices to this thesis.

<sup>1341</sup> AIMS (Unmarked AU document, version 1.0) (2012) at par. 27. See also par. 60.

<sup>1342</sup> *Idem* at par. 13. See also par. 12 which provides that ‘it is further assumed that all related binding legal instruments are ratified (or under consideration for ratification) and domesticated.’

The rationale for the strategy was articulated as:

‘...a tool to address Africa’s maritime challenges for sustainable development and competitiveness. The strategy aims to foster more wealth creation from Africa’s oceans, seas and inland water ways by developing a thriving maritime economy and realizing the full potential of sea-based activities in an environmentally sustainable manner.’<sup>1343</sup>

However, the accomplishment of this vision is marred by a series of real and potential threats to the maritime domain of the continent.<sup>1344</sup> Amongst the list of threats identified are: ‘Transnational Organized Crimes in the maritime domain (includes...*piracy and armed robbery at sea*...)<sup>1345</sup>

In responding to these threats and vulnerabilities, the strategy sets out a series of strategic objectives which will underscore the activities pursued under the strategy. Listed amongst these strategic objectives are: (i) the establishment of a Combined Exclusive Maritime Zone of Africa (CEMZA);<sup>1346</sup> (ii) to enhance political will at community, national, regional and continental levels;<sup>1347</sup> (iii) to ensure the safety and security of maritime transportation systems,<sup>1348</sup> and (iv) preventing hostile and criminal acts at sea.<sup>1349</sup> The strategy adopts the IC5 principle: i.e. ‘Information Sharing, Communication, Collaboration, Cooperation, Capacity-building and Coordination.’<sup>1350</sup>

The strategy then proposes a framework for strategic actions under a series of thematic headings. The strategic actions pertinent to this study are: (i) the CEMZA,<sup>1351</sup> (ii) inter-agency/transnational cooperation and coordination on maritime safety and security;<sup>1352</sup> (iii) regional maritime operational centers<sup>1353</sup> and (iv) maritime governance, which includes approaches to combatting piracy and armed robbery at sea.<sup>1354</sup>

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<sup>1343</sup> *Idem* at par. 11. *See also* par. 18.

<sup>1344</sup> *Idem* at par. 15. *See also* par. 7(i).

<sup>1345</sup> *Idem* at par. 16(i) (with my emphasis).

<sup>1346</sup> *Idem* at par. 21(i).

<sup>1347</sup> *Idem* at par. 21(iii).

<sup>1348</sup> *Idem* at par. 21(v).

<sup>1349</sup> *Idem* at par. 21(vii).

<sup>1350</sup> *Idem* at par. 22.

<sup>1351</sup> *Idem* at par. 29-30.

<sup>1352</sup> *Idem* at par. 31.

<sup>1353</sup> *Idem* at par. 32-34.

<sup>1354</sup> *Idem* at par. 70-71.

Turing respectively to these specific strategic actions in more detail *ad seriatim*, the CEMZA is premised on being a ‘common African maritime space without barriers’ and is aimed at ‘boosting intra-African trade and eliminating or simplifying administrative procedures in intra-AU maritime transport, the aim being to make it more attractive, more efficient and more competitive, and do more to protect the environment’.<sup>1355</sup> It is envisaged that the CEMZA would contain a common information sharing environment which would ‘allow for the convergence of existing and future monitoring and tracking systems used for [*inter alia*] maritime safety and security...’<sup>1356</sup> The desired effect of CEMZA is to ‘to grant Africa enormous cross-cutting geo-strategic, economic, political, social and security benefits, as it will engender collective efforts and reduce the risks of all transnational threats, environmental mismanagement, smuggling and arms trafficking’.<sup>1357</sup>

With regard to inter-agency/transnational cooperation and coordination on maritime security, the strategy includes ‘the development of an inter-agency approach, a Naval Component capacity within the framework of the African Standby Force (ASF), and the establishment of a representative continental working group of Chiefs of African Navies and/or Coast Guards (CHANS) to scrutinise issues of situational awareness and collaborate towards the enhancement of Africa’s Maritime Domain Awareness (MDA), and to uphold cooperative efforts between Navies/Coast Guards of the AU Member States and international partners.’<sup>1358</sup> This provision also contains a clause which is particularly relevant for the purposes of this study, namely to ‘[i]ncrease joint regional surveillance operations at sea, and the establishment of seagoing navies and/or coast guard networks around Africa, *with cross-border hot pursuit function*’.<sup>1359</sup> These provisions will be revisited in the recommendations in the following chapter of this thesis.

Regional maritime operation centres could play a crucial role in combatting piracy. Its broad goals, which can be incorporated into anti-piracy measures are to: ‘i) to increase the effectiveness and the efficiency of the African Standby Force (ASF) as African Navies participate in *integrated operations*, a move to improve Africa’s Maritime response capabilities; and ii) to improve situational awareness in the AMD, involving all organisations and agencies with a key role in maritime safety and security’.<sup>1360</sup>

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<sup>1355</sup> *Idem* at par. 30.

<sup>1356</sup> *Idem*.

<sup>1357</sup> *Idem* at par. 29.

<sup>1358</sup> *Idem* at par. 31.

<sup>1359</sup> *Idem* at par 31(iii) (with my emphasis).

<sup>1360</sup> *Idem* at par 32 (with my emphasis).

The strategic actions then focus on maritime governance with a specific reference to piracy and armed robbery at sea. It notes at the outset how the ‘AU has advocated a comprehensive approach towards combating piracy and armed robbery at sea’ and emphasised the complimentary role of the AU with other organs external to the AU.<sup>1361</sup> Joint cooperation was emphasised in anti-piracy measures with the strategy directing that the ‘AU shall encourage Member States, consistent with their available resources and related priorities, their respective national laws and regulations, and applicable rules of international law, in cooperation with the IMO and any other relevant organisations, to mutualize their assets so as to cooperate to the fullest possible extent in the repression of piracy and armed robbery against ships.’<sup>1362</sup> Such cooperation would have a number of benefits and the strategy specifies that it would encourage: ‘(i) burden sharing; (ii) tracking financial flows; (iii) sharing and reporting relevant information; (iv) *interdicting ships and/or aircraft suspected of engaging in piracy or armed robbery against ships*; (v) apprehension and prosecution of persons committing or attempting to commit piracy or armed robbery against ships, and (vi) 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.’<sup>1363</sup>

In the result, Potgieter and Walker sum up the effect of AIMS, which intends to ‘[serve] as a common *template* for all stakeholders to guide maritime-related actions to enhance maritime viability for an integrated and prosperous Africa.’<sup>1364</sup>

A few months after the adoption of strategy by the assembly, the PSC observed its tenth anniversary and a declaration was issued in June 2014 to commemorate its establishment.<sup>1365</sup> The declaration makes no reference to the AIM strategy but called on the AU Commission and Secretariats of the Regional Economic Committees and Regional Mechanisms to ‘come up with a comprehensive AU strategy for addressing the phenomenon of extremism, terrorism and other emerging threats to peace and security in Africa such as *piracy*, human trafficking, drug trafficking, religious tensions, the spread of

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<sup>1361</sup> *Idem* at 70. In particular the strategy listed (*idem*) the efforts of the following external organs: ‘the work of the Contact Group on Piracy Off the Coast of Somalia (CGPCS), as well as all IMO initiatives to combat piracy and armed robbery against ships, including the Best Management Practices (BMPs) for vessel protection in High Risk Areas (HRA)<sup>12</sup> and the Djibouti Code of Conduct (DCC) concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden.’

<sup>1362</sup> *Idem*.

<sup>1363</sup> *Idem* at par 70 (a)-(f) (with my emphasis).

<sup>1364</sup> Potgieter and Walker ‘The 2050 African Integrated Maritime Strategy (AIMS): Content and Progress’ in Vreġ and Mandrup *Towards Good Order at Sea: African Experiences* (2015) at 106.

<sup>1365</sup> AU Doc. PSC/HSG/Dec. (CDXLIV) (June 2014).

small arms and light weapons. Furthermore, we *call for* the development of mechanisms within the APSA to deal with these emerging threats.<sup>1366</sup>

#### 5.4.2 *African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter)*

In June 2014, the Togolese Republic made a proposal to the assembly to host a conference on maritime security and safety.<sup>1367</sup> The Assembly decided that in light of the importance of the issue of maritime security and safety and based on the recommendations of the meeting of Ministers of Defence and Security held in May 2015, an extraordinary AU summit on maritime security and safety and development in Africa would be scheduled to take place from in November 2015.<sup>1368</sup> This summit was postponed to ensure adequate preparations.<sup>1369</sup> The summit was held recently during October 2016 in Lomé, Togo, with an aim of adopting and signing an African Charter on Maritime Security and Safety and Development.<sup>1370</sup> The antecedent measures on maritime security on the continent prior to the adoption of this charter have largely constituted soft-law, non-binding instruments.<sup>1371</sup> In contrast, the Lomé charter would constitute a legally binding treaty between signatory parties. The charter, however, does not supersede the provisions of the AIM strategy, as one of the objectives of the charter is to ‘boost the implementation of the 2050 AIM strategy in conformity with International Maritime Law.’<sup>1372</sup>

At the outset, the Lomé charter recognises how ‘cross-border crime contribute[s] to the spread of insecurity and instability and pose[s] serious risks to international maritime navigation’<sup>1373</sup> and contends that ‘the prevention, management and the eradication of these scourges can only succeed through the enhancement of cooperation...’<sup>1374</sup>

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<sup>1366</sup> *Idem* at par. 8 (with my emphasis).

<sup>1367</sup> AU Doc. Assembly/AU/Dec. 583 (XXV) (June 2015) at par. 22.

<sup>1368</sup> *Idem*.

<sup>1369</sup> AU Doc. Assembly/AU/Dec. 593 (XXVI) (January 2016) at par. 2.

<sup>1370</sup> *Idem* at par. 3-4. The African Charter on Maritime Security and Safety and Development would be referred to hence as ‘the Lomé charter.’ See also AU Doc. EXT/Assembly/AU/Dec.1 (VI) (October 2016).

<sup>1371</sup> For example, as demonstrated in the foregoing section of this thesis dealing with the AIM strategy. The Lomé charter was not publically accessible at the time of the writing of this thesis, however a copy was procured and is retained on file by the present researcher from the South African Department of International Relations and Cooperation, Soutpansberg Road, Pretoria. The full text of the charter is reproduced as an appendix *et seq.*

<sup>1372</sup> Article 3(f) of the Lomé charter.

<sup>1373</sup> 17-18<sup>th</sup> preambular par. of the Lomé charter. In this regard, it is submitted that piratical activities, as elucidated in the second chapter of this thesis would fall within this scope of these articles as cross-border crimes.

<sup>1374</sup> *Idem* at 20<sup>th</sup> preambular par.

The Lomé charter provides a list of definitions of key terms, of which the following relevant terms are defined, to wit: ‘maritime security’<sup>1375</sup>, ‘armed robbery against ships’<sup>1376</sup> and ‘piracy.’<sup>1377</sup> The charter is constituted by the following chapters: (i) general provisions; (ii) measures to prevent and combat crimes at sea; (iii) maritime governance; (iv) development of the blue/ocean economy; (v) cooperation; (vi) monitoring and control and (vii) final provisions.

The relevant objectives of the charter are: (i) to ‘to prevent and suppress national and transnational crime, including...piracy [and] armed robbery against ships...’<sup>1378</sup> (ii) to ‘promote and enhance cooperation in the fields of maritime domain awareness, prevention by early warning and fight against piracy [and] armed robbery against ships...’<sup>1379</sup> (iii) to ‘establish appropriate national, regional and continental institutions and ensure the implementation of appropriate policies likely to promote safety and security at sea’<sup>1380</sup> and (iv) to ‘promote inter-agency and transnational coordination among Member States, within the spirit of the [APSA].’<sup>1381</sup> The scope of the charter is meant to cover ‘the prevention and control of all transnational crime at sea, including...piracy, armed robbery against ships...and other unlawful acts at sea, *under the jurisdiction of a State Party in its area of responsibility.*’<sup>1382</sup>

Substantial obligations rest with state parties with regard to maritime governance and measures to prevent and combat crimes at sea. These are measures which a state would undertake ‘according to its own realities.’<sup>1383</sup> From a maritime governance perspective, states must ‘ensure good governance based on better information sharing, effective communication, and efficient coordination of their actions.’<sup>1384</sup> Each state is also required to ‘protect its maritime territories and ensure its maritime security and safety in conformity

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<sup>1375</sup> *Idem* at article 1, which defines ‘maritime security’ as ‘the prevention of and fight against all acts or threats of illicit acts against a ship, its crew and its passengers or against the port facilities, maritime infrastructure, maritime facilities and maritime environment.’

<sup>1376</sup> *Idem* at article 1, which defines ‘armed robbery against ships’ as ‘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 of property on board such a ship, in an area falling within the jurisdiction of a State.

<sup>1377</sup> *Idem* at article 1, where the definition of ‘piracy’ is an exact reproduction of the definition of piracy contained in article 101 of UNCLOS.

<sup>1378</sup> *Idem* at article 3(a).

<sup>1379</sup> *Idem* at article 3(d).

<sup>1380</sup> *Idem* at article 3(e).

<sup>1381</sup> *Idem* at article 3(f).

<sup>1382</sup> *Idem* at article 4(a) (with my emphasis).

<sup>1383</sup> *Idem* at article 6.

<sup>1384</sup> *Idem* at article 12.

with the relevant international laws and principles.’<sup>1385</sup> This provision does not expressly mention the security of international maritime commercial navigation.

Turning to the responsibilities of the respective states, the charter requires each state to firstly ‘develop its capacity to protect its maritime area and provide assistance to other States Parties or third States as may be required.’<sup>1386</sup> Secondly, each state must ‘strengthen law enforcement at sea...’<sup>1387</sup> and thirdly, each state must ‘maintain patrols, surveillance and reconnaissance in the anchorage areas, the exclusive economic zone and continental shelf for law enforcement, search and rescue operations.’<sup>1388</sup>

Developing capacity and mustering the resources required to execute these responsibilities is vital and states are required to adopt policies to guarantee the availability of resources<sup>1389</sup> and encourage the sharing of responsibilities and financial obligations between flag states and coastal states.<sup>1390</sup> Lastly the charter directs that state parties must undertake to establish a maritime security and safety fund.<sup>1391</sup>

These obligations are underscored by underlying principle of territorial integrity and national sovereignty of member states<sup>1392</sup> where a state is left to its own devices to administer its maritime realm. However, to implement these obligations, states must garner the requisite political will, develop capacity and allocate resources. Accordingly, these obligations, which rest on a state are onerous. This burden is somewhat softened by an article in the charter which provides that ‘State Parties shall cooperate and coordinate their actions in combating transnational organized crimes of all kinds including...acts of piracy and armed robbery against ships...’<sup>1393</sup>

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<sup>1385</sup> *Idem* at article 14.

<sup>1386</sup> *Idem* at article 6(a).

<sup>1387</sup> *Idem* at article 6(b); the article further provides that this should be done ‘through the training and the professionalization of navies, coast guards, and agencies responsible for maritime safety and security, custom[s] authorities and port authorities.’

<sup>1388</sup> *Idem* at article 6(c).

<sup>1389</sup> *Idem* at article 9 which provides these funds are derived from ‘either by public funds or by forging public-private partnerships, needed for investment in equipment, operations and training in the field of maritime security and safety in accordance with their domestic procedures.’

<sup>1390</sup> *Idem* at article 10 which provides that each state party ‘shall encourage cooperation between Flag States and Coastal States, so that, in a spirit of co-responsibility, the financial obligations of security and safety in the African maritime domain are shared and supported by the different actors concerned.’

<sup>1391</sup> *Idem* at article 11.

<sup>1392</sup> *Idem* at article 2(e).

<sup>1393</sup> *Idem* at article 32. *See* also article 37 which provides for a continental cooperation framework: ‘State Parties shall establish a framework for close cooperation in the field of maritime security and safety with the national cross-sectoral mechanisms, the Regional Economic Communities and other relevant bodies.’

## 5.5 Observations

Having comprehensively described the continental approach to maritime security, it is apposite to note some observations and consider these observations in light of a principal objective of this thesis, namely to extend the application of the universal enforcement regime to combat piracy into territorial waters of African states. The recommendations arising therefrom will be presented in the ensuing chapter. These recommendations will be presented in the alternative to the main recommendation which details a series of amendments to UNCLOS itself. These alternative recommendations would be complementary to the extant international regime, as reflected by UNCLOS. Given that the developments described in the foregoing sections are nascent and fledgling, with limited published scholarship in the field, I have taken some liberty to engage in a broader speculative analysis.

### 5.5.1. *Holistic observations*

Strydom noted that ‘[t]he re-emergence of the [OAU] in the apparel of the [AU] was enthusiastically sold to the world as a turning point in the dismal record of post-colonial effort to rid the African continent of bad governance and to change its image as a lost continent where human misery, underdevelopment and violent conflicts have left millions without an horizon of hope’.<sup>1394</sup> He further noted how the AU was promoted differently from its predecessor and its new rescue operations were ‘not, as in the past, imposed from the outside, but were conceived and developed by African leaders themselves, and were specifically designed to address Africa’s unique problems’.<sup>1395</sup> Strydom pondered about how this personal involvement and ownership of an idea by the African leaders would transform despair into hope when the OAU itself was, after all, also an ‘own affair’.<sup>1396</sup>

However, a decade on after Strydom’s remarks, the developments described in the foregoing section have shown a forward-looking movement towards developing and solidifying bespoke maritime strategies to ultimately benefit the people of the continent. This recent movement is innovative and decisions and instruments were since adopted by the AU to secure the ocean, which hitherto was not at the forefront of the AU’s policy.<sup>1397</sup> These responses are seen as a clear and marked shift away from the self-imposed

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<sup>1394</sup> Strydom (2003) at 59.

<sup>1395</sup> *Idem.*

<sup>1396</sup> *Idem.*

<sup>1397</sup> Vreÿ ‘Turning the Tide: Revising African Maritime Security’ 41 *Scientia Militaria* (2013) at 1, where he states that ‘[a] pattern of explicit commitments to secure African offshore assets is a rather recent manifestation.’

*seableness*.<sup>1398</sup> This seableness was attributed to an ‘inherited and institutionalized ignorance or mystification of the sea’.<sup>1399</sup> A consequence of seableness is where ‘stakeholders misunderstand or fail to realise the economic importance of Africa’s seas and oceans and the contribution they do and can make to development and prosperity’.<sup>1400</sup> The benefit of negating seableness is that stakeholders can ‘better understand how much maritime activities contribute and the total worth then spending priorities can be determined and additional resources invested to both secure and grow maritime industries’.<sup>1401</sup>

The piracy epidemic between 2006 and 2012 off the eastern African seaboard, chronicled earlier in this thesis, was the catalyst to negate this seableness<sup>1402</sup> which Potgieter referred to as a ‘blessing in disguise’ because it ‘stimulated political action in this sphere, illustrated maritime security weaknesses of Africa and made Africans aware of the value of their vast maritime interests’.<sup>1403</sup> In the result, Potgieter also notes that ‘[n]ow, African leaders cannot ignore it [maritime security] anymore and maritime security issues are central to the security debate.’<sup>1404</sup> Walker noted how the AIMS was initially focused on the need to combat piracy but it was later expanded in scope ‘to incorporate ways in which African counties might benefit from not only enhanced maritime security, but also development and governance’.<sup>1405</sup> In addition, the adoption of AIMS was not only a significant step in

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<sup>1398</sup> *Idem* at 4.

<sup>1399</sup> Potgieter and Walker (2015) at 110.

<sup>1400</sup> Wilton Park and Institute for Security Studies ‘Report: Implementing Africa’s maritime security strategies’ (2015) WP 1407 at 3.

Available at: <https://www.wiltonpark.org.uk/wp-content/uploads/WP1407-Report.pdf>. The report also notes (at 5) that ‘[t]he presence and persistence of seableness is partly attributable to the landcentric nature of policy making, and the relative absence of African states from the maritime domain. This has resulted in underfunding of maritime authorities, which have struggled as a result to maintain maritime security or good order at sea over their maritime domains.’

<sup>1401</sup> *Idem*.

<sup>1402</sup> See for instance: Beuger ‘After piracy: Towards an African Maritime Security Architecture’ in Vreÿ and Mandrup *Towards Good Order at Sea: African Experiences* (2015) at 47, where he writes: ‘[t]he problem of Somali piracy has led to a fundamental re-evaluation of the importance of maritime security for the African continent...[and] has opened a window of opportunity to re-organise maritime security governance and build sustainable institutions.’ The same author in ‘Communities of Security Practice at Work? The Emerging African Maritime Security Regime’ 6 *African Security* (2013) 297 at 298 also states that this window of opportunity presents an opportunity ‘for considering the maritime in the African security architecture and to improve the maritime security relations on the continent.’

<sup>1403</sup> Potgieter ‘Leadership and Political Will – Crucial for Maritime Security in East Africa’ Architecture’ in Vreÿ and Mandrup *Towards Good Order at Sea: African Experiences* (2015) at 252.

<sup>1404</sup> *Idem* at 259.

<sup>1405</sup> Walker ‘Reviving the AU’s maritime strategy’ 96 *ISS Policy Brief* (February 2017) at 1.

negating seablindness, it is commendable, particularly when compared to the European Union, which adopted a maritime strategy after the AU.<sup>1406</sup>

These developments have reached a stage where they could be categorised and studied against trite principles in security jurisprudence. In pursuing the objectives of a common security policy, Strydom refers to the Maastricht Treaty, which provides for three key instruments, namely common strategies; joint actions and common positions.<sup>1407</sup> Bueger states that understanding mechanisms of cooperation and convergence in these circumstances could be done through the prism of a 'security community'.<sup>1408</sup> He describes that main criterion of a security community as 'members who have a shared understanding of what constitutes a threat and what does not, what requires security action and what does not'.<sup>1409</sup> The security community is characterised by three traits, namely (i) a joint enterprise<sup>1410</sup>; (ii) mutual engagement<sup>1411</sup> and (iii) a shared repertoire.<sup>1412</sup> The AIMS embodies these traits.

In the result, the growth of maritime security jurisprudence has moved beyond the piracy agenda. Vreÿ observes that 'there is a wider ambit of threats and responses that now embodies African maritime security.'<sup>1413</sup> Stockbruegger commented that '[t]his 'African' conceptualization [of maritime security] goes beyond the narrow piracy centrist perspective that has driven international maritime security efforts so far'.<sup>1414</sup> This shift towards recognising other threats to maritime security and stability is apparent in the AIMS and Lomé Charter. This is compounded by the fact that incidents of piracy across the maritime domain of the eastern African seaboard has declined significantly since late 2012. The ISS

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<sup>1406</sup> See Wilton Park and Institute for Security Studies (2015) at 4. The European Union Maritime Security Strategy (EUMSS) for the global maritime domain was adopted by the European Council in June 2014. See:

[https://ec.europa.eu/maritimeaffairs/policy/maritime-security\\_en](https://ec.europa.eu/maritimeaffairs/policy/maritime-security_en).

<sup>1407</sup> Strydom (2003) at 68.

<sup>1408</sup> Beuger (2013) at 299.

<sup>1409</sup> *Idem* at 301.

<sup>1410</sup> This encompasses joint projects, an example being the establishment of the CEMZA. See Beuger (2013) at 311.

<sup>1411</sup> Beuger (*idem* at 302) highlights that this 'points to the importance of continuous interactions, communication, and deliberations among a community's members.' These would include conferences and symposiums.

<sup>1412</sup> Bueger (*idem* at 302 and 309) states that this 'consists of all of the tools that the community uses in its practices [which includes] various artifacts, such as meeting documents [e.g. meeting protocols, conference papers, declarations and statements, legal instruments], databases, or communication technology...'

<sup>1413</sup> Vreÿ (2013) at 2.

<sup>1414</sup> Stockbruegger 'Reclaiming the Maritime? The AU's New Maritime Strategy' (2014) *Cardiff University*. Available at: <http://piracy-studies.org/reclaiming-the-maritime-the-aus-new-maritime-strategy/>

and the UK based think tank, Wilton Park posed the following questions, namely: ‘as pirates no longer no longer pose an immediate threat, should maritime investment in capacity building be continued? Has the reduction in piracy shown that current capacity is sufficient?’<sup>1415</sup> It is submitted that engaging with these questions is premature, particularly when one reflects on the catalysts of the reduction. The following section will show that more could be need to be achieved in respect of anti-piracy operations in Africa and that the challenges posed by the threat of piracy, albeit not imminent, is certainly not extinct. It is trite from the description of the efforts of the AU above that there is an African centrist approach to address the challenges to the security of the waters in the African maritime domain and rightly so. These mechanisms have an ultimate aim of ushering long term and sustainable prosperity to the continent and its people. In explaining the move away from the narrow piracy centrist perspective, Stockbruegger, however, comments that ‘[t]he international counter-piracy approach thus reflects the interests of global economic powers dependent on maritime trade (largely western states) rather than those of African states, people and coastal communities.’<sup>1416</sup> He cannot be faltered for the accuracy of this observation, however, this does reflect a myopia, which was systematic in the erstwhile self-imposed seablindness. It is true that global merchant shipping requires unhindered and secure passage as it transits through the African maritime domain and the security of these sea lanes becomes a priority that underscores the international counter-piracy approach. Vreÿ aptly observes that:

‘Africa’s oceans harbour important resources and lines of communication that call for protection, and if necessary, more aggressive defence. Globalisation – and its economic pillar in particular – relies on African waters as cogs in the safe flow of maritime traffic along international shipping routes. African co-operation to safeguard the maritime common is imperative.’<sup>1417</sup>

However, the maintenance of the smooth flow of global merchant shipping through the African maritime domain is closely linked with the economic, commercial wealth and development of the continent.<sup>1418</sup> Vreÿ comments in this regard that ‘the oceans also tie Africa into global maritime trading and industrial networks that hold critical strategic advantages for Africa as well as the wider international community, as the continent becomes a future economic entity for markets, labour and resources.’<sup>1419</sup> He goes to

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<sup>1415</sup> Wilton Park and Institute for Security Studies (2015) at 3.

<sup>1416</sup> Stockbruegger (2015).

<sup>1417</sup> Vreÿ (2013) at 3.

<sup>1418</sup> See Potgieter (2015) at 240.

<sup>1419</sup> Vreÿ (2013) at 3

emphasise that '[a]s Africa enters the global economy as an attractive investment destination and resource hub, every African country depends increasingly on the free and uninterrupted flow of trade across oceans to benefit from the economic advantage to deliver goods on time to and from Africa. Africa can thus ill afford the current uncertainty tainting shipping routes off sections of the west and east African seaboard.'<sup>1420</sup>

Accordingly, there lies a need to solidify the integration of global anti-piracy approaches into the continental, and ultimately the regional and national enforcement regimes in through a complementary approach.

5.5.2 *Specific observations on the efforts of the AU pertaining to piracy and the case for the extension of universal enforcement jurisdiction into territorial waters.*

With this analysis of the continental approach at hand, this section reverts *ad rem* to a main enquiry of this thesis, proposing the extension of universal enforcement jurisdiction to combat piracy into the realm of the territorial sea. It is significant to note that such a proposal has never featured in AU deliberations or instrument pertaining to maritime security, although it will be shown in subsection (ii) below that this notion can be compatible with the emerging jurisprudence of the AU.

The continued relevance of universal jurisdiction was elaborated earlier in this thesis<sup>1421</sup> and it is explained below in the first part of this section why international and foreign intervention through the exercise of enforcement jurisdiction should be extended into territorial waters of African states. This proposal is prefaced by caveats and restrictions which will be set out in the concluding chapter of this thesis. These caveats and restrictions have the effect of rendering this proposal as a complementary approach to the extant international regime embodied in UNCLOS. The second part of this section evaluates the compatibility of this proposal with the emerging jurisprudence of the AU, described above pertaining to maritime security.

(i) The case for foreign and international naval intervention

Whilst there is an emergent African centrist approach maritime security on the continent where challenges facing the African maritime domain are articulated by African leaders and framed from an African perspective, it will be shown that implementation and

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<sup>1420</sup> *Idem* at 5.

<sup>1421</sup> See generally section IV of chapter 3.

enforcement of instruments and policies formulated as a countermeasure to these challenges would require international and foreign cooperation and assistance because of the following three factors:

The first factor concerns *capacity* and capacity building.<sup>1422</sup> The spacial limits of the African maritime domain is large. Along the eastern seaboard of the continental mainland on the western rim of the Indian Ocean, five states exercise sovereignty over their respective territorial seas. The sheer size of this domain presents obvious challenges in enforcing sovereignty, particularly constabulary powers. This is compounded by the lack of functioning naval and coastguard capacity in most of the states in this region. Kornegay rightly observed that the Somali piracy crisis exposed ‘Africa’s utter lack of capacity to secure its maritime portion of the global commons.’<sup>1423</sup> Vreÿ also noted that a ‘lack of governance by African authorities to uphold sovereignty in the waters under their jurisdiction is accentuated by weak African navies due to the latter not being considered as important as armies.’<sup>1424</sup> Vreÿ further appositely encapsulated the state of affairs in the following terms:

‘Countries are threatened from the sea and, although this threat historically shows a tendency to highlight the warfighting profile, the current African threat echoes the murky world of criminality, low-intensity threats and bad maritime governance. Ungoverned seas remain a danger to African states that have limited or no capacity to extend and uphold jurisdiction at sea and cannot police even soft maritime threats in a credible way’.<sup>1425</sup>

In answering what is required of Africa states to remedy this state of affairs and execute strategies and policy through operationalisation, commentators have drawn a demanding list. Konegay, for example, observes that ‘[p]utting these plans into effect would, in turn, require investment in building awareness, expenditure of political capital, and investment in capabilities pertaining to people, resources and appropriate mechanisms. This would

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<sup>1422</sup> Wilton Park and Institute for Security Studies (2015) at 8 describe three interlinked levels in which the term capacity building can be conceptualised: i.e. ‘[f]irstly, at a strategic level, pertaining to the functioning and relationships of various global and international maritime institutions, partnerships and actors. *Secondly*, at an operational level, which prioritises the regional implementation and operationalisation of strategies through coordinated activities such as joint patrols. *Thirdly*, at a tactical level, which concerns the creation of national development plans, acquisition programmes for naval and maritime assets and capacity building...’

<sup>1423</sup> Kornegay ‘South Africa and SADC in the Indian Ocean maritime security equation’ 8 *Journal of the Indian Ocean Region* (2012) 71 at 72.

<sup>1424</sup> Vreÿ (2013) at 3.

<sup>1425</sup> *Idem* at 5.

have to involve efforts in education and legislation. Given Africa's fragmented political landscape, this is a tall order...'<sup>1426</sup> Bueger similarly writes that '[b]uilding and maintaining naval capacities is a core challenge. Procurement can, however, be a costly and politically difficult exercise. Electorates might reject the significant investments required and corruption can drive up costs. Since navies require advanced training to become operational, this is also a long term project. Training officers can easily take decades'.<sup>1427</sup>

In further illustrating the present state of affairs, the AU did not follow through and implement some of the decisions referred to earlier in this chapter. Firstly, Egede noted that 'the [AU] does not have an African joint naval task force and/or joint coast guard operations to deal with piracy and armed robbery'.<sup>1428</sup> Secondly, although the AU Commission intended to create a coastguard network for eastern and southern Africa with the aim of deterring all illegal activities in those areas in 2009,<sup>1429</sup> this has not yet materialised. Thirdly, the proposed conference to discuss the epidemic of piracy was never convened and finally, the proposal to establish a standby force to fight piracy on Africa's coasts was not taken any further.

Whilst the instruments of the AU acknowledge the challenges of capacity building to enforce and implement these instruments, they have come under criticism for its overly broad purview.<sup>1430</sup> Engel, for example contends that 'its [AIMS] rhetoric resembles too much that of the OAU's many lofty grand plans from the 1980s and 1990s....' and further that '[t]he issue areas covered are too many, and the concept of maritime security and safety has still not been defined precisely. Too many agendas of different actors are brought together'.<sup>1431</sup> It becomes apparent that if the instruments are cast too widely, then the specific capacity challenges become tougher to achieve. The Lomé Charter illustrates this well with an article which requires state parties to 'undertake to establish a Maritime Security and Safety Fund'<sup>1432</sup> without tangible suggestions on how this would be achieved. Potgieter thus encapsulates how to close the gap between what must be achieved and the capability and capacity to achieve it:

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<sup>1426</sup> Kornegay (2012) at 81.

<sup>1427</sup> Bueger (2013) at 312.

<sup>1428</sup> Egede 'Institutional gaps in the 2050 Africa's Integrated Maritime Strategy' 1 *Iilwandle Zethu: Journal of Ocean Law and Governance in Africa* (2016) 1 at 3.

<sup>1429</sup> AU Doc. EX/CL/520 (XV) (June 2009) at par. 160.

<sup>1430</sup> See for example Potgieter (2015) at 255 contends that AIMS is 'too ambitious because it lacks an emphasis on maritime governance, the tangible ways in which to achieve economic and business growth, and the creation of maritime employment opportunities.'

<sup>1431</sup> Engel *The African Union, the African Peace and Security Architecture, and Maritime Security* (2014) at 16.

<sup>1432</sup> See article 11.

‘[r]esources are always scarce in the competitive political and economic environment in Africa and it will require visionary leadership and political will to ensure wider political and social support, the apportionment of resources, and proper governance processes to ensure successful delivery. Successful implementation will therefore depend on finding a balance between ends, ways and means’.<sup>1433</sup>

The challenge is daunting, and it is necessary, but through the intervention of global partners, the continent could go a long way in operationalising its strategy and vision for the maritime realm. Emphasis lies in the mutual benefit where global and foreign leaders could champion for the protection of their valuable maritime interests through naval engagement. African leaders would be to some extent relieved of the financial burden of exercising enforcement jurisdiction over a large maritime domain. The leaders of African navies could benefit from training through joint naval exercises in the region.

The second factor is a persistent lack of *political will* amongst member states of the AU. If there is to be an appropriate capacity building and a commitment to maritime security amongst these member states, there must be an implementation and ratification of legal instruments domestically. Egede observed that there is a ‘rather slow and long drawn ratification process of treaties by AU member States, resulting in such treaties taking a long time to come into force and become binding on member states’.<sup>1434</sup> Several commentators have observed this slow ratification process.<sup>1435</sup> They observed how the Maritime Transport Charter of 1994 and its revision in 2010 have not yet come into force.<sup>1436</sup> Walker noted that although the African Maritime Transport Charter was ‘welcomed as a major step forward in improving African maritime development, albeit with some criticisms of its shortcomings, it has largely disappeared from sight’.<sup>1437</sup> Walker observed how the Strategic Task Force (STF) which was mandated to promote and implement the AIMS has been unsuccessful. At the time of writing, the STF met only once in July 2015 but failed to meet the quorum, with only seven member states participating.<sup>1438</sup> Further meetings did not take

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<sup>1433</sup> Potgieter (2015) at 255.

<sup>1434</sup> Egede ‘Lome Charter on African Maritime Security: Next Steps’ (2017). *Cardiff University*. Available at:

<http://piracy-studies.org/africas-lome-charter-on-maritime-security-what-are-the-next-steps/>.

<sup>1435</sup> See Egede (*Idem*), Walker (2017) at 4 and Engel (2014) at 16.

<sup>1436</sup> *Idem*.

<sup>1437</sup> Walker (2017) at 4.

<sup>1438</sup> *Idem* at 5.

place due to a lack of budget.<sup>1439</sup> He went on to note that the ‘failure of the STF to convene any official meetings and its subsequent inability to accomplish its goals became the major stumbling block to the implementation of aims’.<sup>1440</sup> Walker points out that this is alarming because a failure to reach quorum is indicative of a ‘broader indifference – or even a sheer lack of interest – among the member states and RECs over whether the strategy is implemented’.<sup>1441</sup> It is difficult to offer a panacea to a lack of political will, as it is multi-faceted, but if a lack of funding was one of the catalysts of inaction, this could, in part, be remedied through the assistance (and participation) of global partners who have an interest in the maritime security of the region. This may provide some incentive and stimulus to member states to act more decisively.

The third factor relates to the catalysts of the *reduction* of the Somali piracy epidemic. Hopkins *apud* Bueger describes four factors which were attributable to the decline of piracy in the region: (i) there has been a declining support for pirates by local communities who have a greater awareness of the corrosive effect of pirates;<sup>1442</sup> (ii) the use of private maritime security companies and the arming and hardening of merchant vessels, together with industry adoption of best management practices (BMP) as a self defence mechanism;<sup>1443</sup> (iii) increased willingness of states to prosecute pirate suspects in their domestic courts;<sup>1444</sup> and (iv) an international naval presence in the region which engaged in surveillance, patrol and guarding.<sup>1445</sup> Bueger appositely observed that ‘[t]hree of the reasons provided are related to the changing character of law enforcement. The international naval programme directly affects and improves enforcement in the region’s waters.’<sup>1446</sup> The extent and central role of naval intervention was significant and Potgieter described how this intervention and programme included patrols, escort duties, supporting and conducting small-scale operations by special forces and involvement in alliance building and maritime assistance exercises like training and capacity building.<sup>1447</sup> It is noteworthy that the credit for the reduction through law enforcement was attributed to the international naval programme with an absence of input from indigenous continental mechanisms such as the ASF. Indeed the reaction to the Somali piracy epidemic by the AU was belated. Whilst there were harbingers of the surge of piracy in the region as early as

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<sup>1439</sup> *Idem.*

<sup>1440</sup> *Idem.*

<sup>1441</sup> *Idem.*

<sup>1442</sup> Bueger (2015) at 41.

<sup>1443</sup> *Idem.*

<sup>1444</sup> *Idem.*

<sup>1445</sup> *Idem.*

<sup>1446</sup> *Idem.*

<sup>1447</sup> Potgieter (2015) at 248.

2005, the AU only acknowledged the impact of piracy in 2009 in a declaratory fashion without concrete steps which would be implemented expediently as a countermeasure. In contrast, by 2009, the UN had taken decisive action and passed Security Council Resolutions and the IMO adopted the Djibouti Code of Conduct.

These factors present a compelling case for the importance of effectively integrating an international naval response in the African maritime domain. Whilst the high seas and EEZ inherently allow for such universal enforcement jurisdiction to combat piracy, the territorial waters of respective member states of the AU remain outside the jurisdictional reach of an international naval programme. The following sub-section thus comments on the compatibility of the fledgling continental jurisprudence on maritime security with the proposal to extend such universal enforcement jurisdiction into territorial waters.

(ii) Compatibility with the existing AU developing jurisprudence and architecture

Having adumbrated the developing jurisprudence on maritime security, by surveying decisions and instruments passed by the AU, this section commences by highlighting references from the survey undertaken relating to international cooperation. References to cooperation in general and amongst member states of the AU would also be considered on an analogous basis. Secondly, the section then interprets these instruments and decisions with the aim of exposing potential avenues of enforcement action which could transcend the traditional boundaries under the extant UNCLOS regime.

In respect of references to cooperation<sup>1448</sup>: the Brenthurst Foundation maintained that a ‘*collaborative security architecture would allow the conduct of free trade, i.e. in a safe and secure environment*’.<sup>1449</sup> In 2009, the assembly called for a conference on piracy which would promote ‘*effective international cooperation, which in conformity with the [UNCLOS], ensures the freedom of maritime navigation...*’<sup>1450</sup> The Maritime Transport Charter, as detailed previously in this chapter contained several references to cooperation and obliged member states to adopt effective measures to combat acts of piracy and armed robbery through *co-operation with other international bodies*.<sup>1451</sup> The Durban Resolution envisaged member states taking a role of supporting international and regional counter

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<sup>1448</sup> The references cited hence in this paragraph contain my emphasis.

<sup>1449</sup> Brenthurst Foundation (2010) at 8.

<sup>1450</sup> AU Doc. SP/Assembly/PS/PLAN (I) (August 2009) at par. 3 (xi).

<sup>1451</sup> See article 26(2) of the charter.

piracy efforts.<sup>1452</sup> The Lomé Charter also noted that ‘the prevention, management and the eradication of these scourges can only succeed through the *enhancement of cooperation*’.<sup>1453</sup>

Turning to the second aspect of the present discussion, a number of initiatives can be revisited and re-interpreted: *Firstly* the proposal by Libya to establish an ‘African Agency for the Protection of Territorial and Economic Waters of African Countries’<sup>1454</sup> requires further analysis. As discussed earlier in this section, the concept of protection in this context is not defined, but using a broad interpretation, it could be submitted that ‘protection’ includes enforcement jurisdiction pertaining to piracy. The reference to ‘territorial and economic waters’ was not accompanied by any definitions but it is submitted that this most likely refers to territorial waters and the exclusive economic zone as delimited under the UNCLOS regime. If these interpretations are considered, the agency envisaged in Libya’s proposal could engage in enforcement jurisdiction in territorial waters of African states to suppress piracy. It is significant to note that this proposal gained acceptance and was adopted by the AU.<sup>1455</sup> However, this Agency was never established<sup>1456</sup> and it remains unclear whether the AU’s reference to ‘regional waters’ in the decision to adopt the proposal was a precursor to the concept of the CEMZA.

*Secondly*, ministers responsible for Maritime Affairs emphasised the importance of inter-agency and cross-border cooperation.<sup>1457</sup> One of the AIMS clauses, cited earlier is of importance, namely the establishment of seagoing navies and coast guard networks with cross-border hot pursuit function.<sup>1458</sup> It was deduced in the second chapter of this thesis, how those involved in acts of piracy and other illicit activities in the maritime domain often fail to respect national borders.<sup>1459</sup>

*Thirdly*, the strongest case for cross-boundary enforcement lies in the CEMZA concept that is set out in the AIMS, and which was highlighted earlier. This is primarily because the CEMZA is premised as being a common maritime space without barriers. However, for a

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<sup>1452</sup> AU Doc. AU/MT/MIN/DRAFT/Res.(II) (October 2009) at 3.

<sup>1453</sup> 20<sup>th</sup> preambular par. Of the Lomé Charter.

<sup>1454</sup> AU Doc. EX.CL520 (XV) Rev.2 (June 2009) at par. 1

<sup>1455</sup> AU Doc. Assembly/AU/Dec. 259 (XIII) (July 2009) at par. 3.

<sup>1456</sup> See Potgieter and Walker (2015) at 102-103.

<sup>1457</sup> AU Doc. DECL/M/II/CAMRMRA/2012 (December 2012) at 1.

<sup>1458</sup> See par. 31 (iii) of AIMS.

<sup>1459</sup> See also Potgieter (2015) at 241. He also emphasized, at 242, how ‘transgressions in the maritime domain could occur on the high seas, in territorial waters, in ports or inshore areas. But, as perpetrators operate from bases on land...most of the transgressions are within the jurisdiction of states...’

concept that is an innovative as CEMZA, it still remains soft law without any direct legal implications to the UNCLOS regime. The CEMZA is limited to the proviso in the AIMS itself where no part of the strategy is to be construed or applied contrary to the sovereignty of any AU member state.<sup>1460</sup> It is however necessary to unpack this concept, and the first enquiry is to ascertain the limits of the breadth of the CEMZA: firstly, whether it aims to centralize the EEZ of respective member states into one borderless zone for the purposes set out in article 30 of AIMS, secondly whether the territorial seas of member states also fall into the ambit of CEMZA and thirdly to clarify the interface between CEMZA and the border delimitation contained in the existing UNCLOS regime. These questions are not answered in the AIMS itself and furthermore there are no *travaux préparatoires* publically available pertaining to the conceptualization of the CEMZA with a view to its inclusion in the AIMS. The operationalisation of the CEMZA is dependent on the provisions contained in article 29 of AIMS, which requires ‘the establishment of a dedicated Strategic Special Task Force (S2TF) to prepare the technical file which will underpin the Solemn Declaration of the CEMZ. The technical file will include charts presenting the CEMZA limits’.<sup>1461</sup> Preparing such a technical file and charts would itself present a challenge considering the underdeveloped continental hydrographic capacity.<sup>1462</sup> To date, this task has not been undertaken, leaving the questions posed above unanswered. Given the dearth of primary sources pertaining to the CEMZA, it is unsurprising that there is a corresponding dearth of scholarly commentary on the concept. Potgieter and Walker note that ‘...it is not at all clear what this [CEMZA] actually means for the various participants and stakeholders.’<sup>1463</sup> The ISS and think tank Wilton Park also noted that ‘AIMS contains innovative and potentially transformative concepts such as the [CEMZA]. These urgently need to be better researched and analysed’.<sup>1464</sup>

The potential implications of CEMZA have also drawn some concern, for example, Benkenstein observed that ‘African governments will undoubtedly be concerned about the full implications of CEMZA in relation to national sovereignty, particularly with regard to resource utilization’.<sup>1465</sup> Egede queries ‘if the idea of the CEMZA is to transcend the sovereignty/sovereign rights given to each coastal State over their marine space by the

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<sup>1460</sup> See article 13 of AIMS.

<sup>1461</sup> See article 29 of AIMS.

<sup>1462</sup> See the steps set out in article 68 and 69 of AIMS.

<sup>1463</sup> Potgieter and Walker (2015) at 110. See also Egede (2017).

<sup>1464</sup> Wilton Park and Institute for Security Studies (2015) at 2.

<sup>1465</sup> Benkenstein ‘Aligning Africa’s Maritime Ambitions with Broader Indian Ocean Regionalism’ 25 *SAIIA Policy Insights* (September 2015) at 4.

provisions of [UNCLOS]...this would obviously require rather complex negotiations amongst AU member States...'<sup>1466</sup>

In light of CEMZA being so broadly articulated in AIMS, without the benefit of the envisaged technical file, and the concerns of encroachment into national sovereignty of member states, it is not difficult to see how the concept of the CEMZA could fall into oblivion, in a way similar to the fate of the African Maritime Transport Charter. It would not be prudent, however to completely dismiss this innovative concept on these grounds, but to also consider the merits of CEMZA on the basis of its objectives and its potential contribution to the counter-piracy jurisprudence on the continent. There is further no indication in articles 29 and 30 of AIMS that the CEMZA would compromise the sovereign rights of states to the resources in their EEZ.

In examining the merits, article 30 of AIMS provides a strong case for cooperation in a wide spectrum of activities which cannot be solely construed as undue encroachments on national sovereignty, but useful mechanisms which would aid individual states. From a commercial perspective, it aims to boost intra-African trade and intra-AU maritime transport through simplified and more efficient procedures. From a public or civic perspective, the CEMZA aims to do more to protect the environment and to develop a common information sharing environment which would better facilitate monitoring and tracking systems used *inter alia* for safety and security, law enforcement, fisheries and border control. If fisheries control were to be used as an example, a borderless realm within the CEMZA would enable free movement of coast guard fleets and other law enforcement vessels to monitor compliance with applicable legislation and swiftly pursue offenders. The jurisdictional hurdles inherent in the traditional maritime boundaries would be alleviated. Member states could easily see the benefits of this approach because the aim of pooling law enforcement resources over a large maritime domain would be most efficient in the borderless maritime commons created by CEMZA. This efficiency could have positive effects by deterring or reducing illegal fishing and plunder of resources in these commons – something that member states would readily support. Similarly, the CEMZA was expected to ‘engender collective efforts and reduce the risks of all transnational threats’.<sup>1467</sup> It was shown in the second chapter of this thesis that acts of piracy and armed robbery are in most instances transnational. Whilst universal enforcement jurisdiction to combat piracy exists under the UNCLOS regime on the high seas and EEZ, if the CEMZA were to include

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<sup>1466</sup> Egede (2017).

<sup>1467</sup> See article 29 of AIMS.

territorial waters of states within its ambit, then such universal enforcement jurisdiction could apply, subject to caveats and in the limited circumstances which would be proposed in the final chapter of this thesis. The benefits of this approach would need to be highlighted to member states in the same way as cross-border fisheries control would benefit member states. In the premises, the CEMZA could facilitate much needed pooling of resources and capacity in an environment with lessened obstacles created by the extant jurisdictional framework. Proponents of the CEMZA concept, however, would face integration challenges. The ISS and Wilton Park observed that these challenges will revolve around ‘how best to go about reconciling top-down visions of maritime integration contained in the [AU] and Regional Economic Strategies with the bottom-up realities of working together faced by member states such as, boundary demarcation, joint resource extraction and sharing and information sharing (particularly of potentially sensitive information concerning naval capability’.<sup>1468</sup> Although the CEMZA was not referred to in the recently adopted Lomé Charter, it would be conjecture to presume that the concept has been accordingly been discarded. Indeed, draft annex I of the Charter defines broad ranging concepts such as ‘Maritime Africa’<sup>1469</sup> and ‘Maritime Domain’.<sup>1470</sup> The Charter, although a binding instrument, was envisaged to be complementary to the AIMS. Further discourse is needed to engage with the technical file for the CEMZA, allay fears of encroachment and top-down approaches and balance these with the benefits to be gained from the borderless CEMZA regime.

*Fourthly*, the Lomé Charter appropriates the UNCLOS definition of piracy, but also defines the term ‘armed robbery against ships’ as ‘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 of property on board such a ship, *in an area falling within the jurisdiction of a State*’ (with my emphasis). The territorial sea of a state is the principal maritime zone falling within the jurisdiction of a state. As outlined on several occasions previously in this thesis, the state is left to its own devices to combat piracy and exercise enforcement and adjudicative jurisdiction in its territorial waters. However, the charter contains several references to cooperation in the repression of *armed robbery against ships*: i.e. (i) the objective ‘to prevent and suppress national and

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<sup>1468</sup> Wilton Park and ISS (2015) at 2.

<sup>1469</sup> Defined as ‘the concept that encompasses Africa’s entire maritime estate, including its marine environment, the resources contained thereof and all maritime economic activities that take place within the continent.’

<sup>1470</sup> Defined as ‘without prejudice to the definition in Article 1 of the Lomé Charter included: (i) maritime areas under the national jurisdiction of States Parties; and (ii) Maritime Areas beyond national jurisdiction.’

transnational crime, including... armed robbery against ships...<sup>1471</sup> (ii) to ‘promote and enhance cooperation in the fields of maritime domain awareness, prevention by early warning and fight against ...armed robbery against ships...’<sup>1472</sup> (iii) the scope of the charter being to cover ‘the prevention and control of all transnational crime at sea, including...piracy, armed robbery against ships...and other unlawful acts at sea, *under the jurisdiction of a State Party in its area of responsibility*’<sup>1473</sup> and (iv) State Parties shall cooperate and coordinate their actions in combating transnational organized crimes of all kinds including...acts of ... armed robbery against ships...’<sup>1474</sup> The AIMS also provides that the ‘AU shall encourage Member States, consistent with their available resources and related priorities, their respective national laws and regulations, and applicable rules of international law, in cooperation with the IMO and any other relevant organisations, to mutualize their assets so as to cooperate to the fullest possible extent in the repression of ... armed robbery against ships’<sup>1475</sup> with a view to encouraging the interdiction of ships suspected of engaging in armed robbery against ships.<sup>1476</sup>

These provisions are invasive of the exclusive right of member states to prevent and repress armed robbery against ships according to their domestic legislation and policy in their territorial waters. If the charter enjoys widespread ratification in the years to come, it will be indicative of a change of approach and a willingness of states to allow encroachments into sovereign territory in the circumstances set out above for the purposes of interdiction and enforcement jurisdiction.

## 5.6 Evaluative and consolidatory remarks

In this section, the context of continental maritime security was considered by examining in detail the antecedents of continental perspectives pertaining to the law of the sea in general. The survey then highlighted the genesis of the AU and its institutional framework. The salience and recognition of maritime security in the AU was laid out followed by a comprehensive analysis of the AU’s response to the epidemic of piracy off Somalia and along the east African seaboard. These responses were the forerunners to a recent bespoke maritime security framework in the form of the AIMS and Lomé Charter. A detailed commentary was provided on these instruments followed by some holistic observations.

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<sup>1471</sup> Lomé Charter at article 3(a).

<sup>1472</sup> *Idem* at article 3(d).

<sup>1473</sup> *Idem* at article 4(a) (with my emphasis).

<sup>1474</sup> *Idem* at article 32.

<sup>1475</sup> AIMS at article 70.

<sup>1476</sup> *Idem* at article 70(d).

The key research question on the extension of universal enforcement jurisdiction into territorial waters was tested against this framework and a case was made for the importance of international intervention followed by a further argument drawing on interpretations of the instruments and deliberations of the AU which would support the key research question.

The innovations of the AU and the suggestions advanced by this thesis have also raised in this section the crucial concern about encroachments into the sovereign jurisdiction of member states, with a particular reference to African member states. These concerns harken back to the formative years of the OAU, discussed earlier in this section, where the emerging trend amongst newly independent African states was to assert sovereignty and push for greater rights over the resources in the waters adjacent to the continent. The efforts of Njenga in formulating the EEZ is a useful example in this regard. The sovereignty over these waters was seen as sacrosanct and trite in all subsequent instruments pertaining to maritime matters on the continent. It has been advanced in this thesis that the exercise of universal enforcement jurisdiction to combat piracy in controlled and specific circumstances, particularly where there is incapacity on the part of the coastal state, would not be as invasive an encroachment on sovereign rights as illegal fishing by foreign national in the EEZ would be and a change in mindset and normative thinking will need to be inculcated. Strydom considers how ‘common security interests would have a chance to triumph over narrowly defined own security interests’.<sup>1477</sup> He makes a particularly apt observation and proposes that:

‘A change of mindset in this regard will have to coincide with the abandoning by African leaders of their nineteenth century concept of state sovereignty, which in the past was all too easily used as an excuse for their paralysis in the face of political and humanitarian crises on the continent’.<sup>1478</sup>

Potgieter and Walker similarly note that innovative concepts like the CEMZA is ‘dependent on a change in values and norms’ and ‘[t]he seas become in effect a pan-sovereign area, the basis of new thinking and policy’.<sup>1479</sup> They observe that these innovations ‘mirror the AU’s stance on sovereignty and intervention whereby sovereignty is transcended’.<sup>1480</sup> These views of Strydom, Potgieter and Walker are rooted, for example, with the AU Commission noting that the Constitutive Act of the AU marked a ‘radical shift

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<sup>1477</sup> Strydom (2003) at 67.

<sup>1478</sup> *Idem.*

<sup>1479</sup> Potgieter and Walker (2015) at 107.

<sup>1480</sup> *Idem.*

from the cardinal OAU principle of national sovereignty and non-intervention in national affairs'.<sup>1481</sup>

However, in moving towards this changing mindset, there was still a criticism that the international naval programme merely showed that the international community was not concerned with the real problems of Somalia where the perpetrators have their stronghold, but rather with the associated symptoms.<sup>1482</sup> This was because the focus was essentially on the security of global shipping and the safeguarding of their commercial interests.<sup>1483</sup> Potgieter notes that from an African perspective, the focus should be on the roots and causes of maritime insecurity.<sup>1484</sup> It is submitted that if the AU provides a stronger framework for the intervention of the international community in counter-piracy interdiction and enforcement jurisdiction on their terms<sup>1485</sup>, then the continent would benefit from the capacity building, resources and training which would be brought by the international community into the fray. Ultimately this would strengthen the security and stability of the region and allow maritime trade to proceed unhindered and for the developmental objectives of the AIMS to flourish. The by-product of the intervention of the international community would thus be the enhancement of the continent's maritime security, and if this is done in conjunction with a framework provided by the AU, there is a possibility that this would foster a sustainable indigenous maritime security regime for the continent, and in particular, the east African seaboard. In turn, this secure maritime environment would advance what Kornegay terms as the 'continental sovereignty' of Africa.<sup>1486</sup>

## VI. CONCLUDING REMARKS

This chapter commenced by showing how the key international enforcement provision for anti-piracy measures, article 105 of UNCLOS, has a restricted geographical application. It was further shown that piratical acts occurring in territorial waters of the east African seaboard escaped the universal enforcement provisions of the article. To circumvent this limitation, passing of initiatives took place at both an international level – through the passing of resolutions by the Security Council – and at a regional level.

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<sup>1481</sup> AU Commission (2015) at 12-13.

<sup>1482</sup> Potgieter (2015) at 249.

<sup>1483</sup> *Idem* at 249 and 258.

<sup>1484</sup> *Idem* at 258.

<sup>1485</sup> Suggestions in this regard will be proposed in the final chapter of this thesis.

<sup>1486</sup> Kornegay (2012) at 74 and at 87 where he notes that the continental sovereignty of Africa would be advanced by enhancing the continent's maritime security.

In closing this chapter, it can be concluded that there has been a need to exercise foreign enforcement jurisdiction in territorial waters, especially due to the unique circumstances of modern Somali piracy – the initiatives presented above have sought to achieve that. However, in surveying the context and content of these initiatives, its limitations became apparent: the Security Council resolutions were temporary – *ad hoc* and *sui generis* measures and the regional Code of Conduct and MoU between South Africa, Tanzania and Mozambique are non-binding instruments. The initiatives have been reactionary in nature – a response to the sharp increase in piratical activity between 2006 and 2012.

It is submitted that there is a need for a permanent enforcement regime in place which extends universal enforcement jurisdiction into territorial waters in qualified circumstances. Geiß and Petrig were cited earlier in this chapter, but it is apt to restate their comment on the two options that were placed before the Security Council. The first option was to ‘[t]o draft a comprehensive and region-specific enforcement regime from scratch, tailored specifically towards the repression of the criminal phenomenon encountered in the Gulf of Aden’.<sup>1487</sup> The second option was to ‘to build upon the existing enforcement regime contained in UNCLOS and to remedy its shortcomings so as to better target piracy off Somalia’s coast’.<sup>1488</sup> It was evident that the UN Security Council chose the latter approach and the resolutions circumvented the high seas limitation in the UNCLOS provisions. The operative provisions of these resolutions have been periodically extended for 12 month terms and they are currently in force.<sup>1489</sup>

Whilst continuing to periodically renew these resolutions may be an option for the international community, the resolution and its successive renewals do not offer a permanent solution because of its tentative nature, carefully worded caveats and restricted geographical application. Should piratical attacks occur further south off the coasts of Kenya, Tanzania or Mozambique, these would fall outside the ambit of the resolution. Furthermore, if the statistics of instances of piratical acts continue on the current trajectory and decline to the extent that such acts become dormant, this could result in piracy falling out of the agenda of the Security Council with the consequence that the resolution may not be renewed and would consequently lapse. Thus, after such lapse, if subsequent isolated or sporadic piratical acts occur in the region, foreign naval capacity which may wish to promptly interdict suspects in the territorial waters of coastal states would be precluded from exercising the unique jurisdiction conferred by the resolution.

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<sup>1487</sup> Geiß and Petrig (2011) at 70.

<sup>1488</sup> *Idem*.

<sup>1489</sup> See UN Security Council Doc. S/RES/2383 (2017) at par. 14.

Geiß and Petrig noted above that the first option of formulating a new region specific enforcement regime was not a realistic alternative.<sup>1490</sup> The remaining option of building upon the UNCLOS regime would be an appropriate course of action. It is suggested that a modification of the regime in UNCLOS through a revision of key articles, particularly article 105 to extend its application into territorial seas in defined circumstances would *prima facie* be a logical remedy to the adverse consequences of the high seas limitation. The final chapter proposes an exemplar of how such a modification could be formulated and the process of effecting such a modification.

However, the analysis of the Security Council resolution revealed a harbinger of what to expect when proposals are put forward to modify UNCLOS. It was apparent that states are protective of their sovereignty and prefer to maintain the integrity and sanctity of the UNCLOS regime as it stands.<sup>1491</sup> The third chapter of this thesis, however, canvassed how this absolute notion of sovereignty over the territorial sea has a hollow foundation, and found that there is an evolving new conceptual framework for sovereignty in the 21<sup>st</sup> Century which is eroding some of the foundations of the concept of state sovereignty. National political will to deviate from this accepted norm, as embodied in the potential modification of UNCLOS, however, would be a significant challenge.

Whilst the integrity of state sovereignty appears to be a paramount concern from the global perspectives of states relating to the UNCLOS regime, this chapter has revealed a different orientation on the continental platform under the auspices of the AU and its member states. Through the course of the analysis of the institutional and legislative framework of the AU and the decisions and initiatives arising from it, the facilitation of cooperation, collaboration, intervention and the pooling of resources both on a continental and international front appears to be a common theme and provides a tenor of developing AU jurisprudence. This orientation appears to trump the traditional notions of state sovereignty and non-interference. It is in this context, that the penultimate section of this chapter made a case for and proposed the extension of universal enforcement jurisdiction to interdict suspects in the territorial waters of the states on the east African seaboard. This proposal would be integrated into the AU legislative framework and would be shown to be compatible with the developing jurisprudence of the AU. In this regard, the final chapter

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<sup>1490</sup> Geiß and Petrig (2011) at 70.

<sup>1491</sup> Researchers in the law of the sea would be well acquainted with the legislative history of UNCLOS, particularly the length of the deliberations and that the convention is, holistically, a 'package deal' as a result of a compromise of various competing interests.

will present a model that is built into the AU institutional and legislative framework for universal enforcement jurisdiction in the territorial waters of AU member states with a permanent and wide geographical application. The model will be complimentary to the extant UNCLOS framework. Whilst Vrancken appropriately observes with regard to the AU that ‘the limited powers of the organisation inevitably constrain its overall contribution’,<sup>1492</sup> the model that is proposed is supported and strengthened through a mutually beneficial interaction with foreign and international stakeholders.

These findings and observations, together with those of the previous chapters, will now be consolidated in the following final chapter of this thesis.

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<sup>1492</sup> Vrancken (2014) at 63.

# VI

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## RECOMMENDATIONS AND CONCLUSION

### I. INTRODUCTION

Having traversed historical foundations of piracy law through academic opinion and selected cases, followed by a survey of the development of the codification of these doctrines and its regional and national application – the aim of this final chapter is to consolidate the findings and to present some recommendations. Piracy off the east African seaboard between 2006 and 2016 was analysed and provided the impetus to revisit and challenge an established principle of law, which confined the definition of piracy and universal enforcement jurisdiction to the high seas or a place outside the jurisdiction of a state. In this chapter, the key findings of the previous chapters are presented, followed by a discussion of some practical recommendations. Lastly, the discussion will forecast challenges relating to the adoption of these recommendations, and bring the study to a close with a few parting remarks.

### II. SUMMATIVE ASSESSMENT AND SUBMISSIONS

#### **2.1. Summative assessment of the chapters**

Chapter 2 contextualised the study to the East African seaboard and demonstrated that incidents which have the same *actus reus* of piracy occur within territorial waters, and acts of piracy committed on the high seas descend into territorial waters. The chapter enumerated the incidents of piracy and armed robbery at sea through an analysis of the reports prepared by the IMB and the IMO. It was shown that the role of naval interdiction was significant in reducing the incidents of piracy in the region. However, even though these incidents have reduced significantly, the chapter concluded with precautionary remarks that should favourable conditions once again manifest – then the incidents of piracy could resurge.

In Chapter 3, the legal analysis commenced. The chapter considered two lines of jurisprudence: the developing jurisprudence that defined piracy, and the developing jurisprudence on the extent and juridical nature of the territorial sea. The chapter contained four substantive sections:

The first section revisited one of the earliest and most frequently cited terms to describe pirates: namely as *hostis humani generis*. The section, having traversed the conflicting opinions of jurists from Cicero to Travers Twiss, concluded that what remains is a phrase that could be described as an unreliable epithet and a metaphorical invective.

The second section considered the definition of piracy in early cases and doctrines. The expansive jurisdiction over piracy over all parts of the ocean was apparent in *R v Dawson*.<sup>1493</sup> The dominance of British naval power over the oceans was evident by the Nineteenth Century, and the section presented incidents like the Qawasim in the Persian Gulf, the Huascar incident in Peru, and the Kwok-A-Sing saga in Hong Kong. This showed the potential for abuses of foreign power within the territorial waters of the coastal state and cases such as the *Serhassan pirates* and the *Magellan pirates* which favoured a broad reach of naval power over all parts of the ocean, and which did not distinguish between the high seas and territorial sea. The section also contained an overview of American jurisprudence during the 19<sup>th</sup> Century, which highlighted the interface between the mechanism for punishing pirates under the law of nations and under municipal law and its extraterritorial reach. The Supreme Court in *US v Smith*<sup>1494</sup> recognised the diversity of opinions on the definition of piracy and presented a definition of piracy which contained no reference to the high seas or territorial sea.

The chapter then examined the *locus* of piracy and the third section then reviewed the concept of universal jurisdiction – which is applied exclusively on the high seas. The bases of jurisdiction were set out, followed by pointing out the rationale for universal jurisdiction over piracy based on three grounds: (i) heinousness; (ii) denationalisation; and (iii) the security of international commerce. Judicial precedents over incidents were discussed and were found to be too sparse and too scattered to develop any consistent jurisprudential doctrines. The discussion concluded by finding that the exercise of universal jurisdiction over piracy has enduring value. However, it was only applicable to piracy *jure gentium* and not piracy as defined by municipal law. The key distinction between piracy *jure gentium* and piracy under municipal law is the *locus* of the act. This led to the final

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<sup>1493</sup> (1696) 13 How. St. Tr. 451.

<sup>1494</sup> 18 U.S. (5 Wheat) 153 (1820).

part of the discussion in the chapter on the realm of the high seas vis-à-vis the realm of the territorial sea.

In the final part of the chapter, the extent and juridical nature of the territorial sea was surveyed. It was shown that there was uncertainty, ambiguity and conflicting academic opinions on the extent of the territorial sea. Furthermore, in the development of the juridical nature of the territorial sea, it was shown that there was a diversity of opinion, and unpacking the nature of the sovereignty entailed an understanding of the division between *dominium* and *imperium*. The survey in the chapter points to numerous theories on the juridical nature of the territorial sea. They ranged firstly from a broad *territorialist thesis* that sees the sea as a prolongation of a state's land territory to the second thesis that rejects the possibility of the territorial sea as a subject to the sovereignty of the coastal state, and instead views the territorial sea as part of the high seas – leaving the coastal state with jurisdiction for specific purposes. The chapter reviewed and collated the various theories that support the latter thesis.<sup>1495</sup> The existence of these theories suggests that there are views that are alternative to the traditional Westphalian notions of absolute sovereignty. Contemporary views on sovereignty were set out briefly, and it was shown that movements towards globalisation, interdependence and cooperation have eroded the traditional approach to sovereignty as an absolute and unlimited authority.

Chapter 4 considered the development of the codification of the international framework. The current provisions of UNCLOS were set out and the narrow application and impact of the high seas' limitation was emphasised. The chapter importantly notes how the impact of the high seas' limitation was dismissed as an area of contention. It was highlighted that there was a lack of progressive development on the high seas' limitation due to a paucity of cases and the perception, at the time, that piracy was extinct or a historical curiosity. The chapter then examined each of the codification attempts, with a focus on the high seas' limitation. The Matsuda report was the first codification attempt to recognise the possibility of a reverse hot pursuit in the territorial sea where there is a need to safeguard international relations. In its draft provisions, the reverse hot pursuit provisions are interpreted to purport that piracy *jure gentium* can therefore extend into the territorial sea. A detailed discussion followed on the provisions of the Harvard Draft and its voluminous commentary. The Draft

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<sup>1495</sup> For convenience of recollection, these theories are: the police theory, conservation theory, competence theory, and servitude theory. See section 5.3.3 (v)(a)-(d) of chapter 3.

also contained reverse hot pursuit provisions. It is noteworthy that these two attempts rested on a deficient analysis of the large corpus of jurisprudence regarding piracy and the territorial sea – as highlighted in chapter 3. In the analysis of the subsequent work of the International Law Commission (ILC) the reverse hot pursuit provisions were not included in the draft instruments. The *travaux préparatoires* highlighted that in the deliberations during the ILC projects and the first and third United Nations Conferences on the Law of the Sea, the commissioners, at each stage, queried the high seas' limitation – which were rejected without a substantive or probative analysis.

Chapter 5 considered the application of the various legal frameworks applicable to the east African seaboard. It was shown that the incidents of piracy off Somalia required an additional enforcement remedy, as the high seas limitation prevented international and foreign naval interdiction in the territorial sea, which was prone to attacks and seen as a haven for the perpetrators. From an *international perspective*, need for an additional enforcement remedy was addressed by the passing of Security Council Resolution 1816, which authorised interdiction in the Somali territorial sea. The chapter considered the *ad hoc* nature, limitations and deliberations which lead up to the adoption of the resolution. The deliberations provided a harbinger of the potential obstacles of obtaining the consent of states to new provisions which would encroach on their sovereign rights. The most significant *regional effort* under the auspices of the IMO was the Djibouti Code of Conduct which was seen as a positive development which goes a long way towards complementing the UNCLOS regime. Its successful adoption is seen as a progressive development where states, mindful of the importance of consent and consultation, are prepared to break away from the sacrosanct approach to their sovereign rights in recognition of regional and global community needs. The chapter then turns to a *municipal level* and reviewed the approach to piracy in the region by two key players: South Africa and Kenya. It was found that South Africa's enforcement measures are consistent with the international framework and the country has concluded a trilateral anti-piracy agreement with Mozambique and Tanzania which allows entry into each other's territorial waters in order to suppress piracy. It was shown that Kenya has taken progressive steps to incorporate the international framework through the enactment of the Merchant Shipping Act of 2009. In these national frameworks, it was shown that the *locus* of a piratical act has been a crucial element in the forging of an enforcement and prosecutorial regime. Lastly, the chapter presented a detailed treatment of the *continental* anti-piracy responses. The section highlighted how 'seablindness' was ingrained for decades in policymakers on the continent, but the piracy epidemic off Somalia in the decade under review in this thesis generated a new impetus and became a catalyst to drive the recognition of maritime security and the shift away from seablindness. A case for

universal enforcement jurisdiction to interdict piratical acts in territorial seas was made. Due to institutional and capacity constraints and a general lack of political will on the continent, international and foreign intervention and cooperation in maritime security endeavours in the problematic Horn of Africa region played a significant role in the rapid decline of piracy at the end of the period under review. The detailed survey of the initiatives of the AU and key instruments, namely the AIMS and the Lomé Charter has pointed towards a new emerging jurisprudence which shifts away from the traditional approach of the OAU which favoured the concept of absolute state sovereignty and enshrined the principle of non-intervention. In surveying the instruments and decisions of the AU structures, trends towards increased collaboration, cooperation and pooling of resources amongst members states and between international partners have become apparent. Cross-border operations are envisaged and innovative frameworks such as the CEMZA in the AIMS point toward a changing mindset and in principle appear to be compatible with the proposals which will be advanced later in this chapter as the secondary submission.

## **2.2. Overview of the primary submission**

The grounds for challenging the high seas' limitation were made on the basis of: (i) the hollow jurisprudential foundation; (ii) the rejection and disappearance of relevant articles during the codification processes and revisiting its significance in light of contemporary challenges; and (iii) the emerging trends in the manner of application in regional instruments and domestic legislation. The grounds for challenging the high seas' limitation have been elucidated and addressed in the preceding chapters. Based on this primary submission, the next section will present further recommendations in the form of a revision of the UNCLOS articles on piracy.

## **2.3 Overview of the secondary submission**

The secondary submission, in contrast to the primary submission, complements the existing UNCLOS framework and is geographically applicable to the coastal regions of the African continent. It is submitted that a model of universal enforcement jurisdiction over piratical acts in the territorial waters of AU member states can be integrated into the existing institutional framework of the AU.<sup>1496</sup> This submission is supported by the findings of the

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<sup>1496</sup> In this regard, all the states on the east African seaboard are member states of the African Union (dates of accession in parenthesis): South Africa (6 June 1994); Mozambique (18 July 1975); Tanzania (25 June 1963); Kenya (13 December 1963) and Somalia (25 June 1963).

previous chapter which points towards a penchant for collaborative efforts between the AU and international or foreign stakeholders.

The submission analyses the AU's right of intervention in its member states, as emphasised in its Constitutive Act, and submits that piratical acts would fall within one of the grounds of intervention, namely a serious threat to legitimate order. This provision can circumvent the need for Security Council authorisation and state consent. The AU Standby Force (ASF) provides the mechanism for such intervention. The submission recommends an additional deployment scenario to the policy framework of the ASF which facilitates joint intervention interdiction operations between the ASF and foreign and international naval capacity in territorial seas of member states. Submissions are also made to incorporate the AU Continental Early Warning System (CEWS) into this framework. The framework for the joint intervention interdiction operations are proposed as a further annex to the Lomé Charter.

In effect, the proposed model will accommodate any foreign or international naval deployments that engage in interdicting piratical acts in territorial waters. It will be shown that the model does not provide for the blanket exercise of universal enforcement jurisdiction, but it is exercised under the aegis of the AU institutional framework through cooperative deployment with the ASF and minimal formalities required. The model thus aims to be housed within a permanent and binding AU framework.

### III. PRIMARY SUBMISSION: PRACTICAL RECOMMENDATIONS

The summary above – which highlights salient findings from discussions in the previous chapters – presents a largely academic debate. To enhance the usefulness of these findings and discussions, aspects thereof will be drawn into a practical amendment<sup>1497</sup> to the UNCLOS provisions, followed by a brief commentary setting out the rationale and motivation.

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<sup>1497</sup> Madden in 'Trading the shield of sovereignty for the scales of justice: A proposal for reform of international sea piracy laws' 21 *University of San Francisco Maritime Law Journal* (2008-9) 139 at 155, comments that 'the creation and modification of international law ought to be practical, rather than a strictly academic endeavor. International law is a tool that should exist to serve the needs and objectives of the community of nations'.

### 3.1 Amendment of UNCLOS

Harrison commented that from the late Nineteenth Century ‘it was widely believed that the codification of international law on significant areas of international law would contribute to the maintenance of international peace and security by promoting clarity in the applicable law, thereby avoiding the causes of international conflict’.<sup>1498</sup> Furthermore, Tanaka considers that the international law of the sea ‘should be considered as a dual legal system comprising both a zonal management approach which primarily seeks to coordinate interests of individual States and an integrated management approach focusing on the protection of community interests at sea’.<sup>1499</sup> UNCLOS provides the framework envisaged above and was described at the time of its adoption as ‘the greatest legislative effort undertaken by the United Nations and probably the greatest ever undertaken in the annals of international law as a whole’.<sup>1500</sup>

In the present study of piracy on the east African seaboard, in reviewing the Security Council Resolution 1816 in chapter 5, the preamble to the resolution affirmed that UNCLOS sets out the legal framework applicable to combatting piracy and armed robbery.<sup>1501</sup> The enforcement regime set out in the resolution is modelled on UNCLOS.<sup>1502</sup> Furthermore, the regional agreement, the Djibouti Code of Conduct, focused on incorporating the provisions of UNCLOS into domestic law.<sup>1503</sup>

### 3.2 Specific recommendations

Although the achievement of UNCLOS has been acclaimed, Murphy has remarked that ‘no human act is perfect. Each bears the marks of its maker and the time of its gestation. Treaties are not immune from this law and UNCLOS is no exception’.<sup>1504</sup> The existing

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<sup>1498</sup> Harrison *Making the Law of the Sea: A study in the development of International Law* (2011) at 28.

<sup>1499</sup> Tanaka *The International Law of the Sea* (2015) at 453. Article 101(a)(i) and (ii) of UNCLOS provide that the *actus reus* of piracy is directed against ‘against another ship ... or against persons or *property* on board such ship’ (my emphasis). Property, as envisaged in this section, would include the commercial cargo being transported, and therefore acts of piracy are seen as predated upon international commerce which is a shared community interest.

<sup>1500</sup> Statement of Norway, 186<sup>th</sup> meeting, 17 *Official Records of the Third United Nations Conference on the Law of the Sea* 27 at par. 42. Cited in Harrison (2011) at 27.

<sup>1501</sup> U.N. Doc. S/RES/1816 (2 June 2008) at preambular par. 4.

<sup>1502</sup> Shnider ‘Universal jurisdiction over “operation of a pirate ship”: The legality of the evolving piracy definition in regional prosecutions’ 38 *North Carolina Journal of International and Commercial Regulation* (2012-3) 473 at 479.

<sup>1503</sup> IMO Doc. C/102/4 (2009) at article 11. See, also, Shnider (2012-3) at 480.

<sup>1504</sup> Murphy ‘Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?’ in Lehr (ed.) *Violence at Sea: Piracy in the age of global terrorism* (2007) at 155.

provisions of UNCLOS relating to piracy are once again reproduced, with framework suggestions and alterations to the provisions appearing in italics – followed by a commentary:

3.2.1 Revision of Article 100 (Duty to cooperate in the repression of piracy):

- ‘(1) All states shall cooperate to the fullest possible extent in the repression of piracy:
  - (i) on the high seas; or
  - (ii) in any place outside the jurisdiction of any State; **or**
  - (iii) *in a place within a State’s territorial sea that is incapable of exercising jurisdiction.*’
- (2) *States should designate a national focal point to facilitate coordinated, timely and effective communication and cooperation with states exercising duties under subparagraph 1(iii) of this article and for the purposes of article 105(3).*<sup>1505</sup>

*Comments:* What is patent from the insertions to this article is the extension of enforcement jurisdiction into the territorial sea of the coastal state in subsection 1(iii). This aspect will be discussed in the section below. Subsection 2 is drawn from a similar concept contained in article 8 of the Djibouti Code of Conduct.<sup>1506</sup> While the objective of the designated national focal point is ‘to facilitate coordinated, timely, and effective information flow among the Participants consistent with the purpose and scope of this Code of conduct’,<sup>1507</sup> it is suggested that – as envisaged in the deleted draft provision of the Code<sup>1508</sup> – this national focal point would serve as a conduit of cooperation in interdiction operations between the coastal state and the capturing state. Immediate and swift responses are an inherent feature in naval interdiction. Given that piracy would flourish in areas without an effective government, obtaining the necessary approval through the usual diplomatic channels would not be feasible in the context of naval interdiction. This is further complicated where, in the context of failed states, the authorities who would issue such approval, would typically not be legitimate or recognised. The designated focal point would be an immediate channel of communication.<sup>1509</sup>

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<sup>1505</sup> Article 105 dealing with enforcement jurisdiction is discussed in section 3.2.3, below.

<sup>1506</sup> See section 5.2.2 of chapter 5.

<sup>1507</sup> See article 8(1).

<sup>1508</sup> See section 5.2.2 of chapter 5.

<sup>1509</sup> A parallel could be drawn with the concept of a Secretary of State’s Representative (SOSREP) for maritime salvage and intervention. *See* par. 5.5 of ‘The National Contingency Plan A Strategic Overview for Responses to Marine Pollution from Shipping and Offshore Installations’ (2014), available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/478676/1501120\\_NCP.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478676/1501120_NCP.pdf).

### 3.2.2 Article 101 (Definition of piracy)

Piracy consists of any of the following acts:

- ‘(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
  - (iii) *against a ship, aircraft, persons or property in a place within a State’s territorial sea that is incapable of exercising jurisdiction.*’

*Comments:*

Madden approached an amendment of this article in the following way:

‘piracy consists of any acts of violence or detention, or any act of depredation, committed at sea.’<sup>1510</sup>

At face value, this suggested revision by Madden solves the high seas’ limitation in article 101 of UNCLOS, as it currently stands. The use of ‘committed at sea’ in the suggested revision by Madden is reminiscent of the early piracy jurisprudence which used generic terms such as the open ocean, ocean, and sea. It is submitted however, that the adoption of Madden’s revision would not conform to the general tenor of UNCLOS, where jurisdiction and control and use of ocean resources are based on management of specific zones.

The suggested approach would be to maintain the integrity of the UNCLOS framework and retain notions of distinct jurisdictional zones. The revised article defines an act of piracy as occurring in the territorial seas – and is only applicable where the coastal state is incapable of exercising jurisdiction. The concept of capacity is given its ordinary meaning and is related to the ability to control. This suggestion addresses one of the key impediments prohibiting the extension of piracy *jure gentium* into the territorial sea: the presumption of state capacity. It is submitted that this approach would still recognise the sovereignty of the coastal state, when viewed through the analysis of the juridical nature of the territorial sea, revisited in chapter 3. The notions of *imperium* and *dominium* discussed in chapter 3 can find a contemporary interpretation as a conceptual framework, where *imperium* would

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<sup>1510</sup> Madden (2011) at 155 (with my emphasis).

equate with the ability to exercise control and enforcement jurisdiction over the territorial sea, and *dominium* would refer to the sovereign rights of the coastal state. Earlier, in chapter 3,<sup>1511</sup> it was concluded, based on the writings of several historical commentators, that *imperium* and *dominium* are concepts that are independent of each other. The survey of the writings of jurists in chapter 3, particularly Loccenius, suggested that it is possible to cede a form of *imperium* or temporary power for the purposes of protection – without derogating from the rights of the coastal state. A division of rights, without derogating from fundamental rationales behind those rights, is not uncommon: in the realm of the EEZ the coastal state enjoys and exercises certain sovereign rights and yields to the general freedoms of the sea exercised by all nations. The survey of different theories on the juridical nature of the territorial sea<sup>1512</sup> convincingly suggests inherent limitations in the concept of sovereignty over the territorial sea. This thesis is a proponent of the view that the extension of enforcement jurisdiction over piracy into the territorial sea would minimally infringe on the sovereign rights of the coastal state in the exclusive circumstance where the coastal state has no capacity to enforce its jurisdiction over the territorial sea. The emphasis on this view would be crucial, should states vote to adopt the amendments which are suggested above.

At the other end of the spectrum, Azubuike proposes that where a failed state cannot exercise control over its territorial waters in the suppression of piracy, then it ought not to hold exclusive rights over those waters to suppress piracy. He writes:

‘where a State has demonstrably failed, the international community, through the United Nations Security Council, should be bold to declare it as such with the result that the normal attributes of a State may temporarily be denied it. Every right carries with it a concomitant duty. If a State is not able to perform its duty to the international community, its statehood should legitimately be called into question. The result of this analysis, with respect to the law of piracy, is that where a State has failed, it really cannot assert its right to the inviolability of its territorial waters.’<sup>1513</sup>

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<sup>1511</sup> See section 5.3.3 (iii) of chapter 3.

<sup>1512</sup> See section 5.3.3 (v) of chapter 3.

<sup>1513</sup> Azubuike ‘International law regime against piracy’ 15 *Annual Survey of International and Comparative Law* (2009) 43 at 52.

His view, however – that statehood would be called into question – would not gain a foothold and garner favour amongst states, should such a provision be inserted into the UNCLOS articles.

### 3.2.3 Article 105 – Seizure of a pirate ship or aircraft

1. Every State may:
  - (a) On the high seas, or in any other place outside the jurisdiction of any State; **or**
  - (b) *in a place within a State's territorial sea, in circumstances where that State that is incapable of exercising jurisdiction,*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.
2. The courts of the State which carried out the seizure **in subparagraph 1(a) of this article** 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.
3. *Any State carrying out a seizure under subsection 1(b) of this article must:*
  - (a) *notify and report the pursuit and seizure to the designated national focal point of the coastal state;*
  - (b) *tender possession of the ship and property seized and the custody of the persons arrested to the coastal state.*
4. *If a tender provided for in subsection 3(b) of this article is not accepted by the coastal State, the State making the seizure may proceed in terms of subsection 2 of this article.*

*Comments:* The effect of the amendment to the architecture and additions to this article, is that the universal jurisdiction granted to all states on the high seas now extends into the territorial sea of a state. In chapter 2, the discussion of the business model or *modus operandi* of pirates operating off Somalia has shown that the act traverses both the high seas and the territorial sea, and in some instances the entire act was committed in the territorial sea. This has the implication that an amendment which only provides for reverse hot pursuit would not be applicable, as the act commenced on the high seas. Building on the previous codification attempts such as the Harvard Draft, which provided for *reverse*

*hot pursuit*,<sup>1514</sup> this provision is broader in its scope and can be interpreted to extend enforcement powers for acts committed wholly in the territorial seas not exclusively for acts committed by descent from the high seas.

The provisions of subsection 3 of the revised article are critical for securing the adoption and coming into force of this amendment, as they provide for a consultative process through the conduit of the designated national focal point, and is a recognition of a state having a preferent right of jurisdiction. Subsection 3(a) is drawn from the concept of a focal point in the Djibouti Code of Conduct – particularly the deleted provisions of article 4(5) of the Code.<sup>1515</sup> Under the deleted provisions, the focal point of the coastal state would notify the capturing state whether they intend to relieve the capturing state by deploying their own vessel or issue any specific instructions as to the actions that may be taken by the capturing state in the territorial waters of the coastal state. The onus would lie on the coastal state to raise these considerations through the national focal point. Subsection 3(b) and 4 have been adapted from article 7(2) and 7(3) of the Harvard Draft.<sup>1516</sup> Rejection of the tender by the coastal state in subsection 4 can be seen as a tacit consent by the coastal state to allow the exercise of enforcement jurisdiction in its territorial sea, pursuant to the provisions of this article.

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<sup>1514</sup> See Article 7(1) of the Harvard Research in International Law (Harvard Draft) 26 *American Journal of International Law* (1932). Nyman in ‘Modern Piracy and International Law: Definitional Issues with the Law of the Sea’ 5/11 *Geography Compass* (2011) 863 at 866, defines reverse hot pursuit as the ‘ability of a ship to pursue a pirate from international waters into a state’s territorial waters’. It is also worth noting the following extract from a publication of the United States Department of the Navy *The Commander’s Handbook on the Law of Naval Operations* NWP 1-14M (2007):

‘3.5.3.2 Pursuit of Pirates into Foreign Territorial Seas, Archipelagic Waters, or Airspace  
If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the nation having sovereignty over the territorial sea, archipelagic waters, or superjacent airspace to continue pursuit ... The inviolability of the territorial integrity of sovereign nations makes the decision of a warship or military aircraft to continue pursuit into these areas without such consent a serious matter. However, the international nature of the crime of piracy may allow continuation of pursuit if contact cannot be established in a timely manner with the coastal nation to obtain its consent. In such a case, pursuit must be broken off immediately upon request of the coastal nation, and, in any event, the right to seize the pirate vessel or aircraft and to try the pirates devolves on the nation to which the territorial seas, archipelagic waters, or airspace belong.  
Pursuit of a pirate vessel or aircraft through or over international straits overlapped by territorial seas or through archipelagic sea lanes or air routes, may proceed with or without the consent of the coastal nation or nations, provided the pursuit is expeditious and direct and the transit passage or archipelagic sea lanes passage rights of others are not unreasonably constrained in the process.’ See, also, Murphy (2007) at 163.

<sup>1515</sup> The deleted provisions are reproduced in section 5.2.2 of chapter 5 of this thesis.

<sup>1516</sup> These provisions were discussed in detail in section 4.4.4 of chapter 4. These suggested amendments to UNCLOS are also informed by the findings in respect of the Matsuda Report in section 3.5 of chapter 4.

These revised articles can then be drawn into domestic legislation, in a manner similar to those described in chapter 5.

### 3.3 Prognosis

#### 3.3.1 Amendment procedure

Article 312 of UNCLOS provides the general amendment procedure.<sup>1517</sup> A 10-year waiting period for the article to take effect expired on 16 November 2004.<sup>1518</sup> Given that the above recommendations amount to a specific amendment, they would need to be presented in writing to the UN Secretary-General. The article provides that this proposal will be circulated to state parties. If at least half the state parties, within 12 months, accept the request, then a conference will be convened. A simplified amendment procedure is contained in article 313,<sup>1519</sup> where a proposal is adopted automatically if no state party objects. However, this simplified procedure may not be as simple and expeditious in these circumstances because article 313(1) refers to a process involving ‘an amendment’, whereas the proposals herein contain a series of amendments. In addition, article 313(2) contains the proviso that if one state party objects to the amendment, then the process would

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<sup>1517</sup> Article 312 of UNCLOS provides:

- ‘1. After the expiry of a period of 10 years from the date of entry into force of this Convention, a State Party may, by written communication addressed to the Secretary-General of the United Nations, propose specific amendments to this Convention, other than those relating to activities in the Area, and request the convening of a conference to consider such proposed amendments. The Secretary-General shall circulate such communication to all States Parties. If, within 12 months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Secretary-General shall convene the conference.
2. The decision-making procedure applicable at the amendment conference shall be the same as that applicable at the Third United Nations Conference on the Law of the Sea unless otherwise decided by the conference. The conference should make every effort to reach agreement on any amendments by way of consensus and there should be no voting on them until all efforts at consensus have been exhausted.’

<sup>1518</sup> Harrison (2011) at 65. He remarks *idem* that ‘the temporal limitation was aimed at preserving the integrity of the Convention for its initial period of operation’.

<sup>1519</sup> Article 313 provides: *Amendment by simplified procedure*:

- ‘1. A State Party may, by written communication addressed to the Secretary-General of the United Nations, propose an amendment to this Convention, other than an amendment relating to activities in the Area, to be adopted by the simplified procedure set forth in this article without convening a conference. The Secretary-General shall circulate the communication to all States Parties.
2. If, within a period of 12 months from the date of the circulation of the communication, a State Party objects to the proposed amendment or to the proposal for its adoption by the simplified procedure, the amendment shall be considered rejected. The Secretary-General shall immediately notify all States Parties accordingly.
3. If, 12 months from the date of the circulation of the communication, no State Party has objected to the proposed amendment or to the proposal for its adoption by the simplified procedure, the proposed amendment shall be considered adopted. The Secretary-General shall notify all States Parties that the proposed amendment has been adopted.’

be halted and the proposal rejected. It therefore seems unlikely that the simplified procedure would be the most effective approach to a proposal that encroaches on state sovereignty. Furthermore, article 315 deals with signature, ratification and accession, and article 316 provides for the entry into force of amendments. Harrison has noted, however, that since the coming into force of UNCLOS, neither of these amendment procedures has been invoked.<sup>1520</sup> In the premises, the probability of a conference being convened to amend the provisions set out above is low.

### 3.3.2 Impact

The recommendations above present a *prima facie* logical solution to the research problem presented at the outset of this thesis. However, based on the observations noted below, it would appear unlikely that a modification or amendment to UNCLOS, as recommended above, would be adopted if these observations of a sampling of state practice persists. Indeed, I am cautious and mindful not to delude myself into believing that these submissions and specific recommendations would elucidate with finality and provide a neatly packaged solution for the issues and challenges in this discipline which international scholars far more experienced than myself debate over and are still finding solutions for.

The key observation, which would hinder the progression of these recommendations to a debate in a policy making forum and revealed during the course of this thesis, relates to the continuing state practice that points to an aversion to challenging the framework laid by the current UNCLOS regime. Indeed, drawing on the history of the third United Nations Conference on the Law of the Sea (UNCLOS III), Harrison pointed out that it took place in a much more politically charged atmosphere than had been the case with previous attempts at law making.<sup>1521</sup> It is clear that sovereignty and territorial integrity is still a sacrosanct component of the international legal system.<sup>1522</sup> The question of whether encroachments of sovereign rights arising from these amendments would be acceptable to states is still an open one. In the discussion in chapter 5 relating to the passing of the UN Security Council Resolution 1816, the deliberations leading up the adoption of the

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<sup>1520</sup> Harrison (2011) at 70. A possible explanation for this can be found in Geiß and Petrig *Piracy and armed robbery at sea* (2011) at 52, where they note that ‘UNCLOS is traditionally perceived to reflect a subtle balance of extensively negotiated compromises that is only acceptable to States parties as a package deal. Thus, a widely held perception is that a modification of singular elements or even entire sections would off-set the negotiated compromise and would necessitate modifications of UNCLOS in its entirety. For the time being, States appear to be strongly committed to uphold this package-deal.’

<sup>1521</sup> Harrison (2011) at 40.

<sup>1522</sup> See, for example, U.N. Doc. S/RES/1816 (2 June 2008) at preambular par. 6, which ‘[reaffirms] its respect for the sovereignty, territorial integrity, political independence and unity of Somalia’.

resolution were particularly instructive. Some state delegates, like Indonesia and China, expressed in unambiguous terms that the sovereignty and territorial integrity of the coastal state is a paramount consideration.<sup>1523</sup>

What becomes apparent is that any attempt to modify or amend the UNCLOS framework would be met with resistance by some states.<sup>1524</sup> The surveys shown in this thesis reveal that this resistance has often been summarily meted out from early codification attempts in the early twentieth century to the recent deliberations in the Security Council. The reasoning for this sacrosanct approach to respect for the territorial integrity of the respective states could be explained in various ways, for example, it may be a key factor in the geopolitics of territorial disputes<sup>1525</sup> or simply because their respective coastlines and regions or shipping interests are not affected by piracy and the unique circumstances that manifested due to piracy off the east African seaboard.

Thus, unless there is a significant change in the mindset of states, the proposed modifications would remain confined to a draft paper. To move, in measured strides, towards this direction of a change in mindset requires ‘political will’ on the part of individual states. It is apposite to quote Potgieter’s description of this term as having ‘an influence on the choices political leaders make and on the way these choices are implemented, and it is central to achieving or not achieving political outcomes’.<sup>1526</sup> He goes on to state that ‘[p]olitical will is dependent on having leading figures to ‘champion’ a specific issue and to ensure that implementation occurs. But such ‘champions’ require *good information* to ensure that they can communicate clearly and promote their support of specific initiatives’.<sup>1527</sup> In Potgieter’s comment lies a source of the holistic value of the primary aim of this thesis: that champions or policy makers in various platforms<sup>1528</sup> need

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<sup>1523</sup> See section 2.1.4 of chapter 5.

<sup>1524</sup> It was beyond the scope of this thesis to gain a broader view of the current individual or collective attitudes of states regarding encroachments of their sovereignty. It is suggested – to follow on from this thesis – a further detailed study sourcing and listing the various coastal states’ views in this regard would be particularly informative in assessing the prospects of states approving the convening of an amendment conference to discuss the proposals in the primary submission of this thesis.

<sup>1525</sup> For example, see generally *Philippines v China* 2013-19 (Permanent Court of Arbitration).

<sup>1526</sup> Potgieter ‘Leadership and Political Will – crucial for maritime security in East Africa’ in Mandrup and Vreÿ *Towards Good Order at Sea: African Experiences* (2015) at 244 (with my emphasis).

<sup>1527</sup> *Idem* (with my emphasis).

<sup>1528</sup> Once this occurs at a domestic level, there is further potential to escalate this change of mindset to policy makers at a multilateral level. For example, Tiekou suggests that ‘[AU] Commissioners will need to ensure that the politicians agree on issues that advance the general interests of Africans...’ Tiekou ‘Explaining the clash and accommodation of interests of major actors in the creation of the African Union’ 103 *African Affairs* (2004) 249 at 266.

to be well appraised with sound information, who can then circulate and proliferate these ideas which need deep reflection grounded by detailed analyses. Potgieter and Walker caution how ‘conferences often focus on superficial or ‘popular’ or newsworthy themes instead of dissecting deeper issues.’<sup>1529</sup> The survey in this thesis also reveals how critical opportunities to deeply dissect issues concerning sovereignty and the high seas’ limitation which could had a wider impact were missed: for example, in chapter 4 it was revealed how key submissions made in a 1955 meeting of the ILC were simply outvoted in a meeting lasting two hours.<sup>1530</sup> Decades later, in 2010, when a meeting of experts convened under the auspices of the AU Commission to underscore the formulation of the AIMS, the UNCLOS framework was discussed in superficial terms.<sup>1531</sup> In this spirit, the holistic analysis presented in this thesis, in which the high seas’ limitation was challenged on historical and contemporary grounds, is submitted as the first comprehensive attempt in scholarship with the aim of serving as a repository for policy makers to reflect more deeply on these issues.

Although the possibility of modifying the framework in UNCLOS is unlikely for the reasons set out above, it is submitted that this does not detract from the usefulness of the specific recommendations made in this primary submission as an academic endeavour and a stimulus for deeper reflection by policy makers for two reasons. First, early codification attempts that considered issues such as reverse hot pursuit in the early twentieth century have never been considered in academic scholarship in any great detail,<sup>1532</sup> however this thesis sets out its relevance through the prism of contemporary challenges manifesting off the east African seaboard. The circumstances under which those key provisions and submissions were rejected well over half a century ago also markedly differ from the present circumstances of Somali piracy; the creation of the EEZ and the decolonisation of Africa.<sup>1533</sup> Second, the specific recommendations drafted herein are offered as the first detailed legislative proposal showing an exemplar of a modified UNCLOS framework in response to the research problem in this thesis. Having an exemplar provides a foundational reference point for testing its compatibility with respective states current and future policy.

Finally, as a parting remark at this interval, the analysis of regional, national and continental measures along the east African seaboard contains weightier evidence to suggest a view

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<sup>1529</sup> Potgieter and Walker (2015) at 97.

<sup>1530</sup> See section 5.2 of chapter 4.

<sup>1531</sup> See section 5.3.3 of chapter 5.

<sup>1532</sup> See for example section 4.5 of chapter 4 where the only author who appears to analyse these codification attempts was Rubin (1988).

<sup>1533</sup> See the discussion in section 2.5 and 2.6 of chapter 4. Indeed

that resistance to compromises to traditional concepts of state sovereignty will yield to the broader interests of the international community and the protection of international trade from the predation of piracy.

#### IV. SECONDARY SUBMISSION: PRACTICAL RECOMMENDATIONS

##### 4.1 General observations

In the previous chapter, a survey was undertaken of the continental approach concerning maritime security and specifically to maritime security, with an analysis of the recent bespoke continental instruments relevant to maritime security. From this analysis, a case was made for the incorporation of universal enforcement jurisdiction within territorial waters for the purposes of combating piracy within an AU continental framework. This section considers one way in which this proposal could be formulated into the existing institutional architecture.

The survey in the previous chapter has shown that while there were calls for piracy conferences, special technical committees and a specialised maritime department within the AU Commission,<sup>1534</sup> to date, none of these initiatives has been taken forward. It is therefore suggested that existing mechanisms are utilised and improved upon to achieve the proposal presented above. Using existing mechanisms have some advantages and the ISS and Wilton Park note that ‘there are important issues of how to achieve synergies, promote complementary rather than duplicative approaches, coherence, and coordination on the part of both African organisations and countries and international donors and partners’.<sup>1535</sup> Kame-Domguia, the coordinator of the AIMS Task Force in the AU Commission, noted with regard to east Africa that ‘[t]he region in general has insufficient Maritime Domain Awareness and unreliable Maritime capability. Examples include navy, coastguard, and civilian maritime agencies. Furthermore, they lack a single agency or coordinating body that operates on the maritime security issues i.e. there are too many actors and programs that are uncoordinated’.<sup>1536</sup> Using existing mechanisms could possibly foster a greater integration of maritime security policies within the APSA. In its 2016-2020 Roadmap, it was observed for example, that ‘[t]he African Union’s maritime security

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<sup>1534</sup> See Walker (2017) at 3.

<sup>1535</sup> Wilton Park and ISS (2015) at 1.

<sup>1536</sup> Kame-Domguia ‘The African Union Commission’s 2050 Africa’s Integrated Maritime Strategy’ *Briefing Paper* commissioned for the Fourth UAE Counter Piracy Conference: ‘Securing State Recovery: Sustaining Momentum at Sea, Confronting Instability on Land.’ Dubai (October 2014). See: [www.counterpiracy.ae](http://www.counterpiracy.ae).

policy is weakly integrated into APSA: This [is due to] the absence of a Plan of Action for the operationalization of the [AIMS] [and] a lack of effective mainstreaming of maritime security into CEWS'.<sup>1537</sup>

## 4.2 Recommendations

The proposal to extend universal enforcement jurisdiction into territorial waters of AU member states is proffered as an alternative to the proposals in the previous section regarding amendments to the UNCLOS text. These proposals are intended to be complementary to the extant regime contained in the UNCLOS. The approach will entail a revisit of the framework for the ASF and the CEWS, as well as a recommendation for a further annex to the Lomé Charter. The proposals are made *ad referendum* and suggest one of the ways in which the integration of maritime security policies into the APSA can be fostered.

### 4.2.1 Intervention under the aegis of the African Union Standby Force

#### (i) Preface and milieu

Foreign naval interdiction in territorial waters to suppress or prevent an act of armed robbery against ships without the authorisation or consent of the coastal state would be tantamount to an intervention in a state and is not an automatic privilege granted by international law to foreign navies. The Constitutive Act of the AU provides for specific grounds of intervention. Article 4(h) thereof provides the following principle, i.e. 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'. Piracy and armed robbery are expressly excluded from this list. However, this *numerus clausus* was expanded when the Protocol on Amendments to the Constitutive Act of the African Union revised this article to read as 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity *as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council*'.<sup>1538</sup> It is submitted that the perceived lawlessness of the waters and the threat to security of shipping and humanitarian concerns

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<sup>1537</sup> APSA Roadmap 2016-2020 (2015) at 52. See also Engel (2014) at 21, where he notes that 'Maritime security and safety was not, however, fully integrated into the AU's African Peace and Security Architecture. Thus far, it does not feature in the African Standby Force or in the Continental Early Warning System.'

<sup>1538</sup> See article 4 (with my emphasis). This provision was replicated in article 11(f) of the Solemn Declaration on a Common African Defence and Security Policy.

caused by piracy and armed robbery along the east African seaboard during the period of analysis in this thesis could arguably have fallen within the ambit of the threat stipulated in the revised intervention article. In support of this submission, the Security Council, in its most recent resolution pertaining to the situation in Somalia expressed concern about the ‘ongoing threat that resurgent piracy and armed robbery at sea poses to the prompt, safe, and effective delivery of humanitarian aid to Somalia and the region, to the safety of seafarers and other persons, to international navigation and the safety of commercial maritime routes, and to other ships, including fishing vessels operating in conformity with international law’.<sup>1539</sup>

This intervention article has been described as groundbreaking and significant in that it transcends the traditional models of state sovereignty. Dersso appropriately captured the significance of this article in the following way:

‘This provision, together with the emphasis on ending conflicts and promoting peace and security, reverses the primacy that the OAU accorded to the state and its state centric principles over people and the rights and interests of citizens. Most notably, it revises the understanding and scope of the application of the principles of state sovereignty and non-interference. By narrowing the scope of application of state sovereignty and non-interference, this provision removed the issues covered by these principles from the exclusive domestic jurisdiction of the state and made them matters of continental concern.’<sup>1540</sup>

Darkwa similarly commented that the intervention article ‘was a stark deviation from the OAU’s non-interventionist stance and a clear demonstration of African leaders’ determination to prevent the use of sovereignty as a shield for human rights violations’.<sup>1541</sup>

The specific institutional mechanism within the AU to enforce this intervention article is the ASF. Article 13(1) of the PSC Protocol provides that ‘In order to enable the [PSC]

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<sup>1539</sup> United Nations Security Council Doc. S/RES/2383 (2017) at preambular par. 4. It is worth restating Klein *Maritime Security and the Law of the Sea* (2012) at 304, where he remarked that: ‘it seems likely that ongoing, or particularly violent acts of piracy and armed robbery at sea could be viewed as a threat to international peace and securing and enabling the Council to act under Chapter VII if there was sufficient political will to do so.’

<sup>1540</sup> Dersso ‘The role and place of the African Standby Force within the African Peace and Security Architecture.’ *Institute for Security Studies: Paper 209* (2010) at 4.

<sup>1541</sup> Darkwa ‘The African Standby Force: The African Union’s tool for the maintenance of peace and security’ 38 *Contemporary Security Policy* (2017) 471 at 473.

perform its responsibilities with respect to the deployment of peace support mission and intervention pursuant to article 4(h) and (j) of the Constitutive Act, an [ASF] shall be established'. As was set out in the previous chapter, the ASF is an integral component of the APSA. Darkwa reflected that '[f]ourteen years after the [PSC Protocol] provided for the establishment of the [ASF], the ASF was declared to have attained full operational readiness [only] on January 15, 2016.'<sup>1542</sup> She goes on to state that the 'ASF is one of the self-help tools of the AU, which emerged as a part of the determination of African leaders to prevent the situations of the late 1980s and 1990s'.<sup>1543</sup> Dersso similarly comments that the 'ASF is intended to be one of the mechanisms through which the AU seeks to respond to future conflicts and crisis situations on the continent 'timely and efficiently'.<sup>1544</sup>

In terms of its composition and concept, the PSC Protocol provides that the ASF 'shall be composed of standby multidisciplinary contingents, with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice.'<sup>1545</sup> These deployments are availed to the AU through the REC/RM on request.<sup>1546</sup> Dersso notes that the 'ASF is not the equivalent of a national army for, unlike a national army, it is not a standing force'.<sup>1547</sup> Furthermore Darkwa comments that although 'the Protocol does not specifically mention the police, this has since been rectified and a police component is now part of the ASF'.<sup>1548</sup> The ASF is further federalised into five geographic regional brigades.<sup>1549</sup>

The Protocol also sets out the mandate for the ASF in article 13. The article lists the situations in which the ASF is deployed which *inter alia* are peace support missions,<sup>1550</sup> intervention under article 4(h) of the Constitutive Act of the AU<sup>1551</sup> and a wider provision

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<sup>1542</sup> Darkwa (2017) at 471.

<sup>1543</sup> *Idem* at 472-473.

<sup>1544</sup> Dersso (2010) at 1.

<sup>1545</sup> Article 13(1) of the PSC Protocol.

<sup>1546</sup> Darkwa (2017) at 474. REC/RM refers to Regional Economic Community/Regional Mechanism.

<sup>1547</sup> Dersso (2010) at 7.

<sup>1548</sup> Darkwa (2017) at 474. *See* par. 3.13 of the ASF Policy Framework: AU Doc. Exp/ASF-MS/2 (I).

<sup>1549</sup> *See* Dersso (2010) at 7. These regional brigades are: 'The Southern African Development Community (SADC) brigade (SADCBRIG); The East African Peace and Security Mechanism (EAPSM) brigade, which is known as the Eastern Africa Standby Brigade (EASBRIG); The Economic Community of West African States (ECOWAS) brigade (ECOBRI); The North African Regional Capability (NARC) brigade, which is known as the North African Standby Brigade (NASBRIG); The Economic Community of Central African States (ECCAS) brigade (ECCASBRIG), or Multinational Force of Central Africa (FOMAC).'

<sup>1550</sup> *See* articles 13(3)(b), 13(3)(d) and 13(3)(e) of the PSC Protocol. *See* also Dersso (2010) at 9.

<sup>1551</sup> *See* article 13(3)(c).

for any other functions as may be mandated by the PSC or the Assembly.<sup>1552</sup> In the Policy Framework for the Establishment of the ASF and the Military Staff Committee<sup>1553</sup> the following six conflict and mission scenarios were identified for ASF deployment:<sup>1554</sup>

- ‘(1) as a mission under a regional banner of the AU to provide military advice to a political mission;
- (2) as an observer mission to be co-deployed with the UN;
- (3) as a stand-alone observer mission either under the AU or a regional banner;
- (4) as an AU/regional peacekeeping force under Chapter VII of the Charter of the UN;
- (5) as an AU peacekeeping force for complex multidimensional peacekeeping operations;
- (6) as an AU intervention mission in situations of mass atrocities such as genocide, ethnic cleansing, and crimes against humanity.’<sup>1555</sup>

With the exception of mission scenario 2 above, the ASF is dependent on the resources and capacity of its member states. The ASF Policy Framework, however, did consider the issue of collaboration with the international community. It noted that ‘while external initiatives have helped improve some African peace support capacities, the level of external assistance has been lower than expected, and has not always focused on key African concerns. In particular, the OAU/AU has not been fully involved in determining the nature and scope of the initiatives’.<sup>1556</sup>

It is submitted that the framework under the Constitutive Act and the ASF is not fully articulate of maritime security concerns and the particular threat of piracy and armed robbery, notwithstanding the developments under the various organs and decisions of the AU set out in the previous chapter.<sup>1557</sup> In evaluating the potential enforcement mechanisms that could be adopted, the current international law presents the following limitations, namely international and foreign naval programs cannot exercise naval interdiction in territorial seas without the express consent of the coastal state or pursuant to a UN Security Council Resolution.<sup>1558</sup> On the other hand, the Constitutive Act and the ASF, as set out in

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<sup>1552</sup> See article 13(3)(g).

<sup>1553</sup> Adopted at the third meeting of the African Chiefs of Defense Staff (1-15 May 2003): AU Doc. Exp/ASF-MSC/2 (I).

<sup>1554</sup> *Idem.* See par. 1.6 of Chapter 1.

<sup>1555</sup> *Idem.* The scenarios in the text accompanying this footnote were reproduced the adaptation in Darkwa (2017) at 475.

<sup>1556</sup> AU Doc. Exp/ASF-MSC/2 (I) at par. 2.28.

<sup>1557</sup> Engel (2014) at 22 notes that ‘to fully integrate maritime security into the [ASF], the issue needs to systematically be put on the agenda at the continental level through the Specialized Technical Committee on Defence, Safety and Security.’

<sup>1558</sup> See also article 4(5) of the Djibouti Code of Conduct.

the PSC Protocol and Policy Framework does not expressly provide for such foreign and international naval interdiction in territorial seas of member states. Given the arguments advanced in the previous chapter demonstrating the need for foreign and international resources and capacity and through an interpretation of the developing jurisprudence that favours cross-border interdiction, the following recommendation in respect of the ASF is proffered. This recommendation is read with the additional recommendations set out *et seq.*

(ii) Recommended addition and commentary

It was submitted in the previous section that the amendment to article 4(h) of the Constitutive Act of the AU, could view acts of piracy and armed robbery as ‘a serious threat to legitimate order to restore peace and stability to the Member State of the Union’ and thus trigger the application of the intervention mechanism under that article to restore security and stability to the maritime realm in the region.

However, the relevant articles of the Protocol to the PSC must be commensurately amended to reflect amended article 4(h). The articles of the Protocol which require amendment are: article 4(j)<sup>1559</sup> which sets out one of the principles of the PSC, article 7(e)<sup>1560</sup> which enumerates one of the powers of the PSC, and article 13(3)(c)<sup>1561</sup> that sets out one of the mandates of the ASF. In addition to the Protocol to the PSC, the Policy Framework for the ASF would require a new seventh scenario of deployment in addition to the six mission scenarios listed in the previous section. This seventh scenario would be premised on two grounds: first, to adapt to the amended article 4(h) of the Constitutive Act, and second to bring foreign naval intervention and interdiction within the aegis of the intervention under the auspices of the ASF. Since the Policy Framework is not a binding legal instrument, this mission scenario will also be articulated in a recommended annex to the Lomé Charter, set further below. The seventh mission scenario of the ASF could read as:

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<sup>1559</sup> It currently reads as: ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive Act.’

<sup>1560</sup> It currently reads as: ‘recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments.’

<sup>1561</sup> It currently reads as: ‘intervention in a Member State in respect of grave circumstances or at the request of a Member State in order to restore peace and security, in accordance with Article 4(h) and (j) of the Constitutive Act.’

‘As a joint intervention mission co-deployed with foreign naval capacity to repress piracy and armed robbery against ships<sup>1562</sup> in the territorial waters<sup>1563</sup> of member states.’

Dersso noted that ‘peace support missions [i.e. mission scenario 1-5 of the ASF Policy Framework] are generally deployed with the support and consent of the authorities in the host country, whereas intervention deployment [mission scenario 6] is by nature forcible.’<sup>1564</sup> Intervention is thus appropriate in circumstances where the state is incapable of granting consent and cooperation i.e. where the government is not functional or incapable of exercising its sovereign rights.

The mandating authority for these deployments is a relevant consideration. The authority to formulate regional agreements can be found in article 52(1) of chapter VIII of the UN Charter which provides that ‘[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations’. Accordingly, it is within the powers of the AU to formulate regional arrangements, as is demonstrated by the mission scenarios for the ASF. However, in order to enforce such regional arrangements, authorisation must be provided by the UN Security Council, as provided for in article 53, which states that: ‘[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...’

Intervention pursuant to article 4(h) of the Constitutive Act, however, is different. In a document outlining key elements of the policy documents of the ASF, by the STC on Defence, Safety and Security, it was set out that ‘[f]or an intervention in Scenario 6 under Article 4(h) of the Constitutive Act, the authority is vested in the Assembly of the AU. While international sanction is preferred under Chapter VIII of the UN Charter, this is not a pre-condition for action by the AU. All efforts will be made to obtain a UN mandate and seek the cooperation of the UN’.<sup>1565</sup>

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<sup>1562</sup> This could be extended to include other transnational maritime security threats.

<sup>1563</sup> This could be replaced by inserting ‘CEMZA’, however, this would be dependent on the production of a technical file that would determine the limits of the breadth of this zone.

<sup>1564</sup> Dersso (2010) at 9.

<sup>1565</sup> ‘Key Elements of the Policy Documents of the African Standby Force’ Fourth Ordinary meeting of the STC on Defense, Safety and Security: Preparatory Meeting of Experts and sixth meeting of

Dersso comments that article 4(h) and mission scenario six ‘break new ground in international law by vesting the AU with a legal authority to intervene in a state. In other words, the AU has come to assume greater legal authority than what the UN Charter grants to regional organizations with respect to the maintenance of peace and security’.<sup>1566</sup> He also notes that article 4(h) and mission scenario six are ‘the first legal instruments to codify the right of an intergovernmental organisation to intervene for preventing or stopping the perpetration of such serious international crimes that go beyond those provided for under Article 33 of the UN Charter’.<sup>1567</sup>

In distinguishing article 4(h) and the associated mission scenario six from the other mission scenarios of the ASF, which are predicated on consent and the authorisation of the UN Security Council, Dersso commented that because the grounds for intervention were grave circumstances, namely genocide, war crimes and crimes against humanity, they fall outside the purview and requirements of article 54 of the UN Charter dealing with the maintenance of international peace and security.<sup>1568</sup> However, the impact of the amendment to article 4(h) and whether intervention action under the new ground of a *serious threat to legitimate order* would require prior Security Council authorisation has not been considered. It is submitted, however, that the *sui generis* nature of article 4(h) ought to be retained and intervention under the new ground in the article should proceed without prior Security Council authorisation. This authority would be derived from the PSC directly.<sup>1569</sup> The primary basis for this submission is that the circumstances under which piracy and armed robbery constitutes a threat differs markedly from an ongoing land-based conflict. The *actus reus* of piracy and armed robbery are inherently opportunistic, occurring from time to time, over a vast maritime area.<sup>1570</sup> Furthermore, the concentration, frequency and magnitude of attacks have significantly lessened in recent years.<sup>1571</sup> These incidents, which collectively could constitute a serious threat to legitimate order over the maritime domain

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the African Chiefs of Defense Staff and Heads of Security and Safety Services.’ Unmarked AU Document (December 2010) at par. 11.

<sup>1566</sup> Dersso ‘The legality of intervention by the [ASF] in grave circumstances’ *ISS Today* (24 June 2009).

Available at: <https://oldsite.issafrica.org/iss-today/the-legality-of-intervention-by-the-african-standby-force-in-grave-circumstances>.

<sup>1567</sup> Dersso (2010) at 10.

<sup>1568</sup> Dersso (2009). See also article 54 of the UN Charter which provides that ‘The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.’

<sup>1569</sup> See par. 2.2 of the ASF Policy Framework which provides that the ‘PSC is a legitimate mandating authority under Chapter VIII of the UN Charter.’

<sup>1570</sup> As was discussed in section 1.2 of chapter 2 of this thesis.

<sup>1571</sup> See table 2 in chapter II of this thesis.

and threaten the security of the merchant marine requires a rapid enforcement mechanism<sup>1572</sup>, particularly for the purposes of reverse hot pursuit into territorial seas. The time taken before an endorsement is received from the Security Council could defeat the purpose for which it was requested.<sup>1573</sup> Unlike other conflict scenarios where belligerents could be identified in an organised structure such as a terrorist organisation or a political separatist group, acts of piracy and armed robbery are committed by various groups and possibly on an *ad hoc* basis. It would thus not be pragmatic to seek authorisation on a case by case basis.

This would not mean, however, that consultation with the Security Council would be absent as the Protocol of the PSC provides for the need to forge closer cooperation with the UN.<sup>1574</sup> Lastly, Dersso comments that ‘to the extent that this authority [article 4(h)] of the AU is treaty based, member states of the AU can be considered to have surrendered their sovereign right against intervention as envisaged under Article 2(7) of the UN Charter’.<sup>1575</sup> This represents a radical change from the earlier OAU stance on non-intervention, however it is submitted that this interpretation of the effect of article 4(h) with respect to diminishing the right against intervention conforms with the analysis contained in the previous chapter which analysed the developing jurisprudence and potential for changing norms to flourish. In this jurisprudence, the emphasis was drawn on international cooperation, cross-border hot pursuit and references to combating armed robbery and the detailed CEMZA analysis which advocates for a borderless maritime domain.

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<sup>1572</sup> Par. 5.2 (c) of the ASF Policy Framework sets out deployment timelines for intervention operations, however this envisages a robust military force to be deployed in 14 days.

<sup>1573</sup> Dersso (2010) at 16-17 notes that ‘the political processes of deciding on UN deployment in the Security Council as well as the technical/bureaucratic procedures of planning and deploying UN forces could take a minimum of six months...The concept of the ASF also endows Africa with its own mechanism for a timely response to conflicts and for intervention in the case of grave circumstances.’

<sup>1574</sup> The fourth preambular paragraph of the PSC Protocol provides: ‘MINDFUL of the provisions of the Charter of the United Nations, conferring on the Security Council primary responsibility for the maintenance of international peace and security, as well as the provisions of the Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer cooperation and partnership between the United Nations, other international organizations and the African Union, in the promotion and maintenance of peace, security and stability in Africa.’ Article 17(1) thereof similarly provides that: ‘In the fulfilment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa.’

<sup>1575</sup> Dersso (2009).

Having set out a continental framework for intervention to combat piracy and armed robbery under the aegis of the ASF, further detail would need to be set out on how and when foreign navies could deploy in interdiction missions under this framework. It will be proposed that this could be conveniently set out as an additional draft annex to the recently adopted Lomé Charter. The Charter is the most recent strategic approach with a view to coordinating specific actions to secure the maritime domain by combating piracy occurring along the African coastline.

#### 4.2.2 Additional annex to the Lomé Charter

##### (i) Preface

As discussed in greater detail in the previous chapter, parties to the Charter must undertake a series of responsibilities to protect their respective maritime areas<sup>1576</sup> however there is a proviso that these responsibilities are undertaken by each state party ‘according to its own realities’.<sup>1577</sup> It was shown in this thesis that these realities revealed multi-faceted challenges for state parties, ranging from *inter alia* financial constraints, resource and capacity constraints, seablindness and a lack of political will or the extreme circumstances of a failed state, as was the case of Somalia before the establishment of the TFG. Collectively, these challenges left a significant portion of the African maritime domain, which lay under the respective jurisdiction of states, ungoverned and fostered conditions for acts of armed robbery against ships or piracy to flourish. Although the Charter envisages cooperation at various stages,<sup>1578</sup> such cooperation is aimed between state parties and continental and regional structures of the APSA. The issue of cooperation with foreign stakeholders who share an interest in the securing the African maritime domain by virtue of international commercial shipping, is not addressed.

It is therefore submitted that this could be addressed through the formulation of a draft annex to the Charter. The Charter presently contains eight draft annexes.<sup>1579</sup> Egede noted that ‘[d]uring the adoption of the Lomé Charter, it was felt that certain Specialized Technical Committees (STCs) did not have the opportunity to be involved in the

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<sup>1576</sup> See particularly article 6 and 14 of the Charter.

<sup>1577</sup> *Idem*, article 6.

<sup>1578</sup> See for example at article 3(d), 3(f), 10, 13 and 37.

<sup>1579</sup> These being: (I) definitions; (II) general provisions; (III) living marine resources; (IV) extraction of non-living marine resources and energy; (V) climate and environmental sustainability; (VI) poverty eradication, employment and social development; (VII) blue/ocean economy, and (VIII) African maritime cabotage.

elaboration process of the Charter, especially as regards the developmental aspects.’<sup>1580</sup> A recent decision of the AU Assembly requested the AU Commission to:

‘take all necessary measures in order to convene Extraordinary Session of the relevant Specialized Technical Committees (STCs) which were not involved in the elaboration process of the Charter namely: The STCs on Trade, Industrial Minerals, STC on Transport, Infrastructure, Energy and Tourism, STC on Monetary Affairs, Economic Planning and Integration and other relevant STCs to enable them to consider issues falling within their respective mandate and submit their contributions to the African Charter, in the form of annexes for the Assembly for consideration in July 2017.’<sup>1581</sup>

To date, this extraordinary session has not been convened. It is submitted that it would therefore be an opportune moment to consider the inclusion of a ninth annex pertaining to the issues advanced in the present paragraph.<sup>1582</sup> Such annex would receive the consideration of the STC on Defence, Security and Safety.

(ii) Suggested Annex

The following formulation is proffered as a draft annex:

**Annex IX:**  
**Foreign and International Naval cooperation to repress piracy and armed robbery  
against ships.**

*Paragraph 1*

In implementing article 4(a) of the Charter, each State Party:

1. Acknowledges that each respective coastal state has the responsibility to protect its maritime territory and ensure its maritime safety and security.

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<sup>1580</sup> Egede (2017).

<sup>1581</sup> AU Doc. Decision EXT/Assembly/AU/Dec.1 (VI) (October 2016). Egede (2017) explains the process pertaining to the finalization of the annexes and its incorporation into the Charter: ‘the finalised draft Annexes would be distributed to the AU member States for their input prior to the convening of joint STC meetings. After the inputs of the joint STC meetings, draft Annexes would then be submitted to the Justice and Legal Affairs STC which would consider and submit the draft Annexes to the Assembly for adoption. As far as this author is aware, the draft Annexes have not yet been submitted the joint STC meetings.’

<sup>1582</sup> It should be noted that under article 52(1) of the Charter, a State party, when ratifying or acceding to the Charter could submit a reservation with respect to any of its provisions.

2. Acknowledges, without prejudice to its sovereign rights over its maritime territory, the importance of fostering foreign and international cooperation to repress piracy and armed robbery against ships.
3. Further acknowledges that their respective maritime territories are shared by foreign and international stakeholders through the innocent passage of merchant vessels in such territories.

*Paragraph 2*

1. In the event that a State party is unable to effectively exercise its obligations contained in article 6, 12 and 14 of the Charter, the CEWS (Continental Early Warning System) must be notified immediately of this situation by the respective State party.
2. In circumstances where the respective coastal state party is unable to notify the CEWS in terms of sub-paragraph 2(1), the PSC may issue such a notification to the CEWS.
3. Each State Party shall establish a national support contingent to be deployed to the African Standby Force (ASF) in terms of articles 13(2) and 17 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union for the purposes of repressing acts of piracy and armed robbery against ships. These respective support contingents from State Parties, shall collectively constitute an ASF anti-piracy support contingent to be deployed in joint missions set out in paragraph 3 below. These support contingents may consist of: boarding teams, seamen and officers, diplomatic and medical personnel.

*Paragraph 3*

1. Each State Party authorises the entry of a joint intervention mission, consisting of a foreign or international naval contingent, accompanied by an ASF anti-piracy contingent, into its maritime territory in the circumstances set out in paragraph 2(1).
2. The joint intervention mission contemplated in paragraph 3(1) is for the purposes of interdicting and repressing acts of piracy and armed robbery against ships. Intervention missions include hot pursuit mission by descent from the high seas or exclusive economic zone into the maritime territory of a State Party.
3. A foreign or international naval contingent is required to:
  - (i) communicate with the CEWS to ascertain the status referred to in paragraph 2(1) prior to any deployment in the maritime territory of member states.

- (ii) provide the principal naval vessel/s, aircraft, associated personnel, communication systems and boarding/interdictory equipment required for the joint intervention mission/s.<sup>1583</sup>
- (iii) conduct anti-piracy missions in maritime territories only in collaboration with an ASF anti-piracy support contingent and in the circumstances set out in paragraph 2(1).
- (iv) assist, where possible, in initiatives to assist the ASF support contingent in training, logistics, equipment, communications and funding.
- (v) notify and report any seizure or arrest pursuant to a joint-intervention mission to the CEWS and tender possession of the ship and/or property seized and custody of the persons arrested to the State Party in whose jurisdiction such seizure or arrest occurred.

#### 4.2.3 Additional role of the Continental Early Warning System

*'If we do not know about trouble that is brewing, we can do nothing to prevent it'*<sup>1584</sup>

It was noted by the AU that '[w]ithout the capacity to monitor, analyse and develop tailored and timely responses and policy options to threats to peace and security on the Continent, the African Union would be severely limited in its ability to address these appropriately'.<sup>1585</sup> Thus, the Continental Early Warning System is 'core to the fulfilment of the Union's conflict prevention, management and resolution mandates'.<sup>1586</sup> The AIMS envisages the establishment of 'standardized Regional Maritime Headquarters (MHQ) with Maritime Operational Coordination Centers (MOC) with mutualized response capabilities in all RECs/RMs'.<sup>1587</sup> The organs envisaged by the AIMS also have a broadly similar role to CEWS in that it aims 'to improve situational awareness in the AMD, involving all organizations and agencies with a key role in maritime safety and security'.<sup>1588</sup> Under this AIMS provision, interdiction operations in territorial waters, including cases of hot pursuit are dependent on the approval and authority of the member state and on the establishment

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<sup>1583</sup> The constabulary role of the naval vessel must be emphasized: Potgieter (2015) at 256 notes that: 'Navies and coastguards must therefore redefine their roles as they are versatile instruments that can engage a variety of tasks, from the traditional military roles to diplomatic roles and maintaining good order at sea. Renewed emphasis is therefore placed on the so-called secondary function of navies – the constabulary role.'

<sup>1584</sup> Vasu Gounden 'An early warning on Africa's early warning system' *ISS Peace and Security Council Report* (11 August 2015) available at: <https://issafrica.org/pscreport/addis-insights/an-early-warning-on-africas-early-warning-system>.

<sup>1585</sup> 'The CEWS Handbook' AU Doc. PSD/EW/CEWS HANDBOOK (2008) at 7.

<sup>1586</sup> *Idem*.

<sup>1587</sup> See article 32 of AIMS.

<sup>1588</sup> *Idem*.

of cross-border hot pursuit arrangements.<sup>1589</sup> However, this article does not provide a clear framework for situations of reserve hot pursuit by descent from the high seas and EEZ and where the member state is unwilling or incapable of communicating such approval or authority. Furthermore, the provision envisages cooperation between AU member states and does not elucidate mechanisms for international cooperation. Given the ambitious objectives such as the convening of a piracy conference, which to date have not materialised, it is anticipated that the adoption of specific cross border hot pursuit agreements would not be forthcoming in the short term and particularly because of the significant reduction of piracy at the end of the period of study in this thesis. In the absence of such agreements, interdiction operations would be hindered when international or foreign navies engaged in such interdiction operations would need to apply for the approval and authorisation of the coastal state to enter its territorial waters. The extant framework does not provide for a near real-time assessment of events and rapid authorisation to enable an effective and timely interdiction operation.

The recommendations in the section above incorporate the CEWS as having a central role in the revised framework. It is submitted that using the existing CEWS framework would be appropriate instead of duplicating roles by establishing different organs to serve a similar mandate. This is a significant consideration bearing in mind that resource and capacity constraints are evident. Two reasons are offered for this submission: first, the CEWS is a mechanism which is currently in operation<sup>1590</sup> and second, there have been frequent calls for the greater integration of maritime security within the APSA.<sup>1591</sup>

The place of the CEWS in the APSA was briefly set out in the previous chapter and it developed from a Summit meeting of the AU in Maputo in July 2003 where Heads of State mandated the AU Commission to take the necessary steps for the establishment of the CEWS in anticipation of the entry into force of the PSC Protocol later in the same year.<sup>1592</sup>

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<sup>1589</sup> See article 34 of AIMS.

<sup>1590</sup> See Cilliers 'Towards a Continental Early Warning System for Africa' *ISS Paper 102* (April 2005) at 5 where he notes that '[t]he Situation Room now [a feature of the CEWS] now operates on a round-the-clock basis and acts as point of contact for the AU and field operations.' See also African Union Peace and Security Department 'African Peace and Security Architecture (APSA)' [online video] 17 July 2013 at 07:30 minutes.

Available at: <https://www.youtube.com/watch?v=xwnWrOH32WU&t=36s>. The CEWS Handbook (2008) at 22 notes that the 'CEWS is making use of state-of-the-art technology which places it in a unique position not only vis-à-vis other EWS on the continent, but also internationally.'

<sup>1591</sup> See for example Engel (2014) at 22 recommends the need to 'fully integrate maritime security into the Continental Early Warning System, the data collection and monitoring function of CEWS needs to be expanded to systematically cover related information; also, reporting formats should be amended to include the maritime security domain...'

<sup>1592</sup> See Institute for Security Studies 'Non-Paper on the Operationalization of the Continental Early Warning System (CEWS)' (November 2004) at 7.

Cilliers highlighted the importance of the establishment of CEWS by noting that ‘[t]he OAU was built on consensus and the sanctity of the principle of non-interference in internal affairs of Member States, and found it difficult to respond to emerging crises until clear warning signals were lost amidst armed conflict, widespread human suffering and open war’.<sup>1593</sup> CEWS is founded on the provisions of article 12 of the PSC Protocol.<sup>1594</sup> An early warning system is premised on three stages, namely: information collection and sharing;<sup>1595</sup> analysis of that information<sup>1596</sup> and formulating responses<sup>1597</sup> The CEWS Handbook provides that ‘the purpose of the information and analysis produced by the CEWS is to facilitate the anticipation and prevention of conflicts by advising AU decision-makers on threats to peace and security and recommend the best courses of action’.<sup>1598</sup> It is particularly noteworthy that the CEWS is envisaged as ‘an open-source system where information is gathered from a variety of different sources’.<sup>1599</sup> This feature distinguishes the system from

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Available at: <https://oldsite.issafrica.org/uploads/CEWSNOV04.PDF>.

<sup>1593</sup> Cilliers (2005) at 3. The CEWS Handbook (2008) at 21 notes that ‘the AU is the first African institution to introduce a fully-fledged [early warning system]’.

<sup>1594</sup> The article provides:

- ‘1. In order to facilitate the anticipation and prevention of conflicts, a Continental Early Warning System to be known as the Early Warning System shall be established.
2. The Early Warning System shall consist of:
  - a. an observation and monitoring centre, to be known as "The Situation Room", located at the Conflict Management Directorate of the Union, and responsible for data collection and analysis on the basis of an appropriate early warning indicators module; and
  - b. observation and monitoring units of the Regional Mechanisms to be linked directly through appropriate means of communications to the Situation Room, and which shall collect and process data at their level and transmit the same to the Situation Room.
3. The Commission shall also collaborate with the United Nations, its agencies, other relevant international organizations, research centers, academic institutions and NGOs, to facilitate the effective functioning of the Early Warning System.
4. The Early Warning System shall develop an early warning module based on clearly defined and accepted political, economic, social, military and humanitarian indicators, which shall be used to analyze developments within the continent and to recommend the best course of action.
5. The Chairperson of the Commission shall use the information gathered through the Early Warning System timeously to advise the Peace and Security Council on potential conflicts and threats to peace and security in Africa and recommend the best course of action. The Chairperson of the Commission shall also use this information for the execution of the 18 responsibilities and functions entrusted to him/her under the present Protocol.
6. The Member States shall commit themselves to facilitate early action by the Peace and Security Council and or the Chairperson of the Commission based on early warning information.
7. The Chairperson of the Commission shall, in consultation with Member States, the Regional Mechanisms, the United Nations and other relevant institutions, work out the practical details for the establishment of the Early Warning System and take all the steps required for its effective functioning.’

<sup>1595</sup> See CEWS Handbook (2008) at 18 and 45.

<sup>1596</sup> *Idem* at 18 and 54.

<sup>1597</sup> *Idem* at 18 and 64.

<sup>1598</sup> *Idem* at 68.

<sup>1599</sup> *Idem* at 17.

concepts of traditional intelligence and state security.<sup>1600</sup> Cilliers explains that ‘[b]y definition, early warning systems use open source material and generally aim to serve human capacity, not national or state interests. Ironically, it is this characteristic that makes early warning systems appealing to intergovernmental organisations such as the AU that would have great difficulty in accessing (or using) state intelligence from one member country vis-à-vis another member country’.<sup>1601</sup> This open system thus facilitates interaction and collaboration with a wide variety of stakeholders beyond the AU structures, which is relevant when foreign and international naval capacity undertake anti-piracy interdiction operations.<sup>1602</sup> It is apposite at this stage to make a final remark from Cilliers regarding the suitability of the CEWS framework:

‘Since the purpose of early warning (as apposed to intelligence) is the formulation of strategic options directed at taking preventive action in the common (regional or international) good as apposed [sic] to the national interest, it is possible and desirable to bring these components (early warning and prevention action) closer to one another. In a sense, the transparent nature of early warning systems provides a check and balance on the orientation of the analysis – a situation not possible in the secret world of traditional intelligence analysis.’<sup>1603</sup>

Having thus traversed the suitability of the CEWS, what remains is to finally recommend that the function of the CEWS, as adumbrated in the CEWS Handbook, be extended to accommodate the roles suggested in the abovementioned draft additional annex to the Lomé charter.

### **4.3 Benefits of the model**

Without prejudice to other possible arrangements which could be concluded at bilateral or multilateral levels, a few comments can be made proposing and highlighting the benefits of this model. First, from a continental perspective and those of its member states: (i) the model can be formulated with minimal legislative changes and can be operationalised through the existing institutional framework of the AU; (ii) the method of co-deployment proposed requires minimal resource commitments from the ASF, apart from human

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<sup>1600</sup> See Cilliers (2005) at 1.

<sup>1601</sup> *Idem.*

<sup>1602</sup> See CEWS Handbook (2008) at 72.

<sup>1603</sup> Cilliers (2005) at 2.

capacity. In this model the substantive naval resources are provided through the international or foreign stakeholder; (iii) it is envisaged that through these joint deployment missions, the ASF personnel would gain practical and real time training and skills building; (iv) the use of the ASF and the CEWS in these operations add to the legitimacy of the intervention of foreign or international naval capacity within the territorial waters or proposed CEMZA of member states; (v) the model does not provide for a blanket exercise of universal jurisdiction in the territorial seas of member states or the proposed CEMZA as there are still caveats contained in the model which recognises the sovereignty and territorial integrity of the coastal state and set out the circumstances under which this model may operate; and (vi) the AU enjoys the goodwill of African states. Second, from the perspective of foreign and international stakeholders, the model allows for swift action with minimal authorisations, apart from the requirement of channels of communication with the CEWS and embarking ASF personnel on their warships engaging in the interdiction operation.

#### V. PARTING REMARKS

Since the resurgence of Somali piracy in around 2006, there have been a plethora of studies emerging,<sup>1604</sup> and measures taken, at international, regional and national levels – as a specific response to this particular resurgence.<sup>1605</sup> The resurgence reached unprecedented levels in a short period of time between 2009 and 2011, causing much alarm.<sup>1606</sup> At the end of the decade under review, in 2016, only three incidents of piracy or armed robbery occurred off the East African seaboard, compared to 161 during 2011. It is predicted that should such trends in terms of declining incidents of piracy continue, Somali piracy would soon no longer feature prominently in the global media and on the agenda of the United Nations and other regional bodies. Because piracy was also dormant when commentators and draftsmen converged to codify international law, they created a sparse legal framework that remains unchanged since the mid Twentieth Century. This is despite numerous *ad hoc* measures like the UN Security Council Special Resolutions,<sup>1607</sup> which under controlled circumstances and restrictions aimed to counter the high seas' limitation in UNCLOS.

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<sup>1604</sup> See, for example, the discussion in Scharf, Newton and Sterio (eds) *Prosecuting Maritime Piracy: Domestic solutions to international crimes* (2015) at 3.

<sup>1605</sup> See chapter 5 holistically.

<sup>1606</sup> See section 2 of chapter 2.

<sup>1607</sup> Discussed in section 2 of chapter 4 of this thesis. This dormancy in piracy also explains why the draftsmen of the Harvard Draft in 1932 realised that 'the reason for the startling lack of international case authority and modern state practice is apparent, as soon as one remembers that large scale piracy disappeared long ago and that piracy of any sort on or over the high sea(s) is sporadic except in limited areas bordered by states without the naval forces to combat it'. See Harvard Research in International Law (Harvard Draft) 26 *American Journal of International Law* (1932) at 749.

The resurgence of piracy off the east African seaboard was a missed opportunity to revisit the piracy regime in UNCLOS – while the scourge attracted global attention. However, some opinions presented in the second chapter of this thesis suggest that piracy has now merely reached a dormant stage, and could resurge should favourable conditions manifest along with the absence of naval interdiction.

Franson, in delivering a keynote address at the International Symposium on Coastal Zone Piracy in 2006, commented in simple terms on the following characteristic of piracy:

‘In many ways, this is a crime like any other ... People rob banks, they rob supermarkets, they rob people in their houses – why not rob a ship? It is a crime like any other crime. You do it for money and because you desperately need money or you want lots of money. The reason why armed robbery against ships is attracting attention is that shipping is an international venture and it affects the international shipping community ... Then what do we do about it? Piracy and armed robbery will probably never go away. Why should these types of crimes disappear when no other type of crime disappears? Nevertheless, something can be done to curtail it.’<sup>1608</sup>

Notwithstanding the decline in piracy off the east African seaboard at the end of the period under review, Franson’s remarks characterise piracy as an enduring crime.<sup>1609</sup> The preceding chapters of this thesis<sup>1610</sup> have shown the long history of acts of piracy committed at sea. While this study contextualised modern piracy around the East African seaboard, acts occur in many parts of the world, as can be seen in annual reports compiled by the IMO and IMB. This modern piracy, according to Murphy, means that ‘[i]nstead of cruising the oceans, modern pirates operate in coastal waters relatively close to the shore. It is a phenomenon that can be observed around the globe: in the Caribbean, off Ecuador, off Africa mainly in the vicinity of Nigeria and Somalia, around the Bay of Bengal, and in Southeast Asia in particular, where it is far from sporadic’.<sup>1611</sup>

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<sup>1608</sup> Franson ‘Keynote address: Coastal zone piracy’ in Mejia and Xu (eds) *Coastal Zone Piracy and other unlawful acts at sea* (2007) at 175.

<sup>1609</sup> Geiß and Petrig (2011) at 52 observed that ‘violence against ships and persons on board, continued to pose a threat throughout the 20<sup>th</sup> century. This is likely to hold true in the 21<sup>st</sup> century. There will be plenty of opportunities given that in the course of globalization the international shipping industry has grown exponentially, becoming itself a motor of globalization.’

<sup>1610</sup> See, generally, chapter 3.

<sup>1611</sup> See Murphy (2007) at 157-8. See, also: section 2 of chapter 2 of this thesis.

Given the enduring and opportunistic nature of piracy, it follows that the legal framework should also evolve to account for the changing circumstances.<sup>1612</sup> Dickinson wrote in 1925 that ‘[w]hile the occasions for invoking its [piracy’s] rules are less frequent now than formerly, it may still be made a potent factor in preventing lawlessness upon the seas. It belongs emphatically to the law in reserve rather than to the law in history.’<sup>1613</sup> Harrison thus observes that: ‘[t]he drafters of [UNCLOS] were aware that if the Convention was to provide an enduring legal framework, it must be able to evolve and take into account legal, political, scientific and technological developments’.<sup>1614</sup>

As a final submission, it is suggested that the above amendments and associated commentary should conform to a report of the United Nations Secretary-General’s high-level panel on threats, challenges and change, entitled: ‘A more secure world: our shared responsibility’. An extract from the synopsis of the report, states that:

‘[I]n the twenty-first century, more than ever before, no State can stand wholly alone. Collective strategies, collective institutions and a sense of collective responsibility are indispensable. The case for collective security today rests on three basic pillars. Today’s threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today’s threats. And it cannot be assumed that every State will always be able, or willing, to meet its responsibility to protect its own peoples and not to harm its neighbours’.<sup>1615</sup>

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<sup>1612</sup> This is a notion that is well entrenched in the law. For example, in *In re Piracy Jure Gentium* [1934] Vol. 49 Lloyds List 411 (PC) at 417, the Lord Chancellor, Viscount Sankey, remarked: ‘we are not now in the year 1696 [referring to the date of *R v Dawson*]; we are now in the year 1934. International law was not crystallised in the 17<sup>th</sup> century, but is a living and expanding code.’ See also Surbun (2010) at 22.

<sup>1613</sup> Dickinson ‘Is the crime of piracy obsolete?’ 38 *Harvard Law Review* (1924-5) 334 at 360.

<sup>1614</sup> Harrison (2011) at 62. He also cites *idem* a Statement of Sri Lanka, 187<sup>th</sup> meeting, 17 *Official Records of the Third United Nations Conference on the Law of the Sea* at 48, par. 161: ‘It is in the nature of all things that they do not remain static, that there will be growth and there will be decay. The march of technology and changing perceptions and aspirations will, in time, place pressures upon the regimes we establish today.’

<sup>1615</sup> ‘A more secure world: our shared responsibility’ *United Nations* (2004) at 1. Available at: [http://www.un.org/en/peacebuilding/pdf/historical/hlp\\_more\\_secure\\_world.pdf](http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf).

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REGISTER OF ARTEFACTS

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APPENDIX  
I

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SELECT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE  
LAW OF THE SEA, 1982

ARTICLE 100

*Duty to cooperate in the repression of piracy*

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.

ARTICLE 101

*Definition of piracy*

Piracy consists of any of the following acts:

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

ARTICLE 102

*Piracy by a warship, government ship or government aircraft  
whose crew has mutinied*

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

ARTICLE 103

*Definition of a pirate ship or aircraft*

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing 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.

ARTICLE 104

*Retention or loss of the nationality of a pirate ship or aircraft*

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

ARTICLE 105

*Seizure of a pirate ship or aircraft*

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.

ARTICLE 106

*Liability for seizure without adequate grounds*

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

ARTICLE 107

*Ships and aircraft which are entitled to seize on account of piracy*

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.'

APPENDIX  
II

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OFFENCES AT SEA ACT, 28 HENRY VIII, c 15 (1536) FOR PIRATES  
*Reproduction of the original text*

ARTICLE II.

(1) And be it enacted by the Authority aforesaid, That such Persons to whom such Commission or Commissions shall be directed, or four of them at the least, shall have full Power and Authority to enquire of such Offences, and of every of them, by the Oaths of twelve good and lawful Inhabitants in the Shire limited in their Commission, in such like Manner and Form, as if such Offences had been committed upon the Land within the same Shire;

(2) and that every Indictment, found and presented before such Commissioners, of any Treasons, Felonies, Robberies, Murders, Manslaughters, or such other Offences, being committed or done in or upon the Seas, or in or upon any other Haven, River or Creek, shall be good and effectual in the Law;

(3) and if any Person or Persons happen to be indicted for any such Offence done or hereafter to be done upon the Seas, or in any other place above limited, that then such Order, Process, Judgment and Execution shall be used, had, done and made, to and against every such Person and Persons so being indicted, as against Traytors, Felons and Murderers, for Treason, Felony, Robbery, Murder or other such Offences done upon the Land, as by the Laws of this Realm is accustomed;

(4) and that the trial of such Offence or Offences, if it be denied by the Offender or Offenders, shall be had by twelve lawful Men inhabited in the Shire limited within such Commission, which shall be directed as is aforesaid, and no Challenge or Challenges to be had for the Hundred;

(5) and such as shall be convict of any such Offence or Offences, by Verdict, Confession or Process, by Authority of any such Commission, shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attainted and convicted of any Treasons, Felonies, Robberies, or other the said Offences done upon the Lands.

ARTICLE III.

And be it enacted by Authority aforesaid, That for Treasons, Robberies, Felonies, Murders and Confederacies done upon the Sea or Seas, or in any Place above rehearsed, the Offenders shall not be admitted to have the Benefit of his or their Clergy, but be utterly excluded thereof and from the same, and also of the Privilege of any Sanctuary.

ARTICLE IV.

Provided always, That this Act extend not to be prejudicial or hurtful to any Person or Persons for taking any Victual, Cables, Ropes, Anchors or Sails, which any such Person or Persons (compelled by Necessity) taketh of or in any Ship which may conveniently spare the same, so the same Person or Persons pay out of Hand for the same Victual, Cables, Ropes, Anchors or Sails, Money or Money-worth to the Value of the Thing so taken, or do deliver for the same a sufficient Bill obligatory to be paid in Form

following, that is to say, If the taking of the same Things be on this Side, the Straits of Marroke, then to be paid within four Months, and if it be beyond the said Straits of Marroke, then to be paid within twelve Month next ensuing the making of such Bills, and that the Makers of such Bills well and truly pay the same Debt at the Day to be limited within the said Bills.

ARTICLE V.

Provided alway, That whensoever any such Commission for the Punishment of Offences aforesaid, or of any of them, shall be directed or sent to any Place within the Jurisdiction of the Five Ports, that then every such Commission shall be directed unto the Lord Warden of the said Ports for the Time being, or to his Deputy, and unto three or four such other Person or Persons, as the Lord Chancellor for the Time being shall name and appoint; any Thing in this present Act to the contrary notwithstanding.

ARTICLE VI.

Provided alway, That whensoever any Commission shall be directed unto the Five Ports for the Inquisition and Trials of any the Offences expressed in this Act, that every such Inquisition and Trial to be had by Virtue of such Commission, shall be made and had by the Inhabitants in the said Five Ports, or the Members of the same; any Thing in this act to the contrary thereof notwithstanding.'

APPENDIX  
III

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SELECT PROVISIONS OF THE SUA CONVENTION, 1988

ARTICLE 3

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

APPENDIX  
IV

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DRAFT PROVISIONS FOR THE SUPPRESSION OF PIRACY  
(MATSUDA REPORT), 1926

ARTICLE I

‘Piracy occurs only on the high sea and consists in the commission for private end of depredations upon property or acts of violence against persons. It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.

ARTICLE II

It is not involved in the notion of piracy that the ship should not have the right to fly a recognised flag, but in committing an act of piracy the piracy loses the protection of the State whose flag the ship flies.

ARTICLE III

Only private ships can commit acts of piracy. Where a warship, after mutiny, cruises on its own account and commits acts of the kind mentioned in Article I, it thereby loses its public character.

ARTICLE IV

Where, during a civil war, warships of insurgents who are not recognised as belligerents are regarded by the regular Government as pirates, third Powers are not thereby obliged to treat them as such. Insurgents committing acts of the kind mentioned in Article I must be considered as pirates, unless such acts are inspired by purely political motives.

ARTICLE V

If the crew of a ship has committed an act of piracy, every warship has the right to stop and capture the ship on the high sea. On the condition that the affair shall be remitted for judgment to the competent authorities of the littoral state, a pursuit commenced on the high sea may be continued even within the territorial waters unless the littoral state is in a position to continue such pursuit itself.

ARTICLE VI

Where suspicions of piracy exist, every warship, on the responsibility of its commander, has the authority to ascertain the real character of the ship in question. If after examination the suspicions are proved to be unfounded, the captain of the suspected ship will be entitled to reparation or to an indemnity as the case may be. If, on the contrary, the suspicions of piracy are confirmed, the commander of the warship may either proceed to try the pirates, if the arrest took place on the high sea, or deliver the accused to the competent authorities.

## ARTICLE VII

Jurisdiction in piracy belongs to the state of the ship making the capture, except: (a) in the case of pursuit mentioned I article V, paragraph 2; (b) in the case where the domestic legislation or an international convention otherwise decides.

## ARTICLE VIII

The consequences of capture, such as the validity of the prize, the right of recovery of the lawful owners, the reward of the chapters, are governed by the law of the State to which jurisdiction belongs.'

APPENDIX  
V

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HARVARD RESEARCH IN INTERNATIONAL LAW:  
DRAFT CONVENTION ON PIRACY  
(HARVARD UNIVERSITY DRAFT)  
1932

ARTICLE 1

‘As the terms are used in this convention:

1. The term “jurisdiction” means the jurisdiction of a state under international law as distinguished from municipal law.
2. The term “territorial jurisdiction” means the jurisdiction of a state under international law over its land, its territorial waters and the air above its land and territorial waters. The term does not include the jurisdiction of a state over its ships outside its territory.
3. The term “territorial sea” means that part of the sea which is included in the territorial waters of a state.
4. The term “high sea” means that part of the sea which is not included in the territorial waters of any state.
5. The term “ship” means any water craft or air craft of whatever size.

ARTICLE 2

Every state has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy. This jurisdiction is defined and limited by this convention.

ARTICLE 3

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

ARTICLE 4

1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a

state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs.

2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a state by descent from the high sea, as long as it continues under the same control.

#### ARTICLE 5

A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the state from which it was derived.

#### ARTICLE 6

In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

#### ARTICLE 7

1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state.
2. If a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of this article, the state making the seizure shall give prompt notice to the other state, and shall tender possession of the ship and other things seized and the custody of persons seized.
3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high sea.

#### ARTICLE 8

If a pursuit is continued or a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of Article 7, the state continuing the pursuit or making the seizure is liable to the other state for any damage done by the pursuing ship, other than damage done to the pirate ship or the ship possessed by pirates, or to persons and things on board.

#### ARTICLE 9

If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

#### ARTICLE 10

If a ship seized on suspicion of piracy outside the territorial jurisdiction of the state making the seizure, is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the state making the seizure shall be liable to the state to which the ship belongs for any damage caused by the seizure.

#### ARTICLE 11

1. In a place not within the territorial jurisdiction of any state, a foreign ship may be approached and on reasonable suspicion that it is a pirate ship or a ship taken by piracy and possessed by pirates, it may be stopped and questioned to ascertain its character.
2. If the ship is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if it is not subject to such interference on other grounds, the state making the interference shall be liable to the state to which the ship belongs for any damage caused by the interference.

#### ARTICLE 12

A seizure because of piracy may be made only on behalf of a state, and only by a person who has been authorized to act on its behalf.

#### ARTICLE 13

1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.
2. The law of the state must conform to the following principles:
  - (a) The interests of innocent persons are not affected by the piratical possession or use of property, nor by seizure because of such possession or use.
  - (b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims.
  - (c) A claimant who establishes the validity of his claim is entitled to receive the property or compensation therefor, subject to a fair charge for salvage and expenses of administration.

#### ARTICLE 14

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.
3. The law of the state must, however, assure protection to accused aliens as follows:
  - (a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.
  - (b) The accused person must be given humane treatment during his confinement pending trial
  - (c) No cruel and unusual punishment may be inflicted.

- (d) No discrimination may be made against the nationals of any state.
4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.

#### ARTICLE 15

A state may not prosecute an alien for an act of piracy for which he has been charged and convicted or acquitted in a prosecution in another state.

#### ARTICLE 16

The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy.

#### ARTICLE 17

1. The provisions of this convention shall supersede any inconsistent provisions relating to piracy in treaties in force among parties to this convention, except that such inconsistent provisions shall not be superseded in so far as they affect only the interests of the parties to such treaties *inter se*.
2. The provisions of this convention shall not prevent a party from entering into an agreement concerning piracy-containing provisions inconsistent with this convention which affect only the interests of the parties to that agreement *inter se*.

#### ARTICLE 18

The parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation.

#### ARTICLE 19

1. If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present convention, and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties to the dispute providing for the settlement of international disputes.
2. In case there is no such agreement in force between the parties to the dispute, the dispute shall be referred to arbitration or judicial settlement. In the absence of agreement on the choice of another tribunal, the dispute shall, at the request of any one of the parties to the dispute, be referred to the Permanent Court of International Justice, if all the parties to the dispute are parties to the Protocol of December 16, 1920, relating to the Statute of that Court; and if any of the parties to the dispute is not a party to the Protocol of December 16, 1920, to an arbitral tribunal constituted in accordance with the provisions of the Convention of the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907.'

APPENDIX  
VI

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EXTRACTS FROM THE CONVENTION ON THE HIGH SEAS, GENEVA, 1958

ARTICLE 14

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

ARTICLE 15

Piracy consists of any of the following acts:

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph I or sub-paragraph 2 of this article.

ARTICLE 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

ARTICLE 17

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 15. 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.

ARTICLE 18

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

ARTICLE 19

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the

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

#### ARTICLE 20

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

#### ARTICLE 21

A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect.

APPENDIX  
VII

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EXTRACTS FROM THE DEFENCE ACT 42 OF 2002 (SOUTH AFRICA)

CHAPTER 4  
LAW ENFORCEMENT POWERS OF DEFENCE FORCE AT SEA (ss 21-29)

**§21 Definitions**

In this Chapter a word or expression has the meaning ascribed to it in any appropriate convention and, unless the context indicates otherwise-

- (a) 'innocent passage' means the right of innocent passage contemplated in section 2 of the Marine Traffic Act, 1981 (Act 2 of 1981);
- (b) 'military aircraft' means an aircraft of the armed forces of a State having the military marks of that State, commanded by a member of the armed forces and the crew of which is subject to regular armed forces discipline;
- (c) 'UNCLOS' means the United Nations Convention on the Law of the Sea adopted at Montego Bay on 10 December 1982;
- (d) 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list or its equivalent, and the crew of which is under regular armed forces discipline.

**§22 Criminal and civil law enforcement by Defence Force**

- (1) If requested by a competent Minister, the Chief of the Defence Force, with the concurrence of the Minister of Defence, may authorise the use of any military aircraft of the Defence Force or any warship of the Defence Force or any member of the Defence Force for the purpose of enforcing any provision of South African law at sea.
- (2) An officer on board an aircraft or a warship contemplated in subsection (1) may enforce South African law in-
  - (a) the internal waters of the Republic;
  - (b) the territorial waters of the Republic, but any measures taken must be carried out in accordance with paragraphs 3, 4 and 5 of article 27, and paragraphs 2 and 3 of article 28, of UNCLOS; and
  - (c) subject to subsection (3), outside the territorial waters of the Republic.
- (3) No enforcement outside the territorial waters of the Republic may take place-
  - (a) in the territorial waters of a foreign state, unless it takes place on board a South African ship or in pursuance of an agreement on co-operation in law enforcement with that state; and
  - (b) against foreign ships or those on board them, except in circumstances permitted by international law.
- (4) An officer of the Defence Force acting in accordance with subsection (2)-

- (a) who exercises any power referred to in this section inside or outside the Republic, must be regarded as being a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977), and may exercise such power in the same manner as a peace officer exercising such powers within the Republic;
  - (b) may exercise all other powers referred to in this Chapter; and
  - (c) may exercise all or any of the powers conferred on any enforcement authority in terms of the relevant legislation, the provisions of which are being enforced by the said officer.
- (5) This section does not affect powers contemplated in sections 25, 26, 27 and 28, or any other matters which are within the original and exclusive jurisdiction of the Defence Force.

### **§23 Interests to be considered**

- (1)
  - (a) If the Master of a foreign ship in relation to which and on board of which enforcement measures are being taken in accordance with section 22 (2) (b) so requests, directly or through any military aircraft or warship authorised in terms of section 22 (1), the Department of Foreign Affairs must notify a diplomatic agent or consular officer of the flag state of such ship before any enforcement measures are taken.
  - (b) The Department of Foreign Affairs or the Defence Force, as the case may be, must, if reasonably possible, facilitate contact between such diplomatic agent or consular officer and the crew of the ship in question.
  - (c) In a case of emergency or if there is danger that such ship might escape, the notification contemplated in paragraph (a) may be communicated while the enforcement measures are being taken.
- (2) In considering whether or in what manner an arrest should be made, due regard must be had to the interests of safe navigation.

### **§24 Piracy**

- (1) For purposes of this Act, piracy is-
  - (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew, including the Master, or the passengers of a private ship or a private aircraft, and directed-
    - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
    - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
  - (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a ship or aircraft contemplated in subsection (1); and
  - (c) any act of inciting or of intentionally facilitating an act contemplated in paragraph (a) or (b).
- (2) Any act of piracy committed by the crew of a warship or military aircraft, government ship or government aircraft which has mutinied and taken

control of such ship or aircraft, must for purposes of this section be regarded as having been committed by the crew of a private ship or aircraft.

- (3) 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.

#### **§25 Seizure of pirate ship or aircraft**

- (1) An officer of the Defence Force may seize a ship or aircraft and the property on board, and arrest any person on board, in accordance with articles 105 and 107 of UNCLOS.
- (2) Any officer of the Defence Force who exercises any power referred to in this section inside or outside the Republic, must be regarded as being a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977).
- (3) Any ship, aircraft or property seized, or any person arrested, in terms of this section, must as soon as possible be brought to the Republic or to any other authority determined by the Minister of Foreign Affairs, with the concurrence of the Ministers of Defence and of Justice, to be dealt with in accordance with applicable law.

#### **§26 Right of visit on high seas by warships of Defence Force**

- (1) Any South African warship may exercise the right of flag verification as provided for in paragraph 2 of article 110 of UNCLOS in the circumstances mentioned in paragraph 1 of that article.
- (2) If the suspicion referred to in article 110 of UNCLOS is proved to be well-founded, the ship may be seized and any person who is reasonably suspected of having committed an offence justiciable by a criminal court of the Republic, may be arrested, whereupon such seized ship and any arrested person shall be dealt with in accordance with section 25 (3).

#### **§27 Hot pursuit of ships**

- (1) Any warship or military aircraft of the Defence Force may exercise on behalf of the Republic or on the behalf of a foreign state, the right of hot pursuit of any ship in accordance with article 111 of UNCLOS.
- (3) The seizure of a ship and the arrest of any person on board such ship may be effected by any officer of any ship or aircraft which acts in accordance with this section.
- (3) An officer of the Defence Force who exercises any power referred to in this section inside or outside the Republic, must be regarded as being a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

#### **§28 Warships or military aircraft of Defence Force to render assistance**

- lost;
- (1) Subject to subsection (2), a warship or military aircraft of the Defence Force must-
    - (a) render assistance to any person found at sea in danger of being lost;
    - (b) proceed with all possible speed to the rescue of persons in distress at sea, if informed of their need for assistance, in so far as such action may be reasonably expected of such warship or aircraft; or
    - (c) after a collision at sea, render assistance to the other ship, its crew and passengers, and where the collision involves the warship, if possible, inform the other ship of its name, its flag state and the port at which it will call.
  - (2) A warship or military aircraft may only render assistance or proceed to the rescue as contemplated in subsection (1), if-
    - (a) it can be effected without serious danger to the warship or military aircraft, its crew and its passengers; and
    - (b) in times of armed conflict, it can be effected without serious prejudice to an operation in which the warship or military aircraft is engaged at the time.

## **§29 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 other 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).
- (2) An action contemplated in subsection (1) may only be taken-
  - (a) in pursuance of a reciprocal agreement on co-operation in law enforcement at sea between the Republic and the relevant foreign state;
  - (b) if the law enforcement measure taken, is consistent with the agreement; and
  - (c) if the relevant foreign state may take the law enforcement measures contemplated in subsection (1) (a) to (e) under international law.
- (3) Subsections (1) and (2) apply with the necessary changes to enforcement in respect of violations of South African or foreign law by officers of the-
  - (a) Defence Force on board a foreign warship, military aircraft or other authorised foreign vessel or aircraft; and

(b) armed forces of a foreign state on board a warship or military aircraft of the Defence Force or on board any other authorised South African vessel.

(4) An officer contemplated in subsection (3) (b) must be regarded as being a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977), when taking enforcement measures in respect of the violation of any South African law.

APPENDIX  
VIII

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UNITED NATIONS SECURITY COUNCIL  
RESOLUTION 1816 (2008)

Adopted by the Security Council at its 5902nd meeting  
on 2 June 2008

*The Security Council,*

*Recalling* its previous resolutions and the statements of its President concerning the situation in Somalia,

*Gravely concerned* by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation,

*Expressing* its concerns at the quarterly reports from the International Maritime Organization (IMO) since 2005, which provide evidence of continuing piracy and armed robbery in particular in the waters off the coast of Somalia,

*Affirming* that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (“the Convention”), sets out the legal framework applicable to combating piracy and armed robbery, as well as other ocean activities,

*Reaffirming* the relevant provisions of international law with respect to the repression of piracy, including the Convention, and *recalling* that they provide guiding principles for cooperation 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, including but not limited to boarding, searching, and seizing vessels engaged in or suspected of engaging in acts of piracy, and to apprehending persons engaged in such acts with a view to such persons being prosecuted,

*Reaffirming* its respect for the sovereignty, territorial integrity, political independence and unity of Somalia,

*Taking into account* the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters,

*Deploing* the recent incidents of attacks upon and hijacking of vessels in the territorial waters and on the high seas off the coast of Somalia including attacks upon and hijackings of vessels operated by the World Food Program and numerous commercial vessels and the serious adverse impact of these attacks on the prompt, safe and effective delivery of food aid and other humanitarian assistance to the people of Somalia, and the grave dangers they pose to vessels, crews, passengers, and cargo,

*Noting* the letters to the Secretary-General from the Secretary-General of the IMO dated 5 July 2007 and 18 September 2007 regarding the piracy problems off the coast of Somalia and the IMO Assembly resolution A.1002 (25), which strongly urged Governments to increase their efforts to prevent and repress, within the provisions of international law, acts of piracy and armed robbery against vessels irrespective of where such acts occur, and *recalling* the joint communiqué of the IMO and the World Food Programme of 10 July 2007,

*Taking note of* the Secretary-General's letter of 9 November 2007 to the President of the Security Council reporting that the Transitional Federal Government of Somalia (TFG) needs and would welcome international assistance to address the problem,

*Taking further note of* the letter from the Permanent Representative of the Somali Republic to the United Nations to the President of the Security Council dated 27 February 2008, conveying the consent of the TFG to the Security Council for urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation,

*Determining* that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Condemns and deplors* all acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia;

2. *Urges* States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to be vigilant to acts of piracy and armed robbery and, in this context, *encourages*, in particular, States interested in the use of commercial maritime routes off the coast of Somalia, to increase and coordinate their efforts to deter acts of piracy and armed robbery at sea in cooperation with the TFG;

3. *Urges* all States to cooperate with each other, with the IMO and, as appropriate, with the relevant regional organizations in connection with, and share information about, acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia, and to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law;

4. *Further urges* States to work in cooperation with interested organizations, including the IMO, to ensure that vessels entitled to fly their flag receive appropriate guidance and training on avoidance, evasion, and defensive techniques and to avoid the area whenever possible;

5. *Calls upon* States and interested organizations, including the IMO, to provide technical assistance to Somalia and nearby coastal States upon their request to enhance the capacity of these States to ensure coastal and maritime security, including combating piracy and armed robbery off the Somali and nearby coastlines;

6. *Affirms* that the measures imposed by paragraph 5 of resolution 733 (1992) and further elaborated upon by paragraphs 1 and 2 of resolution 1425 (2002) do not apply to supplies of technical assistance to Somalia solely for the purposes set out in paragraph 5 above which have been exempted from those measures in accordance with the procedure set out in paragraphs 11 (b) and 12 of resolution 1772 (2007);

7. *Decides* 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;

8. *Requests* that cooperating states take appropriate steps to ensure that the activities they undertake pursuant to the authorization in paragraph 7 do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State;

9. *Affirms* that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG;

10. *Calls upon* States to coordinate their actions with other participating States taken pursuant to paragraphs 5 and 7 above;

11. *Calls upon* all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators or piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution;

12. *Requests* States cooperating with the TFG to inform the Security Council within 3 months of the progress of actions undertaken in the exercise of the authority provided in paragraph 7 above;

13. *Requests* the Secretary-General to report to the Security Council within 5 months of adoption of this resolution on the implementation of this resolution and on the situation with respect to piracy and armed robbery in territorial waters and the high seas off the coast of Somalia;

14. *Requests* the Secretary-General of the IMO to brief the Council on the basis of cases brought to his attention by the agreement of all affected coastal states, and duly taking into account the existing bilateral and regional cooperative arrangements, on the situation with respect to piracy and armed robbery;

15. *Expresses* its intention to review the situation and consider, as appropriate, renewing the authority provided in paragraph 7 above for additional periods upon the request of the TFG;

16. *Decides* to remain seized of the matter.

APPENDIX  
IX

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REVISED CODE OF CONDUCT CONCERNING THE REPRESSION OF PIRACY,  
ARMED ROBBERY AGAINST SHIPS, AND ILLICIT MARITIME ACTIVITY IN  
THE WESTERN INDIAN OCEAN AND THE GULF OF ADEN AREA

The Governments of Comoros, Djibouti, Egypt, Eritrea, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Mauritius, Mozambique, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, the United Arab Emirates, the United Republic of Tanzania and Yemen (hereinafter referred to as "the Participants"),

RECOGNIZING the need to develop and revise the existing Djibouti Code of Conduct in view of increasing threats to maritime activities,

CONSIDERING the relevant provisions of United Nations General Assembly resolution 70/1 on Transforming our world: the 2030 Agenda for Sustainable Development, including the Sustainable Development Goals detailed therein and, in particular, Goal 14 "Conserve and sustainably use the oceans, seas and marine resources for sustainable development" and Goal 16 "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels";

CONVINCED THAT international seaborne trade between Participants and other States, developing efficient ports and infrastructure, nurturing national shipping lines and promoting seafaring as a career, and developing the "blue economy", that is managing and protecting fisheries, securing offshore energy production, and creating the stable conditions that encourage investment and tourism, will help to ensure sustainable economic growth, food security, employment, prosperity and stability;

DEEPLY CONCERNED about the crimes of piracy, armed robbery against ships and other illicit maritime activity, including fisheries crime, in the Western Indian Ocean and the Gulf of Aden and the grave dangers to the safety and security of persons and ships at sea and to the protection of the marine environment arising from such acts;

REAFFIRMING that international law, as reflected in UNCLOS, sets out the legal framework applicable to maritime economic development, maritime governance and maritime law enforcement, including combating piracy, armed robbery at sea and other illicit maritime activity;

RECALLING that the Assembly of the International Maritime Organization (hereinafter referred to as "IMO"), at its twenty-fifth regular session, adopted, on 27 November 2007, resolution A.1002(25) on Piracy and armed robbery against ships in waters off the coast of Somalia which, among other things, called upon Governments in the region to conclude, in cooperation with IMO, and implement, as soon as possible, a regional agreement to prevent, deter and suppress piracy and armed robbery against ships;

RECALLING FURTHER that this led to the development of the Code of conduct concerning the repression of piracy and armed robbery against ships in the western Indian Ocean and the Gulf of Aden (the Djibouti Code of Conduct), adopted on 29 January 2009;

NOTING that the General Assembly of the United Nations, at its seventy-first session, adopted, on 23 December 2016, resolution 71/257 on Oceans and the law of the sea which amongst others:

- recognizes the crucial role of international cooperation at the global, regional, sub-regional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea, terrorist acts against shipping, offshore installations and other maritime interests, through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats, the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats, the prosecution of offenders with due regard to national legislation and the need for sustained capacity-building to support such objectives;

- emphasizes the importance of promptly reporting incidents to enable accurate information on the scope of the problem of piracy and armed robbery against ships at sea and, in the case of armed robbery against ships at sea, by affected vessels to the coastal State, underlines the importance of effective information sharing with States potentially affected by incidents of piracy and armed robbery against ships at sea, and notes with appreciation the important role of the International Maritime Organization; - calls upon States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy;

- recognizes that some transnational organized criminal activities threaten legitimate uses of the oceans and endanger the lives of people at sea, as well as the livelihoods and security of coastal communities; - notes with concern the continuing problem of transnational organized crime committed at sea, including illicit traffic in narcotic drugs and psychotropic substances, the smuggling of migrants, trafficking in persons and illicit trafficking in firearms, and threats to maritime safety and security, including piracy, armed robbery at sea, smuggling and terrorist acts against shipping, offshore installations and other maritime interests, and noting the deplorable loss of life and adverse impact on international trade, energy security and the global economy resulting from such activities;

- recognizes the importance of enhancing international cooperation at all levels to fight transnational organized criminal activities, including illicit traffic in narcotic drugs and psychotropic substances, within the scope of the United Nations instruments against illicit drug trafficking, as well as the smuggling of migrants, trafficking in persons and illicit trafficking in firearms and criminal activities at sea falling within the scope of the United Nations Convention against Transnational Organized Crime; - recognizes that illicit trafficking in wildlife is, in some cases, committed by transnational organized criminal groups using maritime routes, contributes to damage to ecosystems and livelihoods and requires enhanced regional and global cooperation and coordination in response, in accordance with international law;

- urges all States, in cooperation with the IMO, to actively combat piracy and armed robbery at sea by adopting measures, including those relating to assistance with capacity-building through training of seafarers, port staff and enforcement personnel in the prevention, reporting and investigation of incidents, by bringing the alleged perpetrators to justice, in accordance with international law, and by adopting national legislation, as well as providing enforcement vessels and equipment and guarding against fraudulent ship registration; and

- welcomes the recent achievements against piracy and armed robbery at sea off the coast of Somalia resulting from efforts at the global and regional levels and the significant decrease in reported incidents of piracy off the coast of Somalia, which are at the lowest level since 2006, in this regard continues to be gravely concerned by the ongoing threat that piracy and armed robbery at sea continue to pose in the region off the coast of Somalia;

NOTING that the General Assembly of the United Nations, at its seventy-first session, adopted, on 7 December 2016, resolution 71/123 on Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments; NOTING ALSO that through resolution 71/123, the General Assembly of the United Nations, inter alia, emphasized once again its serious concern that illegal, unreported and unregulated fishing remains one of the greatest threats to fish stocks and marine ecosystems and continues to have serious and major implications for the conservation and management of ocean resources, as well as the food security and the economies of many States, particularly developing States, and renewed its call upon States to comply fully with all existing obligations and to combat such fishing and urgently to take all steps necessary to implement the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU); and noted with satisfaction the recent ratifications, acceptances and approval of and accessions to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) of the Food and Agriculture Organization of the United Nations (FAO), which have resulted in the entry into force of that Agreement;

NOTING FURTHER that the Security Council of the United Nations has adopted a number of resolutions in relation to piracy and armed robbery in waters off the coast of Somalia, transnational organized crime in the maritime domain, and other illicit maritime activity;

RECALLING the Assembly of IMO, at its twenty-second regular session, adopted, on 29 November 2001, resolution A.922(22) on the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships which amongst others invited Governments to develop, as appropriate, agreements and procedures to facilitate cooperation in applying efficient and effective measures to prevent acts of piracy and armed robbery against ships;

TAKING INTO ACCOUNT the Special measures to enhance maritime security adopted on 12 December 2002 by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 as amended (SOLAS), including the International Ship and Port Facility Security (ISPS) Code; INSPIRED by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia adopted in Tokyo, Japan on 11 November 2004, the original text of the Djibouti Code of Conduct adopted in Djibouti on 29 January 2009, and the Code of conduct concerning the repression of piracy, armed robbery against ships and illicit maritime activity in west and central Africa adopted in Yaoundé, Cameroon on 25 June 2013;

RECOGNIZING the urgent need to devise and adopt effective and practical measures for the suppression of piracy, armed robbery against ships, illegal, unreported and unregulated fishing and other illicit maritime activity;

RECALLING that the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and 2005 and the associated Protocols for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (hereinafter referred to as "SUA Treaties") provide for parties to make the offences set forth

in it punishable by appropriate penalties, establish jurisdiction, and accept the 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; DESIRING to promote greater regional cooperation between the Participants, both coastal States and landlocked States, and thereby enhance their effectiveness, in the prevention, interdiction, prosecution, and punishment of those persons engaging in piracy and armed robbery against ships on the basis of mutual respect for the sovereignty, sovereign rights, sovereign equality, jurisdiction, and territorial integrity of States;

WELCOMING the initiatives of IMO, the United Nations Office on Drugs and Crime, the United Nations Development Programme, the African Union, the European Union, the European Commission, the Indian Ocean Commission, the League of Arab States, the North Atlantic Treaty Organization, donor States and other relevant international entities to provide training, technical assistance and other forms of capacity building to assist Governments, upon request, to adopt and implement practical measures to apprehend and prosecute those persons engaging in transnational organized crime in the maritime domain, maritime terrorism, and illegal, unreported, and unregulated (IUU) fishing;

NOTING FURTHER the need for a comprehensive approach to address the poverty and instability that create conditions conducive to piracy, which includes strategies for effective environmental conservation and fisheries management, and the need to address the possible environmental consequences of piracy;

CONVINCED that the following Code of conduct will promote regional maritime cooperation and a stable maritime environment, contribute to the peace, good order and continuing prosperity of the western Indian Ocean and the Gulf of Aden area;

Have agreed as follows:

ARTICLE 1  
DEFINITIONS

For the purposes of this Code of conduct, unless the context otherwise requires:

1. "Piracy" consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; - 38 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).
2. "Armed robbery against ships" consists of any of the following acts: (a) unlawful 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; (b) any act of inciting or of intentionally facilitating an act described in subparagraph (a).
3. As defined in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing:
  - 3.1 Illegal fishing refers to activities:
    - 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

- 3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
- 3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.
- 3.2 Unreported fishing refers to fishing activities:
  - 3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
  - 3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.
- 3.3 Unregulated fishing refers to fishing activities:
  - 3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
  - 3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.
- 4 For the purposes of this Code of conduct, "Transnational organized crime in the maritime domain" consists of any of the following acts when committed at sea: (a) trafficking in arms, (b) trafficking in narcotics and psychotropic substances, (c) illegal trade in wildlife and other items in contravention of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, (d) piracy and armed robbery against ships, (e) illegal oil bunkering, (f) crude oil theft, (g) human trafficking, (h) human smuggling, (i) illegal dumping of toxic waste.
- 5 "Secretary-General" means the Secretary-General of the International Maritime Organization.

ARTICLE 2  
PURPOSE AND SCOPE

- 1. Consistent with their available resources and related priorities, their respective national laws and regulations, and applicable rules of international law, the Participants intend to cooperate to the fullest possible extent in the repression of transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea with a view towards:
  - (a) sharing and reporting relevant information;
  - (b) interdicting ships and/or aircraft suspected of engaging in transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea;
  - (c) ensuring that persons committing or attempting to commit transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea are apprehended and prosecuted; and

- (d) facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea, particularly those who have been subjected to violence.
- 2. The Participants intend this Code of conduct to be applicable in relation to transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea in the Western Indian Ocean and the Gulf of Aden area.
- 3. The Participants shall carry out their obligations and responsibilities under this Code of conduct in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
- 4. Operations to suppress transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea in and over the territorial sea of a Participant are the responsibility of, and subject to the sovereign authority of that Participant.

ARTICLE 3  
MEASURES AT THE NATIONAL LEVEL

- 1. The Participants intend to develop and implement, as necessary:
  - (a) A national strategy for the development of the maritime sector and a sustainable "blue economy" that generates revenue, employment and stability;
  - (b) Appropriate national maritime security policies to safeguard maritime trade from all forms of unlawful acts;
  - (c) National legislation, practices and procedures, informed by national maritime threat assessments, which together provide the security necessary for the safe and secure operation of port facilities and ships at all security levels; and
  - (d) National legislation which ensures effective protection of the marine environment and sustainable management of marine living resources,
- 2. The Participants intend to establish, as necessary, a multi-agency, multi-disciplinary national maritime security and facilitation committee or other system for coordinating the related activities between the departments, agencies, control authorities, and other organizations of the State, port operators, Companies and other entities concerned with, or responsible for the implementation of, compliance with, and enforcement of, measures to fight transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea.
- 3. The Participants intend to establish designated authorities for maritime security ashore, including, establishing in all national ports, port security and facilitation committees charged with implementing national policies on security, border controls, health and safety and trade facilitation, pursuant to relevant international conventions and agreements.
- 4. The Participants intend to establish, as necessary, a national maritime security plan with related contingency plans (or other system) for harmonizing and coordinating

the implementation of security measures designed to enhance the security in the international maritime transport sector with those of other modes of transport.

5. The Participants intend to prosecute, in their domestic courts and in accordance with relevant domestic laws, perpetrators of all forms of piracy and unlawful acts, including IUU fishing, against seafarers, ships, port facility personnel and port facilities,
6. The organization and functioning of this national system is exclusively the responsibility of each State, in conformity with applicable laws and regulations.

#### ARTICLE 4 PROTECTION MEASURES FOR SHIPS

The Participants intend to encourage States, ship owners, and ship operators, where appropriate, to take protective measures against transnational organized crime in the maritime domain, maritime terrorism, and other illegal activities at sea, taking into account the relevant international Conventions, Codes, Standards and Recommended Practices, and guidance adopted by IMO and the maritime industry. The Participants intend to cooperate in the implementation of measures to protect ships.

#### ARTICLE 5 MEASURES TO REPRESS PIRACY

1. The provisions of this Article are intended to apply only to piracy.
2. For purposes of this Article and of Article 12, pirate ship means a ship intended by the persons in dominant control to be used for the purpose of committing piracy, or if the ship has been used to commit any such act, so long as it remains under the control of those persons.
3. Consistent with Article 2, each Participant to the fullest possible extent intends to cooperate in:
  - (a) arresting, investigating, and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy;
  - (b) seizing pirate ships and/or aircraft and the property on board such ships and/or aircraft; and
  - (c) rescuing ships, persons, and property subject to piracy. 1 Such conventions and agreements could include, but are not limited to, the Special measures to enhance maritime security detailed in SOLAS chapter XI-2 and the ISPS Code; the Convention on the Facilitation of International Maritime Transport, 1965, as amended; and the ILO/IMO Code of Practice on Security in Ports .
4. Any Participant may seize a pirate ship beyond the outer limit of any State's territorial sea, and arrest the persons and seize the property on board.
5. Any pursuit of a ship, where there are reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue such a ship in or over the territory or territorial sea of any coastal State without the permission of that State.
6. Consistent with international law, the courts of the Participant which carries out a seizure pursuant to paragraph 4 may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship or property, subject to the rights of third parties acting in good faith.
7. The Participant which carried out the seizure pursuant to paragraph 4 may, subject to its national laws, and in consultation with other interested entities, waive its

- primary right to exercise jurisdiction and authorize any other Participant to enforce its laws against the ship and/or persons on board.
8. Unless otherwise arranged by the affected Participants, any seizure made in the territorial sea of a Participant pursuant to paragraph 5 should be subject to the jurisdiction of that Participant.

ARTICLE 6  
MEASURES TO REPRESS ARMED ROBBERY AGAINST SHIPS

1. The provisions of this Article are intended to apply only to armed robbery against ships.
2. The Participants intend for operations to suppress armed robbery against ships in the territorial sea and airspace of a Participant to be subject to the authority of that Participant, including in the case of hot pursuit from that Participant's territorial sea or archipelagic waters in accordance with Article 111 of UNCLOS.
3. The Participants intend for their respective focal points and Centres (as designated pursuant to Article 11) to communicate expeditiously alerts, reports, and information related to armed robbery against ships to other Participants and interested parties.

ARTICLE 7  
MEASURES TO REPRESS ILLEGAL, UNREPORTED AND UNREGULATED FISHING AND ASSOCIATED CRIMES

1. The Participants intend to consult at the bilateral and sub-regional levels in the formulation and harmonization of policies to ensure the sustainable use of marine living resources that straddle national maritime zones, or which are highly migratory, or occur on the high seas. Participants shall develop and harmonize measures particularly on:
  - (a) Port state measures, including ratification, approval and accession to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA);
  - (b) Mandatory vessel tracking, such as vessel monitoring systems (VMS) and automatic identification systems (AIS) for all vessels fishing outside of their national jurisdiction;
  - (c) Mechanisms for sharing VMS information from these systems through secure channels with appropriate authorities; (d) Mandatory identification of all vessels fishing outside of their national jurisdiction and keeping of accurate and updated national vessel registers;
  - (e) Ensure a due diligence process for their vessels intending to fish in waters outside their national jurisdiction i.e. inside national waters of a third country and/or in the High Seas;
  - (f) Strict regulation of transshipment activities, particularly at sea;
  - (g) Control over the activities of nationals involved in fishing activities independently of the nationality of the vessel, or the waters they fish in;
  - (h) Ensuring compliance with flag State obligations as described in FAO Voluntary Guidelines on Flag State performance.
2. The Participants intend to cooperate and collaborate among themselves and with the sub-regional fisheries bodies, the FAO and other relevant international organizations on preventing and combating illegal, unreported and unregulated fishing, and associated crimes to protect fisheries resources for sustainable long term utilization to sustain livelihoods in the Western Indian Ocean and the Gulf of Aden area. In particular, the Participants intend to:

- (a) Integrate activities related to combating IUU fishing in other international, regional and sub-regional initiatives related to repressing transnational organized crime in the maritime domain, maritime terrorism, and other illegal activities at sea;
- (b) Participate fully in relevant international projects and initiatives, such as INTERPOL Environmental Crime Project Scale, an international initiative to detect, suppress and combat fisheries crimes;
- (c) Form Task Forces or other mechanisms to facilitate the sharing and analysis of information and intelligence, and collaborative action against illegal operators within the fisheries sector to include cooperation with other agencies, bodies and States relevant to crimes in the fisheries domain.

ARTICLE 8  
MEASURES IN ALL CASES

1. The Participants intend that any measures taken pursuant to this Code of conduct should be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being in government service and authorized to that effect.
2. The Participants recognize that multiple States, including the flag State, State of suspected origin of the perpetrators, the State of nationality of persons on board the ship, and the State of ownership of cargo may have legitimate interests in cases arising pursuant to Articles 5 and 6. Therefore, the Participants intend to liaise and cooperate with such States and other stakeholders, and to coordinate such activities with each other to facilitate the rescue, interdiction, investigation, and prosecution.
3. The Participants intend, to the fullest possible extent, to conduct and support the conduct of investigations in cases of transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea taking into account the relevant international standards and practices, and, in particular, recommendations 2 adopted by IMO.
4. The Participants intend to cooperate to the fullest possible extent in medical and decedent affairs arising from operations in furtherance of the repression of piracy and armed robbery against ships.

ARTICLE 9  
EMBARKED OFFICERS

1. In furtherance of operations contemplated by this Code of conduct, a Participant (hereafter referred to as "the designating Participant") may nominate law enforcement or other authorized officials (hereafter referred to as "the embarked officers") to embark in the patrol ships or aircraft of another Participant (hereafter referred to as "the host Participant") as may be authorized by the host Participant.
2. The embarked officers may be armed in accordance with their national law and policy and the approval of the host Participant.
3. When embarked, the host Participant should facilitate communications between the embarked officers and their headquarters, and should provide messing and quarters for the embarked officers aboard the patrol ships or aircraft in a manner consistent with host Participant personnel of the same rank.

4. Embarked officers may assist the host Participant and conduct operations from the host Participant ship or aircraft if expressly requested to do so by the host Participant, and only in the manner requested. Such request may only be made, agreed to, and acted upon in a manner that is not prohibited by the laws and policies of both Participants.
5. When duly authorized by the host participant, embarked officers may:
  - (a) embark on law enforcement vessels of any of the Participants;
  - (b) enforce the laws of the designating Participant to suppress transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea in the waters of the designating Participant, or seaward of its waters in the exercise of the right of hot pursuit or otherwise in accordance with international law;
  - (c) authorize the entry of the law enforcement vessels on which they are embarked into and navigation within the waters of the designating Participant;
  - (d) authorize the law enforcement vessels on which they are embarked to conduct patrols in the waters of the designating Participant; 2 Resolution A.922(22) on the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships as it may be revised.
  - (e) authorize law enforcement officials of the vessel on which the embarked officer is embarked to assist in the enforcement of the laws of the designating Participant to suppress transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea; and
  - (f) advise and assist law enforcement officials of the other Participant in the conduct of boarding of vessels to enforce the laws of the other Participant to suppress transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea.

ARTICLE 10  
ASSET SEIZURE AND FORFEITURE

1. Assets seized, confiscated or forfeited in consequence of any law enforcement operation pursuant to this Code of conduct, undertaken in the waters of a Participant, should be disposed of in accordance with the laws of that Participant.
2. Should a flag State Participant have consented to the exercise of jurisdiction by another Participant pursuant to Article 13, assets seized, confiscated or forfeited in consequence of any law enforcement operation of any Participant pursuant to this Code of conduct should be disposed of in accordance with the laws of the boarding Participant.
3. To the extent permitted by its laws and upon such terms as it deems appropriate, a Participant may, in any case, transfer forfeited property or proceeds of their sale to another Participant or an intergovernmental body specialising in the fight against transnational organized crime in the maritime domain, maritime terrorism, and other illegal activities at sea.

ARTICLE 11  
COORDINATION AND INFORMATION SHARING

1. Each Participant should designate a national focal point to represent the national maritime security and facilitation committee and to facilitate coordinated, timely,

and effective information flow among the Participants consistent with the purpose and scope of this Code of conduct. In order to ensure coordinated, smooth, and effective communications between their designated focal points, the Participants intend to use the piracy information exchange centres Kenya, United Republic of Tanzania and Yemen (hereinafter referred to as "the Centres"). The Centres in Kenya and the United Republic of Tanzania are situated in the maritime rescue coordination centre in Mombasa and the sub-regional coordination centre in Dar es Salaam, respectively. The Centre in Yemen is situated in the Regional Maritime Information Sharing Centre (ReMISC) in Sana'a. Each Centre and designated focal point should be capable of receiving and responding to alerts and requests for information or assistance at all times. Participants are also encouraged to make full use of other national and regional initiatives that promote communication, coordination and cooperation, both civilian and military.

2. Each Participant intends to:
  - (a) declare and communicate to the other Participants its designated focal point(s) at the time of signing this Code of conduct or as soon as possible after signing, and thereafter update the information as and when changes occur;
  - (b) provide and communicate to the other Participants the telephone numbers, telefax numbers, and e-mail addresses of its focal point, and, as appropriate, of its Centre and thereafter update the information as and when changes occur; and
  - (c) communicate to the Secretary-General the information referred to in subparagraphs (a) and (b) and thereafter update the information as and when changes occur.
3. Each Centre and focal point should be responsible for its communication with the other focal points and the Centres. Any focal point which has received or obtained information about an imminent threat of, or an incident of, transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea, or any other action that requires an urgent response including shipping accidents, should promptly disseminate an alert with all relevant information to the Centres. The Centres should disseminate appropriate alerts within their respective areas of responsibility regarding imminent threats or incidents to ships.
4. Each Participant should ensure the smooth and effective communication between its designated focal point, the national maritime security and facilitation committee and competent national authorities for maritime safety, security, and protection of the marine environment as well as relevant non-governmental organizations.
5. Each Participant should make every effort to require ships entitled to fly its flag and the owners and operators of such ships to promptly notify relevant national authorities, including the designated focal points and Centres, the appropriate search and rescue coordination centres and other relevant the contact points of incidents of transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea.
6. Each Participant intends, upon the request of any other Participant, to respect the confidentiality of information transmitted from a Participant.
7. To facilitate implementation of this Code of conduct, the Participants intend to keep each other fully informed concerning their respective applicable laws and

guidance, particularly those pertaining to the interdiction, apprehension, investigation, prosecution, and disposition of persons involved in transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea. The Participants may also undertake and seek assistance to undertake publication of handbooks and convening of seminars and conferences in furtherance of this Code of conduct.

## ARTICLE 12 INCIDENT REPORTING

1. The Participants intend to undertake development of uniform reporting criteria in order to ensure that an accurate assessment of the threat of transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea in the Western Indian Ocean and the Gulf of Aden is developed. Such reporting criteria should take into account the recommendations adopted by IMO. The Participants intend for the Centres to manage the collection and dissemination of this information in their respective geographic areas of responsibility. <sup>3</sup> For example the Maritime Liaison Office Bahrain (MARLO), the United Kingdom Maritime Trade Office Dubai (UKMTO), the Maritime Security Centre-Horn of Africa (MSCHOA), the NATO Shipping Centre, the Seychelles Coast Guard and centre in Madagascar. <sup>4</sup> MSC/Circ.1333/Rev.1 on Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships as it may be revised. <sup>5</sup> MSC/Circ.1334 on Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships as it may be revised.
2. Consistent with its laws and policies, a Participant conducting a boarding, investigation, prosecution, or judicial proceeding pursuant to this Code of conduct should promptly notify any affected flag and coastal States and the Secretary-General of the results.
3. The Participants intend for the Centres to:
  - (a) collect, collate and analyse the information transmitted by the Participants concerning transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea, including other relevant information relating to individuals and transnational organized criminal groups committing such acts in their respective geographical areas of responsibility; and
  - (b) prepare statistics and reports on the basis of the information gathered and analysed under subparagraph (a), and to disseminate them to the Participants, the shipping community, and the Secretary-General.

## ARTICLE 13 ASSISTANCE AMONG PARTICIPANTS

1. A Participant may request any other Participant, through the Centres or directly, to cooperate in detecting any of the following persons, ships, or aircraft:
  - (a) persons who have committed, or are reasonably suspected of committing, transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea;
  - (b) pirate ships, where there are reasonable grounds to suspect that those ships are engaged in piracy;

- (c) other ships or aircraft, where there are reasonable grounds to suspect that those ships or aircraft are engaged in transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, or other illegal activities at sea; and
  - (d) ships or persons who have been subjected to piracy or armed robbery against ships.
2. A Participant may also request any other Participant, through the Centres or directly, to take effective measures in response to reported acts of transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, and other illegal activities at sea.
  3. Cooperative arrangements such as joint exercises or other forms of cooperation, as appropriate, may be undertaken as determined by the Participants concerned.
  4. Capacity building cooperation may include technical assistance such as educational and training programmes to share experiences and best practice.

#### ARTICLE 14 TRAINING AND EDUCATION

1. The Participants intend to cooperate on the development and promotion of training and educational programs on security-related matters in respect of the management of the marine domain, particularly for the maintenance of safety and law and order at sea, and the preservation and protection of the marine environment and sustainable use of marine living resources. Such cooperation might include:
  - (a) Coordination of training activities through a system of national focal points and under the Djibouti Regional Maritime Training Centre Coordination Mechanism;
  - (b) the offer of places on national training courses to other States, subject to payment of relevant costs;
  - (c) sharing curriculum and course information;
  - (d) the exchange of naval and law enforcement personnel, scientists and other experts;
  - (e) the exchange of views on maritime issues;
  - (f) holding conferences, seminars, workshops and symposia on maritime subjects of common interest; and
  - (g) fostering cooperation among maritime training institutions and research centres
2. Participants are invited to institute regular meetings to enhance cooperation and coordination in their maritime enforcement activities.

#### ARTICLE 15 REVIEW OF NATIONAL LEGISLATION

Participants are encouraged to incorporate in national legislation, transnational organized crime in the maritime domain, and other illegal activities as defined in Article 1 of this Code of conduct, in order to ensure, as appropriate, effective indictment, prosecution and conviction in the territory of the Participants; and to facilitate extradition or handing over when prosecution is not possible. Each Participant intends to develop adequate guidelines for the exercise of jurisdiction, conduct of investigations, and prosecution of alleged offenders.

ARTICLE 16  
DISPUTE SETTLEMENT

The Participants intend to settle by consultation and peaceful means amongst each other any disputes that arise from the implementation of this Code of conduct.

ARTICLE 17  
CONSULTATIONS

- 1 Within five years of the effective date of this Code of conduct, and having established national maritime security and facilitation committees and designated the national focal points referred to in Article 11, the Participants intend to consult, with the assistance of IMO, on the merit of developing a binding agreement.
- 2 The Participants shall engage in regular consultations with each other and with IMO to review the implementation of this Code of conduct.

ARTICLE 18  
CLAIMS

Any claim for damages, injury or loss resulting from an operation carried out under this Code of conduct should be examined by the Participant whose authorities conducted the operation. If responsibility is established, the claim should be resolved in accordance with the national law of that Participant, and in a manner consistent with international law, including Article 106 and paragraph 3 of Article 110 of UNCLOS.

ARTICLE 19  
MISCELLANEOUS PROVISIONS

Nothing in this Code of conduct is intended to:

- (a) create or establish a binding agreement, except as noted in Article 17;
- (b) affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag;
- (c) affect the immunities of warships and other government ships operated for non-commercial purposes;
- (d) apply to or limit boarding of ships conducted by any Participant in accordance with international law, beyond the outer limit of any State's territorial sea, including boardings based upon the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action;
- (e) preclude the Participants from otherwise agreeing on operations or other forms of cooperation to repress piracy and armed robbery against ships;
- (f) prevent the Participants from taking additional measures to repress transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, or other illegal activities at sea through appropriate actions in their land territory;
- (g) supersede any bilateral or multilateral agreement or other cooperative mechanism concluded by the Participants to repress piracy and armed robbery against ships;
- (h) alter the rights and privileges due to any individual in any legal proceeding;
- (i) create or establish any waiver of any rights that any Participant may have under international law to raise a claim with any other Participant through diplomatic channels;

- (j) entitle a Participant to undertake in the territory of another Participant the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Participant by its national law;
- (k) prejudice in any manner the positions and navigational rights and freedoms of any Participant regarding the international law of the sea;
- (l) be deemed a waiver, express or implied, of any of the privileges and immunities of the Participants to this Code of conduct as provided under international or national law; or
- (m) preclude or limit any Participant from requesting or granting assistance in accordance with the provisions of any applicable Mutual Legal Assistance Agreement or similar instrument.

#### ARTICLE 20

##### RELATIONSHIP BETWEEN THIS CODE OF CONDUCT AND THE DJIBOUTI CODE OF CONDUCT

This revised Code of conduct will supersede the Djibouti Code of Conduct as between the Participants to this Code of conduct which are also Participants to the Djibouti Code of Conduct.

#### ARTICLE 21

##### SIGNATURE AND EFFECTIVE DATE

1. The Code of conduct is open for signature by Participants on 12 January 2017 and at the Headquarters of IMO from 16 January 2017.
2. The Code of conduct will become effective upon the date of signature by two or more Participants and effective for subsequent Participants upon their respective date of deposit of a signature instrument with the Secretary-General.

#### ARTICLE 22

##### LANGUAGES

This Code of conduct is established in the Arabic, English and French languages, each text being equally authentic.

DONE in Jeddah this twelfth day of January two thousand and seventeen.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Code of conduct. Signed (signatures omitted) in Jeddah on 12 January 2017 by Comoros, Djibouti, Ethiopia, Jordan, Madagascar, Maldives, Mozambique, Saudi Arabia, Seychelles, the United Arab Emirates, the United Republic of Tanzania and Yemen.

APPENDIX  
X

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2050 AFRICA'S INTEGRATED MARITIME STRATEGY (AIM STRATEGY)\*

I. INTRODUCTION

1. Water covers more than two-thirds of the earth's surface and affects life everywhere. As the second biggest continent and the largest island, Africa's 43 million km<sup>2</sup> area<sup>1</sup> covers one-fifth of the total surface of the earth. Its total length of coastline, including its islands, is over 26,000 nautical miles. Thirty-eight (38) African countries are either coastal or island states while fifty-two (52) of its over one hundred port facilities handle containers and various forms of cargo. Whilst African owned ships account for about 1.2% of world shipping by number and about 0.9% by gross tonnage, the ports handle only 6% of worldwide water borne cargo traffic and approximately 3% of the worldwide container traffic.
2. International trade is very critical to many African economies, with over 90% of Africa's imports and exports conducted by sea. Over the past four decades, the volume of global sea borne trade has more than quadrupled. Ninety percent of world trade and two-thirds of energy supplies are carried by sea. The world's oceans and seas are interlinked, and action in one sea or one policy area with a direct or indirect impact on the sea may have positive or negative effects on other seas and policy areas. Whilst over 46% of Africans live in absolute poverty—a figure that is still rising—fish makes a vital contribution to the food and nutritional security of over 200 million Africans and provides income for over 10 million. Regrettably, Africa's export of fish and fishery products has not shown significant improvement in the past decade. Likewise, the increasingly intense use of the oceans and seas by various sectors, combined with climate change, has added to the pressure on the marine environment.
3. The AMD offers all African nations, vast growth opportunities and a network of sea-lanes of enormous importance for their security and prosperity. It is of huge importance in terms of natural resources and energy, trade and industry, scientific and leisure activities. International commerce by water affects people and industries throughout the entire continent, including landly-connected countries. In addition, the numerous vessels, ports, shipyards, and support industries in the AMD provide thousands of jobs for Africans. Clearly, disruptions or inefficiencies in Africa's maritime system with its supply chains and industries can thus have costly impact on a large number of participants in the economies of many African countries.
4. Accordingly, the development of AMD requires innovative solutions and careful management systems to ensure its long-term sustainability, as well as the implementation of national and international regulations and instruments to address current challenges amidst new, shifting global dynamics (e.g. shifting geographic trade patterns, emerging economic powers, environmental dynamics, etc.).
5. The Anthem of the AU reads, in part, as follows: "O sons and daughters of Africa, flesh of the sun and flesh of the sky, let us make Africa the Tree of Life". To bring this about, the OAU, which formally became the AU in 2002, set itself the goal to

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\* Extracted verbatim from: [http://cggrps.org/wp-content/uploads/2050-AIM-Strategy\\_EN.pdf](http://cggrps.org/wp-content/uploads/2050-AIM-Strategy_EN.pdf).

build, by the year 2025: 1 Including the 13 million km<sup>2</sup> Exclusive Economic Zones of AU Member States. 9 SKD “A united and integrated Africa<sup>2</sup> ; an Africa imbued with the ideals of justice and peace; an interdependent and robust Africa determined to map for itself an ambitious strategy; an Africa underpinned by political, economic, social and cultural integration which would restore to PanAfricanism its full meaning; an Africa able to make the best of its human and material resources, and keen to ensure the progress and prosperity of its citizens by taking advantage of the opportunities offered by a globalized world; an Africa capable of promoting its values in a world rich in its disparities<sup>3</sup> .”

6. There are seven missions that have been assigned to the AU Commission (AUC) to bring this vision into reality. They are related and embrace the ideals of peace, stability and all aspects of security, in particular human security. The seven missions are to:
  - i. Establish an effective and responsible AU;
  - ii. Build consensus around a shared Vision and Agenda in the Continent;
  - iii. Promote the emergence of societies based on the principles of the rule of law, good governance and human security;
  - iv. Promote regional economic cooperation as a foundation for irreversible integration in the Continent;
  - v. Develop integrated infrastructure;
  - vi. Address the structural causes of poverty and underdevelopment;
  - vii. Enhance the dynamism of African culture and creativity.
  
7. The maritime dimension of the seven missions embraces virtually all major issues that Africa is confronted with, namely:
  - i. Diverse illegal activities which include toxic waste dumping and discharge of oil, dealing in illicit crude oil, arms and drug trafficking, human trafficking and smuggling, piracy and armed robbery at sea;
  - ii. Energy exploitation, climate change, environmental protection and conservation and safety of life and property at sea;
  - iii. Research, innovation and development;
  - iv. Maritime sector development including competitiveness, job creation, international trade, maritime infrastructure, transport, information, communication and technology, and logistics;.
  
8. For this reason, the time has come for Africa to rethink how to manage her inland water ways, oceans and seas. They are a key pillar for all AU Member States’ economic and social development, and are vital in the fight against poverty and unemployment. There is also the urgent imperative to develop a sustainable “blue economy” initiative which would be a marine version of the green economy, one that improves African citizens well-being while significantly reducing marine environmental risks as well as ecological and biodiversity deficiencies.
  
9. In view of the above, African Heads of State and Government called upon the AUC at the 13th Ordinary Session of AU Assembly “to develop a comprehensive and coherent strategy” They<sup>2</sup> The Africa one is referring to is indeed the whole of Africa, including its inland waters as well as its adjoining oceans and seas, from North to South, from East to West without distinction as to race, color and religion. <sup>3</sup> African Union Commission, Strategic Plan of Action for the period 2004 – 2007. <sup>4</sup> Decision [Assembly/AU/Dec.252(XIII)] adopted by the 13th Ordinary Session of the AU Assembly held in Sirte, Libya, on July 2009. <sup>10</sup> SKD also charged the RECs/RMs of Africa to develop, coordinate and harmonize policies and strategies;

and improve African maritime security and safety standards as well as African maritime economy for more wealth creation from its oceans and seas, ultimately ensuring the well-being of African people.

10. The need for the 2050 AIM Strategy is also inherent in the objectives and principles of the Constitutive Act (Article 3 and 4). Article 3 of the Protocol relating to the establishment of the Peace and Security Council (PSC) of the AU provides that the objectives for which the PSC was established shall include the development of a Common African Defense and Security Policy (CADSP) for the AU, in accordance with Article 4(d) of the Constitutive Act.
11. In line with the aforementioned, the 2050 AIM Strategy is hereby developed as a tool to address Africa's maritime challenges for sustainable development and competitiveness. The Strategy aims to foster more wealth creation from Africa's oceans, seas and inland water ways by developing a thriving maritime economy and realizing the full potential of sea-based activities in an environmentally sustainable manner. It goes without saying that the preservation of Africa's marine environment is vital to growing its GDP, share of global and regional trade, competitiveness, longterm growth and employment. Accordingly, the accompanying Plan of Action to the Strategy outlines the required objectives that are defined by related activities, outcomes, time frames and executing agents. The objectives cover projections for new institutions and structures, wealth creation and human resource development, as well as capacity building for maritime governance.
12. It is assumed that obvious limitations such as resources, to include the soft power, as well as capacity and capabilities, could be mitigated with a strong political will from Africa's political leadership, reinforced cooperation and effective coordination of all maritime-related policies at the different decision-making levels of responsibility. It is further assumed that all related binding legal instruments are ratified (or under consideration for ratification) and domesticated.
13. Nothing in this document shall be construed or applied contrary to the sovereignty of any of the AU Member States in accordance with the principles of international law.
14. Before identifying the economic benefits (which are wealth creation from AMD) and the resources required to implement the strategy, this document will outline a set of definitions, threats and vulnerabilities in AMD, the Vision Statement of the 2050 AIM Strategy, its Strategic End State, its Strategic Objectives and the framework for strategic actions.

## II. THREATS AND VULNERABILITIES.

15. AMD draws attention to a broad array of real and potential threats that could result in mass casualties and inflict catastrophic economic harm to African States. In addition to loss of revenue, they could fuel violence and insecurity. Some of them, such as drug trafficking, could feed corruption, finance the purchase of illegal weapons, corrupt the youth, pervert democracy/rule of law, distort economies and destabilize communal life. As the actors threatening Africa's maritime domain continue to grow in number and capability, there must be a corresponding African endeavor to address these at the national, regional and continental levels.
16. Among others, the threats and vulnerabilities in the AMD include:

- i. Transnational Organized Crimes in the maritime domain (includes Money Laundering, Illegal Arms and Drug Traffic, Piracy and Armed Robbery at Sea, Illegal Oil bunkering / Crude Oil Theft along African coasts, Maritime Terrorism, Human Trafficking, Human Smuggling and Asylum Seekers Travelling by Sea);
- ii. Illegal, Unreported and Unregulated Fishing - IUU Fishing - and overfishing, and Environmental Crimes (includes deliberate shipwrecking and oil spillage as well as dumping of toxic wastes);
- iii. Natural Disasters, Marine Environmental Degradation and climate change;
- iv. Strategic Communications Systems;
- v. Vulnerable legal framework;
- vi. Lack of and/or poorly maintained aids to navigation and modern hydrographic surveys, up-to-date nautical charts and maritime safety information in a number of AU Member States.

### III. 2050 AFRICA'S INTEGRATED MARITIME STRATEGY.

17. The "2050 Africa's Integrated Maritime Strategy (2050 AIM Strategy)" consists of the overarching, concerted and coherent long-term multilayered plans of actions that will achieve the objectives of the AU to enhance maritime viability for a prosperous Africa.

### IV. VISION STATEMENT.

18. The overarching vision of the 2050 AIM Strategy is to foster increased wealth creation from Africa's oceans and seas by developing a sustainable thriving blue economy in a secure and environmentally sustainable manner.

### V. STRATEGIC END STATE.

19. Increased wealth creation from AMD that positively contributes to socio-economic development, as well as increased national, regional and continental stability, through collaborative, concerted, cooperative, coordinated, coherent and trust-building multilayered efforts to build blocks of maritime sector activities in concert with improving elements of maritime governance.

### VI. GOALS.

20. The 2050 AIM Strategy aims to achieve the following:
  - i. A comprehensive understanding of existing and potential challenges, including allocation of resources to identified priorities over a pre-determined time-frame.
  - ii. A comprehensive, concerted, coherent and coordinated approach that improves maritime conditions with respect to environmental and socio-economic development as well as the capacity to generate wealth from sustainable governance of Africa's seas and oceans.
  - iii. A common template for the AU, the RECs/RMs, and relevant Organizations; and Member States, to guide maritime review, budgetary planning and effective allocation of resources, in order to enhance maritime viability for an integrated and prosperous Africa. 12 SKD iv. A business plan that specifies milestones, capacity building targets and implementation requirements, including technical and financial support from within Africa and also from development partners.

## VII. STRATEGIC OBJECTIVES.

21. In keeping with the AU principles and the deep-rooted values enshrined in the Constitutive Act of the AU with applicable programs, the following objectives will guide the 2050 AIM Strategy's activities:
- i. Establish a Combined Exclusive Maritime Zone of Africa (CEMZA)
  - ii. Engage civil society and all other stakeholders to improve awareness on maritime issues
  - iii. Enhance political will at community, national, regional and continental levels
  - iv. Enhance wealth creation, and regional and international trade performance through maritime-centric capacity and capability building
  - v. Ensure security and safety of maritime transportation systems
  - vi. Minimize environmental damage and expedite recovery from catastrophic events
  - vii. Prevent hostile and criminal acts at sea, and Coordinate/harmonize the prosecution of the offenders
  - viii. Protect populations, including AMD heritage, assets and critical infrastructure from maritime pollution and dumping of toxic and nuclear waste
  - ix. Improve Integrated Coastal Zone/Area Management in Africa
  - x. Promote the ratification, domestication and implementation of international legal instruments
  - xi. Ensure synergies and coherence between sectoral policies within and between the RECs/RMs
  - xii. Protect the right of access to sea and freedom of transit of goods for landlyconnected States.

## VIII. PRINCIPLES AND VALUES OF THE 2050 AIM STRATEGY.

22. In addition to "Think Africa Above All" as enshrined in Article 4 of the Constitutive Act of the AU, the principles and values informing the 2050 AIM Strategy are those contained in the aforementioned Article. Information Sharing, Communication, Collaboration, Cooperation, Capacity-building and Coordination (IC5) shall remain its guiding philosophies, with the overall objective being to achieve increased development and integration of the continent.
23. The start point, as depicted below at the base of the inverted pyramid, is hardly visible. However, the enduring IC5 within and between the RECs/RMs would broaden the base and embrace the entire continent. The prospect for Maritime Viability "consolidation" as depicted will constitute the End State. The "Urgent Vs Important" matrix will help in setting up a sound prioritization scheme of implementation for the first 8-year period covering 2010 to 2018.

## IX. STAKEHOLDERS.

24. Stakeholders of improved maritime conditions include AU Member States, local communities, specialized regional institutions and associations, the African maritime private sector, strategic development partners and the international community as a whole. Towards the implementation of the AIM Strategy, the envisaged expectations of these stakeholders include;
- (a) transparency and accountability,
  - (b) efficient and prudent utilization of resources,
  - (c) timely and accurate information reports,

- (d) advice, guidance and support for institutional functionality and sustainability,
- (e) coordination in the harmonization of the legal and regulatory regimes,
- (f) cooperation and coordination, and
- (g) effective and timely response to emerging challenges in Africa.

This will require enhanced collaborative, concerted, cooperative, coordinated, coherent and trust-building multilayered approach among the AU, RECs/RMs, relevant African organizations, Member States, the private sector as well as international development partners, in order to promote the AU's objectives.

25. Africa's maritime sector and related areas of capacity building can be further described using the following activities:

- i. Maritime governance;
- ii. Maritime commerce;
- iii. Maritime defense and security (military and civilian, public and private protective services);
- iv. Maritime education and scientific research (hydrography, oceanography, fisheries, coastal and inland training, research and transfer of technology);
- v. Maritime tourism (ashore and afloat);
- vi. Fisheries and aquaculture industry;
- vii. Shipbuilding and ship repair industries;
- viii. Maritime transport and auxiliary services;
- ix. Wealth creation;
- x. Ports and harbours management;
- xi. Maritime safety of navigation (navigational warnings, meteorological services and warnings, search and rescue services, hydrographic services, aids to navigation, ships' manning, etc.)
- xii. Promotion of African vessel ownership;
- xiii. Promotion and protection of African shippers' interests;
- xiv. Promoting welfare of seafarers;
- xv. Access to sea and freedom of transit of landly-connected States; xvi. Offshore exploration and exploitation;
- xvii. Development of inland water ways;
- xviii. Maritime infrastructure development.
- xix. Promotion of African Classifications societies;
- xx. Promotion of a panafrikan fleet;
- xxi. Promotion of an African unified and harmonised Maritime Code.

#### X. CHALLENGES AND VIABILITY.

26. The challenge in developing the 2050 AIM Strategy is that it must pass four viability tests:

- i. Suitability – The End State must be achievable and consistent with the Strategy's Plan of Action, that is, attainment and sustainment of increased wealth creation from AMD that positively contributes to environmental and socio-economic development, as well as increased national, regional and continental stability.
- ii. Acceptability – The Strategy must have the support and ownership of Member States, RECs/RMs, and it must be cost-effective in implementation.

- iii. Feasibility – The Plan of Action must clearly identify all resources, including funding requirements for execution within realistic time-frames.
- iv. Compatibility – The Strategy must be compatible with extant African and internationally agreed maritime instruments and legal frameworks.

## XI. EXISTING REGULATORY FRAMEWORKS AND ON-GOING INITIATIVES.

27. This 2050 AIM Strategy shall be interpreted and implemented in conjunction with all relevant AU, national and international regulatory frameworks and on-going maritime initiatives in Africa, which include, but not limited to:
- i. The specialized regional institutions and associations, Indian Ocean Memorandum of Understanding (MoU), Mediterranean MoU and the West and Central Africa MoU on Port State Control (Abuja MoU), which are instruments signed in response to the global initiative for the eradication of substandard vessels, working conditions of seafarers and preservation of marine environment.
  - ii. The UN Convention on the contract of international goods transported wholly or partially by sea (2009 Rotterdam Rules), the UN Convention on transit trade of landlocked States (1965) and the Convention on the facilitation of International Maritime Transport (FAL Convention-1965).
  - iii. The Maritime Organization of West and Central Africa (MOWCA) MoU on Establishment of an Integrated Coast Guard Function Network.
  - iv. The Sea Power for Africa Symposium (SPAS), a periodical gathering of African Heads of Navies and Coast Guards.
  - v. African Regional Strategy for Disaster Risk Reduction (DRR) initiated by African Union and its then NEPAD Secretariat<sup>6</sup>, in conjunction with the UN International Strategy for Disaster Reduction, the African Development Bank (AfDB) and UN Development Programme Bureau for Crises Prevention and Recovery (UNDP/BCPR), as well as the UN Environmental Programme (UNEP) and Almaty Action Programme.
  - vi. Abuja Declaration on Sustainable Fisheries and Aquaculture in Africa (2005).
  - vii. AU Ouagadougou Action Plan (2007) to Combat Trafficking in human beings, especially women and children and the ‘AUC Initiative against Trafficking (AU.COMMIT) Campaign’ (2009), launched by the Department of Social Affairs of the AUC in partnership with the UN/AU Social and Human Development Cluster (SHD).
  - viii. The Zone "D" Multinational Center of Coordination of Regional Centre for the Maritime Security of Central African States (CRESMAC).
  - ix. The African Maritime Transport Charter (AMTC), 2010, as well as the Durban resolution on maritime safety, maritime security and protection of the marine environment in Africa.
  - xi. ECCAS Merchant marine Community Code.
  - xii. Other significant initiatives such as: a. Agreements on delineation, delimitation and demarcation of maritime boundaries among Member States. b. Development and Implementation of Integrated Maritime Strategies within and among RECs/RMs. c. International counter–piracy operations and maritime capacity building programmes.

## XII. FRAMEWORK FOR STRATEGIC ACTIONS.

28. In line with the identified objectives and end state of the AIM Strategy, this section articulates the bases for necessary activities and outcomes that are necessary for

the implementation of the Strategy. Consequently, the activities and outcomes, including execution time frames and the responsible agencies are provided in the accompanying 2050 AIM Strategy Plan of Action annexed to this document.

a) Combined Exclusive Maritime Zone of Africa (CEMZA).

29. NEPAD is a programme of the AU and since the formal integration into the structures and processes of the AU in January 2012, the NEPAD Secretariat has since been renamed to the NEPAD Planning and Coordinating Agency (NPCA). Africa is to establish as appropriate and when permissible, a Combined Exclusive Maritime Zone of Africa (CEMZA). This will require the establishment of a dedicated Strategic Special Task Force (S2TF) to prepare the technical file which will underpin the Solemn Declaration of the CEMZA. The technical file will include charts presenting the CEMZA limits. CEMZA is expected to grant Africa enormous cross-cutting geo-strategic, economic, political, social and security benefits, as it will engender collective efforts and reduce the risks of all transnational threats, environmental mismanagement, smuggling and arms trafficking.

30. The CEMZA, being a common African maritime space without barriers is a concept which aims at “Boosting intra-African Trade”, eliminating or simplifying administrative procedures in intra-AU maritime transport, the aim being to make it more attractive, more efficient and more competitive, and do more to protect the environment. The CEMZA will contribute to the integration of the internal market for intra-AU maritime transport and services. The AU shall further set out guiding principles for the development of a common information sharing environment for the CEMZA. This should allow for the convergence of existing and future monitoring and tracking systems used for maritime safety and security, protection of the marine environment, fisheries control, trade and economic interests, border control and other law enforcement and defence activities.

b) Inter-Agency/Transnational Cooperation and Coordination on Maritime Safety and Security.

“On its part, the AU is in the process of complementing its efforts by setting the tone to address Maritime Security and Safety, including Situational Awareness in the maritime domain of the African continent, by thoroughly addressing the issue in the new Commission’s Strategy”. (H.E. Amb. Ramtane Lamamra, AUC’s Commissioner for Peace and Security, 6046th UNSC Meeting, New York, 16 Dec. 08)

31. Steps toward promoting inter-agency and transnational cooperation and coordination on maritime safety and security shall include the development of an inter-agency approach, a Naval Component capacity within the framework of the African Standby Force (ASF), and the establishment of a representative continental working group of Chiefs of African Navies and/or Coast Guards (CHANS) to scrutinize issues of situational awareness and collaborate towards the enhancement of Africa’s Maritime Domain Awareness (MDA), and to uphold cooperative efforts between Navies/Coast Guards of the AU Member States and international partners. The AU, in collaboration with maritime agencies across the continent, including those from coastal and noncoastal Member States, will designate appropriate representatives to the CHANS. The CHANS will strive to: i. Foster development of requisite capacities to achieve effective MDA in Africa. ii. Pool national and regional political will by enhancing understanding of the importance of MDA as a critical enabler in building Africa’s maritime domain security and

safety. iii. Increase joint regional surveillance operations at sea, and the establishment of seagoing Navies and/or Coast Guard networks around Africa, with cross-border hot pursuit function. Theme of the 18th AU Assembly Summit, January 29 – 30, 2012, Addis Ababa, Ethiopia. iv. Achieve a "shared situational awareness capability" that will link all the relevant agencies and sustain interagency cooperation, by integrating relevant Command, Control, Communications, Computers, Intelligence, Surveillance and Reconnaissance (C4ISR) systems and operational concepts. v. Promote the establishment of Regional Centers of Excellence for training, operations and equipment development on maritime safety and security. vi. Promote the establishment of Liaison Team mechanism among neighbouring Member States and within RECs/RMs bearing in mind the IMO Recommendations on Regional Agreement on Cooperation on Preventing and Suppressing Acts of Piracy and armed Robbery Against Ships (IMO MSC 1/ Circ 1333). vii. Establish in collaboration with relevant and interested stakeholders, Continental and Regional agreements, arrangements, and capabilities including, but not limited to, mutualization of assets to address such common agendas as law enforcement, Search and Rescue, Humanitarian Crises, Disaster Relief, etc. viii. Push for the requirement for Continental, Regional and National harmonization of Force Structure Element capability requirements. ix. Enhance cooperation through existing regional organizations associated with fisheries, maritime commerce, and transport, maritime tourism and academia. x. Rally round a cross-sector interagency approach to improve the concept of Integrated Coastal Area Management (ICAM) in Africa.

c) Regional Maritime Operational Centers.

32. In partnership with interested stakeholders, the AU is working towards the rapid establishment of standardized Regional Maritime Headquarters (MHQ) with Maritime Operational Coordination Centers (MOC) with mutualized response capabilities in all RECs/RMs. The goals of Regional MHQ and MOCs are twofold: i) to increase the effectiveness and the efficiency of the African Standby Force (ASF) as African Navies participate in integrated operations, a move to improve Africa's Maritime response capabilities; and ii) to improve situational awareness in the AMD, involving all organizations and agencies with a key role in maritime safety and security. It is in this spirit that during the 5th Ordinary Meeting of the Special Technical Committee on Defence, Safety and Security (STCDSS), held in Addis-Ababa, Ethiopia, on 26 October 2011, the African Ministers of Defence, Safety and Security adopted the proposal made by the Commission to establish a Maritime Information and Coordination Cell (MIC2).
33. For coordination, all the Regional MHQs and MOCs shall be inter-operable and interlinked to each other and to the AU-based MHQs and MOCs to form a network of situational awareness information sharing. In order to benefit from economies of scale and the streamlining information flows, monitoring existing situation and reporting entities within Member States and the RECs/RMs should be aligned and staff members could be exchanged between the Regional MHQs and MOCs.
34. All AU Member States shall establish a 24-hour communications nodal point for coordination of national input and/or response. In accordance with Article 111 of UNCLOS, Member States' intent for operations to deter or disrupt acts of piracy and armed robbery against ships in the territorial sea and airspace of another Member State shall be subject to the approval and authority of that Member State, including in the case of hot pursuit. To increase the ability to deliver successful outcomes, all AU Member States are encouraged to establish cross-border hot

pursuit arrangements. Further, due cognizance shall be given to the IMO Recommendations on Regional Agreements on Cooperation on Preventing and Suppressing Acts of Piracy and armed Robbery Against Ships (IMO MSC 1/ Circ 1333).

d) Fisheries and Aquaculture.

35. Building on the NEPAD's 2005 Abuja Declaration on sustainable fisheries and aquaculture in Africa, the 2010 Conference of African Ministers of Fisheries and Aquaculture (CAMFA) as well as on the UN Conservation and Fish stocks management agreements, the AIM Strategy shall incorporate and implement a Common Fisheries Policy for the conservation, management and exploitation of fish stocks in accordance with the ecosystems and precautionary approach for the whole CEMZA, when established.
36. In order to further deter IUU fishing activities, sanctions "of sufficient gravity as to deprive the offenders of the benefits accruing from their illegal activities" shall be put in place as per the 2005 Rome Declaration on IUU Fishing, which might include seizure of assets and prosecution, with the toughest stand for compensation. All Member States are encouraged to report any IUU fishing activity to the AU for supplementary stringent dissuasive actions through all available channels deemed appropriate.
37. The effective implementation of the universal duty to cooperate in the conservation of marine living resources is required. This necessitates coordinated action by AU Member States, RECs/RMs and Regional Fisheries Management Organizations (RFMOs) to ensure that the provisions of Articles 62, 63, 64, 117 and 118 of the UNCLOS are promoted and essentially met.
38. AU Member States are urged to endeavour to deter IUU fishing activities. Recommended measures include: (i) Effective licensing and control of vessels allowed to fish by Flag States; (ii) Real-time positional reporting by licensed vessels via Vessel Monitoring Systems (VMS); (iii) Surveillance and interception of irresponsible fishing by on-water patrols; (iv) Implementation of technical regulations for the safety of non-convention fishing vessels; and (v) Promotion of effective Flag State implementation in a broader context through the enforcement of RFMO measures, such as 'white' or 'black lists' to identify 'bad actors'.
39. The RECs/RMs are requested to present proposals to develop a common strategy that will warrant 24/7 patrolling of the seas. This calls for effective communications and rapid response capabilities with OPVs, fast boats, Maritime Patrol Aircraft (MPA), Unmanned Aerial Vehicles (UAVs) and helicopters for surveillance and deterrence actions. In collaboration with relevant stakeholders, the AU shall make an assertive call for the declaration of Marine Reserve Areas and enforcement of the rules and regulations governing them, as a way to preserve Africa's marine biodiversity, protect marine endangered species threatened because of unsustainable overfishing in Africa and, by the same token, encourage ecotourism, confront a host of environmental problems, such as soil degradation and coastal inundation, climate change and encourage scientific research on biodiversity. The AU shall advocate a concerted role for the international community, African Maritime Bank, African Development Bank and the World Bank to facilitate the development of this vision in Member States.
40. African governments, the RECs/RMs and the AU shall facilitate collaboration among research entities, provide funding, expertise and dissemination of

innovative practices. Adopting state-of-the-art technologies is very important for the competitiveness of the African maritime sector in the global market, through initiatives on research and development, including pooling of knowledge into an African marine data centre.

41. In partnership with relevant stakeholders to include the FAO and RFMOs, the AU shall promote research, fisheries and aquaculture industry growth and development as well as marine conservation. It shall also promote biodiversity and the preservation of the marine ecosystems, as well as the protection of endangered and threatened species and the habitats upon which they depend.
42. Fisheries and aquaculture from lakes, reservoirs, rivers, ponds, and wetlands contributed about 25% (34 million metric tons) of reported world fisheries production in 2003<sup>8</sup>. Inland fisheries or aquaculture can play a significant role in the economy of the RECs/RMs and AU Member States. Where small-scale inland fisheries or aquaculture has been supported and well managed, fish-related activities have played a critical role in generating wealth and sustaining economic growth. With relevant stakeholders, the AU shall encourage all Member States to further develop sustainable inland fisheries or aquaculture.
43. The AU shall work towards seeking the appropriate level of compensation for the five decades of losses due to IUU and over fishing in AMD. A compensation fund shall be established and its proceeds invested in the development of sustainable fishing industries across Africa.
44. Any analysis aimed at informing policy makers must rely on robust and precise data in order to be effective. Currently, sector performance monitoring is very limited, if not non-existent. Ideally, there is a need for regular data updates and trend analysis that interprets information gathered. There are various repositories of very useful and relevant information in the continent.
45. The AU shall work towards the establishment of a nodal point where a database accommodating cross-sector maritime data can be warehoused. The objective here is to integrate existing, but fragmented initiatives in order to facilitate access to primary data for public authorities, maritime services, related industries and researchers.

e) Integrated Marine Tourism and Leisure Strategy for Africa.

46. Tourism in Africa is most promising, but it is often underappreciated. In recent years, the tremendous power and potential that travel and tourism holds for the continent has been unraveling. In terms of numbers, Africa receives more tourists than the Caribbean, Central America and South America combined. This development makes a strong case for increased investment in tourism. Tourism creates jobs and opportunities for entrepreneurship, reduces poverty, promotes stability, preserves heritage and culture and builds global connections. Despite this, more work needs to be done in making the case for the travel and tourism industry. Therefore, the AU shall work with the UN World Tourism Organization on eco-sustainable marine tourism in Africa.
47. Marine recreation can be defined as comprising all recreational facilities along and/or nearby coastal areas and cruise ship tourism. It includes all activities driven by the ocean environment and marine resources, including marine ecology and related activities such as surfing, fishing, sailing, scuba diving, among others.

48. The AU shall therefore address the need to commit to the development of a comprehensive maritime tourism and recreation strategy for the continent (with environmental impact assessments) which will look at the following issues: i. Common concept and understanding of maritime tourism in the context of the continent. ii. Review of market trends related to marine tourism and recreation in the context of the continent. iii. Social and economic potential of marine tourism and recreation for the continent. iv. Evaluation of marine tourism and recreation facilities in the continent and the opportunity for improvement. v. SWOT analysis on marine tourism and recreation towards setting up appropriate vision, strategy, organizational plan and action plan for sustainable and viable maritime tourism in the continent. vi. Human resource cultivation for marine recreation and capacity for business analysis to support marine tourism and recreation

f) Giant Africa Aquariums (GA2).

49. The past 24 years has witnessed the renaissance of marine aquariums globally. For instance, the Giant Africa Aquariums (GA2) is a concept aimed at building a pan-African portfolio of profitable walkthrough aquariums. The aquarium environment is modelled on local marine conditions and provides a unique combination of educational and entertainment facilities in addition to generating income and employment.
50. In partnership with international conservation organizations and interested stakeholders, the AU shall encourage all Member States to build Giant Aquarium with panoramic view of marine life, which will provide a vital additional value to the selected cities.

g) Integrated Maritime Human Resources Strategy for the Continent.

51. Currently, there are limited in-depth studies to operationally define the maritime sector human resources development value chain in Africa. As a result there are no specific models of the maritime sector human resources development footprint that would facilitate the building of a comprehensive human resources development strategic plan to direct the growth of human resources that will elevate the maritime sector as a recognized contributor to the continent's economy. There is therefore the need to have an integrated human resources strategy for the maritime sector to support the provision of skills taking into account gender balance in the entire maritime value chain which includes shipping and logistics, offshore activities, fishing, tourism and recreation, and safety and security.
52. The AU shall set up a research exercise that will link up with member states' human resources development agendas as well as explore economic growth and job creation opportunities more widely along the maritime value chain.
53. The AU shall tackle the need to protect the current employment generation levels and provide catalysts for growth and development across all sectors of the maritime industry, which include shipping, marine resources, marine tourism and leisure, marine manufacturing and construction, commercial support and business services and public interests. This will enable the maritime sector to act as a new employment creation driver of the continental economy.
54. The African Maritime Human Resources Development Strategy must look into the following issues: i. Nature of Africa's maritime industry including human resource requirements. ii. Identification of principal sources for competitive advantage. iii. Nature of deliberate investment required in the education and training of the

maritime workforce, including in maritime administration, marine safety etc. iv. Strategies to expand workforce in the maritime sector. v. Conduciveness of work conditions to attract new comers into the maritime sector. vi. Competitiveness of Africa's skilled manpower in the maritime sector. vii. Improved relationship between the maritime industry, universities, Further Education and Trainings (FETs) and colleges. viii. Mechanism for the recognition of prior learning. ix. Support programmes for research in maritime education. x. Data gathering and statistical information for improved policy making in the maritime sector.

h) Disaster Risk Management.

55. In collaboration with relevant stakeholders such as the World Meteorological Organization (WMO), the UNESCO's Intergovernmental Oceanographic Commission (IOC) and the IMO, the AU shall encourage and support the implementation of continuous and integrated multisectoral and multi-disciplinary Maritime Disaster Management Strategy for Africa, with measures aimed at preventing or reducing risks of disasters; lessening severity or consequences of disasters; emergency preparedness, rapid and effective response to disasters; and post-disaster recovery and rehabilitation in the AMD. In this regard consideration shall be given to early warning sensors and centers and build on the concept of disaster relief and humanitarian aid from the sea.
56. In collaboration with relevant stakeholders, the AU shall also (a) make an assertive call to establish and constantly update co-operation and hence co-ordination between Member States so as to enhance regional co-operation, especially between or among those sharing common borders and Search And Rescue (SAR) areas; (b) conduct regular, inclusive, multi-agency maritime disaster management exercises, in national and regional sea areas; and (c) maintain compliance with relevant international conventions.

i) Handling and Shipment of Hazardous Materials and Dangerous Goods.

57. The handling and shipment of hazardous materials and dangerous goods is a serious matter that requires AU Member States compliance with regulatory requirements, especially the International Maritime Dangerous Goods (IMDG) Code. All workers handling hazardous materials or dangerous goods shall follow regulatory requirements, in line with the Convention on Hazardous and Noxious Substances, and the Basel Convention and the 1996 Bamako Convention on the Ban of the Import to Africa and the Control of Trans-boundary Movement and Management of Hazardous Waste within Africa. The AU shall encourage Member States to ensure, through appropriate legislation in collaboration with relevant stakeholders, the safe handling and transport of hazardous goods and materials.

j) Maritime Boundaries/Delineation.

58. Through the AU Border Programme, in accordance with the UN Convention on the Law of the Sea (UNCLOS), the AU shall make an assertive call to peacefully solve existing maritime boundary issues between Member States including within bays, estuaries, and inland waters (lakes and rivers). 59. Member States shall be encouraged to claim their respective maritime limits, including their extended continental shelf where applicable. Member States are further urged to accept and fulfill all those responsibilities that emanate from the establishment of maritime zones as foreseen by UNCLOS and the IMO SOLAS Convention.

k) Maritime Governance.

i. Legal and Regulatory Regimes.

60. The AU shall encourage Member States to develop legal frameworks for coordinated State intervention at sea and inland water ways and subsequent actions. The AU shall further actively and continuously encourage high levels of commitment within RECs/RMs and other regional initiatives, including RFMOs, to harmonize national maritime laws and to enhance bi-lateral and regional strategic synergies, including signing and ratification and accession by Member States of the relevant international maritime instruments. The Commission shall urge RECs/RMs and Member States to take full advantage of the provisions contained in these various international instruments. Alongside initiatives aimed at addressing the root causes of piracy and other maritime crimes, AU Member States shall be encouraged to put in place the necessary legal frameworks for the prosecution of perpetrators engaged in these crimes.

ii. Illegal Oil Bunkering/Crude Oil Theft.

61. In addition to the broader issues of underdevelopment and insecurity in the Gulf of Guinea, only concerted, coordinated and sustained actions by all relevant stakeholders has the potential to address illegal oil bunkering and crude oil theft. Such actions will apply to both the demand and supply side. It will also require attention to the root causes of the problem. Building on the success of the “conflict diamonds” campaign, the AU and relevant stakeholders shall develop Regional Energy Security Strategies to address illegal oil bunkering/crude oil theft by focusing on the market for the illegally bunkered oil and stolen oil.
62. RECs/RMs and affected Member States shall endeavour to develop and expand coastal surveillance systems and information sharing mechanisms with relevant parties. Relatively cheap and unsophisticated surveillance equipment such as remote sensors and UAVs can be deployed to monitor vandalism of pipelines and track movement of suspicious cargo.

iii. Money Laundering, Illegal Arms and Drug Trafficking.

63. Greater and stronger development is needed across all RECs/RMs so as to provide legal framework of prevention aimed at combating money laundering, arms and drug trafficking, and related crimes. Information-sharing shall be promoted among affected countries in order to disrupt trafficking networks. In partnership with relevant stakeholders (UNODC, Interpol, etc.), the AU shall create a C4ISR-equipped Trans-Saharan Crime Monitoring Network to improve information, monitor suspicious activities, exchange evidence, facilitate legal cooperation, and strengthen national and regional efforts against these organized crimes. Such a Trans-Saharan crime monitoring network would ensure a first and practical response to a growing problem, such an early warning device, linked to the AU’s Continental Early Warning System (CEWS), will help review situations that warrant careful investigation.
64. At the national level, Member States shall be encouraged to stiffen penalties associated with money laundering, illegal arms and drug trafficking. AU Member States shall strive to harmonize policies and laws in this area to curb these trans-boundary crimes, borrowing from the workings of the Council of Europe Group of States against Corruption [GRECO] and Money Laundering and Corruption [MONEYVAL] which carry out evaluations and peer reviews to ensure that Member States have effective systems to counter corruption, money laundering

and terrorist financing. The AU already has a peer review mechanism in place, namely the African Peer Review Mechanism (APRM), whose mandate can be expanded.

iv. Environmental Crimes.

65. The AU shall develop mechanism to detect and prosecute cases of dumping of toxic waste in the AMD, with the toughest position for compensation. The AU together with relevant partners shall support the NEPAD Joint Implementation Mechanism of the Nairobi and Abidjan Conventions in the implementation of the marine and coastal environment component of the NEPAD. Full support shall also be given to the Environment Initiative of the NEPAD and the Sirte Declaration on Agriculture and Water on comprehensive environment protection and management, as well as other relevant conventions, such as CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora), and the Convention on Biological Diversity

v. Container Security and Control Programme.

66. In order to prevent arms, drug trafficking and other illicit activities, the AU shall work towards the establishment of effective container security and control programme in coastal States all around Africa.

vi. Flag State and Port State Control.

67. Building on initiatives such as the relevant MoUs on Port State Control, the AU shall work towards complementing RECs/RMs and Flag States towards eradicating the operation of substandard shipping practices and to enhance security and safety, protection of the marine environment from pollution and improvement of the working and living conditions of personnel on board ships. The Nairobi Convention is the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region. The Abidjan Convention is the Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment in the West and Central African Region. Furthermore, building on the 2009 FAO's Port State Measures Agreement (PSMA) to prevent, deter and eliminate IUU fishing, the AU shall work towards ensuring that Members States accede to these Agreements as well as solicit the support of partners in the implementation of Article 22 (Requirements of Developing States). Enhancing Flag State implementation and Port State Control will further build capacity to exercise maritime safety and security oversight over vessels.

vii. Hydrography, Oceanography and Meteorology

68. The AU shall make an assertive call to concerned Member States to become members of the International Hydrographic Organization (IHO), World Meteorology Organisation (WMO) and UNESCO Intergovernmental Oceanography Commission (IOC) so as to advance maritime safety, efficiency and the protection and sustainable use of the marine environment. This will help create a global environment in which AU coastal Member States provide adequate and timely hydrographic data, products and services and ensure their widest possible use. viii. Aids to Navigation (AtoN).

69. The AUC shall make an assertive call for concerned Member States to the International Association of Marine Aids to Navigation and Lighthouse Authorities

(IALA) so as for coastal and relevant landly connected Member States to advance maritime safety of navigation, the protection and sustainable use of the marine environment by : (i) Providing appropriate aids to navigation as the volume of traffic and the degree of risks requires, (ii) Obtaining the greatest possible uniformity in aids to navigation, take into account the international recommendations and guidelines when establishing such aids, and (iii) Undertaking to arrange for information relating to aids to navigation to be made available to all concerned. (iv) Establishing Vessel Tracking System (VTS) where traffic volume or risks justify it. a VTS to follow guidelines adopted by IMO b Ships to be encouraged by Administrations to use VTS

ix. Piracy and Armed Robbery at Sea.

70. Since 2008, the AU has advocated a comprehensive approach towards combating piracy and armed robbery at sea. The AU fully supports the work of the Contact Group on Piracy Off the Coast of Somalia (CGPCS), as well as all IMO initiatives to combat piracy and armed robbery against ships, including the Best Management Practices (BMPs) for vessel protection in High Risk Areas (HRA) and the Djibouti Code of Conduct (DCC) concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden. Therefore, the AU shall encourage Member States, consistent with their available resources and related priorities, their respective national laws and regulations, and applicable rules of international law, in cooperation with the IMO and any other relevant organisations, to mutualize their assets so as to cooperate to the fullest possible extent in the repression of piracy and armed robbery against ships. This would be with a view towards: encouraging (a) burden sharing, (b) tracking financial flows, (c) sharing and IALA Recommendations and Guidelines Available for download at [www.au.int/maritime](http://www.au.int/maritime). reporting relevant information; (d) interdicting ships and/or aircraft suspected of engaging in piracy or armed robbery against ships; (e) apprehension and prosecution of persons committing or attempting to commit piracy or armed robbery against ships, and (f) 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.
71. The AU shall provide support and technical assistance to vulnerable African states, to enhance their capacity to ensure effective coastal and maritime patrols. In this regard, special attention shall be given to the development of effective Navies/Coast Guard(s).

x. Maritime Terrorism.

72. Within the past decade, there have been major developments in the regulation of international shipping, particularly through the introduction of the International Ship and Port Facility Security (ISPS) Code. Consequently, AU Member States that have not yet implemented the ISPS Code should move quickly to do so, and introduce other maritime MDA and security measures.
73. In line with the framework of the UN Strategy on counter-terrorism, the AU, the RECs/RMs, and Member States will strive to support the African Center for the Study and Research on Terrorism (ACSRT) in the operationalization of the Terrorism Early Warning system as well as all the ACSRT activities listed in its strategic plan. 74. The AU shall make an assertive call for preventive measures with efforts to address both real and perceived grievances and underlying social, economic, and political conditions which give rise to this content. Therefore, the

AU, the RECs/RMs and Members States will give priority attention to addressing underlying conditions conducive to the spread of terrorism in the continent, as well as respect for human rights and the rule of law. These conditions include: poverty, prolonged unresolved conflicts, dehumanization of victims of terrorism, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, Corporate Social Responsibility (CSR), socio-economic marginalization and lack of good governance.

xi. Human Trafficking, Human Smuggling and Asylum Seekers Travelling by Sea.

75. Trafficking in persons is a criminal offence addressed by many international instruments and programmes. Among those are the UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000); the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) programme (2004) and in the context of Africa, the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (2006). The UNODC has developed a United Nations Counter - Kidnap Manual on best practices for law enforcement authorities to combat kidnapping.

76. To deal with the scourge of human trafficking, a bigger part of the work will consist in awareness-raising, through media and training workshops, and capacity building in source and transit countries to deal with human trafficking. The AU shall work towards addressing the root causes of human trafficking, which include poverty, unbalanced distribution of wealth, unemployment, armed conflicts, poor law enforcement system, degraded environment, poor governance, societies under stress, corruption, lack of education, lack of respect for universal human rights and discrimination, increased demand for sex trade and sex tourism.

77. The AU in collaboration with relevant stakeholders shall continue to assist Member States with the development and implementation of sound migration policies aimed at addressing trafficking in human beings, especially women and children.

xii. Strategic Communications Systems.

78. Mobile phones and the Internet have had beneficial impacts on supporting the livelihoods of rural people, particularly small scale business women and men in Africa, where mobile phones are the most widely-used form of communications technology. However, while their benefits are yet to be fully exploited for improving strategic communications in support of the maritime industry, the maritime industry has been exposed to a myriad of related risks such as cyber attacks and related crimes.

79. Cybercrime is of particular concern for the AU because of the cross-border nature of the issue., The AU, RECs/RMs, Member States, the private sector and civil society, shall work together to improve cybercrime.

80. In order to prevent, defend against and respond to cyber threats, the AU shall encourage cooperation between the RECs/RMs and Member States, with the cooperation of the UN International Telecommunication Union (ITU), the International Multilateral Partnership Against Cyber Threats (IMPACT) and the UN Office on Drugs and Crime (UNODC). This targeted cooperation will assist AU Member States in mitigating the risks posed by cybercrime and cybercrime through activities such as maritime database generation and maritime information

exchange networks. The AU, RECs/RMs and Member States shall regularly carry out multi-agency cyber drill exercises which involve testing the response technologies.

xiii. Maritime Spatial Planning.

81. Maritime spatial planning is a comprehensive, adaptive, integrated, coherent, ecosystem-based, and transparent spatial planning process, based on sound science. By mapping activities and determining the maritime space settled for each activity, the process provides a characterization of the current uses and helps to establish potential areas for future uses of AMD. This will provide a policy process for the AU, the RECs/RMs and Member States to better determine how maritime zones are sustainably used and protected – now and for future African generations. Within the framework of the 2050 AIM Strategy, Maritime spatial planning will aim at balancing frequently competing sector-based interests, so that: a) marine space and resources are used efficiently and sustainably, b) decisions can be taken based on sound data and in-depth knowledge of the sea and inland water ways, and c) investors have greater legal certainty, encouraging Africa’s blue economic development.

xiv. Environmental and Biodiversity Monitoring.

82. Africa depends on environmentally friendly maritime domain and self-sustaining biological systems that include many kinds of organisms. This requires the preservation of the variety of life, by a) ensuring the sustainable use, conservation and regeneration of the maritime resources, b) promoting the economical, social and environmental importance of the sea and inland water ways, c) establishing a set of indicators to evaluate the sustainable performance of the activities and their monitoring. The AU, the RECs/RMs and Member States shall support such efforts which require inventory knowledge and a full understanding of natural and artificial changes in AMD’s biodiversity. With an innovative monitoring and assessment approach based on joint set of marine biodiversity indicators as well as testing in practice the monitoring and assessment techniques, in partnership with relevant international stakeholders, the AU shall spearhead the development of concepts for assessment of conservation status of AMD’s biodiversity, including species and habitats and impacts of various human activities.

XIII. ECONOMIC BENEFITS: WEALTH CREATION FROM AMD.

83. There cannot be sustainable socio-development without peace and security, and without development and empowerment no sustainable peace will occur. Therefore, to further boost maritime viability in Africa, building on the security-socio-development nexus, the AU shall establish a cross-sectoral Strategic Foresight Marine Task Force (SFMTF) to assess the broad spectrum of current marine activities, bearing in mind the future potential for wealth creation from sustainable development in the AMD and how to make Africa’s maritime industry more competitive for international and regional trade and as a source of sustainable food supply and energy. This would require identifying sectors with the most growth potential (such as ports, aquaculture, renewable energy, submarine telecommunications, tourism and marine biotechnology) as well as the sustainability and security of Africa’s energy supply not only from hydrocarbons but from renewable marine resources which could further support economic development and sustainable job creation.

XIV. IMPROVED MARITIME TRADE AND COMPETITIVENESS .

84. Africa's share in world trade stands at about 3% on average, while intra-African trade averages around 10 percent of Africa's total trade. Further, Africa's share of exports to the world has declined over the years - standing at an average of 2.5 %, a net decline from 10% in the 1950s. In addition, Africa attracts only 2-3% of global Foreign Direct Investment (FDI) and contributes another 1% to world GDP. It is imperative upon Africa to make transformational progress in its competitiveness and share of global and regional trade. To do so will necessitate addressing the various parameters that impinge on the continent's competitiveness, trade performance and economic development. In this regard enhancing access and exploitation capacity in the AMD provides substantial economic opportunities and potential with improvements, including supporting efforts to boost intra-African trade and the creation of Continental Free Trade Area (CFTA) . In view of Africa's trade performance, the continent has to make its maritime transport industries (ship building, marine equipment and port industries) more competitive in the regional and global markets.
85. Although maritime ports play a vital role in developing world trade and commerce, most ports in Africa are small and very few are capable of handling some of the largest ships. Apart from limitations of geography and siltation, a number of the ports also suffer from capacity constraints. The 6th Ordinary Session of the AU Ministers of Trade held in Kigali from 29 October – 2 November 2010 took a Decision to fast track the establishment of a Continental -African Free Trade Area (CFTA) which was subsequently endorsed AU Assembly of Heads of States and Government and which also called for the focus of its January 2012 Ordinary Session to be on the theme “Boosting Intra-African Trade” and poor performance (in terms of port dwell time of vehicles). Given the size of many African ports and the poor state of road networks the volume of container traffic passing through marine ports is far less than their handling capacities. Currently, inland waterways in the continent are insufficiently utilized and in most cases poorly developed, which adds to difficulties in conducting business among Africa countries. To supplement the ports, rivers and lakes could serve as an inexpensive, energy efficient and environmentally friendly form of transport and provide tremendous prospects for penetrating land-connected countries. But exploitation of these inland waterways is one of the weakest links in the transport system. Further, improving the connectivity and access constraints within and between African countries to internal and external market destinations would greatly strengthen the competitiveness of countries, regions and the continent. This shall include a feasibility survey for the creation of a Pan-African owned Shipping Line.
86. In cooperation with relevant stakeholders such as the UNESCO's Intergovernmental Oceanographic Commission (IOC), a continental wide dynamic and multidisciplinary Oceans and Seas Research Institute of Africa (OSERIA) shall be established as soon as possible by the AU to undertake marine scientific and technical surveys and research activities in the whole AMD. The OSERIA will promote scientific research and understanding of the environment for protection, economic activity or conservation. This will also include stepping up search for undersea mineral reserves in the whole AMD.
87. The AU shall encourage Member States to develop an Industrial Benefits Policy (IBP), a market-driven policy that will ensure that Member States benefit from all marine related procurement. IBP will require that non-African companies that win marine sector related contracts with AU Member States undertake business activities in the said Member State at the same value of the contract they have been awarded, over a specified period of time (e.g., they must buy goods and/or services

from the companies of the said Member States). The IBP obligations are to be contractual commitments and part of overall contracts.

88. In this regard, the AU shall develop an ICAM Plan that would map out strategies to provide for the best long term and sustained use of marine natural resources and for perpetual maintenance of the most beneficial natural environment. The ICAM plan will consider, coordinate and integrate the interests of all appropriate economic sectors in such a way as to establish a balance between the special conditions of marine resources conservation and economic development. The plan will harmonize the different sectors pursuing marine resources exploitation such as fisheries, tourism, municipal discharge, oil, gas and mineral exploration, scientific research and marine transport.
89. Sufficient knowledge about marine resources is a precondition for sound management of the resources. Local traditional knowledge can play an important role in the management of marine resources. In drawing up the ICAM plan, therefore, the AU will, to the best extent possible, make use of available local traditional knowledge.
90. Furthermore, there will also be a need to better understand the requirements of marine related SMEs in terms of better access to financing, improved regulatory frameworks and better linkages to regional value chains.
91. Concerning the facilitation of maritime trade, emphasis should be put on setting up of infrastructures and support equipments to shippers, to include: single windows, logistic platforms, dry docks, warehouses, satellite tracking of containers.

#### XV. CAPACITY AND CAPABILITY BUILDING.

92. The AU shall encourage sub-regional cooperation in the construction and equipping of standardized commercial vessels, patrol vessels and other specific naval vessels, machinery and electrical installations and life-saving appliances in Africa. Efforts shall be intensified with RECs/RMs and Member States, to significantly improve Africa's share of global ship ownership by gross tonnage from 0.9% to at least 7% by 2050.
93. In order to improve the picture of one or more aspects of a REC/RM or Member States' maritime sector and facilitate discussion among actors with maritime responsibilities, the AU shall spearhead a full-scale maritime sector assessment that will lead to the activation of relevant reform programmes. The envisaged Maritime Sector Reform (MSR) shall map and assess existing capabilities and gaps so as to enable improved cooperation, capacity-building and coordination between all stakeholders towards enhancing wealth creation in a safe and secure AMD across each of the six cross-cutting categories of activities in the maritime sector (Commerce, Transport, Extractive Industries, Defence and Security, Tourism, and Education, and Scientific Research). Specifically the four building blocks for capacity and capability building are: i. MDA (MDA architecture design, compliance procedures, public participation, interoperable C4ISR architecture, information sharing, environmental protection); ii. Maritime professionals (recruitment process, leadership doctrine, training, pay and benefits, public support, professional relationship); iii. Maritime infrastructure (piers/quays and port facilities, dockyards/shipyards, command centers, aids to navigation and hydrography infrastructure and facilities, C4ISR infrastructure, maintenance facilities, training facilities); iv. Maritime surveillance and response capabilities

(legal authorities, patrol vessels and operational equipment, command and control, operational procedure, sub-regional and cross-country interoperability).

94. Further SWOT and Gap analysis shall be conducted to make an assessment of the current situation and identify tangible points for reaching intended capacity and capability building aims, to achieve the 2050 AIM Strategy objectives. This systematic approach shall lend itself to a return-on investment understanding of cost of improvements versus cost of doing nothing.

#### XVI. OUTREACH INITIATIVES.

95. Safe, healthy and productive seas and oceans are central to Africans' well-being, economic security and sustainable socio-development. In order to further emphasize our individual and collective responsibility to look after the marine environment and carefully manage its resources, a pan-African "No more sea-blindness" campaign shall be launched by the AU and the RECs/RMs, with a yearly event, including use of global media platforms, to sensitize the general public on the importance of the sea. AU Member States shall undertake to incorporate into their education systems at all levels the significance of their maritime zones as part of their geographical territory. The AU shall organize a Maritime Security and Development Conference (MSD Conference) on an annual basis to bring together cross-sector experts from public and private sectors to exchange views on various cross-cutting marine related issues. Ministerial level participants will also be invited so as to bridge discussions with politics decision makers and uphold the indispensable political will. This will allow the AU, the RECs/RMs, Member States and relevant stakeholders to highlight the many ways in which oceans, seas and inland water ways contribute to society.
96. In 2008, the UN General Assembly designated 8 June the "World Oceans Day"<sup>14</sup>, for promoting links between maritime communities and organizations, and increasing awareness for the importance of Africa's oceans and seas to economic development, environmental sustainability and quality of life throughout Africa's vast coastal area. The AU shall push for the effective observance of this Day within Member States, particularly, by ensuring coherent efforts among national institutions responsible for marine science, marine pollution, nautical training, conservation of fisheries, mammals and other living marine resources as well as their associated ecosystems, maritime administration, safety and security.
97. An African regatta, racing formally structured events with comprehensive rules describing the schedule and procedures of the event, including social and promotional activities which surround the racing events shall be organized on a yearly basis at Community, National and Regional levels to uphold awareness of the outreach initiative.

#### XVII. REPRESENTATION IN INTERNATIONAL INSTITUTIONS.

98. Putting Africa's maritime sector in the center stage during international discussions associated with African or global maritime agenda is crucial for long-lasting, meaningful development of AMD. Therefore, AU shall push for a right-sized representation of the African continent in the various organs of marine related international institutions, so as to ensure that the voices of Africa are properly heard in relevant international forums.

## XVIII. RESOURCES STRATEGY.

99. At the AU level, the 2050 AIM Strategy Task Force was set up on 3 June 2011. As soon as possible, the AU shall establish a standalone Department of Maritime Affairs (DMA) to develop and coordinate all policies implementation on the AIM Strategy in AMD. The DMA will work on enhancing collaborative, concerted, cooperative, coordinated, coherent and trust-building efforts throughout the continent and with partners to augment global maritime safety and security standards. The DMA shall seek to assess and realize the economic multiple co-benefits potential of Africa's millions of hectares of marine area; promote the sustainable development of marine industry through strategic funding programmes and essential scientific services; and safeguard Africa's marine environment through research and environmental monitoring. The DMA shall strive to expand and link Africa's cooperative efforts beyond and across traditional regional maritime boundaries, and bridge Africa's initiatives to build a network of partnership that is as global in nature as are the world's common maritime threats and challenges.
100. In partnership with all relevant stakeholders, the DMA shall develop a comprehensive long-term generative strategy of human and material resources development aimed at creating the required means to sustain the 2050 AIM Strategy. This should be complementary to the Logistic Strategy approach prevalent within development interventions undertaken in Africa which does not allow enough scope for the continent to generate its own resources to address development challenges. At regional levels, DMA shall set up inter-agency committees with designated Focal Resolution 63/111, paragraph 171. Points to monitor progress and review the 2050 AIM Strategy implementation blocks in the RECs/RMs.
101. The AU shall establish the African Naval Architects and Marine Engineers Forum (ANAMEF) that will provide a forum for the advancement of marine engineering profession in Africa as applied to the marine field. The ANAMEF will be dedicated to advancing the art, science and practice of naval architecture, shipbuilding and marine geo-engineering. It is to realistically plan to design and build (in Africa) quality ships in order to top up its yards and marine equipment industries and generate a wide range of specialized skillful manpower. Member States within RECs/RMs shall be encouraged to join efforts towards standardizing shipbuilding activities with a view to achieving economy of scale.
102. The AUC shall establish the African Safety of Navigation Forum (ASNF) that will provide a platform for the advancement of the implementation, compliance with, and sustainability of Safety of Navigation as provided for in Chapter V of the International Convention on the Safety Of Life At Sea (SOLAS) 1974.
103. To sustain maritime viability in Africa, a 2050 AIM Strategy Capital Fund (2050 AIMSCAF) to provide research funds and equity venture capitals to new and expanding marine sector projects throughout Africa shall be set up as soon as possible. The 2050 AIMSCAF investors will include Member States as well as private sector and other investment fund in and out of Africa. It will also co-invest with, arrange and/or lead a syndicate of investors as appropriate to a transaction.
104. The AU shall establish a 2050 AIM Strategy High Level College of Champions (2050 AIM Strategy HLC2) to champion the 2050 AIM Strategy. Composed of selected very high profiled African leaders, the 2050 AIM Strategy HLC2 is to leverage, through sustained lobbying throughout Africa and around the world, the

necessary tangible and intangible sources of power, political will and buy-in, as well as marshal the required resources for the implementation of the 2050 AIM Strategy.

#### XIX. RESULT-BASED MONITORING AND EVALUATION.

105. The 2050 AIM Strategy is to be reviewed every three (3) years to ensure alignment of the strategic objectives with global geo-strategic contexts.
106. Each REC/RM and AU Member State should designate a focal point to facilitate coordinated, smooth, timely, and effective information and communications flow among the Member States and the Regional MHQs and MOCs consistent with the purpose and scope of this 2050 AIM Strategy.
107. The AU, the RECs/RMs, Member States and relevant stakeholders shall set up a Steering Committee to address monitoring, evaluations and reports for the 2050 AIM Strategy to track progress towards the End State, and to enable refocusing the key performance areas and the lines of actions.
108. The development of the African Monitoring Evaluation and Reporting Tool (AMERT) software by the AU will help monitor all kinds of indicators, both qualitative and quantitative. 32 SKD Progress in implementation will be closely coordinated to ensure high-level of accomplishment of programme activities and the attainment of the desired results.

#### X. RISK STRATEGY.

109. In order to define how risks will be managed throughout the lifetime of the 2050 AIM Strategy, a Risk Strategy and supporting plan acknowledging actual and potential threats to its successful delivery and determining the activities required to minimize or eliminate them shall be developed and reviewed regularly.
110. The Risk Strategy will include:
  - a) Analysis of risk, which involves the identification and definition of risks, plus the evaluation of potential impact and consequent action;
  - b) Risk management, which covers the activities involved in the planning, monitoring and controlling of actions that will address the threats and problems identified, so as to improve the likelihood of the 2050 AIM Strategy achieving its stated objectives.

#### XXI. CONCLUSION.

*“More than ever before in human history, we share a common destiny. We can master it only if we face it together”. (Kofi Annan, Former UN Secretary-General.)*

111. Full scale top-down and bottom-up efforts synchronized, this 2050 AIM Strategy is not an end, but it is an avenue to get to the End, which is growth in Africa. It presents a vision for the achievement of maritime viability for the people and interests of the whole African continent. Moreover, it underscores the AU’s commitment to strengthening our regional and international partnerships and advancing economic well-being around the globe. As a vision for the future, it certainly faces some serious challenges. Collectively, these challenges can and shall be overcome. There is no doubt that this occurrence will lead to the planet’s geo-strategic return to the lost afrocentricity.

112. Thus, as Africa is now navigating its future, effective implementation of this 2050 AIM Strategy will require enhanced and committed cooperation from local communities, Member States, RECs/RMs, the AU and the broader international community. It will also require a concerted application of a collective endeavor to enhance maritime viability frameworks; deploy layered approach through information sharing based on military sea power, law enforcement authorities, and private sector partners' competencies; pursue scientific research and development. It will also improve Africa's response posture to deal with any incident which may occur. It will require the utmost political will of Member States.

APPENDIX  
XI

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AFRICAN CHARTER ON MARITIME SECURITY AND SAFETY AND  
DEVELOPMENT IN AFRICA  
(LOMÉ CHARTER)

PREAMBLE

We, the Heads of State and Government of the Member States of the African Union (AU);  
CONSIDERING the Constitutive Act of the African Union of 11 July 2000, in particular  
Articles 3 (a), (b), (e) and (f);  
HAVING REGARD to the provisions of the Charter of the United Nations of 26 June 1945,  
in particular its Chapters VI, VII and VIII;  
COGNISANT of the United Nations Convention on the Law of the Sea of 10 December  
1982, in particular its Articles 100, 101 and 105, defining the legal framework for the fight  
against piracy and armed robbery against ships and the International Convention for the  
Safety of Life at Sea, 1 November 1974;  
CONSIDERING the International Convention for the Prevention of Pollution from Ships  
of 2 November 1973;  
CONSIDERING the Convention for the Suppression of Unlawful Acts against the Safety  
of Maritime Navigation of 10 March 1988 and its Protocol of 14 October 2005;  
NOTING the Basel Convention on Transboundary Movements of Hazardous Waste and  
their Disposal of 22 March 1989;  
CONSCIOUS of the United Nations Convention against Transnational Organised Crime  
(Palermo Convention) of 15 November 2000, and its three Supplementary Protocols;  
CONSIDERING the Bamako Convention on the Ban on the Import into Africa and the  
Control of Transboundary Movement and Management of Hazardous Wastes within Africa  
of 30 January 1991;  
CONSIDERING also the Convention for the Suppression of Unlawful Acts against the  
Safety of Maritime Navigation adopted in Rome on 10 March 1988;  
RECALLING the provisions of the OAU Convention on the Prevention and Combating of  
Terrorism of 14 July 1999 and the Protocol to the OAU Convention on the Prevention and  
Combating of Terrorism of 1 July 2004;  
FURTHER RECALLING the provisions of the Revised African Maritime Transport  
Charter of 26 July 2010;  
MINDFUL of the African Union Agenda 2063 and the United Nations 2030 Agenda;  
FURTHER MINDFUL of the relevant provisions of the United Nations Security Council  
Resolutions, which call for the development and implementation of regional, sub-regional  
and national maritime safety and security and flight against piracy strategies;  
RECALLING 2050 Africa's Integrated Maritime Strategy (2050 AIM Strategy) adopted  
on 27 January 2014, whose implementation shall be in conformity with International  
Maritime Law;  
AWARE of the geostrategic importance of the seas, oceans and inland waterways in the  
socio-economic development of Africa and their role in the sustainable development of the  
continent;  
FURTHER CONSIDERING that the persistence of conflicts constitute a serious threat to  
peace and the security and undermines our efforts to raise the standard of living of our  
peoples;  
DEEPLY CONCERNED by the scourge of terrorism, extremism in all its forms and  
transnational organised crime as well as the different threats against peace and security in  
Africa;

ACKNOWLEDGING that the proliferation of small arms and light weapons as well as cross-border crime contribute to the spread of insecurity and instability and pose serious risks to international maritime navigation;

REAFFIRMING our commitment to combat maritime crime, threats and challenges to protect and secure our seas and oceans;

CONVINCED that the prevention, management and the eradication of these scourges can only succeed through the enhancement of cooperation, with a view to coordinating the efforts of coastal, island and land-locked African States within the framework of the African Union;

CONCERNED about the protection of biodiversity and the sustainable use of marine resources of the planet in accordance with the Convention on Biological Diversity, adopted in Rio de Janeiro, on 5 June 1992, the Convention on the Protection, Management and Development of the Marine and Coastal Environment in Eastern Africa, adopted in Nairobi on 21 June 1985 and the Convention for Cooperation in Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region adapted in Abidjan on 23 March 1981;

DEEPLY COMMITTED to peace and security in the Mediterranean Sea, the Red Sea, the Gulf of Aden, the Atlantic Ocean and the Indian Ocean, and WELCOMING the determination, through Maritime Strategies of the Regional Economic Communities/Regional Mechanisms, the Indian Ocean Commission, and the Gulf of Guinea Commission to work closely with the Commission of the African Union on the implementation, in conformity with International Maritime Law, of the 2050 AIM Strategy; ALSO WELCOMING the convening Yaoundé, Cameroon from 24 to 25 June 2013 of the Joint Summit of the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS) and the Gulf of Guinea Commission (GGC) on Maritime Safety and Security, which culminated in the establishment of the Interregional Coordination Centre (ICC) based in Yaoundé, Cameroon.

FIRMLY RESOLVED to work tirelessly to ensure peace, security, safety and stability, protection of the marine environment and facilitation of trade in the maritime space and development of our countries;

HEREBY AGREE AS FOLLOWS:

## CHAPTER I: GENERAL PROVISIONS

### ARTICLE 1 DEFINITIONS

1) For the purpose of this Charter, the following terms and expressions shall apply: “African Space Policy and Strategy” refers to the first concrete steps to realize an African Space Programme, as one of the flagship programmes of the AU Agenda 2063 adopted on 31 January 2016;

“2050 AIM Strategy” refers to the 2050 Africa’s Integrated Maritime Strategy adopted by the Assembly on 27 January 2014;

“Armed robbery against ships” means 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 or against any persons or property on board such a ship, in an area failing within the jurisdiction of a State;

“Assembly” means the Assembly of Heads of State and Government of the African Union;

“AU Agenda 2063” refers to the African Union vision adopted on 27 January 2014;

“Bamako Convention” refers to the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes with Africa adopted by the Organisation of African Unity on 30 January 1991;

“Blue/Ocean Economy” means sustainable economic development of oceans using such technics as regional development to integrate the use of seas and oceans, coasts, lakes, rivers ,and underground water for economic purposes, including, but without being limited to fisheries, mining, energy ,aquaculture and maritime transport, while protecting the sea to improve social wellbeing;

“Charter” means the African Union Charter on Maritime Security and Safety and Development in Africa;

“Coastal State” refers to any state having a coast;

“Commission” means the African Union Commission;

“Drug trafficking” means the global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws;

“Flag State” means – the State under whose laws a vessel is registered or licensed which has authority and responsibility to enforce regulations over vessels registered under its flag, including those relating to inspection, certification, and issuance of safety and pollution preventing documents.

“Illegal, unreported and unregulated (IUU) fishing” means:

- i. Illegal fishing means activities:
  - a) Conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State ,or in contravention of its laws and regulations;
  - b) Conducted by a vessel flying the flag of State that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
  - c) In violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.
- ii. Unreported fishing means fishing activities:
  - a) Which have not been reported, or have been misrepresented, to the relevant national authority, in contravention of national laws and regulations; or
  - b) Undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.
- iii. Unregulated fishing means fishing activities:
  - a) In the area of application of relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
  - b) In areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State Responsibilities for the conservation of living marine resources under International Law.

“Inland waterways” means any navigable rivers, creeks, lakes, tidelands, lagoons, below water baseline, or channel leading into such place having facilities, harbours, berths, jetties, pontoons or buoys and wharves within the limits of the inland waterways in any place in a country and includes any place declared to be an inland waterway under relevant national legislation, as defined in the 2050 AIM Strategy;

“International Maritime Organisation (IMO) SOLAS Convention” refers to the International Maritime Organisation International Convention for the Safety of Life at Sea of 1 November 1974;

“Marine biodiversity” refers to the variety and variability of life on Earth; it is a measure of the variety of organisms’ present in different ecosystems including genetic variations, ecosystems variations or species variations (number of species) within the Maritime Domain;

“Marine Governance” means the national and international, legal and regulatory framework and associated enforcement processes that ensure the peaceful and sustainable use of the seas for commerce, food, energy and raw material;

“Marine Pollution” refers to the introduction and or spread of invasive organisms into the ocean or the harmful, or potentially harmful effects resulting from the entry into the ocean of chemicals, particles, industrial, agricultural and residential waste or noise and any other polluting factors carried by means of air or land pollution;

“Marine Resources” means the things that plants, animals and humans need for life that originates in the sea;

“Maritime Domain” refers to all areas and resources of, on, under, relating to, adjacent to, or bordering on the sea, ocean or lakes, intra-coastal and inland navigable waterways, including all maritime-related activities, infrastructure, cargo, vessels and other means of conveyance, it also includes the air above the seas, oceans, lakes, intra-coastal and inland navigable waterways and oceans electromagnetic spectrum as well, as defined in the 2050 AIM Strategy;

“Maritime Safety” means all measures taken for the safety of ships and offshore installations, their crew and where appropriate, their passengers, the safety of the navigation and the facilitation of maritime traffic, maritime infrastructure, maritime facilities and maritime environment;

“Maritime Security” means the prevention of and fight against all acts or threats of illicit acts against a ship, its crew, and its passengers or against the port facilities, maritime infrastructure, maritime facilities and maritime environment;

“Maritime Territories” means maritime spaces under the jurisdiction or responsibility of the State Party;

“Maritime Zones” means maritime zones as defined in the United Nations Convention of the Law of the Sea (UNCLOS) adopted on 10 December 1982;

“Member State” means a Member State of the African Union;

“Palermo Convention” refers to the United Nations Convention against Transnational Organized Crime adopted by the United Nations General Assembly on 15 November 2000;

“Pavilion State” means the state under whose legislation a merchant ship is registered with and which has authority and responsibility to ensure compliance with the regulations on ships flying its flag, including regulations relating to inspection, certification and issuance of safety and anti-pollution documents;

“Piracy” means:

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

“Pirate Ship” means a ship under the effective control of individuals who have the intention to use it to commit such an act as long as they are under the control of these individuals;

“Port State Control” means the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules;

“Revised African Maritime Transport Charter” refers to the Revised African Maritime Transport Charter adopted by the African Union on 26 July 2010;

“Requested State” means the State that is requested for something;

“Requesting State” means the State that is requesting something;

“Ship” means a vessel or mobile facility of any type whatsoever operating in the marine and or inland waterways environments and includes hydrofoil boat, aircushion vehicles, submersibles, floating craft and fixed or floating platforms operated for the purpose of providing movements for goods and passengers and the provision of marine services;

“Signatory” means a Member State that has signed this Charter;

“States Parties” means Member States that have ratified, accepted, approved or acceded to this Charter in accordance with their respective constitutional rules and the Charter has entered into force for those States;

“Subsidiarity Principle” refers to the principle that seeks to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority;

“Terrorist Acts” refers to terrorist:

- a) Any act or threat to act in violation of the criminal laws of the State Party likely to endanger the life, physical integrity, freedoms of an individual or group of individuals, which results or may result in the damages to private or public property, natural resource, the environment or cultural heritage and committed with the intention of :
  - I. Intimidating, creating a situation of terror, forcing, exerting pressure or compelling any government, body, institution, population or section thereof to take or refrain from taking any initiative, adopt, abandon any particular standpoint or act according to certain principles;
  - II. Disrupting the normal functioning of public services, providing essential services to populations or creating a crisis situation within the populations;
  - III. Creating general insurrection in a State Party.
- b) Any promotion, financing, contribution, order, aide, incitement, encouragement, attempt, threat, conspiracy, organization or equipment of any individual with the intention of committing any act mentioned in paragraphs a)(I) to (III).

“Trafficking in persons” means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation;

“Transnational Organised Crime” means organized crime coordinated across national borders, involving groups of three or more persons existing for a while acting together, to or committing one or more serious offences to obtain, directly or indirectly, a financial or other material benefit or networks of individuals working in more than one country to plan and execute illegal business ventures. In order to achieve their goals, these criminal groups use systematic violence and corruption;

“United Nations 2030 Agenda” refers to the United Nations plans for achieving a better future for all adopted by the United Nations General Assembly on 25 September 2015;

“UN Basel Convention” refers to the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted by the United Nations General Assembly on 31 April 1989; and

“UNCLOS” refers to the Convention on the Law of the Sea adopted by the United Nations on 10 December 1982.

2) In this Charter, any references to sea includes oceans and inland waterways.

## ARTICLE 2 PRINCIPLES

Each State reaffirms its commitment to the principles and objectives contained in the Charter of the United Nations adopted on 26 June 1945, the Constitutive Act of the African Union adopted on 11 July 2000, the Universal Declaration of Human Rights adopted on 10 December 1948, the African Charter of Human and Peoples Rights adopted on 27 June 1981, the Agenda 21 on Sustainable Development, adopted I Rio de Janeiro, on 14 June 1992, the Palermo Convention adopted on 15 November 2000, the Bamako Convention adopted on 30 January 1991, and other relevant legal instruments as well as the following fundamental principles :

- a) The promotion of peace, security, stability and development;
- b) The protection of fundamental human rights and freedoms, as well as the observances of the rules of International Humanitarian Law;
- c) The free movement of people and goods;
- d) The sovereign equality and interdependence of the Member States;
- e) The territorial integrity and national sovereignty of Member States; and
- f) Subsidiarity.

### ARTICLE 3 OBJECTIVES

The objectives of the present Charter shall be to:

- a) Prevent and suppress national and transnational crime, including terrorism, piracy, armed robbery against ships, drug trafficking, smuggling of migrants, trafficking in persons and all other kinds of trafficking transiting through the sea and IUU fishing;
- b) Protect the environment in general and the marine environment in the space of coastal and insular States, in particular;
- c) Promote a flourishing and sustainable Blue/Ocean Economy;
- d) Promote and enhance cooperation in the fields of maritime domain awareness, prevention by early warning and fight against piracy, armed robbery against ships, illicit trafficking of all kinds, the pollution of seas, cross-border crime, international terrorism and the proliferation of small arms and light weapons;
- e) Establish appropriate national, regional and continental institutions and ensure the implementation of appropriate policies likely to promote safety and security at sea;
- f) Promote the inter-agency and transnational coordination and cooperation among Member States, within the spirit of the African Peace and Security Architecture of the African Union;
- g) Boost the implementation of the 2050 AIM Strategy in conformity with International Maritime Law;
- h) Promote the training and capacity building of the maritime, port and industrial sector, for the safe and responsible use of the maritime domain;
- i) Cooperate in the field of Search and Rescue in line with the IMO SOLAS Convention;
- j) Further sensitize communities living next to seas for sustainable development of African coastlines and biodiversity;
- k) To promote and protect the right of access to the sea of landlocked countries in accordance with the provisions of this Charter, the legal instruments of the AU and other regional and international instruments;
- l) Raise the level of social welfare of the concerned population;

### ARTICLE 4 SCOPE

The present Charter shall cover:

- a) The prevention and control of all transnational crime at sea, including terrorism, piracy, armed robbery against ships, drug trafficking, smuggling of migrants, trafficking in persons and all other kinds of trafficking, IUU fishing, prevention of

- the pollution at sea and other unlawful acts at sea, under the jurisdiction of a State Party in its area of responsibility;
- b) All measures to prevent or minimize accidents at sea caused by ships or crew or aimed at facilitating safe navigation;
  - c) All measures for the sustainable exploitation of marine resources and optimization of the developmental opportunities of sectors related to the sea.

## CHAPTER II: MEASURES TO PREVENT AND COMBAT CRIMES AT SEA

### ARTICLE 5

#### SOCIO-ECONOMIC MEASURES TO PREVENT CRIMES AT SEA

Each State Party shall endeavour to:

- a) Continue its efforts to take appropriate measures to create productive jobs, reduce poverty and eliminate extreme poverty, encourage awareness of maritime related issues in order to establish the best living conditions, and to strengthen social cohesion through the implementation of a fair, inclusive and equitable policy to address the socio-economic issues;
- b) Stimulating the creation of jobs along the coasts, particularly by codifying and promoting artisanal fishery through the training of sector stakeholders, encouraging the local processing of fishery products, and facilitating their marketing at national, sub-regional and international levels.

### ARTICLE 6

#### STATES PARTIES RESPONSIBILITY

Each State Party undertakes, according to its own realities, where applicable, to:

- a) Organise its actions at sea and to develop its capacity to protect its maritime area and to provide assistance to other States Parties or third State as may be required;
- b) Strengthen law enforcement at sea, through the training and the professionalization of navies, coast guards, and agencies responsible for maritime safety and security, custom authorities and port authorities;
- c) Maintain patrols, surveillance and reconnaissance in the anchorage areas, the exclusive economic zone and continental shelf for law enforcement, search and rescue operations.

### ARTICLE 7

#### NATIONAL COORDINATING STRUCTURES

- 1) Each State Party shall take measures to curb maritime crime and other forms of unlawful acts, as part of on-going dialogue and effective cooperation between the relevant national institutions.
- 2) Each State Party shall establish a national coordinating structure and centre for awareness on maritime related issues to ensure the coordination of actions aimed at safeguarding and enhancing maritime safety and security.

### ARTICLE 8

#### HARMONIZING OF NATIONAL LEGISLATION

Each State Party shall, where appropriate:

- a) Harmonise its national laws to conform with relevant international legal instruments including UNCLOS, SOLAS and the Protocol of the 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 1 November 2005; and
- b) Train the staff responsible for their implementation, in particular personnel within the justice system.

ARTICLE 9  
RESOURCES TO GUARANTEE MARITIME SECURITY AND SAFETY

Each State shall adopt policies that guarantee the availability of resources either by public funds or by forging public-private partnerships, needed for investment in equipment, operations and training in the field of maritime security and safety in accordance with their domestic procedures.

ARTICLE 10  
FINANCIAL OBLIGATIONS OF FLAG STATES AND COASTAL STATES

Each State Party shall encourage cooperation between Flag States and Coastal States, so that, in a spirit of co-responsibility, the financial obligations of security and safety in the African maritime domain are shared and supported by the different actors concerned.

ARTICLE 11  
MARITIME SECURITY AND SAFETY FUND

State Parties undertake to establish a Maritime Security and Safety Fund.

Chapter III: MARITIME GOVERNANCE

ARTICLE 12  
MARITIME GOVERNANCE

Each State Party shall ensure good maritime governance based on better information sharing, effective communication, and efficient coordination of their actions.

ARTICLE 13  
MARITIME BOUNDARIES

Each State Party shall endeavour to delimit its respective maritime boundaries in conformity with provisions of relevant international instruments.

ARTICLE 14  
PROTECTION OF MARITIME TERRITORIES

Each State Party shall protect its maritime territories and ensure its maritime security and safety in conformity with the relevant international laws and principles.

ARTICLE 15  
FLAG STATE RESPONSIBILITIES AND PORT STATE CONTROL

Each State Party shall fulfil its Flag State and Port State Control responsibilities within their jurisdiction to;

- a) Eradicate sub-standard shipping practices;
- b) Enhance security and safety; and
- c) Protect the marine environment from pollution.

ARTICLE 16  
TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS BY SEA

Each State Party shall develop and implement sound migration policies aimed at eliminating trafficking in human beings, especially women and children, as well as smuggling of migrants by sea.

ARTICLE 17  
DRUG TRAFFICKING

Each State Party shall develop and implement balanced and integrated strategies aimed at combatting drug trafficking and related challenges in the maritime domain.

ARTICLE 18  
SAFETY OF NAVIGATION

Each State Party undertakes to promote safety of navigation as well as the protection and sustainable use of the maritime environment by:

- 1) Providing appropriate aids to navigation according to available resources;
- 2) Ensuring the best possible standardisation in aids of navigation; and
- 3) Facilitating access to information relating to aids of navigation.

CHAPTER IV: DEVELOPMENT OF THE BLUE/OCEAN ECONOMY

ARTICLE 19  
EXPLOITATION OF THE MARITIME DOMAIN

- 1) Each State Party shall explore and exploit their respective maritime domains in accordance with the relevant international principles and standards.
- 2) Each State Party shall facilitate the engagement of non-state actors, especially the private sector, in the development and implementation of the blue/ocean economy.

ARTICLE 20  
FISHERIES AND AQUACULTURE

- 1) Each State Party shall implement appropriate fisheries and aquaculture policies for the conservation, management and sustainable exploitation of fish stocks and other biological resources.
- 2) Each State Party shall carry out the necessary reforms for good governance in the fishery sector and the promotion of continental fishing and aquaculture to contribute to the creation of employment in the sector, reduced food insecurity and malnutrition and promote economic diversification.
- 3) Each State Party shall take appropriate measures to effectively combat IUU fishing activities within the framework of its respective national jurisdictions and to take legal steps aimed at prosecuting the perpetrators engaged in IUU fishing.

ARTICLE 21  
CREATION OF WEALTH AND JOBS THROUGH COASTAL AND MARITIME TOURISM

Each State Party undertakes to promote coastal and maritime tourism as a key sector, with due consideration to the environmental dimensions, that generates considerable revenue and creates jobs, and agree to promote the sustainable development of all associated activities.

ARTICLE 22  
INTEGRATED HUMAN RESOURCES STRATEGY FOR MARITIME DEVELOPMENT

- 1) Each State Party shall develop an integrated human resources strategy for the maritime sector to support the provision of skills, taking into account gender balance, in the entire maritime value chain which includes shipping and logistics, offshore activities, fishing, coastal and maritime tourism, and safety and security.

- 2) Each State Party shall set up human resources development agenda, including training, in accordance with the potential for economic growth and job creation opportunities more widely along the maritime value chain.

ARTICLE 23  
COMPETITIVENESS IMPROVEMENT

Each State Party shall improve competitiveness of its maritime industries, particularly in international trade. To this end, each State Party commits to:

- a) Encourage the creation and development of African maritime companies;
- b) Promote access of African operators to maritime transport auxiliary services and professions;
- c) Create an enabling environment to foster equity investment by African operators in foreign companies operating in Africa in maritime transport auxiliary services and professions;
- d) Prioritize trans-African cabotage to national and regional African maritime companies, in order to promote intra-African trade and facilitate the socio-economic interaction of the continent.

ARTICLE 24  
DEVELOPMENT OF INFRASTRUCTURE AND EQUIPMENT RELATING TO MARITIME  
ACTIVITIES

- 1) Each State Party shall develop and strengthen its infrastructure to enable its port facilities to achieve its economic growth potential and competitiveness.
- 2) Each State Party shall encourage public-private partnerships to facilitate modernisation of African maritime industries in order to provide a standard quality services and contribute to the attainment of the objectives of sustainable development.

ARTICLE 25  
MEASURES TO MITIGATE CLIMATE CHANGE AND ENVIRONMENTAL THREATS

- 1) Each State Party shall adopt specific adaption and mitigation measures to contain climate change and environmental threats to the marine environment in conformity with relevant international instruments.
- 2) Each State Party shall establish information exchange and early warning systems on marine pollution, including the dumping of toxic and hazardous waste and unauthorized emissions from the high seas.

ARTICLE 26  
PROTECTION OF MARINE BIOLOGICAL SPECIES, FAUNA AND FLORA

Each State Party shall preserve the marine environment and protect the biological species of marine fauna and flora in the development process of its environment and biodiversity.

ARTICLE 27  
TOXIC AND HAZARDOUS WASTE DUMPING

- 1) Each State Party shall develop a mechanism for the detection, prevention and reporting of marine pollution, particularly through the dumping of toxic and hazardous waste.
- 2) Each State Party shall prohibit the import, export, handling, accumulation or dumping of trans-boundary hazardous waste, including radioactive materials,

chemical and organic waste in conformity with provisions of the Bamako and Basel Conventions.

#### ARTICLE 28

##### PREVENTION OF ILLEGAL EXPLOITATION AND THEFT OF MARINE RESOURCES

- 1) Each State Party shall endeavour to prevent and effectively fight the illegal exploitation and theft of marine resources in its respective maritime territory.
- 2) Each State Party shall prohibit trade in products derived from illegal exploitation and plundering of marine resources within its maritime domain.
- 3) Each State Party shall prohibit trade in products derived from illegal exploitation and plundering of marine resources from any State Party.

#### ARTICLE 29

##### MARITIME DISASTER RISK MANAGEMENT

Each State Party shall develop an integrated multi-sectoral and multidisciplinary strategy for ensuring disaster risk management and reducing the severity and impacts of disaster.

### CHAPTER V; COOPERATION

#### ARTICLE 30

##### COOPERATION IN THE EXPLOITATION OF THE MARITIME DOMAIN

Each State Party shall cooperate at national, regional and continental levels, in:

- 1) Developing and exploiting marine resources in their territorial waters through scientific and technological exchanges, partnerships for research and innovation as well as the promotion and strengthening of the blue/ocean economy, in accordance with relevant international principals and standards;
- 2) Facilitating business partnerships in the maritime domain;
- 3) Harnessing state-of-the-art technologies, in conformity with the African Space Policy and Strategy and other relevant instruments for maritime security and safety.

#### ARTICLE 31

##### COOPERATION IN FISHING AND AQUACULTURE

- 1) Each State Party shall cooperate in order to ensure the sustainability of marine biodiversity.
- 2) State Parties shall cooperate within the framework of the Fisheries Committees established by its regional competent bodies and specialized institutions in order to strengthen and promote sustainable management of fishery resources.

#### ARTICLE 32

##### COOPERATION IN COMBATING CRIMES AT SEA

- 1) State Parties shall cooperate and coordinate their actions in combating transnational organized crimes of all kinds including the circulation and trafficking of arms, maritime terrorism, drug trafficking, trafficking in protected species or of its trophies, money laundering and its predicate offences, acts of piracy and armed robbery against ships, taking of hostages at sea, theft of oil and gas, trafficking in persons, smuggling of migrants, pollution of the seas and oceans, IUU fishing, and illegal dumping of toxic and hazardous waste.
- 2) State Parties shall take adequate measures, individually and collectively, to effectively fight organised crime, and ensure that the perpetrators of such crimes are effectively prosecuted and denied the advantage of the proceeds of their crimes.

ARTICLE 33  
MARITIME INFORMATION SHARING

- 1) State Parties shall establish a platform for exchange and sharing of experiences and best practices on maritime safety and security.
- 2) State Parties shall endeavour to develop a system of information-sharing integrating national, regional and continental structures for maritime domain awareness aimed at:
  - a) Preventing the commission of unlawful acts at sea;
  - b) The arrest and detention of individuals preparing to or committing any unlawful acts at sea; and
  - c) The seizure or confiscation of ships and equipment used in the commission of any unlawful acts at sea.

ARTICLE 34  
COOPERATION IN INTELLIGENCE SHARING

State Parties shall encourage cooperation in sharing intelligence between its national services, regional and continental agencies and appropriate international specialized organs, to ensure the effectiveness of the fight against unlawful acts at sea.

ARTICLE 35  
STRATEGIES FOR AWARENESS ON MARITIME RELATED ISSUES

Each State Party shall adopt appropriate maritime strategies for awareness on maritime related issues adapted to its national, regional and international maritime security and safety situations in order to create greater awareness of the seas and oceans.

ARTICLE 36  
SCIENTIFIC AND ACADEMIC COOPERATION

Each State Party shall encourage:

- 1) The strengthening of cooperation between its universities and training and research institutes in relation to seas and oceans including those of the Pan African University;
- 2) Maritime scientific research campaigns for development purposes; and
- 3) Support initiatives by training institutions in respect of capacity building in maritime safety and security.

ARTICLE 37  
CONTINENTAL COOPERATION FRAMEWORK

State Parties shall establish a framework for close cooperation in the field of maritime security and safety with the national cross-sectoral mechanisms, the Regional Economic Communities and other relevant bodies.

ARTICLE 38  
REGIONAL COOPERATION STRUCTURES

State Parties shall establish, where they do not exist, regional cooperation structures in the fight against crime at sea.

ARTICLE 39  
NATIONAL COORDINATION FRAMEWORK

- 1) Each State Party shall develop national legal frameworks to coordinate their respective legal interventions at sea.
- 2) Each State Party shall endeavour to incorporate cooperation mechanisms in its national legal frameworks with a view to effectively combatting crime at sea.
- 3) Each State Party undertakes to promote, strengthen and sustain maritime rescue coordination centres and the maritime rescue sub-centres for the efficient organization of maritime search and rescue services.

ARTICLE 40  
JUDICIAL AND LEGAL COOPERATION

- 1) State Parties agree to mutual judicial and legal cooperation on the basis of the present Charter;
- 2) Each State Party shall cooperate on the basis of its bilateral or multilateral agreements, or in the absence of a cooperation agreement, on the basis of its national legislation.
- 3) Notwithstanding the differences in the legal framework of each State Party, national legislation shall guarantee joint investigation mechanisms, secure information exchange procedures, judicial requests, extradition and transfer of detainees and other related mechanisms.

CHAPTER VI: MONITORING AND CONTROL

ARTICLE 41  
COMMITTEE OF STATE PARTIES

- 1) A 15 – member Committee of State Parties is hereby established which shall be responsible for monitoring the implementation of this Charter and recommending follow-up actions.
- 2) The Committee shall be composed of the Ministers responsible for maritime affairs or such other Ministers or Authorities as may be designated by the Governments of the States Parties.
- 3) The Committee members shall be elected every three years, from among the five regions of the continent on the basis of rotation, gender and geographical distribution in accordance with AU procedures and practice.
- 4) State Parties shall adopt the rules of procedure of the Committee.

ARTICLE 42  
STATE PARTIES REPORTS

Each State Party to the present Charter shall undertake to submit to the Committee a report on the measures they have undertaken to give effect to the provisions of this Charter:

- 1) Within two years of the entry into force of the Charter for the State Party concerned; and
- 2) Thereafter, every five years.

ARTICLE 43  
REPORTS OF THE COMMITTEE

The Committee of the State Parties shall present, every two years, to the Assembly of the Union, a report on the progress made in the implementation of the Charter.

ARTICLE 44  
SECRETARIAT OF THE COMMITTEE

The commission shall act as the Secretariat of the Committee of the States Parties.

ARTICLE 45  
SETTLEMENT OF DISPUTES

- 1) Any dispute or differences arising between State Parties with regard to the interpretation, application and implementation of this Charter shall be settled by mutual consent between the States concerned, including through negotiations, mediation, conciliation or other peaceful means;
- 2) In the event of failure by the disputing parties to settle the dispute or difference in accordance with Article 45(1), the disputing Parties may, by mutual consent, refer the dispute to:
  - a) The African Court of Justice Human and Peoples' Rights, where applicable; or
  - b) An Arbitration Panel of three (3) Arbitrators whose appointment shall be as follows:
    - I. Two (2) Arbitrators each appointed by a Party to the dispute; and
    - II. A third Arbitrator who shall be President of the Panel and appointed by the Chairperson of the African Union Commission.
- 3) The decision of the Panel of Arbitrators shall be finding and binding.

ARTICLE 46  
ANNEXES, GUIDELINES AND MODALITIES

- 1) Member States shall adopt, as and when necessary, Annexes to complement this Charter. The Annexes shall be an integral part of this Charter.
- 2) A State Party which accedes to this Charter prior to the adoption of Annexes retains the right to subsequently accede to the Annexes.
- 3) In the event of a State Party acceding to this Charter after the adoption of annexes, the State Party must declare its intention to be bound by one or all of the Annexes.
- 4) State Parties shall also adopt guidelines and modalities to guide State Parties in fulfilling their obligations under this Charter.

CHAPTER VII: FINAL PROVISIONS

ARTICLE 47  
POPULARIZATION OF THE CHARTER

Each State Party shall take all appropriate measures to ensure the widest possible dissemination of this Charter.

ARTICLE 48  
SAFEGUARD CLAUSE

- 1) No provision in this Charter shall be interpreted as derogating from the principles and values contained in other relevant instruments for the promotion of the Maritime Security and Safety and Development in Africa.
- 2) Nothing in this Charter shall be construed as preventing a Party from taking any action, compatible with the provisions of the United Nations Charter or any other international instrument and that is limited to the exigencies of the situation, as it considers necessary to its external or internal security.

ARTICLE 49  
SIGNATURE, RATIFICATION AND ACCESSION

- 1) This Charter shall be open to Member States of the Union for signature, ratification or accession.

- 2) The instrument of ratification or accession to the present Charter shall be deposited with the Chairperson of the Commission who shall notify Member States of the Union of the deposit of the instruments of ratification or accession.

ARTICLE 50  
ENTRY INTO FORCE

- 1) This Charter shall enter into force thirty (30) days after the deposit of the fifteenth (15<sup>th</sup>) instrument of ratification.
- 2) The Chairperson of the Commission shall notify all Member States of the entry into force of the present Charter.
- 3) For any Member State Acceding to the present Charter, the Charter shall come into force in respect of that State on the date of the deposit of its instrument of accession.

ARTICLE 51  
RESERVATIONS

- 1) A State Party may, when, ratifying or acceding to this Charter, submit in writing reservation with respect to any of the provisions of this Charter. Reservations shall not be incompatible with the object and purpose of this Charter.
- 2) Unless otherwise provided, a reservation may be withdrawn at any time.
- 3) The withdrawal of a reservation must be submitted in writing to the Chairperson of the Commission who shall notify other States Parties of the withdrawal accordingly.

ARTICLE 52  
DEPOSITORY

This Charter shall be deposited with the Chairperson of the Commission, who shall transmit a certified true copy of the Charter to the Government of each signatory State.

ARTICLE 53  
REGISTRATION

The Chairperson of the Commission shall upon the entry into force of this Charter, register the Charter with the United Nations Secretary General in conformity with Article 102 of the Charter of the United Nations.

ARTICLE 54  
WITHDRAWAL

- 1) At any time after three years from the date of entry into force of this Charter, a State Party may withdraw by giving written notification to the Depository.
- 2) Withdrawal shall be effective one year after receipt of notification by the Depository, or on such later date as may be specified in the notification.
- 3) Withdrawal shall not affect any obligation of the withdrawing State Party prior to the withdrawal.

ARTICLE 55  
AMENDMENT AND REVISION

- 1) Any State Party may submit proposal(s) for the amendment or revision of this Charter. Such proposal(s) shall be adopted by the Assembly.
- 2) Proposals for amendment or revision shall be submitted in writing to the Chairperson of the Commission who shall transmit such proposals to the Assembly at least six months before the meeting at which it shall be considered for adoption.

- 3) Amendments or revisions shall be adopted by the Assembly by consensus or, failing which, by two-thirds majority of the Assembly.
- 4) The amendment or revision shall enter into force thirty (30) days after the deposit of the receipt of the fifteenth (15<sup>th</sup>) instrument of ratification to the Chairperson of the Commission of the African Union.

ARTICLE 56  
AUTHENTIC TEXTS

This Charter is drawn up in four (4) original texts, in Arabic, English, French and Portuguese languages, all four (4) texts being equally authentic.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, has signed this Charter.

ADOPTED BY THE EXTRAORDINARY SESSION OF THE ASSEMBLY, HELD IN LOMÉ, TOGO, ON 15 OCTOBER 2016.