



**A REVIEW OF DEVELOPMENTS IN THE NATURE AND LAW OF
MARITIME PIRACY**

by

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Research dissertation presented to the Unit for Maritime Studies in partial fulfilment of the requirements of the degree *Master of Law in Maritime Law* in approved courses and a minor dissertation.

The other part of the requirements for this degree was the completion of a program of courses.

University of KwaZulu-Natal
DURBAN
January MMVIII

TABLE OF CONTENTS

Prolegomenon

Acknowledgments

List of Cases and Statutes

I	Introduction	1
II	Historical background to maritime piracy	5
	Concise chronicle of piratical incidents	6
	The developing jurisprudence of piracy law	11
	(i) Rex v Dawson	12
	(ii) US v Smith	13
	(iii) The Magellan Pirates	16
	(iv) In re Piracy Jure Gentium	18
III	Maritime piracy in the modern context	20
	Forms of piracy	20
	Impact on marine insurance	24
	Link with terrorism	24
	Summary of forms of piratical acts	25
	Case Studies	26
IV	Maritime piracy trends and statistics	29
V	International legal instruments to counter measure maritime piracy	33
	United Nations convention on the law of the sea (UNCLOS)	34

(i)	Internal waters	35
(ii)	Territorial sea	35
(iii)	Contiguous zone	35
(iv)	Exclusive economic zone	35
(v)	The high seas	35
	Convention for the suppression of unlawful acts against the Safety of maritime navigation (SUA)	36
	Convention for the safety of life at sea (SOLAS) and the International ship and port facility security (ISPS) code	38
	Model national law on acts of piracy and maritime Violence	40
	Maritime Recommendations	41
(i)	Recommendations to governments for preventing and suppressing piracy and armed robbery against ships	42
(ii)	Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing piracy and armed robbery against ships.	43
	IMB Definition	43
VI	Effectiveness and implementation of the international Instruments	45
	UNCLOS provisions	45
	SUA provisions	52
	Implementation of the ISPS Code	54
VI	Position in South Africa	58
	Principal Statutes referring to piracy	58
(i)	Defence Act 42 of 2002.	58
(ii)	Maritime Zones Act 15 of 1994	59
(iii)	Protection of Constitutional Democracy against Terrorist and related activities	

	Act 33 of 2004.	59
	South African Common law	59
	Threat of piracy in South Africa	60
VII	Conclusion	62
VIII	Bibliography	63

PROLEGOMENON

The subject matter of this Dissertation is on MARITIME PIRACY and is to be divorced from the concept of SOFTWARE PIRACY and related concepts which are defined as the act of making illegal copies of video tapes, digital video discs, computer programs, books etc., in order to sell them.

This Dissertation follows the standard format and referencing system prescribed by the *South African Law Journal* and the Law Faculty, Howard College.

ACKNOWLEDGMENTS

This Dissertation would not have been accomplished if it were not for the love and support of my mum and dad, who have given me the necessary inspiration and guidance through each page of this work. I am grateful for the tremendous sacrifices they have made towards my education.

I would like to also express thanks to:

My brother for introducing me to maritime academics in Pretoria;

My supervisor, Advocate A.G. Jeffrey of the Durban Bar for his meticulous review of my work, guidance and assisting me in obtaining rare publications;

The staff at the Howard College Law Library for assisting in research;

All my colleagues and family who have given me every encouragement; and
Dr Henri Fouche of the Tswane University of Technology for his expert assistance and providing me with useful materials.

TABLE OF CASES AND STATUTES

International Conventions and Recommendations:

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South African Legislation

Maritime Zones Act 15 of 1994

Defence Act 42 of 2002

Protection of Constitutional Democracy against Terrorist and Related
Activities Act 33 of 2004

FOR MY PARENTS

and

my life teacher:

His Holiness Sri Swami Sivananda

(1887 -- 1963)

of the Divine Life Society, Himalayas, India

Sine Qua Non

I INTRODUCTION

Water covers around seventy percent of the surface of our globe, which not surprisingly bears the name “the blue planet”. It was inevitable since the appearance of human beings that the sea would play a prominent role in their development. It is through traversing the sea that mutual interpenetration and reciprocal influence of human civilizations have been accomplished¹. The shipping industry is arguably one of the oldest professions in the world, with a development spanning several thousand years. Since the first crude wooden boats ventured on the waters of the Mediterranean Sea in the prospect of trade, the contemporary maritime industry now comprises a global fleet, with a plethora of container and liner ships, cruise and passenger ships, and in 2006 included 10 041 tankers – massive vessels capable in their totality of transporting 387,7 million deadweight tons across the globe². In addition, on board these vessels there are 1,2 million seafarers worldwide³.

Notwithstanding the sea being a vital highway of the world economy, it is also characterised by its perilous nature.⁴ It can be both hostile and treacherous by nature and compounded by the fact that the sea is not a natural habitat for human beings.⁵ The sea is characterised by wide, open water, where there are no visible borders or demarcations and very often can leave a vessel vulnerable.

This vulnerability has been the case since the very beginning of human maritime ventures. It has been recorded that since the days of ancient Greece, that the crime

¹ Okere ‘The Technique of International Maritime Legislation’ (1981) 30 *ICLQ* 514

² Statistics source available on

http://www.isl.org/products_services/publications/pdf/comm_3-2006-short.pdf.

³ Balkin ‘The International Maritime Organisation and Maritime Security’ (2006) 39 *Tulane Mar LJ* 32

⁴ see Okere (note 1 *supra*)

⁵ Fouche ‘Policing Maritime Piracy in Southern Africa’ (2006) 19 *Acta Criminologica* 185

of piracy has been a constant problem of maritime trade affecting at different times each and every maritime region of the world from the Mediterranean and northern European seas to Asia, the Middle East, Africa and the Americas.⁶ Historically, it was an international menace that thrived and subsided in different periods and regions, exterminated from time to time as a result of campaigns by powerful navies.⁷ So widespread has the practice of piracy been over the centuries that it is one of the few activities, and indeed one of the earliest activities to be regarded in international law as a crime.⁸

The word “pirate” is derived from the Greek *peirates*, which was the label for an adventurer who attacked a ship.⁹ Until the last two and a half decades, the press showed little interest in the routine piratical acts being carried out at poorly policed locations.¹⁰ The common perception was that piracy was a crime of antiquity. To most people the surprising thing is not that piracy can be violent but that it is happening at all.¹¹ The substantive offence is not the historical curiosity that it purports to be. Not only has piracy ever been eradicated but the number of pirate attacks has increased incessantly in the recent years. The International Maritime Organisation (IMO) has in recent years compiled reports that graphically illustrate this trend. These trends will be examined in detail in Chapter Four.

⁶ see Balkin (note 3 supra) at 9

⁷ Meija, Mukherjee ‘Selected issues of law and ergonomics in maritime security’ (2004) 4 *JIML* 318

⁸ see Balkin (note 3 supra) at 9

⁹ Johnson, Pladdet ‘An overview of current concerns in piracy studies and new directions for research’ (2003) at 2, available on http://www.marecentre.nl/people_and_the_sea2/documents/piracy.pdf.

¹⁰ Thachuk, Tangredi ‘Transnational Threats and Maritime Responses’ available on http://www.cuni.cz/EJISBT-24-version1-legal_aspectsterrorism_vol2.pdf

¹¹ International Maritime Organisation, *Piracy and Armed Robbery at sea*. (2000) at 1 available on <http://www.imo.org>.

In as much the same way as bacteria thrive in warm, damp and dark environments, the narrow ocean passages in various parts of the world (commonly called “choke points”) such as the Straits of Malacca, conflict zones with weak governance and territorial waters with a lack of credible law enforcement agencies,¹² provide an ideal arena for piracy to flourish. The *modus operandi* of piratical activities has been described by le Roux¹³ in the following terms:

“Pirates are not petty criminals or small-time crooks. They comprise highly organised and structured groups, well connected to international crime syndicates for information and markets, and employ military means in their attacks. They operate off “mother ships” and use high-power fast-attack craft armed with surface-to-surface missiles, rocket-propelled grenades, heavy calibre machine-guns, anti-aircraft guns and even armed helicopters.”

This statement is generally accurate. As a result of these activities, there is a continuing development of international legal instruments under the broad theme of maritime security which have been drafted under the auspices of *inter alia* the United Nations and the IMO. On a domestic level, the fight against piracy and armed robbery against ships is often impeded in some countries by the absence of an effective legislative framework to facilitate not only the investigation of such crimes but also the arrest and punishment of those accused of such acts.¹⁴

This dissertation will analyse the nature of piracy and its legal regime. First, piracy will be attempted to be defined in the historical context. After reviewing the developing jurisprudence, piracy will be examined in the modern context supported by statistics revealing the trends in acts of contemporary piracy. Thereafter, consideration will be given to the piracy provisions in instruments such as

¹² le Roux ‘Experts Warn of Piracy Threat to South African Waters’ *Pretoria News* 27 November 2006.

¹³ *ibid*

¹⁴ see Balkin (note 3 *supra*) at 11

UNCLOS¹⁵ that, it will be proposed are in need of revision given the dramatic changes in the maritime zones and the more practical issue of the geographical locations where piracy is most prevalent today.¹⁶ Notably within areas where only the coastal state can exercise jurisdiction, and if this latter authority refuses outside help, the international community is powerless to do anything against the perpetrators.¹⁷ The international legal instruments will be evaluated to determine their adequacy and practicality. Consideration will be given to the fact that the line differentiating terrorists, resistance fighters from pirates are not easy to draw, because, in certain instances political ambitions could drive the forces that organise and carry out the crime.¹⁸

Finally, these factors will be considered and applied in the South African context since it is a leading maritime nation on the African continent. Further consideration is given to what applicable international instruments and domestic legislation are extant to counteract the effect that piracy would have on the South African economy should the crime manifest within its territorial waters.

¹⁵ United Nations Convention on the Law of the Sea, 1982

¹⁶ see Mejia and Mukherjee (note 7 above) at 321

¹⁷ Teitler 'Piracy in South East Asia, An Historical Comparison' at 74, available on <http://www.marecentre.nl/mast/documents/GerTeitler.pdf>

¹⁸ see International Maritime Organisation (note 11 supra) at 7

II HISTORICAL BACKGROUND TO MARITIME PIRACY

Before an attempt is made to analyse current law and policy, the historical background of piracy will be sketched. This chapter attempts to outline this topic and provide a context within which the development of the international law of piracy can be analysed. The events discussed in this chapter attempt to elucidate significant events in the long history of piracy and where major jurisprudential developments have taken place. A failure to take cognisance of this would be detrimental. It is not without significance that since ancient times piracy could be regarded a maritime undertaking of international scope. By the latter part of the fifteenth century it was an accepted rule that piracy in any form was contrary to all rules of seafaring trade and that the pirate was thus the common enemy of all nations. Most jurists accepted this viewpoint which became an accepted and applied rule of law.¹ The historical relations between nations and the decisions of their courts during the last 600 years provide a useful template or basis to mould modern policies in combating piracy.

At this stage mention must be made of the manner in which popular culture in the contemporary era has viewed the activity of piracy. Gutoff² quotes the longstanding advertising campaign for a popular brand of alcohol, 'Captain Morgan's Spiced Rum', in which a man appears presumably the captain dressed in clothes from the era of Charles II. He is portrayed amongst happy men and women as a fun-loving person who could liven up any party of young professionals. He notes, however, that Captain Morgan in history tortured the inhabitants of Panama

¹ Lennor 'Piracy Cases in the Supreme Court' (1934) 25 *Journal of Criminal Law and Criminology* 532

² Gutoff 'Law of Piracy in Popular Culture' (2000) 31 *J. Mar. L. & Com* 643

City and Portobelo to get them to turn over their riches³ and reports that these sea robbers being romanticised is no surprise as they have become a staple of fiction since antiquity. As recently as the last few years a successful trilogy of motion picture films⁴, featuring a fictional plot, and clearly romanticising the exploits of pirates earned billions of dollars at cinema box offices. Notwithstanding these popular conceptions of piracy which blur the manner in which we view the past, the remainder of this chapter deviates from these stereotype conceptions to set out actual incidents and to highlight the landmark judgments in the Admiralty Courts of England and America.

A) Concise chronicle of piratical incidents

History is replete with piratical activities and ventures made by different nations at different times to control it with diverse treaties, ordinances and arbitrations to regulate its prevalence and attempts by international jurists to define its legal regime. In classical Greek and Roman literature, piracy was an important element of the environment in which maritime law operated. The classical figure of Odysseus narrates how he got the urge to ready some good ships and crews and lead a raid against Egypt. His men came upon disaster when "...[they] getting too cocky and driven by their greed immediately began to plunder the countryside, killing men and carrying off their women and children..." with the result that they were killed or carried off as slaves.⁵ During the time of the philosopher Homer, around the 8th century BC, such lawlessness prevailed on the high seas and the Odysseus tale would be deemed perfectly credible.⁶

³ Ibid

⁴ "Pirates of the Caribbean"

⁵ Robol 'Maritime Law in Classical Greek and Roman Literature' (2000) 31 *J. Mar. l & Com* 522-3

⁶ *ibid*

Piracy was also problematic in the Roman world. Julius Caesar while *en route* to study oratory in Rhodes is reported to have been captured by Cilician pirates.⁷ During the Hellenistic period, circa 310 BC, the historians Diodoros and Strabo relate how the war was waged against pirates in the Black Sea, among them the Achaians, who lived by piracy.⁸ The Eastern Mediterranean has been plagued by piracy since the first ships ventured on its waters. In some periods, a strong naval power, like Athens during her empire, or Rome during the time of Pompey was able to control the sea routes and reduce piracy to a minimum. At other times however, no power was strong enough - or cared enough - to attempt to suppress piracy.⁹ In the third century AD, there was no shortage of pirate, bandits, robbers and free-lance fighting men.¹⁰

Some of the first reliable sources in the law of piracy were the codifications of decisions made in the maritime courts on the small island of Oleron off the western coast of France around 1200 AD. These rules for the settlement of disputes at sea became widely adopted in port towns in England and other states. The law of Oleron became known to mariners for over a century in western seas.¹¹ The law was recognised in England because the common law could not handle the unique problems presented in maritime cases. In the mid fourteenth century, the Admiralty Court was created and the Laws of Oleron became the basis of the maritime law administered and was an important step in England's role in the maintenance of law on the high seas.¹² The difficulties experienced were in relation to dealing with piracy of 'spoils' claims made by and against foreign sovereigns. Diplomatic

⁷ *ibid*

⁸ Gabbert 'Piracy in the Early Hellenistic Period: A career Open to Talents' *Greece and Rome* (Oct 1986) Vol xxxiii No 2 156

⁹ *ibid* 157

¹⁰ *ibid* 158

¹¹ Runyan 'The Rolls of Oleron and the Admiralty Court in Fourteenth Century England' (1975) 19 *American Journal of Legal History* 96

¹² *ibid* 97

correspondence during the first half of the fourteenth century is characterised by a plethora of complaints made sometimes by the King of England against the Kings of France or Spain, and sometimes by those and other foreign sovereigns against England, as to piracies and spoils committed at sea, and as to the inability of the aggrieved persons to obtain justice.¹³

Examples of such negotiations quoted therein are in 1309 a letter from Philip IV of France to Edward II requiring the restitution of goods seized by an Englishman at sea is endorsed by the English King to the effect that the Chancellor (who was vested with jurisdiction in matters of piracy) was enjoined to do justice to the matter.¹⁴

It appears that the manner in which piracy was dealt with in this period was *via* a commission of inquiry and inquisition charged for each particular instance. In 1339 an English commission was issued to try a case of piracy committed by Englishmen upon some Spanish and Portuguese merchants near Southampton.¹⁵ The commission found that foreign merchants were deterred from bringing their goods into England in consequence of the losses they suffered from pirates. The commission had powers *inter alia* to arrest the spoiled goods and restore the same to the owners, to compel the spoilers, if the goods were not forthcoming, to make satisfaction in damages, and conduct various investigations at the place where piracy was committed. Economic sanctions would be imposed on the inhabitants of these localities if they were unco-operative.¹⁶

¹³ Marsden (ed) *Select Pleas in the Court of Admiralty* (1894) Vol I, xiv

¹⁴ *ibid* xix

¹⁵ *ibid* xxix

¹⁶ *ibid*

The negotiations however, between sovereigns often failed due to a deterioration of diplomatic relations. In 1337 England was at war with France and in 1340 the battle of the Slus was fought. It is, therefore probable that the French claims during that period were never settled. During that century *The Black Book of the Admiralty* came into existence which collated all the documents of the office of the Admiral. In one such document the 'Inquisitions of Queensborough' the objective was to ascertain and settle the maritime law to be administered in the Admiral's Court.¹⁷

Particular reference was made to piracy at this inquisition:

"lett inquiry be made concerning all thieves (or pyrates) whoe robb at sea any of the subjects of our lord the king, or any persons of his allies, or in amity with him, or being under his truce, or under his protection, the names of the pyrates and of the owners of the ships of the pyrates, and of the masters thereof, and what goods they have stolne, and of what value, and in whose hands they are come, and of all their receivers and comforters..."¹⁸

The Sheldon Society in England reported that Piracy flourished during the latter part of the fifteenth century when English, French, Spanish, Portuguese and Venetian pirates preyed upon the shipping of all countries indiscriminately and, just like in the preceding century, diplomatic correspondence contains many complaints as to the difficulty or impossibility of getting redress.¹⁹ In response to these difficulties the sovereigns of England and France entered into treaties by which it was agreed that special tribunals should be provided by each country for the speedy settlement of piracy claims. The terms of the treaties provided that the procedure would be quick and informal and that judgment would be given according to the merits.²⁰

¹⁷ ibid xlviii

¹⁸ Twiss (ed) *The Black Book of the Admiralty* (1985 reprint) Vol 1, 149

¹⁹ op cit note 13 at lvi

²⁰ ibid

It is noteworthy that four hundred years later and half way across the globe, similar difficulties in handling piracy occurred. On the islands Riau and Lingga just to the south of Singapore, strategically located near trade routes, specialised pirate communities came into existence in which the local elite was heavily involved.²¹ During this time the colonial governments, the Dutch and British, were engaged in fierce commercial competition. Neither the British, nor the Dutch, were as yet prepared to place these islands under direct rule, or even close supervision, as they were engaged in a 'cold war' over sovereignty of these regions. Both feared that by vigorously fighting piracy the rival was penetrating and taking control of the disputed archipelago. So deeply suspicious were they of each others intentions that combined expeditions were out of the question.²² In these circumstances, pirates profited from the colonial rivalry and, as long as the Dutch and British were at loggerheads, they did not fear an effective naval campaign against their stronghold.²³

Another variety of piracy manifested in the Sulu sultanate, an archipelago to the northwest of Borneo, which was the most dangerous and inflicted the greatest damage. The Sulu pirates did not roam the high seas but sought their prey mainly in the coastal areas of the islands and were after slaves.²⁴ Tietler, in examining piracy in south-east Asia, notes that this kind of piracy was not merely an economic activity. To the Sulu pirates it was a traditional and prestigious way of life. They viewed it as a means to stress their independence from neighbouring and threatening Dutch, Spanish and British colonial governments. Their exploits had an

²¹ Tietler 'Piracy in South East Asia, An Historical Comparison' at 69, available on <http://www.marecentre.nl/mast/documents/GerTietler.pdf>

²² *ibid*

²³ *ibid*

²⁴ *ibid* at 70

element of political unrest and consequently privateering.²⁵ Soon the colonial forces realised that in counter-guerrilla operations, regular military forces - even when equipped with modern technology -- are too unwieldy and inflexible to achieve success. Only when the colonial governments finally agreed as to the exact location of the lines separating spheres of interest, were they able to subdue and eradicate piracy within that region.²⁶

Historically, in South Africa, it appears that there have been no reported cases on piracy. The only indication of possible incidents of piracy are found in the many of the shipwrecks on the South African coast. They reveal that large East-India Company vessel armed with large muzzle loading canon were used to protect themselves from pirates in privateers in the Mozambique Channel and off Madagascar waiting to plunder the outward-bound spice carrying fleets. This would explain why the shipwrecks of these vessels with signs of canons ready for action with canon balls in their spouts as pre-emptive measures. In the waters near Olifantshos Point is the wreck of the 'Napoleon', a French privateer armed with cast iron canons that was chased ashore by the British navy ship, the 'Narcissus' in 1805.²⁷ Morrison, in his collection of piracy laws of various countries²⁸ says that in about 1924 "...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."

B) The developing jurisprudence of piracy law

It goes without saying that for a crime of this enduring and enigmatic nature, bodies of rules were formulated and judgements were reported over various periods

²⁵ *ibid* at 70

²⁶ *ibid* at 71

²⁷ Turner *Shipwrecks and Salvage in South Africa: 1505 to Present* (1988) 43

²⁸ Morrison 'A collection of Piracy Laws of Various Countries' (1932) 26 *AJIL*, 942

of time that gradually developed into a form of customary law. The Lord Chancellor, Viscount Sankey, during the early 20th century aptly remarked: "...we are not in the year 1696; we are now in the year 1934. International law was not crystallised in the 17th century, but is a living and expanding code."²⁹

(i) **Rex v Dawson**

The year 1696, referred to by the Lord Chancellor, was the year of the trial of Joseph Dawson and others³⁰. These prisoners were indicted *inter alia* "...for piracy in robbing and plundering the ship *Gunswey*, belonging to the Great Mogul and his subjects, in the Indian seas... for piracy, in forcibly seizing and feloniously taking, stealing, and carrying away a merchant ship called *Charles 2d*, belonging to certain of his majesty's subjects unknown on the high seas..." These prisoners were ultimately convicted and sentenced to death accordingly. The Solicitor General, in his presentation of the case to the jury, argued that "these are crimes against the law of nations and are worse than robbery on land." In the direction to the grand jury, Sir Charles Hedges, Judge President of the High Court of Admiralty stated:

"...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 legal authority, this is robbery and piracy..."

This in essence provided that robbery was the first ingredient of the crime of piracy. An extremely wide jurisdiction was given to the English Admiralty Court in respect of Piracy as was further provided by His Lordship:

"The King of England hath not only an empire or sovereignty over the British seas for the punishment of piracy, but in concurrence with other Princes and States, an

²⁹ In *Re Piracy Jure Gentium* [1934] 49 Lloyd's List 417

³⁰ *Rex v Dawson* 5 State Trials, 1 ed 1742

undoubted jurisdiction and power in the most remote parts of the world. If any person, therefore, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we are in amity, trade or correspondence, shall be robbed or spoiled, in the narrow or other seas, whether the Mediterranean, Atlantic, or Southern, or any branches thereof, either on this or the other side of the line, IT IS A PIRACY, within the limits of your inquiry, and cognisable by this Court.”

The commentator, Blackstone, in the following century repeated this notion that offences against the law of nations were punishable by the criminal jurisprudence of England. He said: ‘The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society, a pirate being, according to Sir Edward Coke, *hostis humani generis*... [that] every community hath a right to punish it, for it is a war against all mankind.’³¹

(ii) US v Smith

The central issue in the body of laws devoted to piracy have been manner in which to define its legal regime. The case of *The United States v Smith*³² in 1820 provided examined this moot area in the law which had become the one of the leading authorities of piracy. Briefly the facts were reported as follows. In 1819 Thomas Smith and a group of others were part of the crew of a private armed vessel the *Creollo* (commissioned by the government of Buenos Ayres, a colony then at war with Spain) that was in the port of Margaritta. Smith and others mutinied, confined their officer, left the vessel and in the port seized by violence a private armed vessel, the *Irresistible*. This band of men proceeded out to sea on a cruise, without any documents of commission whatsoever and while on that cruise on the high seas they plundered and robbed a Spanish vessel. They were later captured and indicted.

³¹ see Blackstone 4 *Commentaries* 71.73 cited in *US v Smith* (note 32 below)

³² *United States v Smith* 18 US 153

A critical issue was whether or not the facts warranted a conviction for piracy under an Act of Congress which provided that: "...if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender shall be brought into, or found in the United States, every such offender shall, upon conviction thereof, be punished with death" (emphasis added). The American Supreme Court has to determine whether the said Act of Congress sufficiently defined the term piracy so the Courts would have the power to convict the alleged offenders.

Mr Justice Story, who delivered the opinion of the Court found that there was "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 all other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi* is piracy".³³ It was found that the common law recognises and punishes piracy as an offence, not only against its own municipal code, but also as an offence against the law of nations, as an offence against the universal law of society, a pirate being deemed an enemy of the human race. The judgement was an erudition of all major authorities in piracy law, including the works of jurists, the general usage and practice of nations, and the judicial decisions recognising and enforcing the law. Some of the more noteworthy authorities in the judgment are mentioned below:

One authority³⁴ states that:

"A pirate is one who roves the sea in an armed vessel without any commission of passport from any prince or sovereign state, solely on his own authority, and for the purpose of seizing by force, and appropriating to himself, without

³³ *ibid* at 161

³⁴ see Azuni *part 2* c5.art.3 p351.361 cited in *US v Smith* (note 32 above) at 163

discrimination, every vessel he may meet. For this reason, pirates have always been compared to robbers. The only difference between them is, the sea is the theatre of action for the one, and the land for the other... thus as pirates are the enemies of the human race, piracy is justly regarded as a crime against the universal laws of society, and is everywhere punished with death. As they form no national body, as they have no right to arm, nor make war, and on account of their indiscriminate plunder of all vessels, they are considered only as public robbers, every nation has the right to pursue and exterminate them, without any declaration of war. For these reasons it is lawful to arrest them, in order that they undergo the punishment merited by their crimes..."

The Court noted that "we have, therefore no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea..."³⁵ Another useful authority quoted was from Rutherford³⁶, who said that:

Where a nation makes war upon *pirate or other robbers*, though these are external enemies, the war will be a mixed one; it is public on one side, because a nation or public person is one of the parties; but it is private on the other side, because the parties on the side are *private persons* who act together occasionally, and are not united into a civil society.

The Court also made reference to Sir Leoline Jenkins, who in 1668, said about pirates and piracy:

"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. Everybody is commissioned, and is to be armed against them as rebels and traitors to subdue and root them out. That which is called *robbing upon the highway, the same being done upon the water, is called piracy*. Now robbery as it is distinguished from thieving or larceny, implies not only the actual taking away of the goods, while I am, as we

³⁵ *ibid* at 162

³⁶ see Rutherford *Inst.b2.c.9.s.9*. p481 cited in *US v Smith* (note 32 above) at 163

say, in peace, but also the putting me in fear by taking them by force and arms, out of my hands, or in my sight and presence. When this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy."³⁷

In summary, therefore, the case of *US v Smith* provides the reader with useful excerpts, defining the characteristics and nature of piracy, likening it to robbery at sea. Notwithstanding this eloquent judgement, the existing definitions of piracy were inadequate, as the case of *In Re Piracy Jure Gentium*, discussed below demonstrated.

(iii) The Magellan pirates

At this stage, mention must be made of the judgement of Dr Lushington in the *Magellan Pirates* case.³⁸ The facts giving rise to this trial were as follows. In 1851 there was an insurrection in some of the Dominions belonging to the states of Chile, in particular, a Chilean convict settlement. An officer in the garrison stationed there raised an insurrection against the governor, murdered him, and, in conjunction with those who conspired with him, seized a British vessel, the *Eliza Cornish*, and also an American vessel, the *Florida*. The situation had come to the attention of the commander-in-chief, who despatched the *Viagro*, a British steamer, who pursued the vessel. When she was sighted, a shot was fired across her bow, and she was bordered and seized. The case presented significant issues which are still relevant today.

The first issue was whether an insurgent could be labelled as a pirate. Dr Lushington observed that: "It is true that where the subjects of one country may rebel against the ruling power, and commit diverse acts of violence with regard to

³⁷ see *US v Smith* (note 32 above) at 163

³⁸ *The Magellan Pirates* (1853) 164 ER 47

that ruling power, that other nations may not think fit to consider them as acts of piracy.” He found that: “...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; pirates 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 to the insurrection or rebellion.”³⁹

The second noteworthy issue was the proposition that those acts were not committed on the **high seas** – the traditional requirement of piracy, and therefore the murder and robbery was not properly and legally piratical. The vessels were seized in port and the murders were committed in port or on land. Dr Lushington cited a case where a man 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. Such act was held to be piratical.⁴⁰ He noted that it was true that murder and robbery, done upon land, and not by persons notoriously pirates, would not be piracy. He observed that had the vessels been recaptured whilst lying in port, argument might be raised that the offences would not legally be classified as acts of piracy. Dr Lushington, however, deferred to this contention and stated: “...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.” His rationale for this was that: “...because we all know that pirates are not perpetually at sea, but under the necessity of going

³⁹ *ibid* at 48

⁴⁰ *ibid* at 49

on shore at various places; and of course, they must be followed and taken there, or not at all.”⁴¹

It is suggested that the above observations of Dr Lushington, recorded in 1853, quoted hereinabove are pertinent to current concerns raised in the application of contemporary legal instruments to combat piracy.

(iv) *In re Piracy Jure gentium*

In 1931, on the high seas, a number of armed Chinese nationalists were cruising in two Chinese junks, and they pursued and attacked a Chinese cargo junk. Whilst the attack was in progress, the news reached the *HMS Somme* BY radio and the pursuers were captured. They were indicted and found guilty subject to the question of law to be brought before the Privy Council in England, namely, whether an accused person may be convicted of piracy in circumstances where no robbery had occurred. The judgement, reported as *In Re Piracy Jure Gentium*⁴² qualified the findings in the case of *US v Smith* discussed *supra*, which held that piracy and sea robbery are synonymous. In summary, the Court found that actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a crime of piracy was found to be equally piracy *jure gentium*⁴³.

The Court made further observation on the existing law including a reference to the cases discussed above; in particular, it noted that the definition of piracy as sea robbery was both too narrow and too wide. The Court gave the example of where a passenger on a ship robbed another. It would be impossible to contend that such a robbery on the high seas was a piracy and that the passenger in question had

⁴¹ *ibid* at 50

⁴² *In Re Piracy Jure Gentium* [1934] 49 *Lloyds List* 415

⁴³ *ibid*

committed an act of piracy. Such a broad definition would embrace all acts of plunder and violence in degree sufficient to constitute piracy, because it was done on the high seas.⁴⁴

The Court cited further authorities in support of the contentions above. For instance, the US Federal Court held that an armed ship must have the authority of a state behind it, and if it has not got such an authority, it is a pirate, even though no act of robbery has been committed by it.⁴⁵ The Court also referred to the report of the League of Nations, which in 1926 charged a sub-committee of experts to provide a codification of the existing law of piracy. They state:

“According to international law, piracy consists in sailing the seas for *private ends*, without authorisation from the Government of any state, with the object of committing depredations upon property, or acts of violence against persons.”⁴⁶

This definition formed a template for the formulation and definition of piracy in the modern anti-piracy conventions and instruments, introducing the element of “private ends,” which will be discussed in the proceeding chapters.

⁴⁴ *ibid* at 416

⁴⁵ *ibid* at 419, citing the case of *Ambrose Light* (1885) 25 Fed. Rep 408

⁴⁶ *ibid* at 420

III MARITIME PIRACY IN THE MODERN CONTEXT

In the previous chapter, the exposition of piracy in the historical context revealed that it had existed almost as long as shipping and trade. It seemed however, that by the end of the 19th century it had been eliminated. To modern society, it was merely a historical curiosity, a romanticisation with the theme of piracy forming a genre of the modern entertainment industry. As history revealed, times in which piracy had declined and then subsequently emerged, the 1970's and 1980's saw attacks on merchant shipping increasing. Albeit on a small scale, the events discussed below in this chapter demonstrates that it is a problem that deserves serious attention.

The maritime world has entered into a new paradigm with the increasingly borderless nature of the shipping world due to the globalisation of economic activity.¹ A critical issue is security instability. Akimoto attributes some of this to *inter alia* disputes between states over sovereign rights to resources or the establishment of national jurisdictional waters. This resulted from changes to the basic structures of maritime laws due to the UN Convention on the law of the Sea.² In addition, the maritime industry continues to remain on 'red alert' following the events of 11 September 2001, which exposed the vulnerability of the global transport infrastructure both as a potential target for terrorist activity and perhaps even more threateningly as a potential weapon of mass destruction.³

A) Forms of piracy

¹ Akimoto 'The Current State of Maritime Security – Structural Weaknesses and Threats in Sea Lanes' (2001) *Institute of International Policy Studies* 5

² This aspect is discussed more fully in chapters 5 and 6 below.

³ Balkin 'The International Maritime Organisation and Maritime Security' (2006) 39 *Tulane Mar LJ* 16

Against this backdrop, piracy has re-emerged in various forms. Dillon categorises crimes against ships in the following manner: (i) corruption - as acts of extortion or collusion against maritime vessels by government officials and/or port authorities; (ii) sea robbery - as attacks that take place in port whilst the ship is berthed or anchored; (iii) piracy - as actions against ships underway and outside the protection of port authorities in territorial waters, straits and the high seas; and (iv) maritime terrorism - as crimes against ships by terrorist organisations.⁴

Mukherjee notes, however, that the separation of piracy and other criminal offences in legal terms yields no benefit to the victim ship. He notes that terrorists could exploit the growth in piracy and piratical acts are being carried out with almost military precision. Merchant ships could well be hijacked and used as floating bombs. The fear of this is very real in some states.⁵

Dillon states that boarding a moving ship is far more difficult than boarding a stationary one in port. She notes further that whether a ship is on the high seas or in territorial waters, boarding and attacking a ship while underway requires more organisation and equipment than robbing a stationary ship in port.⁶ In addition, attacks on the high seas outside territorial waters are relatively rare because of the greater distances involved and the need for powerful and expensive speedboats.⁷ Ships at anchor and berthed while waiting to enter a harbour are vulnerable to piracy. Due to congested harbours, ships have to wait a long time, sometimes even days before entering port. While waiting or being boarded, pirates in small boats make their attack.⁸ In summary, it would appear that piracy is moving away from

⁴ Dillon 'Maritime Piracy: Defining the Problem' (2005) 25 *SAIS Review* 157

⁵ Mukherjee 'Piracy, unlawful acts and maritime violence' (2004) 10 *JIMI* 302

⁶ see Dillon (note 4 above) at 159

⁷ Johnson, Pladdet 'An overview of current concerns in piracy studies and new directions for research' (2003) at 5, available on http://www.marecentre.nl/people_and_the_sea2/documents/piracy.pdf.

⁸ *ibid*

its hallmark commission on the 'high seas' to the more convenient locations of ports and sovereign waters.

As technology gets more advanced the need for personnel is reduced. A huge oil tanker the size of a soccer field, for example, can be manned by only eight crewmembers. This, of course, can make the pirates' activities easier. Teitler⁹ has usefully examined how, for example, the crime manifests in the South China Sea. He describes two particular varieties. First where the pirates use small coastal craft or boats launched from mother ships. In this case, the pirates are mainly after the cargo of their objective, and not the victims ship as such. After having completed their operation, they let it drift to a beach or hand it over to their victims who may have survived the attack.¹⁰

Mejia and Mukherjee note with concern that each time a pirate gang takes control of a ship, the coastal area is faced with a major threat to the environment. They note that there are recorded incidents where the vessel has been left unmanned as a result of attacks; and, in at least one case, it took some time before the crew members were able to free themselves after the pirates had ransacked the ship and left. The vessel ran at its regular speed, unmanned for a period of 70 minutes. They observed that had this incident involved a super tanker in a restricted waterway in a sensitive area, the environmental disaster would be unimaginable.¹¹ This sentiment is not fanciful. On 6 October 2002 terrorists/pirates in a small dinghy off Aden,

⁹ Teitler 'Piracy in South East Asia, An Historical Comparison' at 74, available on <http://www.marecentre.nl/mast/documents/GerTeitler.pdf>

¹⁰ *ibid* at 75

¹¹ Mejia, Mukherjee 'Selected issues of law and ergonomics in maritime security' (2004) 10 *JIML* 318

Yemen, loaded with explosives, attacked a French oil tanker *Limburg*, killing one crewman and spilling 90 000 barrels of oil.¹²

Apart from the environmental disaster which Meja and Mukherjee cautioned against, should such an incident occur in a narrow and congested waterway such as the Malacca Straits in South East Asia, where a tanker is bombed or destroyed, nearly half the world's fleet would have to change route. This would increase freight rates worldwide. It would have a serious effect on the economics of China, Japan and South Korea, which rely on imported energy for continued growth.¹³

The second variety of piracy, which Teitler describes, is where the pirates concentrate on the ships of their victims – they leave no survivors behind. The complete ship with its cargo disappears. It obtains a new identity and starts a new life under a new name, a different crew, forged papers and some changes to its external appearance. Teitler further comments that this variety of piracy is one on the grandest scale. It calls for sophisticated organisation, international contacts and ample financial means.¹⁴ In the result, a new breed of 'professional pirates' has been created. For these pirates, the theft of cash, personal belongings and shipboard electronics are usually of secondary interest. Their primary target is particular kinds of cargo, or even entire vessels for which they can earn a much greater returns.¹⁵ Johnson and Pladett discuss that these pirates require much greater organisational sophistication because *inter alia* of their need to procure and operate modern equipment and speedboats employed in attacks on large vessels at sea. They also need to be able to secure reliable access to markets and as much as

¹² see Dillon (note 4 above) at 161

¹³ Unlu 'Currents Legal Developments: Straits of Malacca' 2006 (21) *Int Journal of Marine and Coastal Law* 539

¹⁴ see Teitler (note 9 above) at 75

¹⁵ see Johnson and Pladett (note 7 above) at 6

possible to gain the compliance of local authorities.¹⁶ Pirates also collude with corrupt officials, who provide information on vessels and cargos in their areas of jurisdiction, and in some instances, they have connections with warlords and political movements that have recourse to terrorism.¹⁷ Notwithstanding the aforesaid, modern pirates do not seem to form durable social communities with a dedicated culture and economy like the Sulu pirates in the nineteenth century¹⁸.

B) Impact on marine insurance

The threats to maritime and commercial enterprises also have an impact on marine insurance. The attack by a small group of well-armed men on the cruise liner *Seabourn Spirit* in international waters of the coast of Somalia in November 2005 caused insurers to consider whether 'piracy' risks should no longer be classified as marine hull risk but as war risks.¹⁹ Also, where a vessel is damaged in a pirate attack it would now be possible for an underwriter to refuse to entertain the claim because it could be interpreted as terrorist act.²⁰

C) Links with terrorism

Numerous academics agree that the line differentiating terrorist and resistance fighters from pirates is not always easy to draw. A terrorist can assume the role of a pirate. As Teitler notes with violent robberies and hostage taking they vent their frustration and protests. The income they draw from these activities is used to buy weapons, to reward their followers and also to spend on luxuries.²¹ It is apt at this stage to recall the words of Dr Lushington, recorded over 150 years ago, in his distinction between a pirate and an insurgent (discussed in the previous chapter):

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ see Teitler (note 9 above) at 79

¹⁹ Michel 'War, piracy and terror: the high seas in the 21 century' (2006) 12 *JIML* 314

²⁰ Khalid 'Shipping with the enemy' (2006) 20 *Maritime Risk International* 18

²¹ see Teitler (note 9 above) at 73

where he holds that the acts of insurgents are of “wanton cruelty, in the murder of foreign subjects, and in the indiscriminate plunder of their property, they are guilty of piracy.”²² Mejia and Mukherjee, however, observe that the instances of maritime terrorism have been rare compared with the numerous pirate-like incidents, mostly of a violent nature occurring in certain strategic waterways of the world.²³

D) Summary of forms of piratical acts

In summary, there is a spectrum of varying degrees of violent criminal acts at sea, in which piracy can fit into. These are theft while in port (subsistence piracy); clandestine boarding while the ship is underway, and violent attack while the ship is underway: these are usually less sophisticated types of attacks committed by petty criminals. At the other end of the spectrum, there is kidnapping for ransom and hijacking of ships, which can involve highly organised crime syndicates.²⁴

E) Case studies

These concepts are illustrated by the following cases. The incidents concerned stirred global debate regarding the differences between an act of piracy, insurrection and rebellion or terrorism.

The first case is that of the *Santa Maria*. In 1961, Captain Henrique Galvao, a political opponent of the Salazar government in Portugal, together with 23 men, took control of a Portuguese luxury liner the *Santa Maria* while she was sailing in the Caribbean with approximately 600 passengers and 350 crewmen onboard.²⁵ Galvao declared the seizure to be a step towards overthrowing the dictatorship that

²² The Magellan Pirates 153 ER 47 [1853] at 50

²³ Mejia, Mukherjee ‘The SUA Convention 2005: a critical evaluation of its effectiveness in suppressing maritime criminal acts’ (2005) 12 *JIML* 177

²⁴ *ibid* at 171

²⁵ see Mejia and Mukherjee (note 11 above) at 320

governed Portugal that invalidated the election results in which General Delgado had been elected President. Galvao had seized the ship in his name²⁶. In response, Portugal asked several nations to search and capture the vessel in accordance with the international law governing piracy and insurrection on board a ship.²⁷ Delgado knew that Galvao's actions had been labelled piracy *jure gentium* and he would be branded *hostis humani generis*. This would give any state the jurisdiction to seize the *Santa Maria* on the high seas, making Galvao and the ship easy targets for any British or American warship.²⁸ He lobbied foreign governments not to label the case piracy and asserted that it was in actual fact an 'appropriation of Portuguese transport for Portuguese political objectives'.²⁹ Subsequently, a United States destroyer captured and boarded the ship near Brazil. The US State Department announced that its government had acted under the international law of piracy.³⁰

The incident had ended in Galvao's favour as his actions became widely recognised as an act of protest against the Iberian dictatorship, rather than an act of piracy.³¹ Menefee notes that, in retrospect, the *Santa Maria* incident was important, not for its immediate effect on the international law or policy connected with piracy, but rather as a catalyst for academic discussion and a harbinger of things to come.³²

Almost 25 years later, the incident involving the *Achille Lauro* caused enough concern amongst the international community to result in the formation and

²⁶ *ibid*

²⁷ Kahn 'Pirates, rovers and thieves: New problems with an old enemy' (1996) 20 *Tulane Maritime LJ* 304

²⁸ *see* Mejia and Mukherjee (note 11 above) at 320

²⁹ *ibid*

³⁰ *see* Kahn (note 27 above)

³¹ *see* Mejia and Mukherjee (note 11 above) at 320

³² Menefee 'Contemporary Piracy and International Law' (1995) 19 *Institute of Marine Law: UCT* 31

adoption of a new Convention at the International Maritime Organisation.³³ On 8 October 1985, Palestinian extremists seized the Italian cruise liner *Achille Lauro*. Originally planned by the Palestinian Liberation Movements *Abu Abbas* group as a mission to smuggle arms and explosives into Israel by sea, it turned into a hostage-taking incident when the crew of the ship inadvertently uncovered the Palestinian plot.³⁴ As in the case of the *Santa Maria*, there was a great debate and controversy worldwide as to the terrorist's motives and whether the act should be considered as piracy or terrorism.³⁵ The extremists took control of the vessel and demanded amongst other things, the release of their confederates held in Israeli jails and safe passage for themselves. In the course of the drama, one of the extremists killed an unarmed disabled passenger and threw him and his wheelchair overboard.³⁶

This incident appeared in the subsequent United Nations Security Council debate and western nations condemned the incident and made the connection with piracy.

The United States representative strongly noted:

“...for centuries, pirates have justly been designated as *hostis humani generis*...the long experience that the international community had with their outrages led to the recognition of and confirmed the universal criminality of these sea based terrorists. We know today that terrorists of all sorts are also the common enemies of mankind. Whether their attacks are on land, on sea, or in the air, they are cut from the same sorry fabric...”³⁷

Kahn observes that the seizure of the *Santa Maria* differed from the *Achille Lauro* in that in the *Santa Maria* incident, Galvao gave repeated assurances that he did not want to harm the interests or nationals of other countries, and arguably met the

³³ see Mejia and Mukherjee (note 11 above) at 320

³⁴ see Mejia and Mukherjee (note 23 above) at 173

³⁵ see Mejia and Mukherjee (note 11 above) at 320

³⁶ see Mejia and Mukherjee (note 23 above) at 173

³⁷ see Menefee (note 32 above) at 43

exemption for insurgents under customary international law. The *Achille Lauro* incident on the other hand was not limited to a particular state. They seized an Italian ship, deliberately killed a U.S. national and held hostage persons of diverse nationalities³⁸ a true *hostis humani generis*.

³⁸ see Kahn (note 27 above) at 305

IV MARITIME PIRACY TRENDS AND STATISTICS

In the previous chapter, the nature and form of piracy was discussed. It is a widely held view that the incidents described in the cases discussed caused shock, concern and outrage amongst other emotional reactions. The question that arises is to determine whether incidents of piracy in the forms discussed above are merely isolated incidents. In this chapter an answer to this question is attempted by means of a brief outline of recent piratical statistics.

It is necessary to highlight the role of the ICC International Maritime Bureau (IMB), which is a specialised division of the International Chamber of Commerce (ICC). The IMB is a non-profit making organisation, established in 1981 to act as a focal point in the fight against all types of maritime crime and violence.¹ The editorial team of the *Journal of International Maritime Law* summarised in broad terms the objects of the IMB as the avoidance of fraud in international trade and maritime transport, the elimination of the risk of piracy and the provision of assistance to law enforcement agencies with a view of bringing wrongdoers to justice and recovering losses. It plays an investigative role in relation to piracy and also plays a vital role in raising public awareness and the development of international public policy.² The outrage in the shipping industry at the alarming growth in piracy prompted the creation of the IMB Piracy Reporting Centre (PRC) in October 2002 in Kuala Lumpur, Malaysia. A useful service provided by the PRC is the publication of comprehensive quarterly and annual reports detailing piracy statistics. The latest reports available at the time of the writing of this dissertation are discussed below.

¹ ICC International Maritime Bureau *Piracy and Armed robbery against Ships: Report for period 1 January – 30 June 2007* (2007)

² Editorial 'Piracy (2004)' 10 *JIML* 5

A brief cautionary mention is made at this stage to note the limitations of these reports. Johnson and Pladett note that as such attacks have to be reported to the IMO or the IMB either directly or indirectly via local authorities, data on the frequency of pirate attacks depend entirely on the collaboration of crew, shipping companies, and local authorities.³ They note further that each of these groups have specific reasons not to want to register pirate attacks. Crew and shipping companies fail to report these incidents because of fear of the complex reporting procedures – a resultant delay of just one day can give rise to €10 000 of extra harbour fees and fuel costs. Operators also fear having to pay import duties for the cargo stolen from them. In countries where there are ineffective local authorities lacking competence and integrity, they consider it senseless to report their losses, because no investigation will be made to track pirates of lost cargo.⁴ This is the case of incidents off the coast of Somalia. Local authorities themselves are sometimes hesitant to contact the IMB for fear of the economic consequences of their region being declared a high-risk zone.⁵ Singer notes that operators also fail to report incidents for fear of higher insurance premiums.⁶

Notwithstanding these limitations, the statistical information provided by the IMB constitutes a comprehensive analysis, which hitherto would be difficult to obtain from scattered and isolated reports. In any event, it provides a minimum threshold, in the absence unreported incidents and thus remains a useful basis to formulate policy. Before current trends are examined, it is important to note that according to reports compiled by the IMO between 1984 and the end of 1999, there had been

³ Johnson, Pladett 'An overview of current concerns in piracy studies and new directions for research' (2003) at 3-4, available on http://www.marecentre.nl/people_and_the_sca2/documents/piracy.pdf.

⁴ *ibid*

⁵ *ibid*

⁶ Singer 'Not such a happy new year' (2006) 20 *Maritime Risk International* 13

1587 attacks by pirates on ships around the world, and these statistics showed a disturbing increase in violence.⁷ The rate of piracy attacks, as depicted in the latest report in June 2007⁸ have been volatile, from a low of 202 attacks in 1998, to more than doubling a mere two years later in 2000 with a record high of 469 attacks in that year. The years 2003, 2004, 2005 and 2006 recorded 445, 329, 276 and 239 attacks respectively. The first half of 2007 reported 126 attacks. Although these figures indicate a decline in attacks, those in 2007 recorded the highest levels of violence to crew over the past decade. During the period, January to June 2007, 152 crewmembers had been taken hostage, 41 were kidnapped or held for ransom, and 20 were assaulted. In addition, this period recorded the highest incident of hijacking with 13 reports.⁹

In the previous chapter, the conclusion was reached that piratical acts are moving away from the traditional commission on the high seas, to within the territorial waters of various littoral states. The reports of the IMB appear to support this view. In terms of actual attacks between January to June 2007, 23 occurred when the ship was steaming, whereas 54 occurred whilst the ship was in anchor or berthed. In addition, piracy warnings were issued in Bangladesh that pirates were targeting ships preparing to anchor. Most of the attacks have been in the port of Chittagong. In Tanzania, pirates were also reported to be attacking ships in port and anchorage.

In the previous chapter, attention was drawn to concern about the threat to the environment when a tanker is under attack. The 2007 second quarter report of the IMB reveals that this is a serious and realistic concern:

⁷ International Maritime Organisation, *Piracy and Armed Robbery at sea* (2000) at 2 available on <http://www.imo.org>.

⁸ see note 1

⁹ *ibid*

“Nigeria has been one of the extreme hotspots in the last quarter, seeing an increase in the number of attacks from 6 in the first quarter to 13 in the second quarter bringing the total in the first six months of 2007 to 19. The attacks are mostly aimed at foreign oil workers from the oil rich Niger delta. The attacks are being carried out against the support and standby vessels to the oilrigs. However, the pirates have started attacking tankers during crucial cargo operations thus increasing the risk of loss of lives and enormous environmental destruction. The pirates are usually heavily armed and the attacks are well planned out and co-ordinated making any sort of resistance towards the attack futile.”¹⁰

Fouche notes that the Southern African Development Community (SADC) region can be regarded as the best region to protect itself against piracy and armed robbery against ships. South Africa, Namibia and Angola on the west coast and Mozambique on the east coast have not experienced any attacks for a number of years.¹¹ He further comments that the east coast is problematic with Tanzania having experienced a marked increase in the number of attacks during 2005. Tanzania’s navy appears to be largely unserviceable as witnessed by its inability to assist its near neighbour and East African Development Community (EAC) partner, Somalia, against rampant piracy in that country.¹² Fouche warns that the possibility of the situation in Somalia spilling over other countries on the east coast, and eventually into South African waters needs to be carefully monitored, taking into consideration that the UN Security Council’s calls for assistance from neighbouring states to assist in patrolling off Somalian waters have also gone unheeded by Tanzania.¹³

¹⁰ *ibid*

¹¹ Fouche ‘Policing of Piracy and Armed Robbery Perpetrated against Ships: The role of Interstate Partnerships in Africa’ (2007) 20 *Acta Criminologica* 119

¹² *ibid*

¹³ *ibid*

V INTERNATIONAL INSTRUMENTS TO COUNTERMEASURE PIRACY

In previous chapters an analysis has been attempted of the nature and prevalence of maritime piracy. The conclusion reached was that piracy is extant, experiencing incessant growth and taking new forms that place human lives, the environment and the economy at risk across the globe. The issue that arises is to assess what legal framework is in place to countermeasure the threat of piracy¹. This legal framework is in essence the international maritime legislation, which has been defined by Okere to refer to the corpus of legal precepts regulating the maritime industry. This would, therefore, include not only treaties and conventions, but also recommendations of competent organs and customary law.² Okere further highlights that maritime conventions adopted by diplomatic conferences constitute the most important instrument for the regulation of the maritime domain and they seek to regulate either the legal status of the sea and the seabed or ocean borne trade, as well as the safety of navigation.³

By the late 1980's, a comprehensive series of conventions relating to safety at sea were in place,⁴ which aimed at counter measuring the threat caused by unseaworthy ships and unsafe ship operations. The *Achille Lauro* incident, however, and the alarming trends in piracy highlighted the need for an effective legislative framework to ensure *maritime security*. Mejia and Mukherjee distinguish this from *maritime safety*, describing it as crimes perpetrated by humans against the crew,

¹ Balkin 'The International Maritime Organisation and Maritime Security' (2006) 39 *Tulane Mar LJ* 22

² Okere 'The Technique of International Maritime Legislation' (1981) 30 *International and Comparative Law Quarterly* 515

³ *ibid* at 533

⁴ *Inter alia*: International convention relating to intervention on the high seas in cases of oil pollution casualties, 1969; International convention on civil liability for oil pollution damage, 1969; Convention on the prevention of pollution by ships, 1973/1978.

passengers, cargo or the ship itself.⁵ The threat of piracy thus falls within the ambit of the concept of maritime security. In this chapter the relevant conventions and recommendations pertaining to maritime security are briefly set out.⁶ The structure and background of these instruments will also be discussed and the pivotal and controversial provisions pertaining to piracy will be identified.

A) The United Nations Convention on the Law of the Sea (UNCLOS)

The regime governing piracy has been entrenched in the public international law of the sea which has now been codified within the high seas regime of the United Nations Convention on the Law of the Sea, which was adopted in 1982.⁷ This Convention has largely superseded the Geneva Convention on the High Seas, 1958.

The terrestrial portion of the globe has in political terms been clearly divided by each sovereign states borders. The exception being disputes in certain parts of the world, notably Palestine and Kashmir, which has led to bitter guerrilla warfare, terrorist and insurgent activities. It goes without saying therefore, that the marine portion of the globe ought to have political stability, particularly as to when and where a state has jurisdiction over foreigners in its territorial waters, or its nationals in foreign waters or the high seas. In this regard, UNCLOS was adopted and became the basis on which a littoral states jurisdiction, rights, privileges and obligations at sea are built.⁸ Accordingly, the following zones are created through

⁵ Mejia, Mukherjee 'Selected issues of law and ergonomics in maritime security' (2004) 10 *JIML* 317

⁶ It is beyond the scope of this Dissertation to canvass all the provisions of these conventions and recommendations. The reader is referred to the Doctoral thesis of H. Fouche cited in note 7 below and Menefee 'Contemporary Piracy and International Law' (1995) 19 *Institute of Marine Law: UCT* 31 for a more comprehensive discussion on these aspects.

⁷ Fouche 'Policing piracy and armed robbery of ships in South Africa's territorial waters and contiguous zone' (2006) Unpublished Doctoral Thesis, *Tshwane University of Technology*.

⁸ *ibid*, chapter 3

the provisions of UNCLOS and are pertinent to the study for the reasons set out above.⁹

i) Internal waters: Article 8 describes internal waters as waters on the landward side of the baseline of the territorial sea as forming the internal waters of the state. The best example of a states internal waters would be a port; and the right of a vessel to enter and exit a port vests in the coastal state.¹⁰

ii) Territorial sea: Article 3 determines that every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, determined in accordance with the Convention. Article 19 further describes passage in such waters as innocent so long as it is not prejudicial to the peace, good order or security of the state.¹¹

iii) Contiguous zone: Article 33 permits coastal states to claim a zone, contiguous to its territorial sea, which may not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured, in which it may exercise control over infringement of its customs, fiscal, immigration or sanitary laws.¹²

iv) Exclusive economic zone: Part V of UNCLOS permits states to establish an exclusive economic zone, not exceeding 200 nautical miles from the baseline from which the breadth of the territorial sea is measured, in which the coastal state may exercise sovereignty over the natural resources in that exclusive economic zone.¹³ This zone is subject to considerable debate as to its legal status and is discussed in the next chapter.

v) The high seas: beyond the frontier of the exclusive economic zone is the realm of the high seas, which is not under the legal control of any one country,

⁹ ibid

¹⁰ ibid

¹¹ ibid

¹² ibid

¹³ ibid

and in which the nationals of all states are free to go about their lawful ventures without undue hindrance.

Bearing these categories in mind, article 101 of the Convention defines piracy as follows:

- “(a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship 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). (emphasis added)”

At present, this Convention is the leading authority on the definition of piracy, and accordingly any alleged act of piracy would have to satisfy the requirements of this article.

B) The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)

The *Achille Lauro* incident, discussed in Chapter 3 above, led to proposals that were tabled before the IMO for ‘a convention that would eventually provide the legal basis for action to be taken against persons committing unlawful acts against ships... such as the seizure of ships by force, acts of violence against persons on board ships and the placing of devices on board which are likely to destroy the

ship.¹⁴ The SUA Convention, adopted in 1988 defines these unlawful acts and obliges state parties to either prosecute the alleged or extradite the alleged offenders.¹⁵ Article 3 provides, as amended provides:

- “1. Any person commits an offence within the meaning of this Convention 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 its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - (e) destroys or seriously destroys the maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of that ship; or
 - (f) communicates information which that person knows to be false, thereby endangering the safe navigation of that ship.”

The events of September 11, 2001 led to a revision of the SUA Convention. In 2005, these amendments were adopted in the form of a Protocol to the Convention, which considerably expanded the definition above and included *inter alia* acts to intimidate a population or compel a government to do or abstain from doing an act, and the use of biochemical nuclear weapons.¹⁶

¹⁴ Mejia, Mukherjee ‘The SUA Convention 2005: a critical evaluation of its effectiveness in suppressing maritime criminal acts’ (2005) 12 *JJML* 174

¹⁵ *ibid*

¹⁶ See section 3bis of the 2005 protocol

As discussed in Chapter 3 *supra*, piracy has now taken on a new form and nature, and in certain instances, the line differentiating terrorism and piracy can be blurred. UNCLOS at the time of its adoption in 1982 arguably did not consider this new form of piracy when defining the crime, accordingly restricting its application. The definitions of offences in the SUA Convention quoted above however allow for terrorist/piratical acts to be criminalized in situations where, due to the restrictive definition in UNCLOS, the act would not be piratical. In summary, this Convention contains provisions *inter alia* for the state to establish jurisdiction over the offence, for taking the alleged offender into custody, for extradition, for prosecution, for co-operation of states in the prevention of the offences listed above.

C) The Convention for the Safety of Life at Sea (SOLAS) and the International Ship and Port Facility Security (ISPS) Code

At the time of the adoption of the SOLAS Convention in 1974, the central theme of the Convention, as its title implies was 'safety'. It consisted of provisions relating to *inter alia* the structure and installations on ships, fire safety measures, requirements of life saving appliances, safety of navigation, radio communications, safety measures for nuclear ships, high-speed craft and bulk carriers and special measures to enhance maritime safety. After the events of September 11th, 2001, there was a need to review the existing legal and technical measures to prevent and suppress such acts from manifesting in the shipping industry. The aim was to reduce risks to passengers, crews and port personnel on board ships and in port areas and to the vessels and their cargoes and to enhance ship and port security.¹⁷

¹⁷ Hesse and Charalambous 'New Security Measures for the International Shipping Community' (2004) 3 *WMU Journal of Maritime Affairs* 125

In the result, the IMO adopted at a conference in December 2002, a new chapter to SOLAS, namely Chapter XI-2: Special measures to enhance maritime security. This new chapter incorporates new regulations regarding definitions and the requirements for ships and port facilities. Briefly, the essential features of the new chapter are provisions relating to the obligations of contracting governments with respect to security, requirements for companies and ships, the ship security alert system, control and compliance measures, requirements for port facilities and alternative security arrangements. Supplementary to this chapter, the IMO adopted the International Ship and Port Facility Security (ISPS) Code. The IMO reported that the objective of this code is:

“...to assemble an international framework involving co-operation between contracting governments, government agencies, local administrations and the shipping and port industries to detect/assess security threats and take preventative measures against security incidents affecting ships or port facilities used in international trade... [which it aims to achieve by establishing] ...the respective roles and responsibilities of all parties concerned, at the national and international levels, for ensuring maritime security.”¹⁸

Accordingly, the Code is structured with a mandatory section (part A), and a recommendatory section (part B) which contains guidelines for the implementation of the regulations in SOLAS chapter XI-2 and the provisions of part A.¹⁹ The premise upon which the Code was formulated was that maritime security is essentially a risk management activity²⁰ and thus the minimum functional security requirements for ships would be the appointment of ship security officers, company security officers and the implementation of ship security plans and the installation of stipulated onboard equipment. Port facilities have corresponding requirements,

¹⁸ IMO ‘ISPS Code’ (2003) *IMO Publication*, quoted in Mejia and Mukherjee (Note 5 supra) at 323

¹⁹ see note 17

²⁰ see note 17

namely to appoint port facility security officers and to implement port facility security plans. In addition, both ships and port facilities are required to monitor access, monitor the activities of people and cargo, and ensure that security communications are readily available. Contracting governments shall set 'Security Levels' and provide guidance for protection from security incidents. Higher security levels indicate greater likelihood of occurrence of a security incident.

To summarise, the ISPS Code provides a pragmatic approach to combating the threat of piracy from a pre-emptive perspective, whereas UNCLOS and the SUA and its Protocol provide the necessary legal framework to take action after the event.²¹

D) Model National Law on Acts of Piracy and Maritime Violence

This model law is an initiative of the *Comite Maritime International* (CMI). The preamble of this model law summaries its objectives:

“...It attempts to attack the problem of piracy and maritime violence by proposing a more systematic treatment of these serious problems through national law, under whose admiralty/maritime jurisdiction the great majority of relevant incidents fall.”

In other words, the primary focus is that piratical acts are to be dealt with by the individual state using its own national law and law enforcement agencies. The obvious difficulty being that each state has a different criminal law regime, hence to ensure uniformity and consistency, the model national law was drafted under the premise that it would serve as a template. It is not model legislation as such, but a framework of principles based on which domestic legislation can be articulated in a

²¹ see Balkin (note 1 *supra*) at 31

meaningful way.²² It defines piracy in the alternative, incorporating the definitions in UNCLOS and the national law of each respective state, and introduces the concept of *maritime violence*, which is in broad terms and allows for a wider range of offences.²³ The model law allows for these offences to be prosecuted in the domestic admiralty courts if committed within the territory or if it is committed on the high seas or exclusive economic zone, the state can prosecute to the extent that such jurisdiction is permitted by the Geneva Convention, 1958.²⁴ Detailed provisions are in place for extradition, prosecution, punishment, forfeiture and restitution and reporting of incidents.

E) Maritime Recommendations

Okere notes that: ‘the term recommendation refers to a resolution of an international organ advocating a certain manner of action but not necessarily importing the obligation to conform, the addressees of a recommendation only being bound either not to counteract its effect or otherwise to submit it to the appropriate municipal authorities for a decision on the action to be taken on it.’²⁵ He notes further that in essence, these recommendations are flexible in nature – the purpose being to ensure the largest possible adoption. Okere’s assessment is that whereas radical solutions may in instances appear apt, in practice they are bound to fail. The emphasis should therefore be on the conciliation of divergent views.²⁶ In summary, they are exhortatory in nature and provide the basis of national maritime

²² Mukherjee ‘Piracy, unlawful acts and maritime violence’ (2004) 10 *JIML* 302

²³ This definition of maritime violence is substantially similar to the provisions of article 3 of the SUA Convention as amended.

²⁴ See Section II, article 2

²⁵ See Okere (note 2supra) at 529

²⁶ *ibid* at 532

legislation.²⁷ Discussed below are two recommendations issued under the auspices of the IMO under the category of 'Piracy and Armed Robbery Against Ships'

i) MSC/Circ.622/Rev 1: Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships²⁷

Emphasis is placed on government agencies to gather accurate statistics on the incidents of piracy, in order to determine their *modus operandi*, its geographical location and the type of attacks *inter alia*. This information must be collated in an understandable format and disseminated to all interested parties. Following this, the state must develop an action plan detailing how to prevent the attacks, and to establish the necessary infrastructure and operational requirements. It is deemed imperative that all attacks or threats of attacks are reported forthwith via radio telecommunication and local security authorities must be informed and other ships in the vicinity ought to be alerted.

The state is to make every endeavour to ensure that masters and their ships are not delayed or financially burdened in reporting these incidents and the state must appoint a suitably qualified investigation agency. In terms of criminal jurisdiction, the prosecuting state must act in conjunction with other substantially interested states and to take such measures as may be necessary to establish jurisdiction.

A more flexible approach in respect of exchange control regulations is expected from States to ensure that ships need not carry large amounts of money in cash – thereby reducing the incentive for robbers.

²⁷ *ibid*

²⁷ International Maritime Organisation *Recommendations to Governments for preventing and suppressing piracy and armed robbery at sea*. MSC/Circular 622/Rev.1. 16 June 1999.

A coastal state, using the statistics it gathers, should route ships away from areas where attacks are frequent and to co-ordinate co-operation and control agreements with neighbouring countries.

ii) **MSC/Circ.623/Rev 3: Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing piracy and armed robbery against ships²⁸**

This circular lists precautions to be taken to reduce risks of piracy against ships at anchor, off ports or when underway through a states coastal waters. It outlines steps that should be taken to reduce the risks and the vital need to report the same. Precautions listed are *inter alia* precautions relating to the ships strongbox, extended vigilance by ships with smaller crews, enhanced surveillance, use of lighting, radio alarm procedures, practice of implementation of the ship security plan and communication procedures, alarms, distress flares, evasive manoeuvring and use of hoses in an attack.

The circular strongly discourages the use of firearms on board, as this would encourage attackers to carry firearms thereby escalating an already dangerous situation, and any firearms on board may themselves become an attractive target for an attacker. Detailed provisions are in place as to how the master and crew are to act when pirates have succeeded in entering the ship.²⁹

F) International Maritime Bureau: Definition of piracy

For statistical purposes, the IMB defines piracy and armed robbery as:

²⁸ International Maritime Organisation *Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing piracy and armed robbery against ships* MSC/Circular 623/Rev 3, 2002

²⁹ See clauses 51 to 62.

“Any act of boarding or attempting to board any ship with apparent intent to commit theft or any other crime and with apparent intent or capability to use force in the furtherance of that act.”³⁰

³⁰ See ICC TMB *Piracy and Armed Robbery Against Ships*: Report June 2007

VI EFFECTIVENESS AND IMPLEMENTATION OF INTERNATIONAL INSTRUMENTS

Having summarised and reproduced relevant extracts of the international instruments to countermeasure piracy, the purpose of this chapter is to assess how effective these instruments are and to examine the manner in which they are implemented. It is significant for the purposes of this chapter to record the words of one academic¹ who states that ‘...Law is undoubtedly the central and direct tool for effectuating maritime security. However, sometimes the law can be dysfunctional. Often legalistic devices are too rigid and unaccommodating. The strict legalistic approach to a problem may end up being counterproductive or defeating the purpose for which the law was created in the first place.’²

A) UNCLOS provisions

Piracy, apart from its international nature is also in essence a criminal offence; therefore the maxim *nullum crimen sine lege* is applicable. This maxim has been summarised as requiring that crimes and their punishments must be created as such by a properly made law in terms that explicitly identify it as a crime.³ Accordingly, the law must adequately define the offence in its constituent elements. It is generally accepted that article 101 of UNCLOS⁴ contains the standard definition of piracy. A dissection of this article reveals that the following elements are necessary for any act or acts to qualify as piracy:⁵

- (a) *Geographical/high seas element*: the act must be committed on the high seas or in waters outside any states sovereign jurisdiction;

¹ Xu ‘Piracy as a maritime offence: Some public policy considerations’ (2007) September *JBL* 652

² *ibid*

³ Burchell and Milton ‘Principles of Criminal Law’ (1997) 2nd ed 59

⁴ see chapter 5 *supra*

⁵ see Mejia, Mukherjee ‘The SUA Convention 2005: a critical evaluation of its effectiveness in suppressing maritime criminal acts’ (2005) 12 *JIMJ*, 182

- (b) *Private Ship element*: the persons who commit the offence must be on board a private ship;
- (c) *Two-ship element*: two ships must be involved in the incident - the pirate ship and the ship that is attacked or plundered;
- (d) *Violence element*: the acts committed by the offender must be an illegal act of violence, detention or depredation;
- (e) *Lucri causa element*: the motive for committing the crime must be for private gain.

It is submitted, supported by the views of academics⁶, that these requirements are anachronistic or obsolete when consideration is given to the changed nature of piracy in the modern era. Chapter 3 of this Dissertation provided a concise summary of the nature of piracy, as it has manifested in the late twentieth century. These considerations, together with the elements listed above are discussed below.

The high seas element has far-reaching consequences. This concept flows directly from the idea of *mare liberum*, or open seas, propounded by the jurist Grotius in 1609. Grotius considered the sea to be *res communis*, or the joint property of mankind.⁷ Following this idea, piracy, being a universal crime means that any state should be able to take action, not only the flag state of the pirate ship or the victim ship.⁸ The right of any state to take action against piracy is considered to be a peremptory norm of international law.⁹

⁶ see Mejia and Mukherjee (note 14 below) at 325 and Menefee 'Contemporary Piracy and International Law' (1995) 19 *Institute of Marine Law: UCT 31* at 63-67

⁷ Johnson and Pladdet 'An overview of current concerns in piracy studies and new directions for research' (2003) at 3, available on http://www.marecentre.nl/people_and_the_sea2/documents/piracy.pdf.

⁸ Editorial 'Piracy, unlawful acts and maritime violence' (2004) 10 *JIML* 301

⁹ *ibid*

With these views in mind, the trends in modern day piracy, discussed in Chapter 3 *supra* show that the majority of piratical acts occur within the territorial waters of a particular state, often within a port. A considerable portion of piratical acts also occurs within the area defined as the exclusive economic zone of a particular state. This is not unrealistic because this zone can cover a considerably large area of sea. South Africa's exclusive economic zone covers an area of approximately 1,3 million square kilometres.¹⁰ South Africa's geographical position is such that it could appropriate the maximum area of sea, permitted by the UNCLOS without conflicting with another state. In certain parts of the world, however, where there are narrow straits or ocean passages, where there are different surrounding states each claiming their respective zones, the result would be that the area defined as the 'high seas' would cease to exist. A study by Dubner during 1989-1993 found that 61.8 per cent of attacks occurred in the territorial waters of a country. The study also revealed that the average distance of piratical attacks from the shore is 11.5 nautical miles (nm) in the case of Indonesia, 68nm in Northeast Asia, and 94.4nm in the South China Sea.¹¹ The latest trends discussed in Chapter 4 *supra* do not deviate significantly from this.

The anomaly in UNCLOS is that through its maritime zoning and the creation of the exclusive economic zone the high seas are now a maximum of 200 nautical miles from the shore. There was no, however, corresponding modification of the piracy provisions in article 101¹² with the result that piracy as it is currently defined would cease to exist, save for the exceptional cases where piratical acts occur

¹⁰ Fouche 'Policing piracy and armed robbery of ships in South Africa's territorial waters and contiguous zone' (2006) Unpublished Doctoral Thesis, *Tshwane University of Technology*

¹¹ Dubner 'Human rights and environmental disaster – two problems that defy the 'norms' of the international law of sea piracy' *Syracuse Journal of Internal Law and Commerce* (1997) 25-26, cited in Mukherjee (note 14 below)

¹² see Mejia, Mukherjee 'The SUA Convention 2005: a critical evaluation of its effectiveness in suppressing maritime criminal acts' (2005) 12 *JIML* 183

beyond the 200nm limit. There is, thus, a vacuum for the universal criminalisation of acts committed within territorial waters and the exclusive economic zone, which would classify as piracy, if it were committed on the high seas. The difficulty posed by this anomaly in UNCLOS is that only the littoral state is vested with and can exercise jurisdiction over piratical acts committed within its territorial waters and exclusive economic zone, which Mejia and Mukherjee describe as 'coastal zone piracy'.¹³ Often many of these littoral states are developing nations and lack the infrastructure and financial resources to implement countermeasures; alternatively these governments consist of corrupt officials that act in collusion with pirates in the form of organised crime. Littoral states which are in conflict with other states, may also resent the usurpation of their jurisdiction if other states intervene in their territorial waters to pursue or monitor pirates.

Quite apart from the problematic high seas element discussed above, the element of 'private ends' is problematic. From a literal interpretation, an act committed for 'public' or 'political' ends would not be regarded as piracy. Examples of such scenarios, namely the incidents involving the *Achille Lauro* and the *Santa Maria*, discussed in chapter 3 *supra*, illustrate that the difficulty of characterising these acts into closed categories of private or political/public ends. Menefee¹⁴ poses the questions 'private ends as opposed to what? Public ends? Political ends? Who defines the ends – the judge, the victim, or the perpetrator?'

While this aspect has caused vigorous debate over many years since the *Santa Maria* incident in 1961, consideration must be given to the judgment delivered in

¹³ *ibid* at 181

¹⁴ cited in Mejia and Mukherjee 'Selected issues of law and ergonomics in maritime security' (2004) 10 *JIML* 325

the *In Re Piracy Gentium* case,¹⁵ discussed in Chapter 2 *supra*. The Court considered the report of the League of Nations dealing with piracy in 1926 when the concept of 'private ends' was first introduced into a definition of piracy. The court noted that:

“In our view, the act of taking for private ends does not necessarily mean that the attack is inspired for the desire for gain. It is quite possible to attack without authorisation from any State and for private ends not with a desire for gain but for vengeance or for anarchistic or other ends.”¹⁶

It is submitted that this broader interpretation would resolve the considerable debate around this particular area until such a time as the provision itself is revised.

The 'two-ship' element fails to take cognisance of the fact that the reported contemporary attacks do not involve two ships; attacks are usually made while ships are at anchor or tied to the pier. Most ships that are attacked while at sea are boarded by pirates using rubber boats or speedboats and not pirate ships.¹⁷

In order to understand the reason why Article 101 of UNCLOS may be outdated, it is necessary at this stage to highlight the background to the provision. This provision was extracted verbatim from article 15 of the Geneva Convention on the High Seas, 1958. In turn, article 15 was adapted from article 3 of the Harvard Draft, 1932. Garmon notes that during the era of the Harvard Draft, the exclusion of political activities made sense; as states were concerned with piracy only insofar as it interfered with commercial shipping, and little attention was paid to the possibility of pirates being used to further political interests.¹⁸ During 1958, at the time of the Geneva Convention, the scope of piratical acts was not increased. This

¹⁵ *In Re Piracy Jure Gentium* 49 Lloyds List (1934)

¹⁶ *ibid* at 420

¹⁷ see Mejia and Mukherjee (note 12 *supra*) at 182

¹⁸ Garmon 'International law of the sea: Reconciling the law of piracy and terrorism in the wake of September 11th' (2002) *Tulane Mar LJ* 263

is probably attributable to the beginnings of the cold war, to avoid jurisdictional problems with states with conflicting ideologies and regimes. At this time, the concept of the exclusive economic zone was not introduced and, therefore, the problem discussed above in relation to the high seas was not as prevalent. The adoption of UNCLOS in 1982 was before the trigger event of the *Achille Lauro* incident, and the drafters of the Convention did not contemplate the effects of not reviewing the piracy provision.

It is submitted that in this regard that an unfortunate trend has emerged in the developing jurisprudence of international maritime law. Virtually all significant maritime Conventions were adopted at conferences brought together in response to a tragic incident. For example, the Conventions on the Prevention of Pollution by Ships, 1973/1978. (MARPOL) were adopted after the incidents of oil spills such as the *Torrey Canyon*. The SUA was adopted in response to the *Achille Lauro* incident and the ISPS code and SUA Protocol were adopted after the September 11 bombings. Ironically these Conventions contain preventative measures, in response to incidents after the fact.

Most academics are of the view that the piracy provision of UNCLOS requires modification. It appears that the logical solution would be to simply amend the article. This, is however, not an easy task as it is a time consuming exercise to obtain the ratifications of all the signatories to the Convention. Historically, it took 12 years for UNCLOS to be adopted and another 12 years before it came into force.¹⁹ Notwithstanding this, the impetus with which the international community adopted the ISPS code and SOLAS amendments can provide a precedent of urgency. Those provisions entered into force only 18 months after their adoption.

¹⁹ see Mejia and Mukherjee (note 14 supra) at 322.

A question that arises is whether there is a need for a specific crime of piracy?²⁰ Most acts of piracy constitute other offences, such as assault, robbery, intimidation, hijacking, kidnapping and murder. There are, however, reasons for justifying the separate treatment of acts falling within the Convention definition of piracy. Convincing reasons for distinguishing certain acts when they occur at sea from those same acts on land are the added safety implications that those acts can have when committed aboard a ship, the threat to international commerce they can pose and the increased difficulty in policing them on the high seas.²¹ Furthermore, the difficulties involved in apprehending the offenders have always been at the core of the recognition of universal jurisdiction over piracy in international law.²² The writer concurs with these views. Chapter 1 *supra* discussed the notion of the sea not being the natural habitat for humans making vessels vulnerable in its vastness. The activities of the pirate, operating within this environment in various guises and committing a range of offences, should accordingly be regarded as *sui generis*. Chapter 3 *supra* discussed the collective impact which piracy in its constituent elements can have on the environment and the economy.

It is submitted in the premises that there is a need for an offence of piracy and that the current definition is inadequate. Accordingly, the logical course of action would be to review the contents of article 101. The following tentative suggestions are made.

The first would be to reconsider the article and redefine the crime of piracy taking into account the concerns raised above. In doing so, a critical amendment would be

²⁰ see the discussion in: Australian Law Reform Commission 'Criminal Admiralty Jurisdiction and Prize' (1990) 48 *ALRC* chapter 4 at 37

²¹ *ibid* at 38

²² *ibid*

to redefine the concept of high seas. There is a possibility that the position could revert to period before the creation of the exclusive economic zone, to bring the 'high seas' closer to the shore where piratical acts are commonly occur. In effect this would usurp the purpose of the exclusive economic zone; namely, for littoral States to gain greater control of the economic resources of their coasts. It is submitted therefore that many states, especially developing countries would object to ratifying and adopting such an amendment.

It is submitted that a viable option would be the addition of a complementary provision creating the offence of coastal zone piracy. The littoral state would be given the option to exercise jurisdiction and such jurisdiction could be exercised in accordance with the provisions of the Model National Law on Acts of Piracy and Maritime Violence, discussed *supra*. The potential difficulty, however, is where a littoral State is unable to exercise jurisdiction because of a lack of appropriate resources or incompetence and corruption, but in zealously refuses to cede jurisdiction to a foreign power.

Another viable option would be to replace the existing provision with a more inclusive and flexible definition, as provided by the IMB. In the IMB definition, set out in the previous chapter, the two-ship problem is eliminated; the act does not have to be committed for private ends; and there is no distinction between sovereign and international waters. The commercial maritime industry is traditionally jealous of its freedom and resents straightjacket measures. Accordingly there must be some element of flexibility to ensure the largest possible adoption. This definition by the IMB satisfies this need for flexibility.

B) SUA Provisions

The SUA is not as controversial as the provisions of UNCLOS. A perusal of the list of offences contained in article 3, set out in the previous chapter, shows that the restrictive elements found in article 101 of UNCLOS are not included here. The different varieties listed make it applicable to most categories of violent crime. Piracy can comfortably fall within the parameters of article 3 (1)(a); the only requirements being that it must be: (i) an unlawful and intentional (ii) seizure or control of a ship (iii) by force or threat thereof or any other form of intimidation. As appears from this provision, many of the controversial provisions discussed above namely the private ends requirement, the high seas requirement, and the two ships requirement are avoided. It has been heralded as landmark Convention because it is the first time that a criminal offence is created in an instrument of this nature.

There are, however, certain limitations that many academics have pointed out. Some are relatively technical such as the additional requirement to many of the offences listed in article 3, namely 'that endangers the safety of maritime navigation'. Mejia and Mukherjee²³ define this concept to refer to instances where the pirates have either exercised control over the ship or endangered or compromised its safe navigation. Accordingly, in the more frequent cases where the ship is not taken control of would not fall within the ambit of that particular provision.²⁴

A criticism of the Convention is that whilst it criminalises the offences listed therein, it is left to state parties to the Convention to prescribe sanctions, which

²³ See Mejia and Mukherjee (note 12 supra) at 184

²⁴ *ibid*

would lead to a lack of uniformity.²⁵ It is submitted however that a possible reason for the omission of defined sanctions for the offences listed is that States have different penal regimes, influenced by its political dispensation and ideology – certain States would impose capital punishment for piratical acts.²⁶ A possible solution to this would be either a referral to the Model National Law discussed above to provide guidance or for the issuing of a recommendation to governments by the IMO prescribing sanctions for the relevant offences, including competent verdicts and in the alternative.

C) Implementation of the ISPS Code

The ISPS Code is a mechanism for the prevention of all risks to security in shipping, of which piracy is a prominent concern. Whereas the Conventions discussed above relate to procedures and actions to be taken after a piratical act has been committed, the ISPS Code is aimed at taking pre-emptive measures through mandatory compliance to ensure that piratical acts do not materialise. It has been stated that ‘even though every new standard adopted by the IMO represents a step forward, it is virtually worthless without proper implementation’.²⁷ Reports from as early as 2004 indicate that the compliance rate with the requirements listed in the code was well over 90 per cent, and information from contracting governments revealed that 90 per cent for Port Facilities complied with the requirements.²⁸ It is trite that that a ship that presents herself for the carriage of cargo and passengers must be seaworthy. A new category of ‘securityworthiness’ is probably added to

²⁵ see Editorial (note 8 supra) at 302.

²⁶ see Mejia and Mukherjee (note 14 supra) at 325

²⁷ Hesse and Charalambous ‘New Security Measures for the International Shipping Community’ (2004) 3 *WMU Journal of Maritime Affairs* 131

²⁸ *ibid* at 132

the established law.²⁹ The burden of implementation, however, is borne by the contracting governments and the industry. Asariotis succinctly states the consequences of non-compliance as follows:

“Non-compliant ships face detention, denial of entry into ports, or expulsion from ports, as well as automatic loss of their P & I cover. Moreover, vessels which have called at non-compliant port facilities may be refused entry into other ports, thus port facilities have a strong incentive to ensure full compliance as they may otherwise face a significant loss of business.”³⁰

Measures such as those required in the ISPS Code cannot be implemented without substantial cost implications. These costs arise through *inter alia* management staff and security-related equipment and procedures, training of security officers, installation of security operating systems prescribed in the code, and the indirect costs to ports for operating at higher security levels.³¹ The initial cost of ISPS Code compliance to ship owners was estimated to be at least US\$ 1,297 million and US\$730 million per year thereafter.³²

In addition to the cost factor, ports do not have the same international standards as ships and are subject to domestic legislation that overrides the ISPS Code.³³ Personnel on ships and in port facilities may find the constraints imposed by these requirements to be irksome and difficult to accept.³⁴

²⁹ Editorial ‘The ISPS code – implications for the private law of international shipping’ (2004) 10 *JIML* 217

³⁰ Asariotis ‘Implementation of the ISPS Code: an overview of recent developments’ (2005) 11 *JTML* 266-267

³¹ see discussion in Asariotis (note 30 *supra*) at 277

³² *ibid*

³³ Robertson ‘ISPS Code – looking forward’ (2004) 2 *Maritime Risk Intl* 11

³⁴ *ibid*

Having regard to these factors, the question that arises is why should the industry and ports bear the considerable cost and responsibility of these pre-emptive measures when the focus should be on the perpetrators and their eradication?

There are, however, considerable advantages to shippers and ports through effective implementation, namely, a potential eradication of terrorist and piratical acts as a regular occurrence. Whilst there are costs involved in implementation, costs are saved through reduced delays, faster processing times, better asset control and decreased insurance costs.³⁵ The nature of the shipping industry is such that an effective security regime is essential when consideration is given to the fact that *inter alia* vessels can easily hide their identities through company registrations and huge volumes of containers in the region of 230 000 000 are transported across the globe which present formidable challenges.³⁶

Accordingly, there needs to be a balance between the need to implement the new security regime strictly and robustly and yet ensure that disruption to global trade is kept to a minimum.³⁷ It is just over three years since the Code came into effect in July 2004. During this time there has been a smooth transition into this new regime governed by the requirements of the Code, without significant disruptions to international trade. It is submitted that the concerns about the onerous requirements will dissipate as these requirements become more entrenched and established in the commercial shipping system. In much the same way as customs and excise duties are accepted norms in terms of operating expenses; security costs would eventually be regarded as an accepted norm.

³⁵ see Hesse and Charalambous (note 27 *supra*) at 134

³⁶ see Robertson (note 33 *supra*) at 10

³⁷ see Hesse and Charalambous (note 27 *supra*) at 135

The next chapter briefly considers the applicable law in the Republic of South Africa and examines the threat of piracy in the South African context.

VII POSITION IN SOUTH AFRICA

Having discussed the international instruments and their practicality and implementation, it is necessary to examine the existing law in South Africa. The reason for this is that these international instruments do not automatically become law in South Africa. The South African Parliament, upon ratification of a Convention, passes enabling legislation to enable the provisions of the Convention to be valid and binding within the Republic. In some instances, the Convention is reproduced verbatim in the style and format of an Act of Parliament. In other instances, the provisions are incorporated or paraphrased within the text of an Act. The Convention itself can also be appended to an act as a schedule or annexure.

A) Principal statutes referring to piracy

(i) Defence Act 42 of 2002

In this Act, the provisions of UNCLOS defining piracy are incorporated. Chapter 4 deals with the law enforcement powers of the South African National Defence Force at sea. Section 24 defines piracy in identical terms to article 101 of UNCLOS. The definition differs only to the extent that it recognises the Master and not only the crew or passengers of a private ship can perform an illegal act of violence, depredation or detention against another ship. The offender can be prosecuted as provided in Section 24(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.”

Section 25 provides for the seizure of a pirate ship, section 26 provides for the right of visit on the high seas by warships of the Defence force with a corresponding

right of hot pursuit as contemplated by section 27. These provisions were passed in accordance with the corresponding provisions in UNCLOS.

(ii) Maritime Zones Act 15 of 1994

This act establishes South Africa's territorial waters as 12 nautical miles from the baselines and an exclusive economic zone within a distance of 200 nautical miles from the baselines. The Republic is vested with the same rights and powers as it has in respect of its territorial waters with regard to all natural resources. The significance of the Exclusive economic zone has been discussed in the preceding chapter of this Dissertation.

(iii) Protection of Constitutional Democracy against Terrorist and related activities Act 33 of 2004.

This Act was aimed *inter alia* to give effect to the provisions of the SUA Convention. The Republic subsequently ratified this Convention in June 2005. Part 2 of Chapter 2 deals with 'Convention offences' and section 10 thereof provides for 'Offences relating to hijacking a ship of endangering safety of maritime navigation.' As appears from this section, the provisions of Article 3 of the SUA Convention (reproduced in Chapter 5 above) have been adopted verbatim. There is a provision detailing the requirements to establish jurisdiction over these offences.¹

South Africa has also endorsed the ISPS Code and the SOLAS amendments in July 2004², along with most of the SOLAS contracting States.

B) South African common law

¹ see section 15

² see Fouche 'Policing maritime piracy in Southern Africa' (2006)19 *Acta Criminologica* 191

Whilst there is no specific crime of piracy in the common law, there are other crimes in the common law which of an act of piracy, committed within South African territorial waters, has common features: notably, robbery or armed robbery; assault; culpable homicide; kidnapping; and malicious injury to property.³ It is not a requirement of any of these crimes that these acts must be committed exclusively on land, and they are accordingly applicable if committed on board a ship within South African waters or a South African port. The crime of 'public violence', defined as 'unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions which are intended forcibly to disturb public peace or security or to invade the rights of others.'⁴ can be applicable.

Piracy can also fall within the category of crimes against community interests, which Burchell and Milton⁵ describe as:

"...[focusing] on the safety, happiness and well being of the community in the enjoyment of public facilities available generally to all members of the community. In particular, there is a claim to be free from conduct which, by reason of the danger or threat of physical harm interferes with the public's ability to use public thoroughfares and public places safely and in peace."

C) Threat of Piracy in South Africa

It is trite that South Africa is a major maritime power on the African continent. The port of the city of Durban on the east coast is reportedly the busiest on the continent. There is a coastline in extent of approximately 3000 kilometres with a corresponding exclusive economic zone in extent of approximately 1 million

³ see Burchell and Milton 'Principles of Criminal Law' (1997) 2nd ed at 465, 478, 519, 566, 593.

⁴ *ibid* at 609

⁵ *ibid* at 607

square nautical miles, which in effect creates a tenth province. South African territory also extends to a portion of the Southern Ocean in waters surrounding the Prince Edward Islands. South Africa has a maritime history, with the Cape of Good Hope being the halfway point on the ancient sea route to the east from Europe. 50 per cent of South Africa's GDP is reportedly generated through maritime foreign trade and the sea fishing industry⁶. There is accordingly a potential threat of piracy. Le Roux wrote that

"...this southwards movement of piracy incidents can be ascribed to the greater international naval presence around the Horn and better law enforcement in other parts of the world forcing pirate groups to seek new waters for their criminal activities. It is also well known that pirates work closely with organised crime syndicates and rely on such syndicates operating in commercial ports for information about the type of cargo, times and routes of commercial shipping. This makes South and Southern Africa an increasingly attractive target for pirates."⁷

In summary, South African legislation embodies the critical provisions of the international conventions relating to piracy. It follows therefore that the difficulties associated with its application discussed above also apply to South Africa. It is accordingly submitted that South Africa should continue to actively participate in international forums which formulate maritime policy. It is generally accepted that many countries in Africa view South Africa as a leading nation and South Africa has a leading role to play in combating the scourge of piracy on the continent.

⁶ Le Roux 'Experts Warn of Piracy Threat to South African Waters' *Pretoria News* 27 November 2006.

⁷ *ibid*

VIII CONCLUSION

The philosopher Aristotle (384 – 322 BC) once remarked:

“For that which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own; hardly at all of the common interest and only when he himself is concerned as an individual.”¹

This is true of the sea, being *res communis*. The examination of piracy in this dissertation has shown that throughout the ages the description of it as the ‘scourge of the seas’ is quite apt. It is the responsibility of all nations to act in co-operation with international organisations in implementing preventative measures and to assist in the prosecution and extradition of pirates.

In summary this dissertation has considered the nature of piracy in the modern context, supported by relevant statistics and trends, and the conclusion reached is that the crime has taken on a new guise together with terrorist activities. After an analysis of the current international instruments adopted for the purpose of criminalizing piracy, it has been suggested that these are outdated and inapplicable to the majority of instances of piracy. On the other hand, preventative measures created by the implementation of the ISPS Code have been largely successful, save for concerns relating to the cost factor. This is a rare instance where the law is defective but implementation of preventative measures has been successful. The reverse is more often true. It is suggested that priority be given to effecting the necessary amendments to UNCLOS and for the establishment of a sustainable international fund to assist developing communities with the costs involved in implementation of the ISPS Code.

¹ cited in De Jager ‘Developing a common African defence and security policy: a maritime perspective’ (2006) paper presented at the 2nd annual maritime surveillance & reconnaissance Africa conference

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