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Africa Programme and International Law Conference Report

Piracy and Legal Issues: Reconciling Public and Private Interests

1 October 2009

Introduction

This conference report is drawn from the Piracy and Legal Issues conference held at Chatham House on 1 and 2 October 2009.[1] While the conference focused on piracy off the coast of Somalia, it was not confined to it, recognising that there has been a resurgence of piracy attacks in other parts of the world. The conference addressed legal issues concerning piracy, and, in particular:

- whether there is sufficient coordination between the private (commercial and personal) interests and the public (governmental) interests involved and whether these interests can be reconciled and
- whether the legal regimes relating to piracy are sufficient or need to be updated.

This report addresses the following questions.

- What is piracy? Is piracy terrorism?
- Public interests:
    - What are the international law powers of governments and their navies?
    - Who should prosecute pirates – the states of the region or the capturing state? Should there be an international court for the purpose?
    - What does human rights law require for the proper treatment of captured pirates?
    - Is international cooperation satisfactory? Is enough assistance being given to Kenya in its prosecution efforts?
- Private interests:
    - What interests are affected?
    - Should private security companies be used?
    - Can ransoms be recovered, once paid?
- Conclusions and recommendations

[1] Speakers and moderators were: Iain Anderson – Ince & Co, Stephen Askins – Ince & co, Alan Bacarese - ICAR, John Bainbridge – Int. Transport Workers' Federation, Agustin Blanco-Bazan – IMO, Martin Bridger, Alan Cole – UNODC, Annie Conway – HMRC, Tim Daniel - Edwards Angell Palmer & Dodge, Simon Davis - Ex Met Police, Douglas Guilfoyle - University College London, Simon Jones – Triton, Cmdr James Kraska - US Naval War College, Vincent Monda - Kenyan Prosecutor, Cmdr Andy Murdoch – RN, Godfrey Musila – ISS, Giles Noakes – BIMCO, Boma Ozobia – Stirling Partnership, Martin Polaine – Amicus Legal Consultants, Michael Peel – Author: *Poisoned Wells,* Robert Quick, Khawar Qureshi QC - Serle Court, Captain J. Ashley Roach, Arvinder Sambei – Amicus Legal Consultants, Katharine Shepherd – FCO, Jonathan Tickner - Peters and Peters, Elizabeth Wilmshurst - Chatham House, Rüdiger Wolfrum - Judge, International Tribunal for the Law of the Sea, Aldo Zammit-Borda – Editor Commonwealth Law Bulletin.

- Can public and private interests be reconciled?
- Recommendations for legal regimes governing private and public concerns.

There are two annexes to this report:
Annex I: international treaties regarding piracy issues, by Dr Douglas Guilfoyle
Annex II: list of laws and other instruments, by J Ashley Roach

←What is piracy? Is piracy terrorism?

Piracy is defined internationally as illegal acts of violence or detention committed for private ends by the crew or passengers of a private ship on the high seas against another ship, or against persons or property on board (Article 101 of the UN Convention on the Law of the Sea (UNCLOS)).[2] 'Piracy' therefore does not include acts with governmental objectives, acts committed within the territorial sea, in port or internal waters, or acts which involve only one ship.

Terrorism on the other hand, while having no internationally agreed definition, usually involves indiscriminate violence with the objective of influencing governments or international organisations for political ends. The international community has grappled with the challenge of defining terrorism over the past century, yet agreement has remained elusive. Most counter-terrorism treaties have been adopted as a response to historical events. As a result the legal landscape is littered with slightly different acts covered by different international treaties.

There are some counter-terrorism treaties which are wide enough to include acts of piracy. For example, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (the SUA Convention), which was adopted in response to the attack in 1985 on the *Achille Lauro*, does not cover piracy in so many words, but many acts of piracy will be offences within its terms. The Convention obliges states to criminalise, inter alia, 'armed robbery at sea'; in other words, an act which would amount to piracy if committed in the circumstances outlined by UNCLOS. The International Convention against the Taking of Hostages 1979 is another example. The offence of hostage-taking covered by this treaty clearly covers holding crews for ransom in the typical acts of piracy being committed off Somalia.

The aim of these two Conventions is to require states to create offences under their law and to provide for a seamless international criminal law framework that reduces

[2] The International Maritime Bureau definition is wider: 'The act of boarding any vessel with intent to commit theft or any other crime... and with the intent or capacity to use force in furtherance of that act.'

the existence of safe havens for those who commit the acts covered by them. This aim finds expression in the obligation on states either to extradite or prosecute those accused of committing the acts *(aut dedere aut judicare).* But although these treaties are commonly characterised as counter-terrorism conventions, the word 'terrorism' appears only in the preamble of each. A terrorist motive does not form any express element of the crime set out in the treaty. The treaties can be useful tools against piracy in many circumstances, but they do not themselves classify acts of piracy as 'terrorism'.

Should piracy be considered in the context of counter-terrorism under national or international law, or should it be regarded as ordinary crime? It sometimes appears that there is a drive to establish a nexus between piracy and terrorism and to view piracy through the context of terrorism; to find a link, for example, between acts of piracy and Al Qaeda or, in the case of Somali piracy, Al Shabaab. A UN monitoring group report on the arms trade shows that money from piracy is being used to purchase arms used in the conflict in Somalia.[3] The example of the Niger Delta may be seen as relevant. It is one of the regions where the regimes governing acts of marine armed robbery (which would be piracy if committed on the high seas) and counter-terrorism converge. Rather than attempting a rigid distinction between acts of terrorism and piracy, the 'four circles' model may be useful, which views terrorism, piracy, insurgency and organised crime as sometimes overlapping activities.

Are there any benefits to be derived from labelling piracy as terrorism? It is sometimes thought that, politically, a counter-terrorism label might encourage greater pro-activity in international co-operation regarding prevention and enforcement. Some countries seek to galvanise states in the West to act against piracy by using counter-terrorism legislation that may be defective in terms of human rights protections. But, given the serious nature of piracy it is unlikely to provide more incentive to states to provide for effective and dissuasive penalties. Piracy is already an offence with universal jurisdiction.

Piratical acts and acts akin to piracy do not need the 'terrorism' label to be seen as grave crimes worthy of an international response. Some actions of the pirate will be caught by the international counter-terrorism instruments but piracy is not terrorism as such and does not need to be treated as such. The typical acts of piracy committed off the coast of Somalia seem to be piracy indeed, rather than terrorist offences. But

[3] Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1811 (2008), United Nations, 10 December 2008, available at:

http://daccessdds.un.org/doc/UNDOC/GEN/N08/604/73/PDF/N0860473.pdf?OpenElement

particular acts may amount to a number of offences and they must be dealt with on a case by case basis.

←Public interests

The interests of states are primarily in the deterrence, disruption and prevention of acts of piracy, and in the bringing of pirates to justice.

Public international law relating to the powers of governments and their navies over acts of piracy

Under Article 100 of the UN Convention on the Law of the Sea (UNCLOS), all states 'shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.'

Any state may seize a pirate ship or aircraft - or a ship or aircraft taken by pirates - and arrest the persons and seize the property on board. In turn, the courts of the state which carried out the seizure may subsequently decide upon the penalties to be imposed; and may determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties (Article 105,UNCLOS). Any warship or military aircraft, or other clearly marked government vessel may seize pirates (Article 107).

Customary international law provides basic principles governing the appropriate amount of force to be used where it is lawful to stop and arrest a ship at sea.[4] Piracy is an ordinary crime and navies are undertaking law enforcement duties, not engaging in conflict. Navies have the right to use reasonable force in pursuit of their law-enforcement mission; the amount of force used must not exceed what is reasonably required in the circumstances. In the event of death or serious injury, human rights and the requirement of humane treatment necessitate the holding of an enquiry.

UNCLOS does not lay down rules as to the prosecution of pirates. But if a ship is attacked, there may be an offence under the SUA Convention, as noted above. This is so whether the attack also comprises the offence of piracy or does not (for example because it is within territorial waters rather than the high seas). Unlike UNCLOS, which imposes a duty on states to cooperate in the suppression of piracy, but no explicit duty to prosecute,[5] the SUA Convention places obligations upon states to

[4] The principles were considered in another context by the International Tribunal for the Law of the Sea in the case of *Saiga 2* (http://www.itlos.org/start2_en.html). See also the case of *S.S. 'I'm Alone' (Canada/United States, 1935), U.N.R.I.A.A., Vol. III*, p. 1609 and *The Red Crusader* case *(Commission of Enquiry, Denmark–United Kingdom, 1962), I.L.R., Vol. 35,* p. 485.

[5] However the obligation in UNCLOS to cooperate in the repression of piracy can be interpreted as meaning that any state having an opportunity of taking measures against piracy and failing to do so is in

have adequate national laws implementing the Convention offences and either to extradite or prosecute suspects found within their territory, irrespective of where the offence was committed. UNCLOS says nothing about transferring suspects to another jurisdiction, but the SUA Convention provides that a master may disembark a suspected person in port (Article 8 (1)) and includes a procedure for such action. The primary obligation is on the port state to receive the suspect unless they have very strong grounds for refusing to do so. In such circumstances, the port state may try the suspect either as a pirate or for a SUA Convention offence, depending upon their own national law.

These and other treaties which may, dependent on the circumstances, be relevant to piracy (treaties on hostage-taking and transnational organised crime) are discussed in Annex 1.

Security Council resolutions

As regards piracy off the coast of Somalia, UN Security Council resolutions have been adopted to facilitate international cooperation in deterring and dealing with acts of piracy. The original impetus was the need to prevent attacks on ships carrying World Food Programme aid. The resolutions[6] give cooperating states the right to pursue and capture pirates in Somali territorial waters and, in the case of resolution 1851, on land in Somalia. There is, however, a stipulation that cooperation must first be agreed by the Transitional Federal Government (TFG) of Somalia and notified to the UN Secretary-General.

Although the term 'all necessary means' is used in the resolutions as an authorisation to states to use force, the stipulation that TFG agreement is necessary and the requirement that the powers are to be exercised consistently with international law may lead to the conclusion that the resolutions do not confer any legal powers which were not already available under international law. The TFG could anyway have granted permission for foreign states to conduct law enforcement operations within its waters or territory. However, there was no agreement amongst the international community regarding the capacity of the TFG, so the Chapter VII authorisation was thought necessary. There is also a strong political impetus given by the resolutions for states and international organisations to cooperate in naval interdiction and law enforcement and the resolutions encouraged the EU and NATO operations. Resolution 1851 in particular encouraged and promoted a number of methods to facilitate international cooperation in law enforcement: the use of shipriders (law

breach of its duty under international law. This interpretation is supported by the Commentary of the International Law Commission on the provision of the 1958 High Seas Convention on which the UNCLOS provision was based.

[6] Principally, resolutions 1816(2008), 1838(2008), 1846(2008), and 1851(2008)

enforcement officers from regional countries who can effect the arrest of pirates captured by the naval vessel); the establishment of a cooperative mechanism, which developed as The Contact Group on Piracy off the Coast of Somalia; and capacity building in Somalia and in the region, including judicial capacity.

Resolutions 1846 and1851 are due to expire in December 2009 and will have to be renegotiated; it is expected that the existing arrangements will continue.

Issues relating to detention and prosecution of pirates

It is an unfortunate fact that 50-60% of captured pirates have been released by the navies which captured them. This illustrates the challenges of providing a feasible system of prosecution of the pirates.

Is there a lack of political will to ensure that pirates or suspected pirates are brought to justice? There is certainly a reluctance to capture pirates without a firm possibility of successfully dealing with them and their ships. Once pirates have been captured, there is the problem of where they should be transferred by the capturing ships for the investigation and prosecution of their crimes. There are frequently multiple jurisdictions involved in a single act of piracy. Ships are referred to as floating multi-nationals due to the varying nationalities of the pirates, crew, passengers, interdiction asset, vessel owner, cargo owners, regional ports and flag of the vessel. But in the case of piracy there is no legal need for a nexus between any of these interests and the country which mounts the prosecution: under international law all states have the power to try pirates in their courts.

However, the first requirement before a person may be transferred to a state for prosecution is that that state has the necessary domestic legislation. Both UNCLOS and the SUA Convention need to be incorporated into the domestic law of states parties; the enactment of proper legislation can be facilitated by combining UNCLOS with IMO Assembly resolutions which contain precise guidelines and recommendations on how to implement UNCLOS provisions on the prevention and punishment of piracy.[7] Although the Security Council resolutions give powers in relation to 'piracy' in Somali territorial waters, the national legislation of most states will not allow prosecution for acts committed in those waters (since this is not piracy as internationally defined) unless the act also amounts to a SUA offence.

[7] For instance, Recommendations To Governments For Preventing And Suppressing Piracy And Armed Robbery Against Ships MSC/Circ.622/Rev.2.

The next issue is one of willingness to prosecute. There is a perception that many countries in the West are not prepared themselves to mount prosecutions and are even divesting themselves of the power. This may be from fear that pirates, after finishing a prison sentence, would apply for asylum, or otherwise. In some countries there may not be jurisdiction as wide as is provided by UNCLOS; for example jurisdiction may be limited to flagged vessels. Other states will not prosecute inchoate offences, but only if the pirates have actually attacked and are caught in the act. A number of pirates have been arrested during or after unsuccessful attacks on ships. While there has been the rare occasion of trial in Europe or the US (for example those involved in the attack on the *Samanyolu* who are now in Holland), there is a strong feeling in some quarters that it is unreasonable to expect the regional countries such as Kenya, Tanzania, and Seychelles to bear almost all the burden of prosecution.

But whether or not some states lack political will, others are hampered by the difficulties of mounting a successful prosecution, due to difficulties of evidence-collection and of investigation and trial more generally. Although there are parallels with other transborder operations, such as counter-terrorism, and it may be thought that the challenges are therefore not unique, the characteristics of capture and transfer of pirates do present particular problems. Decisions on whether to prosecute may take weeks. Meanwhile, the suspects must be held on board their vessel or the naval or commercial ship (neither of which are designed to hold persons in secure but humane conditions). Delays awaiting decisions on whether to instigate domestic investigation, transfer to a third party state or release may give the opportunity to destroy evidence. Pirates are sophisticated, they use the internet, they know about the requirement for evidence and they are increasingly destroying the evidence. There are challenges inherent in arresting in one place for prosecution in another; those responsible for the initial capture may not know for weeks what is the detention and custody regime in the state where prosecutions are going to take place and whether the police, prosecutors and judiciary have the necessary capacity. For the capturing authority it will be difficult to apply the correct standards of investigation since they are unaware which country's jurisdiction they are working to. While some countries have officers on board naval vessels trained to police standards (eg UK) this will not always be the case.

Further international co-operation is needed to bring successful prosecutions. Information-sharing is important: identification of the suspects is often difficult; pirates range from former fishermen who know the sea to ex-militia men who are expert fighters to people who can operate military hardware, GPS and radio.

Once a case comes to trial, to secure oral statements from witnesses involves huge costs and the time for crew to attend trial. The shipping industry can provide support to make the process of prosecutions work by encouraging the attendance of witnesses, who may be masters or crew.

Prosecution of pirates in Kenya

Of the four countries in the region prepared to undertake the prosecution of pirates (Kenya, Somaliland, Puntland, and the Seychelles), Kenya is the key player and the most developed in terms of its judiciary, investigative, and logistic capacity. Piracy presents a potential threat and problem to the stability of all of the countries mentioned, but capacity is limited even though they are willing to cooperate regionally. Even for Kenya, there are fundamental challenges to the successful application of the justice system to Somali pirates, and a need for the international community to continue its support through capacity building initiatives.

There are practical problems for the Kenyan prosecutors. Decisions by the capturing state requiring prosecution may be taken in the country concerned and then communicated to Nairobi (for approval to disembark pirates or not) and then to Mombasa (the arrival port for the pirates). This may result in difficulties for the prosecutors based in Mombasa when decisions to prosecute have been made where there is insufficient evidence on the ground.

The judicial system lacks basic capacities. One of the most pressing issues is the lack of stenographers in courts; court proceedings currently need to be recorded manually, often causing difficulties and delays and sometimes a lack of official records. Modern communication and record systems are needed. Trials may lack Somali speakers to translate for the pirates. More training is needed for prosecutors and more support to the judicial system as a whole, to ensure fair trial standards. Another difficulty is the lack of legal assistance to pirates: the Kenyan penal system does not provide the accused with legal aid unless charged with murder. The collection and processing of evidence is impeded by the lack of forensic facilities in Mombasa, insufficient transport facilities, and limited office space. Prisons are overcrowded.

Capacity building and support for the justice system has been provided by UNODC and, for instance, through EC stability funds and has already made a difference, but the challenges remain. Assistance needs to be given intelligently. For example, coming from a war-torn region many Somali pirates have serious wounds needing treatment. But they should not be seen to be receiving treatment preferential to that given to Kenyan prisoners, or even to prison wardens. Capacity building and

improvement of prisons in Kenya proceeds slowly, as there needs to be a general improvement of prison facilities and systems, not pirate-specific.

The needs however are urgent. The Kenyan Attorney General was quoted on12 September 2009 as saying, *"If the international community does not step up its assistance, then soon rather than later Kenya might say enough is enough"*.

An International Criminal Court to deal with pirates?

In view of the difficulties for national prosecutions, various suggestions have been made for establishing an international court to prosecute pirates, or enlarging the jurisdiction of the existing International Criminal Court to include piracy. There is little support for such proposals. Judging by the experience of other international tribunals, a new international court would take years to set up and would be extremely costly in terms of the financial and human resources required. Neither a new court nor the International Criminal Court would solve the problems of where to imprison convicted pirates. An international court is required only where there is no other structure in place for dealing with a given crime. But for piracy there are innumerable national courts: what is needed is more capacity-building for regional courts and more willingness to prosecute by national systems elsewhere.

Application of Human Rights Law

The treatment of captured pirates is subject to certain safeguards in international law. Humane treatment, the absence of arbitrary detention, the right to be brought promptly before a judge, the right to a fair trial, the avoidance of transfer to a country which will apply the death penalty and conflict with fundamental human rights, and other such obligations are required, for states parties to the relevant treaty, by such treaties as the Convention Against Torture, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights. Most states off the Horn of Africa are party to the Covenant.

European states which have naval vessels off the coast of Somalia are parties to the European Convention on Human Rights (ECHR). Although these states are acting under the authority of Security Council resolutions (see above), those resolutions make clear that they do not displace the operation of human rights; indeed they expressly affirm them.[8] The Convention imposes a number of requirements regarding the treatment of pirates, their capture, detention and transfer.

[8] For example, paragraph 14 of 1846(2008) calls upon states to co-operate in investigating and prosecuting persons suspected of piracy and armed robbery consistent with international human rights law.

The issue which is considered here relates to the requirement not to detain persons except subject to certain criteria, including the need to bring them promptly before a judge (Article 5). Questions raised by this requirement include: does the Convention have extraterritorial effect, does it require states to accord judicial oversight of pirates detained on the high seas, and if so how can this requirement be implemented in practice?

The ECHR applies to persons within a state's jurisdiction (Article 1); in extra-territorial situations this is now agreed to depend upon whether a person is within a state's effective control. Most of the relevant case law of the European Court of Human Rights and of national courts relates to the operation of forces in other countries, for example as part of the multi-national force in Iraq and Afghanistan. In the *Al Skeini* case in the UK courts it was conceded by the government that UK military-run detention facilities in other countries were within its jurisdiction for the purposes of the ECHR. Do the conclusions of the courts in these cases read across to operations on the high seas? At what stage are pirates under the control of the military?

The detention of pirates can be divided into three categories. *First*, there is the situation where pirates are captured and detained with a view to bringing them to the capturing state for prosecution. Here it is relatively clear that the ECHR applies. This situation underlay a recent ECHR case, *Medvedyev*[9], involving a French naval vessel that had captured a Cambodian-flagged vessel suspected of drug-running and escorted it to Brest where proceedings were instigated. The Court ruled against France for failure to properly inform judicial authorities of the navy's actions and on the grounds that it did not have a secure basis in both international and national law for their arrest. France has appealed to the Grand Chamber in Strasbourg. The court dismissed a claim that the applicants in *Medvedyev* had not been brought promptly before judicial authorities, as there was no reasonable alternative to holding them up for the 13 days required to take them to port.

Secondly, there is the situation where pirates are captured and detained, possibly for some weeks, with a view of bringing them to a third state for prosecution. Here a whole range of factors would probably be considered by a court. The court may rule in these circumstances in favour of extra-territorial application for the ECHR, as was conceded in *Medvedyev*. The *third* situation is where it is not known, at the moment pirates are detained, who will prosecute them if at all. If the pirates are detained in this situation on the capturing state's vessel, that ship would probably be regarded as being under the state's jurisdiction for the purposes of the ECHR, akin to a consulate or embassy. If pirates are detained in their own ship, however, pending decision as to

[9] http://www.echr.coe.int/echr/, No. 3394/03.

their disposition, there is uncertainty as to the application of the law. A parallel situation would be where a state rescued persons in distress in accordance with obligations under the SOLAS Convention (on safety of life at sea). The aim there is to preserve life, quite different from a scenario when they are detained with a view to prosecution.

If there is an obligation to provide judicial oversight of detention of pirates on the high sees, there will be questions as to how the obligation is to be put in effect. Technical means through which to bring detainees before judicial officers, for example by way of video link, are being introduced by some states. The detailed application of the ECHR to the treatment of pirates is not clear in every respect, but the Court in Strasbourg is likely to make further pronouncements on the matter.

International Cooperation.

That much-quoted provision, Article 100 of UNCLOS, requires states to cooperate to the fullest possible extent in the repression of piracy.

A number of UN bodies deal with piracy and promote international cooperation. The International Maritime Organisation (IMO) primarily deals with the prevention of piracy, working very closely with UNODC (United Nations Organisation on Drugs and Crime) which has primacy on transnational organised crime and legislative approaches, as well as procedures to assist naval vessels in investigations. The United Nations Office for Somalia co-ordinates activities of different organisations dealing with Somalia, bearing in mind that piracy is only a symptom of the wider problem.

There is a large number of other cooperation initiatives. An example can be found in the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).[10] This initiative, in collaboration with the IMO, aims at capacity building, the sharing of information, and the suppression of piracy in the area. With regard to piracy off the coast of Somalia, cooperation is facilitated through the Djibouti Code of Conduct[11], which with the guidance of the IMO came into force in January 2009. The agreement has a similar strategy of cooperation as ReCAAP,

[10] http://www.recaap.org/about/pdf/ReCAAP%20Agreement.pdf

[11] "…the signatories declare their intention to co operate to the fullest possible extent, and in a manner consistent with international law, in the repression of piracy and armed robbery against ships, with a view towards sharing and reporting relevant information through a system of national focal points and information centres; interdicting ships suspected of engaging in acts of piracy or armed robbery against ships; ensuring that persons committing or attempting to commit acts of piracy or armed robbery against ships are apprehended and prosecuted; and facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to acts of piracy or armed robbery against ships, particularly those who have been subjected to violence.

although rather more complex. The Code of Conduct provides an impetus for countries in the region to adopt legislation for prosecuting pirates and for developing coastguard capability, so that when the navies depart the countries in the region can take over the problem. The Contact Group on Piracy off the Coast of Somalia, set up with the encouragement of the Security Council, is an ad hoc group of states with interests in the issue; the Group has four different working groups with substantive work being done in different areas, the second having responsibility for legal issues. This working group is considering issues of the kind dealt with at the conference. There are moves for more sharing of intelligence among states; EUROPOL, for example, has decided to facilitate the exchange of information.

As well as these multilateral means of cooperation, there are bilateral agreements and memoranda of understanding between states which wish to transfer captured pirates for prosecution and the prosecuting states. Even where such MOUS exist, there is no obligation on the prosecuting state to accept a detained person.

Private interests

What interests are affected?

Hijacking lasts on average 50 or 60 days. The practice most pirates follow is not to harm the crew and to 'sell' the ship back to the owners. Piracy is aimed at extracting financial advantage for the pirates. Who pays for the consequences of piracy? What are the different private interests involved?

The stakeholders in a laden ocean-going vessel are numerous. At the centre is the ship-owner, often a company owning one ship and registered in a country other than that of the domicile of its managing or operating company. The vessel will be under

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Participants intend to fully co-operate in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy; seize suspect ships and the property on board such ships; and rescue ships, persons, and property subject to acts of piracy. These acts would be consistent with international law.

The Code of Conduct also covers the possibilities of shared operations, such as nominating law enforcement or other authorized officials to embark in the patrol ships or aircraft of another signatory.

The Code of Conduct further calls for the setting up of national focal points for piracy and armed robbery against ships and the sharing of information relating to incidents reported. The signatories intend to use piracy information exchange centres in Kenya, United Republic of Tanzania and Yemen, to be located, respectively, in the regional Maritime Rescue Coordination Centre in Mombasa, the Sub-Regional Coordination Centre in Dar es Salaam, and a regional maritime information centre, which is being established in Sana'a." http://www.imo.org/about/mainframe.asp?topic_id=1773&doc_id=10933

charter and, depending on the terms of the charter, either the owner or charterer will bear the not inconsiderable cost incurred by the lost time for the three or four months which now represent the average hijacking.

The other main commercial stakeholder with a direct contractual relationship with the ship-owner is the cargo owner. Sometimes the cargo on board is more valuable than the ship and it may be a commodity whose value will decrease during the period of captivity. The potential losses in such cases may be significant.

Those interests are insured, and it is the terms of the various policies which dictate which is the person carrying the risk of piracy and the responsibility for the payment of a ransom. The two main policies relied on by the ship owner (and the scheme of insurance is mirrored on the cargo side) are provided by the hull and the war risk underwriters. Traditionally, in London the piracy risk has fallen on the hull market although there has been a move to shift the risk onto the war risk underwriters where it more logically sits. There is an acceptance that on a laden voyage the ransom and ancillary costs will be paid in accordance with the principles of General Average. That is, the cargo and ship will pay pro rata to their respective values at the completion of the voyage. This can give an owner a funding problem because cargo interests are unlikely to contribute anything until after the hijacking and indeed may wait until an adjustment has been issued, which can take many months.

The past eighteen months have seen the development of a more specialist policy known as a "Kidnap and Ransom" policy. That has evolved into a product which covers the ransom, its delivery and indeed an element of loss of hire. It has come from the non-marine market which undoubtedly has caused problems, as those seeking to sell it have not had an innate understanding of shipping. Generally it remains a policy of indemnity which means that an owner must pay a ransom first and then make a recovery. But the advantage is that the underwriters pay quickly and this avoids the problem of making a separate recovery from cargo interests. It also protects the owner's hull insurance record which may be of some commercial importance.

Liability cover for a vessel is provided by the P & I Clubs. They cover, for example, damage to cargo and crew personal injury and death claims. However, they do not contribute to the ransom which has caused some adverse comment from the hull insurers. It may also be seen as surprising given that many of the threats by the pirates are made directly against the crew.

The shipping industry has developed a set of guidelines known as *The Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia* (BMP)[12] which give ship-owners a comprehensive outline of the measures

[12] http://www.knowships.org/images/Roundtable-Anti-Piracy-Best-Management-Practices.pdf

that they should follow both prior to and during a transit of the Gulf of Aden. The BMP guidelines (the latest version of which was issued in August 2009) are voluntary but are fast becoming the industry norm. Insurers are not making compliance compulsory but there is little doubt that if they are not followed and a hijacking arises, questions may be asked. This also applies to charterers and cargo interests who may look to non-compliance as a justification for alleging that a vessel is unseaworthy, thereby giving a potential defence to any claim for a contribution to the costs of the ransom. Importantly, following the BMP also ensures that the owner is fulfilling its obligations towards the crew in terms of the duty of care that is owed to them under the employment contracts.

There is no doubt that ships and their crews are much better prepared for the transit of the Gulf of Aden and the Somali Basin (where there have been so many attacks in October 2009); the decrease in the number of the successful attacks is, for the most part, down to the actions of those on board the ships. Key also to safe transit is the Group Transit Scheme monitored and administered by MSCHOA and UKMTO.

As a matter of English law (and indeed most western jurisdictions) the payment of a ransom is legal. This was confirmed by the House of Lords EU Money Laundering Committee in July 2009. However, that is conditional on there being no reasonable belief that the funds are being paid to or will be used by a terrorist organisation. If a link is established between the pirates and Al Shabaab, for example, there will be very real doubt as to whether ransoms can be paid, which will condemn the crews presently being held to an uncertain future. Ransoms have crept up over the past three years and whilst talk of a "market rate" is misleading, the amount reportedly paid is now between US$2m and US$3m. The pirates have indicated that western crews are seen as more valuable to them, attracting a premium in terms of the ransom. Other aggravating factors which make the negotiations over the ransom more difficult include factors such as whether the hijacked vessel is involved in fishing, because the pirates' main grievance is that their waters have been severely overfished. The type of cargo is not seen as significant and indeed some vessels hijacked have been in ballast. The *Faina* was an exception where the tanks and ammunition did lead to a hugely inflated initial demand.

The ransom is, in many cases, only a small part of the overall cost when the cost of delivery, negotiation and the possible commercial liabilities are taken into account. The time taken to negotiate a ransom is becoming longer. There is a question as to whether the interests of all stakeholders are taken into account. Perhaps a voluntary Code of Practice should be introduced so that all stakeholders agree to a without prejudice meeting to look at what the overall cost will be in the event of a protracted

hijacking. This may then lead to a strategy where the target is set by time and not by reference to a "market price". The crews are being asked to endure whilst the negotiations continue; perhaps a debate is needed as to how this period can be shortened. Are the narrow interests of the ransom insurers squeezing out the interests of others who actually may have more at stake or more to lose?

The events surrounding the *Alakrana* have brought the vexed issue of "prisoner exchange" to the fore. A Spanish vessel was hijacked, with mainly Spanish crew. Almost immediately, two of the pirate gang were arrested and taken to Spain for prosecution. Three crew members were thereupon taken ashore by the hijackers and their fate linked to those of the arrested pirates. To date there has been an almost totally commercial response to the problem of hostages taken by pirates, namely, that a ransom is paid and the crew, ship and cargo are returned unharmed and undamaged. But the commercial company does not have the power to release the pirates held for prosecution in Madrid or elsewhere. It may be a reflection of the success of the military that such steps are seen as necessary by the pirates to redress the increased risk that they are taking and it is a worrying development.

Crew Issues

Some 1400 crew members have been taken hostage. They remain the central victims. Some have died during the hijacking; others have been wounded. There is a code of conduct that the crew are not harmed whilst captive and indeed Somali culture has a tradition of looking after vulnerable groups; that includes women. Many crew members will have bounced back from their ordeal but others will be suffering from the trauma and will be struggling to return to sea again. Labour organisations such as the ITF and other Christian welfare groups feel frustrated that they are not given access to the crews to be able to follow up and offer some kind of long term help. Crews are transient and although some work for the same companies for much of their career there is a real spread in the quality of the employers. A duty of care is owed to employees and that includes keeping them out of harm's way. Post-hijacking their treatment is important. They are vital witnesses to the crime and that knowledge needs to be captured. Importantly they will require immediate care and should be seen by a doctor and psychiatrist prior to repatriation. Ideally, that should be followed up in the longer term. There have been very few reported claims against employers, the *Danica White* being the most high profile case, in which a Danish court found the master to have been negligent but that there was no breach of the duty of care. It is likely that the BMP will make such claims easier to maintain.

The use of private security companies

In the face of increasing pirate attacks, and especially in the Gulf of Aden, an increasing number of shipping companies are continuing to debate the desirability and feasibility of arming their vessels or hiring private security companies for protection. The question has legal and political repercussions.

The use of lethal force to protect commercial ships depends first on the law of the flag of that ship, secondly, the law of nationality of the persons concerned,[13] and thirdly on the requirements of each port state visited. Hence, there need to be some baseline rules which combine or reconcile the competing rules by different countries and flag-states. Different countries have different attitudes to the use of force. Most laws in this area are set against a test of reasonableness where self defence will allow the use of lethal force where the threat to life is imminent. Private security contractors tread a fine line where lethal force is used for the protection of property.

A number of private security companies (PSCs) now offer their services to shipping companies. Most PSCs offer small security detachments whose role is to provide the master with advice on security aspects. They will exercise the crew, and oversee the building of defences and obstacles. They have a positive effect on crew morale and when deployed provide an additional layer of security and alertness all of which has proved useful in terms of hardening a ship and making it less likely to be taken.

There is a need to develop a system of accreditation of PSCs. This would allow the commercial shipping companies to check on who they are dealing with and allow those companies which are accredited to put distance between themselves and those that are not. PSCs have no status in international law and those running armed escort ships suffer from a lack of legal certainty about their activities.

As well as lethal force a range of non lethal measures are being adopted. This includes the use of long-range acoustic devices (LRADs), fire hoses net guns, tazers, and flares. There has also been some discussion on the use of dogs. Passive measures currently include web-based tracking and monitoring, pre-transit consultancy such as crew training or vessel 'hardening' defensive protection by using barbed wire, obstacles and grating overbridge windows to give some protection against RPG rocket attack.

A number of legal issues are raised by the hiring of, in particular armed, security personnel. The master of the vessel at any time retains control of and authority over the vessel, the crew and embarked security. Under the International Convention for the Safety of Life at Sea (SOLAS) no one can derogate from the captain's authority in making decisions which go to the safety of the crew and the environment. It is easy

[13] U.S. persons for example need to meet the requirements outlined under Title 18 of the US Code Article 922

to see how a conflict could arise if the power to open fire, and just as importantly, to stop firing, rests with someone other than the master. This problem may be overcome by robust Rules of Engagement approved by the flag state which set out in clear terms when weapons can be used and the steps to be taken such as the use of warning shots and shots designed to stop the pirates' boats rather than to kill the pirates themselves.

The arming of ships must be done with reference to other interested parties particularly the insurance companies. Under the UK Marine Insurance Act 1906, tainting a voyage with illegality may give rise to problems with claims. Insurance companies are not looking for reasons to decline cover but the existence of arms on board clearly affects the risks to which the vessel is exposed. Further legal issues arise when armed gunboats are hired by the ship owners for the vessel's protection. In those circumstances the armed escort will be an agent of the commercial ship which again could lead to the same issues on control raised above. There is the added complication that the armed escort vessel may be of a different flag to the commercial vessel it is protecting.

A Debate: The arguments for and against arming vessels

The use of private armed security guards results from the increase in piratical activity in important and busy shipping routes. For example, between January and August 2008, 167 vessels were attacked, of which 35 attacks took place in the Gulf of Aden; 2009 has seen another increase with 273 reported attacks, of which 175 took place in the Gulf of Aden. Most of these ships had no armed protection.

Piracy is expected to continue in the future, since the benefits to the pirates still far outweigh the risks they face. The increased incidence of violence and the increasing sophistication in the type of weaponry, and improved capabilities (including satellite and cellular communication systems, long range vessels, vessel tracking technology and greater financing availability) provide the argument in favour of the use of private security companies. Current naval operations can protect shipping vessels only to a certain degree. Deterrence should be a combination of credibility and visibility. Although the naval forces in the area have limited intervention and limited air surveillance support, visibility is ensured through their presence in the region; but credibility is lacking since pirates continue to be released. More prosecutions of pirates could make a difference in the risk-benefit analysis facing pirates. Moreover, the naval coalition is more occupied with strategic aspects, whereas private security companies can engage more directly with the owner of the vessel. Lastly, passive measures of protection (unarmed and non-lethal defence measures) on board can

only protect the vessel to a certain point and will eventually not stop a piratical attack but only delay it.

Nevertheless, there are some fundamental arguments against the use of private security forces on board merchant vessels. The provisions on piracy in UNCLOS (Articles 100 – 110) make clear that piracy is a problem to be dealt with by governments and navies. The right of free passage on the high seas should be maintained by governments and their navies. Private security companies have no official status under international law. Under UNCLOS only government vessels can seize ships involved in piracy; this raises the question whether an attack by a private gunboat on another ship is not itself an act of piracy.

A commercial vessel may not want to risk incurring liability for damages, liability to crew, collateral damage and also being in the position of capturing pirates but not having enough evidence to hand them over for prosecution. There is a risk of potential environmental threats emanating from the use of force.

Hiring private security companies may paradoxically not assist with the protection and safety of seafarers; the prevalent risk of escalation into a fire-fight may make this too high a risk to take for the shipping industry. But one of the arguments often used by providers of armed security is that having weapons visible deters attacks by pirates. There have now been a number of reported incidents (the *BBC Portugal* and the attack on two French trawlers) where the pirates have been seen to be willing to exchange fire although ultimately they have backed away from pressing their attack home.

Until the threat of piracy diminishes, private security companies will continue to be given a role. But there will also continue to be disagreement as to whether it is effective or otherwise desirable to hire armed security guards for commercial vessels. It is clear that the legal issues surrounding the rules of engagement for gunboats, jurisdictional issues, insurance, and legal status need further consideration.

The recovery of ransoms?

About $75 million has been paid in ransom to secure the release of ships and crews. The risks of prosecution and punishment for pirates at present are disproportionately low compared with the benefits of receiving ransoms. This is so even though the pirates themselves are, according to some estimates, recipients of only a small percentage of the monies paid out in ransom. An estimate contained in the UN workshop held in Nairobi from 10 – 21 November 2008 gave a breakdown of:

20% to the bosses of the organisation;

20% investment in future missions (guns, fuel, cigarettes, food etc);
30% to the gunmen; and
30% to government officials.

So far as is known, no attempt has yet been made by ship-owners or insurers to recover any of the monies paid out in ransoms. The unwillingness of private interests to spend money on further efforts to recover ransom payments is a fundamental problem.

Of course there would be difficulties in recovery. The main problem with tracing cash is that it gets spread very quickly between the different participants in the piracy act. The method of transfer of the money abroad is generally through Hawallah, a system whereby the physical cash does not leave the country, only the title is transferred. Generally the cash can be found anywhere, but in the case of Somali piracy, Dubai seems to be a popular destination.

> Given the complexity of tracking down ransom money, parallel civil and criminal measures should be used. But the criminal process is generally riddled with problems and the chief concern is prosecution rather than the recovery of the assets. It is thought unlikely that Law Enforcement Agencies and prosecutors would be interested in obtaining confiscation orders. In Kenya, where the majority of the trials are currently being held, there would be the considerable extra difficulty of the absence of any legislation dealing with proceeds of crime and money laundering. If the money is laundered through the UK, different civil court procedures can be used to track money down, such as s.25 of the Civil Jurisdictions Judgement Act. Even if proceedings are in a different jurisdiction, a freezing order can be brought in the UK, if money is believed to be held here.

The International Centre for Asset Recovery (ICAR)[14] provides assistance to developing and developed countries alike in improving their capacity to trace, confiscate and repatriate assets stolen through corruption and related crimes. Piracy is of course a criminal activity. Current problems include the lack of identification of suspects - very few are caught, a lot are released; the lack of identification of financial leads; the use of informal money transfer systems; the need to gather intelligence and evidence; and repatriation - getting the proceeds and identifying to whom they belong.

Political steps being taken include the UN Security Council resolutions authorising states to use land based operations in Somalia as part of the fight against piracy off the coast, and the Contact Group on piracy which has agreed to do more in order to

[14] www.assetrecovery.org

understand the informal financial systems as well as the formal systems that are funding and facilitating piracy off the coast of Somalia.

What is still required is collection of information by both government and industry. The Contact Group should seek financial evidence, share this evidence and set the basis for greater co-operation between states, since some are laundering ransom money. Piracy can be categorised as transnational organised crime, but nevertheless difficulty has been experienced in engaging the interest of Interpol. The states concerned – and Kenya in particular – should adopt the necessary legislation for money-laundering and other financial controls. More should be done in terms of co-operation not only at national and international level, but also between the international organisations and institutions. A proper strategy is needed.

The need to trace the money is not solely or even primarily one for private commercial interests. Public interests are involved. Some of the consequences of the financial impact of piracy include further instability in Somalia and its wider implications to the Horn of Africa and the neighbouring countries. Ransom proceeds are being invested in Kenya, the effects being money-laundering, inflation, higher costs of doing business in Kenya, and driving up house prices over 100% last year because of the increasing number of houses which have been bought on the coast in Mombasa. In addition, re-routing of ships because of piracy would have a devastating effect on the Kenyan economy. There are parallels with the global effort against corruption. Tracing works as a disincentive to corruption. Potential perpetrators are deterred by the likelihood that the money will be traced and that they will be found liable. This concept can be extended to piracy.

Conclusions and Recommendations

Reconciling Public and Private Interests

The interests involved as a consequence of acts of piracy are very different. Shipping lines, insurers, seafarers all face commercial realities – the need for speed and reliability in delivering cargo. That commercial reality expresses itself via the payment of ransom. Ransom payments have increasingly been regarded as a business cost and the expectation of the pirates is therefore that ransoms will be paid. On the other hand, public interests are to disrupt, detect and prosecute piracy.

There are other tensions. Private interests are not yet being reconciled amongst themselves. Those who support the placement of armed guards on ships are opposed by those who seek to minimize the risk of the escalation of violence in the

region. As regards public interests, those states which seek trial and prosecution of the pirates by the countries in the region have placed huge pressure on Kenya's shoulders and on other jurisdictions which attempt to prosecute pirates, and have raised concerns about the unwillingness of other members of the international community to commence prosecutions against piracy.

On one view, there appear to be few attempts to reconcile or compromise between the public and private interests, in stark contrast to the international community's approach to counter-terrorism. On another view, private and public interests overlap: commercial interests are shared by governments who gain tax revenue from a healthy industry; humanitarian concerns should be shared by all; it is in the interests of all (even lawyers) that piracy be stopped; what is needed is more work on coordination and recognition of longterm interests on both sides. There is work in progress.

Are the current legal frameworks adequate?

If we were writing a modern code for piracy, we wouldn't start from here. But the existing multinational agreements and customary international law do provide sufficient legal powers for government vessels to seize pirate vessels, using appropriate levels of force, as well as an adequate international legal regime providing powers to arrest, transfer, prosecute or extradite persons responsible for piracy. The relevant international provisions are scattered and include provisions of soft law such as IMO guidelines.

- The relevant provisions of the various international instruments should be further publicised. At Annexes I and II a start is made to this end.

International conventions are not adequately implemented in *domestic law*. Each state, whether or not with navies in the region, should ensure that

- piracy and armed robbery are offences under its domestic law;
- provision is made for appropriate law enforcement officers, with appropriate powers;
- it has courts competent to hear piracy offences with provision for fair trial;
- there is suitable provision for disposing of property seized by pirates subject to the rights of innocent third parties.

For investigations and prosecutions, there are problems regarding the collection of evidence by the capturing authority for prosecution in another country.

- Detailed information should continue to be made available regarding the evidentiary and procedural requirements of the law of the differing prosecuting authorities, such as the handover guidance prepared in relation to Kenya, and naval and police forces must act in strict compliance with them.
- There should be further efforts to facilitate liaison between the different personnel involved in transfer of suspects and investigation and prosecution.
- There should be identification of appropriately qualified and empowered national leads for collaboration in investigations and prosecutions
- UNODC and other agencies should continue their efforts to collate standard investigative practices and should consider whether it is possible to introduce common rules or guidelines which would facilitate the collection of evidence by one authority for prosecution in another.
- Is it possible to develop common standards, internationally agreed, for the investigation, including collection of evidence, of those engaged in piracy? An attempt should be made.

Prosecutions cannot be continued in countries of the region such as Kenya without full international support.

- There needs to be a longterm commitment by the international community to give support for trials and capacity building in relevant regional states.
- There needs to be intelligent assistance given to these national criminal justice systems.
- There should be support for the International Trust Fund set up under the auspices of the Contact Group to help defray the expenses associated with the prosecution of suspected pirates.

Western states cannot absolve themselves of their responsibility to mount prosecutions themselves. They have legal responsibilities under the SUA Convention, for example, to prosecute where they do not extradite persons within their jurisdiction.

- But trial by new or existing international courts is not the way forward.

For the conduct of trials

- The shipping industry should be ready to cooperate with providing information, evidence and witnesses.

There needs to be greater coordination among the different international organisations and fora which are promoting cooperation on counter-piracy and greater promulgation of the guidelines, codes and other instruments of each. There should be full transparency: for example, why is the output of WG 2 of the Contact Group not freely available?

There are difficulties in ensuring that private interests pull together in combating piracy.

- There should be work on standard contract clauses requiring compliance with The Best Management Practice.
- There should be greater coordination among the insurance interests, with the aim of securing speedier payment of ransom, having regard to the humanitarian interests of the crew taken hostage.
- Responsibility should be allocated for the long term health of crews subjected to pirate attacks.

The issue of private security firms needs to be more carefully scrutinized.

- Consideration should be given to an accreditation system, which would allow a system of due diligence and identification of higher quality private security firms.

In order to foster greater international cooperation, measures for extradition and mutual legal assistance should be encouraged via:

- Greater interagency and international coordination with designated national points of contact.
- The introduction of processes for national-level domestic interagency coordination for incident management which are available at all times.
- Reliable points of contact for all participating agencies.
- Greater clarification on the role for lead and supporting agencies as well as mandatory participation.
- Guiding principles for incident response and standard operating procedures for recurring incidents so as to promote the development of common strategies to deal with incidents.

The unwillingness of public and private interests to spend money on further efforts to recover ransom payments is a problem. It is not known whether insurers would have an interest in making such recoveries, but it is thought that they may do so,

particularly where payments have been very large. It is apparent that there does exist quite a large body of intelligence which is held by Law Enforcement Agencies which would potentially be useful in tracing where ransoms have been paid.

- The collection of information from captured pirates whilst on board the vessel which has captured them is potentially a very valuable source of information (and one which is, potentially, within the power of the Master to distribute).

- A civil route to recover funds would probably have the best chance of success. However, for such action to be successful it would almost certainly be necessary to have access to intelligence held by Law Enforcement Agencies.

- The suggestion was therefore made that a liaison committee be set up consisting of ship owners, insurers, Law Enforcement Agencies and asset recovery lawyers, to facilitate exchanges of information and to try to work out ways in which asset recovery might be made to work in a piracy context.

- Governments appear unwilling to spend money on recovery efforts. A trust fund dedicated to funding initiatives aimed at recovering ransom money could be established. The trust fund would serve as a pool to cover the costs incurred in such efforts and would ultimately pay for itself as ransom debts are recovered.

- It is in the interest of taxpaying citizens (the shipping industry contributes huge sums to their states in terms of taxes paid) that taxes are spent on recovering ransom money. Insurance companies must be involved with this, and there must be a combination of civil action with national agencies.

Piracy is only a symptom of much wider problems. The international community should deal with the root cause of piracy, in particular Somali piracy in the Gulf of Aden.

ANNEX I [15] - International Treaties

September 2009

1. The High Seas Convention 1958 (HSC) and the United Nations Convention on the Law of the Sea 1982 (UNCLOS) define piracy in almost identical terms. This note refers principally to UNCLOS. The HSC continues to be relevant for those States not a party to UNCLOS.[16] The provisions of these treaties, in particular Articles 100 to 107 of UNCLOS, provide the legal framework for the repression of piracy under international law.[17]

The duty to cooperate to suppress piracy

2. Article 100 of UNCLOS provides "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." The International Law Commission in its commentary on the equivalent provision in the HSC noted that: "Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case."[18] Doubt has been expressed historically as to whether this duty extends to requiring that States have an adequate national criminal law addressing piracy.[19] While the wording of Article 100 may be open to the interpretation that all states should have such

[15] Written by Dr Douglas Guilfoyle, University College London

[16] Presently 8 States and the Holy See are parties to the HSC but **not** to UNCLOS (Afghanistan, Cambodia, the Holy See, Iran (Islamic Republic of), Israel, Malawi, Thailand, United States of America, Venezuela). A further 23 States are parties to neither (Andorra, Azerbaijan, Bhutan, Burundi, Democratic People's Republic of Korea, Ecuador, El Salvador, Eritrea, Ethiopia, Kazakhstan, Kyrgyzstan, Libyan Arab Jamahiriya, Liechtenstein, Niger, Peru, Rwanda, San Marino, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan).

[17] The preambles to UNSCR 1848 and 1851 (2008) reaffirm 'that international law, as reflected in [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities'; see also operative paragraph 3, UNSCR 1838 (2008).

[18] [1956] II YbILC, 282.

[19] As many States have not had historically, and still do not have laws adequately criminalising piracy. See: Joseph W. Bingham (reporter), 'Harvard Research in International Law: Draft Convention on Piracy', AJIL Sup 26 (1932), 755–756, 760. This work remains relevant as it influenced the International Law Commission's drafting of relevant treaty provisions, which largely endorsed the Harvard findings: [1956] II YbILC, 282. On the modern position see Laurent Lucchini and Michel Voelckel, *Droit de la mer*, Tome 2, vol. 2 (Pedone, 1996), 158-9.

a law, the Security Council has noted that it remains the case that many States do not.[20]

The definition of piracy

3. Article 101, UNCLOS defines piracy as:

(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).

This provision should be read in conjunction with Article 103 of UNCLOS, which contains the definition of a pirate ship or aircraft.

The geographical scope of the offence

4. Piracy may be committed anywhere seaward of the territorial sea of a State.[21] Equally, the jurisdiction and powers granted to States to suppress acts of piracy apply in all seas outside any State's territorial waters.

5. However, the reference in Article 101 to piracy occurring on the "high seas" may be slightly misleading. Article 86, UNCLOS *prima facie* excludes the Exclusive Economic Zone (EEZ) from being part of the high seas. This might suggest that piracy in the EEZ is a matter for the coastal State. However, Article 58(2) provides that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part". This makes it plain that the provisions of the high seas regime (including all provisions on piracy) "apply to the exclusive

[20] Preamble to UNSCR 1851 (2008).

[21] This is consistent with the position adopted in Article 4(4) of the Djibouti Code of Conduct, discussed below.

economic zone in so far as they are not incompatible with" UNCLOS provisions on the EEZ.[22]

6. Within the EEZ the coastal State enjoys sovereign rights "for the purpose of exploring and exploiting, conserving and managing ... natural resources" and jurisdiction over certain other subject matters (Article 56, UNCLOS). Nothing in Article 56 is incompatible with the UNCLOS provisions on piracy, and therefore under Article 58(2) the general law of piracy applies to all pirate attacks outside territorial waters. If acting in another States' EEZ a government vessel engaged in suppressing piracy is obviously obliged to have "due regard" for the coastal State's rights in matters of natural resources, marine pollution, etc in any action it takes.[23]

Limitations within the UNCLOS definition of piracy

7. The most obvious limitation within the UNCLOS definition is that it only covers, under Article 101(a)(i), attacks committed from a private vessel against another vessel.[24] It therefore does not cover the seizure of a vessel from within by passengers, stowaways or its own crew.[25] Hijackings such as the *Achille Lauro* incident would therefore not be piracy under the treaty-law definition.[26]

8. UNCLOS makes it quite clear that government vessels cannot commit piracy, unless the crew mutinies and uses the vessel to carry out acts of violence against other ships (Article 102). Outside of mutiny any unlawful acts of violence by a government vessel against another craft are a matter of State responsibility, not the law of piracy.

9. Some slight ambiguity is introduced by the words "any illegal acts of violence or detention, or any act of depredation" in Article 101(a). One could ask under what system of law acts must be "illegal"; or whether there is a meaningful

[22] See, eg.: Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 165.

[23] Art 58(3), UNCLOS.

[24] The reference to "a place outside the jurisdiction of any State" in Article 101(a)(ii), UNCLOS is intended to cover events on islands which are *terra nullius* and not part of any State's territory. See: [1956] II YbILC, 282.

[25] [1956] II YbILC, 282.

[26] Which fact prompted the drafting of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, as discussed below.

difference between the use of the words "acts of violence" (plural) and "act of depredation" (singular). The ordinary meaning, object and purpose of these words would suggest a broad approach should be taken. Piracy has always been an international crime enforced by national laws, the exact terms of which have varied between jurisdictions. It may be difficult to give these words the kind of clear and precise meaning that would accord with modern expectations that criminal offences should be precisely drafted in advance. It is perhaps better to consider Article 101(a)(i) as setting out the jurisdiction of all States to: (1) prescribe and enforce a national criminal law of piracy; and (2) take action to suppress and prosecute piratical acts of violence on the high seas.

10. Much more controversy has been caused by the words "for private ends" in Article 101(a). It has often been held that the requirement that piracy be for "private ends" means that an act committed for "political" motives cannot be piracy. Thus some commentators hold that "terrorism" can never be "piracy". An alternative view holds that the relevant distinction is not "private/political" but "private/public".[27] That is, any act of violence on the high seas not attributable to or sanctioned by a State (a public act) is piracy (a private act).[28] This approach accords both with the drafting of the relevant UNCLOS provisions, which make it clear that a public vessel cannot commit piracy, and with some modern case-law indicating that politically motivated acts of protest can constitute piracy.[29] In the Somali context seizing private vessels in order to demand large ransoms from private companies - without any claim to be acting on behalf of a government or making demands of any government – can only be an act "for private ends".

[27] For example: M. Halberstam, "Terrorism on the high seas" (1988) 82 AJIL 269, 276-284; Michael Bahar, "Attaining Optimal Deterrence at Sea" (2007) 40 Vanderbilt Journal of Transnational Law 1, 32; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), 36-40. Note also the change in the French text from 'buts personnels' in Article 15, HSC to 'fins privées' in Article 101, UNCLOS.

[28] Historically there was a debate about the status of insurgents in a civil war and whether they could be classed as pirates if they: (1) attacked the vessels of the government they were attempting to overthrow; or (2) enforced a blockade on government ports against 'neutral' shipping. There is no suggestion Somali pirates are insurgents engaged in either activity. On the debate see: I. A. Shearer (ed.), D. P. O'Connell, *The International Law of the Sea* (Oxford: Clarendon, 1984), vol. 2, 975-6; Hersch Lauterpacht, 'Insurrection et piraterie' (1939) 46 Revue Générale de Droit International Public 513.

[29] *Castle John v. NV Mabeco*, (Belgium, Court of Cassation, 1986) 77 International Law Reports 537.

The extent of powers granted to suppress piracy

11. A warship or military aircraft, or other ship or aircraft clearly marked and identifiable as being on government service and authorized to that effect (Article 107, UNCLOS) on the high seas has the power:

    - to visit any vessel that it has a reasonable ground for suspecting of being engaged in piracy and, if suspicions are not resolved by an inspection of its papers, proceed to search it (Article 110, UNCLOS); and

    - to seize any pirate vessel and arrest any suspected pirates (Article 105, UNCLOS);

    subject to a duty to compensate a vessel for any loss or injury suffered as a consequence of inspection/arrest where suspicions of piracy prove unfounded and the vessel "has not committed any act justifying them" (Articles 106 and 110(3), UNCLOS).

12. Piracy includes "any act of voluntary participation in the operation of a ship ... with knowledge of facts making it a pirate ship" (Article 101(b), UNCLOS). A pirate ship is one "intended by the persons in dominant control to be used" in a pirate attack or which has been used in such an attack and is still under the same control (Article 103, UNCLOS). Thus a warship has a clear right of visit and inspection where it suspects a vessel is under the control of persons intending to use it for a *future* pirate attack.[30] Indeed, it may arrest persons on the basis that they intended a future pirate attack.

13. By definition, the powers of visit, seizure and arrest are granted on the high seas (or in the exclusive economic zone of a State as discussed above) and thus do not extend to pursuing pirates into foreign territorial waters without the coastal State's consent. Without such consent, the exercise of law-enforcement powers by a pursuing warship over a fleeing pirate vessel within foreign territorial waters would *prima facie* be unlawful.[31]

[30] This results from applying the definition in Article 103 to the powers granted in Article 105 and 110, UNCLOS.

[31] While there has been some scholarly support for such a right, it has not found acceptance in State practice: Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 165; O'Connell, *International Law of the Sea*, vol. 2, 978. UNSCRs 1816 (operative paragraph 7), 1846 (operative paragraph 10) and 1851 (operative paragraph 6) obviously provide a mechanism for 'co-operating States' to enter the territorial waters and land territory of Somalia, based both on the consent of Somalia and the authority of Chapter VII.

Exercising jurisdiction over pirates: limitations or rules of priority

14. UNCLOS Article 105 refers only to the power of *the seizing State* to try a seized pirate. However, as a matter of customary international law, every State has jurisdiction to prosecute a pirate subsequently present within their territory irrespective of any connection between the pirate, their victims or the vessel attacked and the prosecuting State (universal jurisdiction).[32]

15. In addition to the existence of universal jurisdiction at public international law, States may also have jurisdiction over suspected pirates on other bases as a matter of national law. Following ordinary principles of criminal jurisdiction, the State of the suspected pirate's nationality, the State of nationality of the suspected pirate's victim and the flag State of any involved vessels may all also have valid claims of jurisdiction over a suspected pirate. An act of piracy, like any number of other offences, may provide a number of States with equally valid claims to exercise jurisdiction over an offence.[33]

16. The law of piracy under UNCLOS does not place any express responsibility upon a seizing State to try an arrested pirate. It simply provides that the seizing State "may" decide upon the penalties to be imposed, i.e., including prosecution (Article 105). On its face, this is a discretionary power not an obligation.[34] However, in exercising this discretion a State should bear in mind its duty to "cooperate to the fullest possible extent in the repression of piracy" (Article 100).

17. Questions of "extradite or prosecute" obligations arising under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 and the International Convention Against the Taking of Hostages 1979 are discussed below.

[32] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002, p.3, President Guillaume (Separate Opinion), para. 5 and Judges Higgins, Kooijmans and Buergenthal (Joint Separate Opinion), para. 61; Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford University Press, 2008), 229; Bingham, 'Harvard Research' (n.4 above), 852-6; Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 182.

[33] A pirate vessel does not necessarily lose its nationality (Article 104, UNCLOS), and may still be subject to its flag State's jurisdiction *in addition* to the jurisdiction of the State of the seizing warship.

[34] Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 176.

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988

18. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) was inspired by the *Achille Lauro* incident in which a vessel was internally hijacked and a hostage aboard was killed. The sponsoring governments who first introduced a draft text for the Convention (Austria, Egypt and Italy) cited as part of their reason for doing so the restrictions inherent within the definition of piracy: that it necessarily involved an act for private ends, and in requiring an attack from one vessel against another it could not cover the internal seizure of a vessel.[35]

19. The original sponsoring governments were quite right to point out that the law of piracy did not extend to internal hijacking. As noted above, the view that politically motivated attacks can never be piracy is widely held but not necessarily correct. However, it is important to note that the stated aim of the sponsoring governments was to produce a "comprehensive" convention that did not rest on existing distinctions.

20. Another relevant inspiration for the SUA Convention was General Assembly Resolution 40/61, which called upon the IMO to "study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures". The SUA Convention is thus commonly considered a "terrorism suppression" convention. It is important to note, however, that the word "terrorism" appears only in its preamble. A terrorist motive does not form any express element of the crime set out in the treaty. Further, the purpose of the terrorism suppression conventions was to proceed by criminalising typical terrorist acts or tactics, given that no consensus on a universal definition of terrorism could be reached.

21. The principal reasons the SUA Convention was seen as necessary were first, as noted above, the law of piracy did not cover internal hijacking of vessels; and second, that while there existed treaties concerning the hijacking and sabotage of airplanes[36] no similar conventions yet existed for the shipping industry. It is unsurprising, then, that the SUA Convention is closely modelled on the conventions concerning offences aboard or against aircraft. The sponsors' explicit aim was to devise a comprehensive convention that would cover all forms of violence against shipping.

[35] IMO Doc. PCUA 1/3 (3 February 1987), Annexe, paragraph 2.

[36] Convention for the Suppression of Unlawful Seizure of Aircraft 1970, 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 UNTS 177.

22. Article 3 of the SUA Convention creates a number of offences. Most relevant for present purposes is Article 3(1)(a), stating that "[a]ny person commits an offence if that person unlawfully and intentionally ... seizes or exercises control over a ship by force or threat thereof or any other form of intimidation". There is no requirement that the seizure be internal or be politically motivated. Thus any pirate seizure of a vessel off Somalia will clearly fall within this definition. Attempting, abetting and threatening such an offence are equally crimes under the Convention (Article 3(2)).

23. The only case in which the Convention would not apply is where the offence was committed solely within a single State's territorial sea *and* the vessel was not scheduled to navigate beyond that territorial sea *and* the suspected offender was subsequently found within that coastal State's territory. This follows from Article 4, which states that the Convention applies either "if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States" or "when the offender or the alleged offender is found in the territory of [another] State Party". As piracy attacks of Somalia are now generally (or invariably) committed far outside territorial waters, Article 4 is no obstacle to the SUA Convention's application.

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

Jurisdiction under the convention

25. Unlike the law of piracy, the SUA Convention creates an express obligation upon parties to create appropriate domestic offences. Under Article 6 States

parties *must* make the offences in Article 3 a crime under national law when committed:

> (a) against or on board their flag vessels;
>
> (b) within their territory, including their territorial sea; or
>
> (c) by one of their nationals.

In addition States parties *may* establish criminal jurisdiction where a relevant offence is committed, *inter alia*, against one of their nationals or in an effort to compel their government to do or abstain from doing any given act.

26. The most important jurisdictional provisions are those dealing with the obligation to either extradite or submit the case for consideration by prosecutorial authorities (commonly, if misleadingly, called an obligation to "extradite or prosecute"). Where a State subsequently finds a suspect or offender within its territory (the territorial State) and another State party or parties have jurisdiction under Article 6, then the territorial State:

> shall ... if it does not extradite him, be obliged ... to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.[37]

To this end each party *must* establish jurisdiction "over the offences set forth in Article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with" the obligations described in paragraph 32 above.[38]

27. Thus parties must establish jurisdiction, for example, over offences committed by other State parties' nationals or on other State parties' vessels where the offender is present within their territory and not extradited to another State party having jurisdiction. Put simply, the test for State Party A is:

> (1) is the suspect within the territory of State A?
>
> (2) has another State party established jurisdiction in accordance with Article 6 over the offence committed by the suspect?

[37] Article 10(1), SUA Convention.

[38] Article 6(4), SUA Convention.

(3) has State A extradited the suspect to one of these States?

If not, State A *prima facie* appears obliged to submit the suspect to its authorities for the purpose of prosecution and is also under an obligation to have taken measures to establish its jurisdiction in such cases. This may be described as a limited form of universal jurisdiction ("quasi-universal jurisdiction"), as it allows the prosecution of individuals lacking relevant "links" to the prosecuting State. Once a piracy suspect is within the territory of a State, therefore, the State may have jurisdiction over that person:

(a) as a matter of universal jurisdiction over piracy; and/or

(b) as a matter of jurisdiction under the SUA Convention.

28. Article 7 provides that a State finding a suspect on its territory is required to commence a preliminary investigation and, if it considers the circumstances so warrant, take the suspect into custody while a decision is made about extradition or prosecution. That investigating State is required to communicate with States having jurisdiction under Article 6, but it is not required to defer to their jurisdiction. Instead Article 7(5) provides that an investigating State Party "shall promptly report its findings to the said States and shall indicate *whether it intends to exercise jurisdiction*" (emphasis added). These last words in particular appear consistent with the view that a State has a free choice whether to extradite or prosecute. Article 7 thus supports the view that, absent an extradition request, a State could validly prosecute a person suspected of a SUA Convention offence found within its territory.

29. Any view that a State Party could *never* commence a criminal prosecution until it had received and declined an extradition request would not only be contrary to the object and purpose of the treaty but would contradict the plain words of Article 7. One should also note that the SUA Convention does not contain the wording found in some other Conventions only obliging a State that does not extradite a suspect to submit the case to its prosecuting authorities "at the request of the requesting Party".[39]

[39] See: Article 6(2), European Convention on Extradition 1957; Article 16(10), United Nations Convention against Transnational Organized Crime 2000.

Putting suspects off in port under the SUA convention

30. Article 8(1) of the SUA Convention provides that:

> The master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3.

Nothing in this provision expressly requires that it actually be the master of the *attacked* ship that delivers a suspect to a receiving State under Article 8. Indeed, the Security Council appears to have presumed that Article 8 would cover such delivery from a seizing warship to a receiving State.[40] While Article 2 of the SUA Convention states that the Convention does not *apply to* a warship this provision was intended to prevent the Convention covering offences against military discipline. Neither the actual language used nor the intent behind it prevents this provision being *applied by* a warship.

31. The only qualifications upon this provision appear to be procedural:

(1) the flag State must ensure that the master "whenever practicable, and if possible before entering the territorial sea of the receiving State" gives notice that he intends to deliver a suspect to the authorities of the receiving State (Article 8(2)); and

(2) the flag State must furnish the receiving State with any relevant evidence (Article 8(4)).

32. A receiving State is under a primary obligation to accept delivery of a suspect. A receiving State may only refuse to accept delivery of a suspect under Article 8(3) of the SUA Convention "where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery". In such a case it must give "a statement of the reasons for refusal". Once a delivered suspect is received within its territory, the obligations under Articles 7 and 10 described above apply.

33. Under Article 8(5), a receiving State may request that "the flag State" accept delivery of the suspect. It is not clear whether this means the flag State of attacked vessel or the flag State of the vessel delivering the suspect.

[40] Operative paragraph 15, UNSCR 1846; preamble, UNSCR 1851. To the extent that Article 2(1)(a) may suggest otherwise, the present report assumes that the Security Council has provided an authoritative interpretation.

Common sense would suggest the former is intended, but the wording of Article 8(1) suggests the latter. In such cases the relevant flag State "shall consider" such a request but has no primary obligation to accept delivery. If it declines to accept delivery, it must provide a statement of its reasons for so doing.

The International Convention Against the Taking of Hostages 1979

34. Article 1 of the Hostage Taking Convention states that: "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (... the 'hostage') in order to compel a third party ... [including] a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for release of the hostage" commits the offence of hostage-taking. This definition is clearly met where a hostage is detained, threatened with continued detention, and a condition of his or her release is that a private person or company pay a ransom. The typical piracy offences being committed off Somalia involving holding crews for ransom could thus clearly fall within the Convention definition.

35. The Convention contains no express territorial limitations,[41] a point made clear by Article 5 under which each party is obliged to establish jurisdiction over the offence defined in Article 1 where committed, *inter alia*:

> (a) In its territory or on board a ship or aircraft registered in that State;
>
> (b) By any of its nationals ... ; [or]
>
> (d) With respect to a hostage who is a national of that State, if that State considers it appropriate.

The Convention is thus clearly capable of applying to events occurring at sea.

36. The Convention provides no hierarchy of jurisdiction but does include an "extradite or prosecute" obligation drafted slightly differently to that in the SUA Convention. The most significant difference is that the Hostage Taking Convention contains a discretionary ground for refusing extradition where it has substantial grounds for believing that extradition has been requested for

[41] The Convention does place an additional obligation upon a territorial State within which hostage-taking has been committed to "take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release ..." in Article 3(1).

the "purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion" or where their position may be prejudiced for such reasons (Article 9). Such concerns would seem of limited relevance to current Somali pirate hostage-takings.

37. Article 13 provides that the Convention has no application: "where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State." These conditions are cumulative and unlikely to be satisfied in any hostage-taking by Somali pirates.

38. The Hostage-taking Convention thus adds little in addition to SUA for present purposes, but may provide an alternative basis of jurisdiction where a State is not a party to SUA and has no domestic laws suitable for the prosecution of pirates.

The United Nations Convention against Transnational Organized Crime 2000 ('UNTOC')

39. The UNTOC is in force for many States which are active in efforts to suppress piracy off Somalia.

40. Under Article 3, paragraph 1, UNTOC covers a number of crimes including "serious crimes" punishable by at least four years' deprivation of liberty or more serious penalties,[42] thus potentially encompassing many acts of piracy. To fall within Article 3(1) a crime must be "transnational in nature" *and* committed by an "organized criminal group".

41. Under Article 3, paragraph 2, a crime is "transnational in nature" when it is:

    (a) "... committed in more than one State";

    (b) "... committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State"; and

    (d) "... committed in one State but has substantial effects in another State".

[42] Articles 2(b) and 3(1)(b), UNTOC.

Can this extend to crimes committed on the high seas? Under Article 15(b) States must criminalise conduct prohibited by UNTOC "committed on board a vessel that is flying the flag of that State Party". The idea of "committed in ... [a] State" under Article 3 of UNTOC should thus be read to include events occurring aboard a flag vessel, thereby including offences planned or prepared in one State and committed aboard another State's flagged vessel.

42. The requirement of an "organized criminal group" is met where there is a:

> group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.[43]

43. UNTOC also includes under Article 5(1)(a) offences of

> [a]greeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group

or

> [c]onduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: (a) [c]riminal activities of the organized criminal group; [or] (b) [o]ther activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim[.]

44. Thus a pirate raid planned in Somalia and carried out aboard a foreign flag vessel would appear, for the purposes of the Convention, to involve one or more "serious crimes" prepared in one State and committed in another State (in the sense of being committed in the flag State's jurisdiction) and carried

[43] Article 2(a), UNTOC.

out by an organized criminal group.[44] It is no obstacle to the application of these principles that Somalia is not a party to the Convention.

45. UNTOC contains an extradite or prosecute obligation in Article 16(10). Unlike other treaties discussed in this report, the obligation to "submit the case without undue delay to its competent authorities for the purpose of prosecution" follows expressly from "the request of the State Party seeking extradition". A request from another State is thus a *precondition* to a duty to submit a case for prosecution arising. The provisions on extradition also contain an exception where a requested State has "substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons", similar to the Hostage Taking Convention provision noted above.

46. UNTOC makes general provision for extradition, in slightly different terms from the provisions discussed above on the Convention's scope of application. The scope of extradition under UNTOC is set out in Article 16(1), which states:

> This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

The intent of this provision appears to be that, for extradition, it will be sufficient that the "person whose extradition is sought" is located abroad, so long as the offence is covered by Article 3(1) and involves an organized criminal group. This formulation omits the "transnational in nature" requirement. On this reading the Convention applies a lower threshold or test for "transnationality" in extradition cases, as the only necessary transnational

[44] This should not be taken as meaning a flag vessel is *territory*; a flag vessel is, however, subject to the exclusive jurisdiction of its flag State on the high seas: Article 92(1), UNCLOS.

element would be that the person sought for a serious crime (or other Convention crime) was in another State's territory.[45]

47. Possibly of more consequence are the provisions of Article 18 regarding mutual legal assistance ('MLA'). State Parties are required to "afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered" by UNTOC (Article 18(1)). While the extensive provisions of Article 18 cannot be summarised in a brief note of this nature, one may note that such co-operation extends to "[t]aking evidence or statements from persons", "providing information, evidentiary items and expert evaluations" and "[f]acilitating the voluntary appearance of persons in the requesting State Party" such as witness (Article 18(3)(a), (e) and (h)). These provisions are sufficiently detailed that they may act as a so-called "mini-MLA treaty". That is, they set out a complete MLA regime that parties can apply between themselves in the absence of other arrangements.

48. For the purposes of requesting MLA the requesting State need only have, under Article 18(1) "reasonable grounds to suspect" that the relevant offence "is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group". The conditions described in paragraph 58-60 thus apply in a somewhat attenuated form for MLA purposes.

UNTOC may thus provide a common framework for facilitating mutual legal assistance in relation to the prosecution of pirates, although that is already happening under more specific instruments such as the Exchange of Letters between the European Union and Kenya.

49. UNTOC also provides for

- criminalising and taking action to suppress "money laundering" (Articles 6 and 7);

[45] This is the interpretation put forward in the UNODC's *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, paragraph 416(b). While practical, this interpretation is not necessarily obvious on the face of the text, see e.g. David McClean, *Transnational Organized Crime: A Commentary on the United Nations Convention and its Protocols* (Oxford University Press, 2007), p.177, or from the travaux préparatoires. However, the UNODC approach is strengthened by Article 34(2), UNTOC which expressly *excludes* the "transnational nature" from being an element of national offences.

- measures to confiscate money, property or other benefits deriving from a crime covered by the Convention (Articles 12 and 14) and international co-operation to that end (Article 13); and
- measures for assistance to and protection of both witnesses and victims (Articles 24 and 25).

Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden 2009

50. The Djibouti Code of Conduct is not a legally binding instrument and applies only as between the participants (Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, United Republic of Tanzania and Yemen).

51. The Code of Conduct defines "piracy" in the same terms as Article 101, UNCLOS. It defines "armed robbery against ships" as any "unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea", thus using a definition very similar to that found in Article 1(2)(a) of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2005 (ReCAAP).[46] The omission of the phrase "another ship" in the definition of armed robbery against ships may allow the term to cover violence occurring aboard a single vessel within a State's internal waters, archipelagic waters or territorial sea.

52. In Article 4(2), the Code of Conduct defines a pirate vessel as being "a ship intended by the persons in dominant control to be used for the purpose of committing piracy, or ... [which] has been used to commit any such act, so long as it remains under the control of those persons", thus closely tracking the language of Article 103, UNCLOS. Notably the Code of Conduct definition of a pirate vessel does not expressly extend to cover pirate aircraft, although Articles 1 and 10 do refer to piracy by aircraft.

[46] (2005) 44 ILM 829.

53. The Code of Conduct spells out how the participants intend to give effect to their existing duty of cooperation to suppress piracy, consistently with applicable rules of international law and available resources, by *inter alia* (under Article 2(1)):

    - "sharing and reporting relevant information";
    - "interdicting ships and/or aircraft suspected of engaging in piracy or armed robbery against ships";
    - "ensuring that persons committing or attempting to commit piracy or armed robbery against ships are apprehended and prosecuted"; and
    - "facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to piracy or armed robbery against ships, particularly those who have been subjected to violence";

    and to this end (under Article 4(3)):

    - "arresting, investigating, and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy";
    - "seizing pirate ships and/or aircraft and the property on board such ships and/or aircraft"; and
    - "rescuing ships, persons, and property subject to piracy".

    On the high seas, the powers to perform such activities are those described above in respect of the general law of piracy (at paragraphs 15-17); within internal waters or the territorial sea, such powers are a matter of the ordinary criminal jurisdiction of the coastal State.

54. The Code expressly acknowledges and incorporates the following principles of general international law:

    - that where a pirate vessel is seized on the high seas the courts of the State "which carries out a seizure pursuant to paragraph 4 may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship or property";[47]
    - that the State which "carried out ... [such a] seizure ... may, subject to its national laws, and in consultation with other interested entities, waive its primary right to exercise jurisdiction and authorize any other

[47] Article 4(6), Djibouti Code of Conduct. See Article 105, UNCLOS.

Participant to enforce its laws against the ship and/or persons on board";[48] and

- that pursuing a suspect vessel from the high seas into another State's territorial sea should not occur "without the permission of that [coastal] State" and both the continued pursuit and any subsequent seizure will be subject to the jurisdiction and authority of that coastal State, including its jurisdiction to prosecute captured suspects.[49]

All of these propositions are well attested in State practice and treaty law.[50]

55. The Code also acknowledges that a Participant may ask for other Participants' co-operation in detection of persons or vessels suspected of piracy or armed robbery against ships (Article 10).

56. Obviously, given the Code's non-binding status and express intention not to alter existing law, it does not create any new powers of enforcement, but it does recognise the manner in which Participant States may cooperate to coordinate their existing legal authorities. Article 7 concerns "embarked officers", often called "ship-riders" in other instruments.[51] Ship-rider agreements or arrangements are encouraged under UNSCR 1851, operative paragraph 3. There are various forms of ship-rider agreements, but they may involve the hosting of embarked law enforcement officers from one regional State (the "sending State" or "sending Participant") aboard another States' government vessel (the "host State" or "host Participant").[52]

57. Under the most advanced form of ship-rider agreements, embarked officers may carry out the arrest of the suspects and collection of evidence under the laws and jurisdiction of their sending State. Thus the prosecuting State will

[48] Article 4(7), Djibouti Code of Conduct. This is a common procedure in maritime interdiction treaties, especially those concerning drug-smuggling. See, for example, Guilfoyle, *Shipping Interdiction*, 84-86, 90-91, 251, 257, 296; Bill Gilmore, "Counter-Drug Operations at Sea: Developments and Prospects" (1999) 25 Commonwealth Law Bulletin 609, 611-613.

[49] Article 4(5), Djibouti Code of Conduct. See Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 165; O'Connell, *International Law of the Sea*, vol. 2, 978; Guilfoyle, *Shipping Interdiction*, 297.

[50] See notes 51-53 above.

[51] On the use of ship-riders see: Kathy-Ann Brown, *The Shiprider Model*, Contemporary Caribbean Legal Issues No. 1 (Faculty of Law, University of the West Indies, 1997); Guilfoyle, *Shipping Interdiction*, 89–94, 119–20, 145-146, 196–7, 209–11; Bill Gilmore, "Counter-Drug Operations at Sea: Developments and Prospects" (1999) 25 Commonwealth Law Bulletin 609, 612-613.

[52] Ship-riders need not be law-enforcement personnel. The present author understands that EUNAVFOR has used ship-riding translators, for example.

> have gathered the evidence and had a continuous chain of custody over evidence and suspects, avoiding the need for the "host" vessel to conduct itself according to the prosecuting State's legal requirements. Article 7 does not go this far on its face, referring only to ship-riders assisting in "operations from the host Participant ship or aircraft if expressly requested to do so by the host Participant, and only in the manner requested" and in a manner not prohibited by the law of either Party. Article 7 thus appears to contemplate that any arrests and investigations will be conducted by the host Participant.

Nothing in Article 7, however, excludes the possibility in appropriate cases that the host Participant might, at its discretion, transfer a prosecution to the sending Participant where the sending Participant is willing to assume jurisdiction as is expressly provided for in Article 4(7). Equally, nothing would require this to occur in any given case.

Annex II: Documents on countering piracy off the coast of Somalia[53]

1. TREATIES AND IMPLEMENTING LEGISLATION

Law of the Sea Convention, 1982, articles 100-107, 110 (piracy), www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm

- Australia: Crimes Act 1914, Part IV §§ 51-56, http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/
- Canada: Criminal Code (2009), C-46, Part II, §§ 74-75, http://laws.justice.gc.ca/en/C-46/
- Indonesia: Penal Code, Chapter XXIX, art. 438-448, https://unodc.org/tldb/showDocument.do?documentUid=6847
- Kenya: The Penal Code, Chapter 63, § 69; Merchant Shipping Act No. 4 of 2009, §§ 371, http://www.kenyalaw.org
- New Zealand: Crimes Act 1961, Part 5 §§ 92-97, http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html?search=ts_act_Crimes+Act_resel&p=1&sr=1
- Philippines: Revised Penal Code, Book Two, Title One, Section Three, articles 122-123, as amended by § 3 of Republic Act 7659, 13 December 1993, http://www.lawphil.net/statutes/repacts/ra1993/ra_7659_1993.html
- United Kingdom: Piracy Act 1837 c. 88, http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1837/cukpga_18370088_en_1; Piracy Act 1850 c. 26, http://www.england-legislation.hmso.gov.uk/RevisedStatutes/Acts/ukpga/1850/cukpga_18500026_en_1; Merchant Shipping and Maritime Security Act 1997 c. 28 § 26, http://www.opsi.gov.uk/acts/acts1997/ukpga_19970028_en_3#pb7-l1g26
- United States: 18 U.S. Code §§ 1651-1661; 33 U.S. Code Chapter 7, §§ 381-387

53 Prepared by J Ashley Roach, draft 20 September 2009.

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