Piracy in a legal context
Middelburg, M.J.

Document version:
Publisher's PDF, also known as Version of record

Publication date:
2011

Link to publication

Citation for published version (APA):

General rights
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy
If you believe that this document breaches copyright, please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Download date: 17. Dec. 2018
Piracy in a Legal Context
Prosecution of Pirates Operating off the Somali Coast

Annemarie Middelburg
# TABLE OF CONTENTS

List of Abbreviations

Introduction .................................................................................................................. 1

1. Definition of Piracy under International Law ..................................................... 5
   §1.1 The Concept of Piracy .................................................................................... 5
   §1.2 Definition UNCLOS ....................................................................................... 5
   §1.3 Definition SUA ............................................................................................. 9
   §1.4 Definition IMB .............................................................................................. 11
   §1.5 Piracy as Terrorism? ..................................................................................... 12
   §1.6 Definition of piracy ....................................................................................... 15

2. Background of Piracy in Somalia ...................................................................... 17
   §2.1 Pirate’s New Paradise .................................................................................... 17
   §2.2 The Somali Civil War .................................................................................... 18
   §2.3 Roots of Somali Piracy .................................................................................. 21
   §2.4 Causes of Somali Piracy .............................................................................. 23
   §2.5 Modus operandi ............................................................................................ 25

3. Universal Jurisdiction and Somali Piracy ............................................................ 29
   §3.1 The General Principles of Universal Jurisdiction ..................................... 29
   §3.2 The Scope of Universal Jurisdiction ......................................................... 31
   §3.3 Universal Jurisdiction Cases ....................................................................... 33
   §3.4 Universal Jurisdiction: International Courts and Tribunals ................. 35
   §3.5 Provisions Universal Jurisdiction in UNCLOS ....................................... 36
   §3.6 Provisions Universal Jurisdiction in UN Resolutions ......................... 39
   §3.7 Anti-Piracy Efforts of the International Community ............................. 42

4.1. Prosecution Solutions, Option 1: Prosecution in Somalia ......................... 47
   §4.1.1 Jurisdiction of Somalia ............................................................................ 47
   §4.1.2 Human Rights Concerns ......................................................................... 48
   §4.1.3 Somalia’s Incapability ............................................................................. 49
   §4.1.4 Conclusion ............................................................................................... 50

4.2. Prosecution Solutions, Option 2: Prosecution in the ICC ......................... 51
   §4.2.1 Jurisdiction of the ICC ............................................................................ 51
   §4.2.2 Conclusion ............................................................................................... 53
4.3. Prosecution Solutions, Option 3: Prosecution in the Flag State .... 55

§4.3.1 Lack of Political Will ................................................................. 55
§4.3.2 The Interest of the State ................................................................. 55
§4.3.3 Inadequate Domestic Legal Structures ........................................... 56
§4.3.4 Asylum Claims ........................................................................... 57
§4.3.5 Conclusion .................................................................................. 63

4.4. Prosecution Solutions, Option 4: Prosecution in Third Countries .... 65

§4.4.1 Agreements With Kenya ............................................................... 65
§4.4.2 Agreements With Seychelles, Tanzania and Mauritius .................. 67
§4.4.3 Problem with Article 105 UNCLOS? ........................................... 69
§4.4.4 Human Rights Concerns .............................................................. 70
§4.4.5 Shipriders ................................................................................... 72
§4.4.6 Conclusion .................................................................................. 73

4.5. Prosecution Solutions, Option 5: Prosecution in an International Piracy Tribunal ........................................................................... 75

§4.5.1 The Creation of an Ad Hoc Piracy Tribunal ...................................... 75
§4.5.2 Advantages of an Ad Hoc Piracy Tribunal ....................................... 78
§4.5.3 Disadvantages of an Ad Hoc Piracy Tribunal .................................... 79
§4.5.4 The Creation of a ‘Hybrid’ Tribunal ............................................... 80
§4.5.5 Advantages and Disadvantages of a ‘Hybrid’ Tribunal ....................... 81
§4.5.6 Other Prosecution Options? .......................................................... 82

4.6. Practical Prosecution Implications .................................................. 85

§4.6.1: Evidence Gathering ...................................................................... 85
§4.6.2: Witness Problem ......................................................................... 86

5. Conclusion ....................................................................................... 87

Bibliography ....................................................................................... 91
List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARPCT</td>
<td>Alliance for the Restoration of Peace and Counter-Terrorism</td>
</tr>
<tr>
<td>CGPCS</td>
<td>Contact Group on Piracy off the Coast of Somalia</td>
</tr>
<tr>
<td>CTF</td>
<td>Combined Task Force</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention of Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
</tr>
<tr>
<td>ESDP</td>
<td>European Security and Defence Policy</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
</tr>
<tr>
<td>ICU</td>
<td>Islamic Courts Union</td>
</tr>
<tr>
<td>ILA</td>
<td>International Law Association</td>
</tr>
<tr>
<td>IMB</td>
<td>International Maritime Bureau</td>
</tr>
<tr>
<td>IMB-PRC</td>
<td>International Maritime Bureau Piracy Reporting Centre</td>
</tr>
<tr>
<td>IMO</td>
<td>International Maritime Organization</td>
</tr>
<tr>
<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
</tr>
<tr>
<td>MSO</td>
<td>Maritime Security Operations</td>
</tr>
<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
</tr>
<tr>
<td>NM</td>
<td>Nautical Miles</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>ReCAAP</td>
<td>Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships</td>
</tr>
<tr>
<td>SNM</td>
<td>Somali National Movement</td>
</tr>
<tr>
<td>SNMG</td>
<td>Standing NATO Maritime Group</td>
</tr>
<tr>
<td>SSDF</td>
<td>Somali Salvation Democratic Front</td>
</tr>
</tbody>
</table>
| SUA          | Convention for the Suppression of Unlawful Acts Against the Safety of Maritime
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>TFG</td>
<td>Transitional Federal Government</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCAT</td>
<td>United Nations Convention Against Torture</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>UNITAF</td>
<td>Unified Task Force</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
</tr>
<tr>
<td>UNOSOM</td>
<td>United Nations Operation in Somalia</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
</tr>
<tr>
<td>WFP</td>
<td>World Food Programme</td>
</tr>
</tbody>
</table>
Introduction

This book examines piracy off the Somali coast and focuses on the possibilities for prosecution of suspected pirates within the framework of international law. The aim of this study is to paint a picture of the most preferable way to proceed on the prosecution and punishment of Somali pirates, in order to combat the international crime of piracy and to find a solution for impunity at national and international level.

The waters off Somalia, including the Gulf of Aden have recently become a dangerous place. According to the International Chamber of Commerce’s International Maritime Bureau’s Piracy Reporting Centre (IMB-PRC), hijackings off the Somali coast accounted for 92% of all ship seizures in 2010 with 49 ships hijacked and 1,016 crew members taken hostage.1 The pirates have been demanding million-dollar ransoms for release of the hostages, ships and cargoes.2

Piracy is a major international problem and States face a lot of problems regarding the prosecution pirates operating off the Somali coast. In December 2009, naval officers from the Dutch frigate HMS Evertsen arrested and disarmed 13 pirates.3 But after two weeks they were returned to their own boat and released near the Somali coast with “sufficient stocks of fuel and food”, former Dutch Minister of Defence Eimert van Middelkoop, said in a statement.4 In March 2010, the Dutch navy frigate HMS Tromp disarmed again a group of 19 Somali pirates in the Gulf of Aden and released them afterwards.5

---

May 2010, the Liberian flagged oil tanker *Moscow University* was seized by Somali pirates. A Russian naval ship captured the pirates but they were released after a couple of days, with Russian officials saying there was “insufficient legal basis to keep them in detention”. In December 2010, the Belgium frigate *Louise-Marie* also released six Somali pirates. The federal prosecutor in Brussels said that a Belgium court would not prosecute the pirates, because “there were no injuries and the frigate has not been damaged.” Over the last two years, hundreds of Somali pirates have been arrested, disarmed and released. Secretary-General’s Top Legal Adviser warned the Security Council in January 2011: “the fact that go per cent of captured pirates were released, is a serious flaw in the international approach to combating piracy.”

The first chapter of this book describes the various definitions of piracy and explains which definition will be used in this book as the legal definition for the act of piracy. The second chapter briefly describes the background of piracy in Somalia. This chapter analyses the Somali civil war and shows that Somali piracy has its roots in the fishing industry. Other causes for the rise of piracy off the Somali coast will be given, as well as the *modus operandi* of the pirates. The third chapter looks into the notion and scope of universal jurisdiction. Important cases will be presented and provisions of UNCLOS regarding universal jurisdiction will be examined, as well as recent UNSC Resolutions. This chapter will also evaluate the anti-piracy efforts of the international community, such as NATO operations, EU Operation ATALANTA,

---

U.S. operation Combined Task Force, the IMO Djibouti Code of Conduct and the Contact Group on Piracy off the Coast of Somalia. The fourth chapter considers and examines five options to prosecute suspected pirates operating off the Somali coast. The following options will be looked at: prosecution in Somalia, prosecution in the ICC, prosecution in flag States, prosecution in third countries and prosecution in an international piracy tribunal. Chapter 4 also includes a short remark about practical prosecution implications. Finally, conclusions about the most preferable option to prosecute Somali pirates are put forth in the conclusive chapter.
1. Definition of Piracy under International Law

§1.1 The Concept of Piracy

Originally, the word ‘pirate’ derives from the Greek and Latin words ‘peirates’ and ‘pirata’ and refers to an adventurer who attacked a ship.10 While many people might think of piracy as something from history books or movies, piracy has never been eliminated and is big threat for the international community these days.11 Over the years, there has been a shift towards more advanced, sophisticated and professional forms of piracy.12 Modern day pirates carry satellite phones, global positioning systems and are armed with automatic weapons, antitank missiles and grenades.13 The following question emerges: what is the definition of piracy in international law? Three definitions of piracy will be looked at in this chapter: Article 101 United Nations Convention on the Law of the Sea (UNCLOS), Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and the International Maritime Bureau’s (IMB) definition will be shortly looked at as well, although it is not legally binding.14

§1.2 Definition UNCLOS

The first attempt to codify the law of piracy was in 1958 when the Convention on the High Seas (or ‘Geneva Convention’) was adopted.15

---

Article 14 till 21 of this Convention addressed piracy directly.\textsuperscript{16} Piracy was also incorporated in the United Nations Convention on the Law of the Sea (UNCLOS I) and during the 1960 UNCLOS II negotiations.\textsuperscript{17} In 1982, these articles were subsequently included in UNCLOS III and were put into force.\textsuperscript{18} Somalia ratified the Convention on 24 July 1989.\textsuperscript{19} Article 101 UNCLOS defines piracy as follows:

"Piracy consists of any of the following acts:

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

The UNCLOS definition has been generally accepted as a reflection of pre-existing customary international law and it is recognized as the most authoritative codification of piracy law.\textsuperscript{20} The definition contains five elements. First and foremost, piracy must include criminal acts of

\textsuperscript{19} UN, ‘Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 1 March 2010’, Division for Ocean Affairs and the Law of the Sea<br HTTP://WWW.UN.ORG/DEPTS/LOS/REFERENCE_FILES/CHRONOLOGICAL_LISTS_OF_RATIFICATIONS.HTM> [Last Accessed 1 March 2011].
Working economic dealing International ship.

The Paper jurisdiction 27

Unfortunately, the UNCLOS definition and provisions on piracy has in the past proved problematic. There is a lack of effectiveness in dealing with attacks on ships, because the definition contains several limitations. The most significant limitation is that the UNCLOS

---

22 Ibid.
27 R. Herbert-Burns, S. Bateman and P. Lehr, ‘Lloyd’s MIU Handbook of Maritime
provisions are only concerned with piracy on the high seas or in an Exclusive Economic Zone (EEZ) and they do not address piracy in territorial, coastal or inland waters. The majority of piracy incidents in the world take place in territorial or coastal waters, but they are legally speaking no acts of piracy at all. The IMO and other bodies commonly classify these attacks as ‘armed robbery at sea’. The consequence is that the special jurisdictional rules on piracy are not applicable because the attacks take place in the wrong geographic area. Another limitation of the UNCLOS definition is the ‘two ship requirement’. When members of the Palestinian Liberation Organization (PLO) hijacked in October 1985 the Italian flag cruise ship *Achille Lauro* in the Mediterranean Sea, the act did not constitute piracy under UNCLOS because the members of the PLO had boarded the ship in a port. No second ship was involved and the fourth element of the UNCLOS definition was not fulfilled. Thus, 'internal seizure' within the ship is not regarded as an act of piracy. The last important limitation is the ‘private ends requirement’. Although it is argued that these wordings must be understood broadly, acts of violence are committed for religious, ethnic or political reasons, such as acts of maritime terrorism, are generally excluded.

---

Because of the limitations outlined above, scholars have advised revising the definition.36 Already in 1970, before UNCLOS III, the International Law Association (ILA) suggested that piracy should be defined as: “unlawful seizure or taking control of a vessel through violence, threats of violence, surprise, fraud or other means”, but this suggestion was not taken into account.37

§1.3 Definition SUA


The SUA Convention is one of the global instruments for the prevention and suppression of international terrorism. The preamble of the Convention expressed deep concern about “the worldwide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings.” While the SUA Convention does not use the term ‘piracy’ at all, the Convention includes piracy and armed robbery within the scope of its application. Article 3, paragraph 1 reads as follows:

"Any person commits an offence if that person unlawfully and intentionally:

1. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
2. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
3. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
4. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
5. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
6. communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
7. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).”

The main purpose of the SUA Convention is to “ensure that appropriate action is taken against persons committing unlawful acts against ships.” Although the Convention is being propagated as an anti-piracy document, it was not designed to address the law of piracy but was rather meant to address international terrorism. The SUA Convention is also listed on the UN website as an anti-terrorist convention.

The SUA Convention might be an attempt at addressing the inadequacies of the UNCLOS definition. In the first place, this convention fills the geographical gap because it applies to ships in all

---

maritime waters, including the territorial sea, archipelagic waters and internal waters.\textsuperscript{43} Article 4 of the SUA Convention confirms that: “This Convention applies if the ship is navigating of 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.” In the second place, the definition in the SUA Convention includes public and political motives and there is no ‘two ship requirement’.\textsuperscript{44} Therefore, ‘internal seizure’ within the ship is regarded as an act of piracy.\textsuperscript{45}

Despite the fact that the SUA Convention is able to sidestep some of the problems inherent in UNCLOS, SUA also raises problems. The first problem is the possible infringements upon national sovereignty. Implementation of the SUA Convention could mean that foreign ships will be allowed to exercise jurisdiction in another country’s territorial waters.\textsuperscript{46} Secondly, the very broadness of the definition and the vague terms in the SUA Convention makes it less than ideal for addressing the threat of piracy.\textsuperscript{47}

\textit{\textsuperscript{\textsection}1.4 Definition IMB}

The International Chamber of Commerce’s International Maritime Bureau (IMB) has defined piracy as "the act of boarding or attempting to board any ship with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act".\textsuperscript{48} This definition is much broader in comparison to the UNCLOS and SUA definition and includes almost every violence at sea. It is

\textsuperscript{45} K. Zou, ‘Seeking Effectiveness for the Crackdown of Piracy at Sea’, Journal of International Affairs, 1 October 2005, p. 3.
\textsuperscript{47} Ibid.
accepted by the shipping industry and it is very common in the media and security literature. The IMB uses this definition for collecting their information, which means that the incidents reported by the International Maritime Bureau Piracy Reporting Centre (IMB-PRC) are based exclusively on this definition. Nevertheless, this definition has not been recognized under international law. It is not legally binding and they do not conform to international legal definitions like Article 101 UNCLOS and Article 3 SUA.

§1.5 Piracy as Terrorism?

Piracy parallels terrorism in many aspects: both are forms of organized crime, both exist on a supra-national level and both seem to take place in lawless regions. Therefore, some scholars argue that pirates are sea-terrorists and should be treated that way. They say that the scourges of piracy and terrorism are intertwined and that piracy on the high seas is becoming a key tactic of terrorist groups. It is an advantage that pirates could be more effectively prosecuted if they were treated as terrorists. In that case, States could rely on a variety of anti-terrorist conventions to justify the capture and prosecution of pirates. But not only piracy, also terrorism is a complicated concept.


52 Ibid, p. 20-23.


55 Examples are the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention against the Taking of Hostages and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf.

The international community has not posited a comprehensive or generally accepted definition of ‘terrorism’.57

Piracy and terrorism have indeed many similarities, but there are also important differences. In the first place, the goals of pirates and terrorists are different. Piracy is a crime motivated by greed and thus pirates seek immediate financial gain through robbery.58 Terrorism is a crime motivated by political goals beyond the immediate act of attacking a ship and thus terrorists seek to make a political point (by causing murder and chaos).59 The second difference is that terrorists want to call attention on their acts and try to harm and damage as much as possible, while pirates want to avoid attention and will only harm and damage what is necessary to complete their mission.60 Thirdly, the root causes are different. The motivating factor for pirates is economics and for terrorists it is political and religious ideology.61 Therefore, terrorism and piracy require different approaches.

The following two examples of maritime terrorism illustrates that an act of terrorism is different compared with an act of piracy. In October 2000, suicide terrorists attacked the war ship USS Cole while it was harbored and refueling in the port of Aden in Yemen. Seventeen U.S. sailors were killed and Al-Qaeda claimed responsibility for the attack.62 The motive was a protest against American involvement in the Middle

---

East. In October 2002, terrorists in the Gulf of Aden off the shore of Yemen attacked the French supertanker *MT Limburg*. A small speedboat filled with explosives rammed into the tanker causing extensive damage. An audiotape believed to have been made by Osama bin Laden claimed responsibility for the suicide attack. He said that these terrorists were interested in “cutting the economic lifelines of the world’s industrialized societies.”

If we translate this to piracy in Somalia, Somali pirates do not have the intention to make a political point. Instead, they hunt for profit. Interviews with pirates operating off the Somali coast confirm that profit is the most important factor in motivating pirates: “the local people coming back home with huge amounts of money also attracted me.” Some argue that there is a link between Somali piracy and the militant Somali Islamist group Harakat Al-Shabaab (‘the youth’). Some form of connection between Somali pirates and terrorist groups is likely, but there is (so far) no evidence that this link exist.

---

§1.6 Definition of piracy

Definitions are important, but defining the crime of piracy has proven problematic.72 The SUA Convention may not be the appropriate instrument that defines the act of piracy off the Somali coast. In the first place, the effectiveness of the SUA Convention depends upon all of the States within a region becoming parties.73 Since Somalia is not (yet) a party of the SUA Convention, Article 3 is not a useful tool. Other reasons why the definition of the SUA Convention is problematic are the breadthness and vagueness of the definition and concerns about national sovereignty. Above all, the SUA convention is not designed to address the law of piracy but was rather meant to address international terrorism. The definition of the International Maritime Bureau may not be an appropriate instrument either, because the definition has not been recognized under international law. It is not legally binding and therefore not a useful tool either in this book.

In my view, the current framework of the UNCLOS convention is in general not really able to cope with modern day piracy. The piracy definition in UNCLOS and its relevant provisions need to be reconsidered in the future.74 But although the UNCLOS definition has a lot of shortcomings, this definition will be used in this book as the legal definition of piracy. The UNCLOS definition does not cause a lot of limitations in case of piracy off the Somali coast. Regarding the IMB-PRC, the vast majority of attacks committed by Somali pirates occur on the high seas.75 Somali pirates commit their acts for private ends (immediate financial gain) and they use small fishing boats to attack ships ('two ship requirement').76 To conclude, terrorism is not included

---

under the terms of Article 101 UNCLOS. Piracy is clearly limited to private ends, all public or political seizures (including terrorism) are ruled out.77 Terrorist attacks do not fit in the definition of piracy given by international law.

2. Background of Piracy in Somalia

§2.1 Pirate’s New Paradise

The Gulf of Aden and the east coast of Somalia became the most pirate-infested water in the world. Piracy activity in this region accounts for 92% of all the acts of piracy reported in the 2010 Annual Piracy Report of the IMB. Off the Somali coast, 49 vessels were hijacked and 1,016 crewmembers were taken hostage in 2010. As of 31 December 2010, Somali pirates were still holding a total of 28 ships and 638 hostages for ransom. Captain Pottengal Mukundan, director of the IMB’s Piracy Reporting Centre78 reported that “These figures for the number of hostages and vessels taken are the highest we have ever seen and the continued increase in these numbers is alarming.”79

Throughout the 1990s and the early 2000’s, the vast majority of piracy attacks were not committed off the Somali coast, but in an area which is known as ‘Maritime Asia’ (the region from the Red Sea, the Persian Gulf, the Arabian Sea, from the Bay of Bengal through the Strait of Malacca and the South China Sea).80 This chapter will answer the question why the act of piracy became so successful off the Somali coast.

Regarding the Failed States Index 2010, Somalia has been the most failed State.81 Somalia is incapable of providing good governance, enforcing respect for the rule of law, maintaining effective control and providing security of its citizens.82 It is not possible to address and to understand the wave of attacks by Somali pirates, without addressing the history of the State.

78 The ICC IMB-PRC has monitored piracy worldwide since 1991. It is the world’s only manned centre to receive reports of pirate attacks, 24 hours a day from all over the world. The PRC is located in Kuala Lumpur, Malaysia.
§2.2 The Somali Civil War

Somalia was created in 1960 by merging British Somaliland Protectorate and the colony of Italian Somaliland.83 In the first nine years, the United Republic of Somalia was a parliamentary democracy until Major General Mohamed Siad Barre took power by a military coup. He was the President of Somalia from 1969, but his government collapsed after 22 years by clan-based forces.84 Barre’s departure left a power vacuum and Somalia immediately broke down into clan-based militia warfare. The clan-based militias turned on each other in pursuit of control and created widespread violence in an intra-State war.85 The civil war disrupted agriculture and food distribution and killed hundreds of thousands and led to widespread starvation across Somalia.86 Another result of the collapse was that it created an emptiness of legitimate institutions that was filled in different ways in different regions. The central part of Somalia, where the Somali Salvation Democratic Front (SSDF) had more support, achieved kind of stability. The Somali National Movement (SNM) gained control in northwest Somalia and declared its independence in May 1991, calling itself the Republic of Somaliland. It is relatively stable in comparison with other parts of Somalia, but no foreign government has recognized its independence.87 Lawlessness, anarchy and famine (an estimated 300,000 people died, including many children) were mostly found in southern Somalia.88 The situation in Somalia caused the United Nations Security Council (UNSC) in April 1992 to authorize the peace keeping operation United Nations Operation in Somalia I (UNOSOM I). UNOSOM I was set up “to facilitate humanitarian aid to

84 P. Lennox, ‘Contemporary Piracy off the Horn of Africa’, Canadian Defence & Foreign Affairs Institute, December 2008, p. 5.
people trapped by civil war and famine." UNOSOM was limited to self-defence and initially formed to monitor “heavy fighting in the Somali capital of Mogadishu between armed elements allied to General Mohamed Farah Aidid, or to Mr. Ali Mohamed Mahdi, the appointed “interim President", and yet other factions.” The failure of UNOSOM I was that the UN did not address the fundamental problem, namely the collapse of State authority. The UN behaved as Somalia was a sovereign government and the UN troops became hostages instead of peacekeepers.

Faced with a humanitarian disaster in Somalia, on December 1992, the UNSC unanimously adopted Resolution 794(1992) approving a coalition of the UN peacekeepers led by the United States to form the Unified Task Force (UNITAF). They allowed a military force to use “all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia as soon as possible.” UNITAF was charged with ensuring humanitarian aid be distributed and peace be established in Somalia. The UN humanitarian troops landed in 1993 and started a two-year effort (mainly in the southern part of Somalia). UNITAF had a positive impact on the security situation in Somalia and delivered effectively humanitarian assistance. But on the other hand there had not been a secure environment established and incidents of violence continued. There was no functioning government in Somalia, neither an organized civilian police nor a disciplined national army. Therefore, in May 2003, UNITAF was replaced by United Nations Operation in Somalia II (UNOSOM II) which was established by UNSC resolution 814(1993). However, General Mohamed Farah Aidid saw UNOSOM II as a threat to his

---

power and in June 1993 his militants attacked Pakistani troops who were part of UNOSOM II in Mogadishu which led to escalating fighting and killed 24 Pakistani peacekeepers. In October 1993, 18 American soldiers and more than 1000 Somalis were killed. In response, the UNSC passed Resolution 837(1993) and condemned the attacks. After several violent incidents and the rule of government still not restored, UNOSOM II withdrew in March 1995.

Somalia has repeatedly failed to establish a functioning central government. As a result, criminal activity, including piracy is rampant throughout the country. Somalia became a playground for the pirates. In 2004, the Transitional Federal Government (TFG) was formed in Kenya and Colonel Abdullahi Yusef Ahmed won the vote for president. Despite several efforts to manage the conflict, the rivalry between different warlords, religious factions and other tribes worsened the violence and humanitarian crisis in the country. In 2006 there was an increase of the conflict in Mogadishu and clashes resulted in some of the worst violence in Somalia. The Alliance for the Restoration of Peace and Counter-Terrorism (ARPCT) was formed, but the Shari’a law oriented Islamic Courts Union (ICU) rapidly consolidated power. The ICU succeeded in overtaking the capital from the ARPCT during the Second Battle of Mogadishu. They continued to expand their control over (mainly the southern part of) Somalia.

96 Ibid.
led to increasingly open warfare. Since 2006 the violence and other abuses against civilians has risen and was worse than at any time. Since 2006 the violence and other abuses against civilians has risen and was worse than at any time. 102 Ethiopian troops, African Union peacekeepers and air support by the United States ensured that the capital Mogadishu was retaken from the ICU in December 2006. This intervention led to more chaos and instability in the country, with humanitarian, political and security conditions continuing to worsen across south-central Somalia. 103 The Ethiopian troops completed their withdrawal from Somalia by 2009, 104 but they left a fragile coalition government behind and a faltering African Union peacekeeping force to assist the TFG troops. 105 After the Ethiopian withdrawal, the conflict worsened when the rebels and Islamic insurgency groups, dominated by the militant Somali Islamist group Harakat Al-Shabaab extended their power. They established strict Islamic rule in areas under their control in line with their long-term goal to “turn Somalia into an Islamic State.” 106 They captured in May 2009 most of the capital city Mogadishu, but failed to overthrow the government. It won’t surprise anybody that the lack of central authority for 19 years has resulted in widespread lawlessness, violence and socio-economic deprivation and a tremendous increase of piracy attacks off the Somali coast.

§2.3 Roots of Somali Piracy

The Somali piracy phenomenon started in the period as early as 1989-1991, in parallel with the State collapse. 107 The first piracy attacks occurred when boats from the Somali National Movement (SNM)

110.
hijacked an oil tanker and two other ships off the Somali coast. The pirates took their goods and re-sold them for profit to prevent them from reaching government-controlled areas. In 1992 and 1993 there were only a few recorded piracy attacks in Somalia. The frequency of attacks went up in 1994-1995 and increased towards the year 2000. It is widely believed that the rise of piracy off the Somali coast must be seen in relation to the Somali fishing industry. Somalia had run a successful large-scale fishing industry from the early 1960s, but slowly fell into disrepair and disuse due to the civil war. European and Asian ships took the advantage of the chaos and aggressively invaded the waters of Somalia. Somalia was not capable to patrol its territorial waters and EEZ. Angry Somali fishermen secured weapons and began firing on foreign ships to protect the territorial waters from illegal fishing and dumping of toxic wastes. But at the same time, militia leaders and young fishermen saw an opportunity to earn easy money by asking fees from foreign fishing ships for ‘licenses’ to fish in the territorial waters and they called themselves ‘Coast Guards’. The foreign ships that failed to pay the fees, ran the risk of being captured and kidnapped. The Somali militia leaders and young fishermen learned quickly that it was more lucrative and less dangerous to attack large and unarmed commercial ships.

110 Ibid, p. 23.
exploded towards the end of 2008 after the massive Saudi oil tanker *M/V Sirius Star* was successfully hijacked in November 2008.\textsuperscript{117} In January 2009 the supertanker was released in exchange for a $3,000,000,- ransom which was parachuted onto its deck. This high profile attack led to new insights into Somali piracy. Pirates became more professional and ransom money was invested in new pirate attacks. The largest crime wave in the modern history of the Western Indian Ocean and Gulf of Aden was a fact and led to media attention all over the world.\textsuperscript{118}

\subsection*{§2.4 Causes of Somali Piracy}

The first cause of Somali piracy originates from the start-up phase in the early 1990’s and has already been discussed in the previous paragraph, namely the illegal fishing.

Another cause often mentioned is the widespread poverty and lack of employment in Somalia as a result of the civil war.\textsuperscript{119} Generally speaking, people engage in piracy because the potential gains from piracy are higher than the potential costs.\textsuperscript{120} In other words: they benefit more from it than other alternatives (for example being a fishermen) and piracy offers the opportunity for increased income. Taking into account the geographical location of Somalia at the Horn of Africa at the crux of all major regional shipping lanes, the fact that weapons are easily available, the fact that most young men have seagoing experience and that they live in a war torn land with little to lose, piracy became a career path open to youth.\textsuperscript{121} They have gone to the waters in search for fortune and they fight for their own financial salvation. Greed became the driving force behind most acts of

\begin{thebibliography}{9}
\end{thebibliography}
piracy.\textsuperscript{122} It worked, because the shipping firms and governments were prepared to pay massive ransoms since they are relatively low compared to the value of the ship, let alone the life of crew members.\textsuperscript{123}

Another cause of piracy off the Somali coast touches upon the main question of this book and includes the lack of legal and maritime counterstrategies. More and more ships passing through the Gulf of Aden and the Indian Ocean use barbed wire, water-hoses, private security and other countermeasures. But pirates hunt for the easiest target and pirates go for ships that fail to have self-defense arrangements.\textsuperscript{124} The problem is that a lot of ships (mostly from poor countries) lack the necessary resources for enforcement of those self-defense arrangements. But even for Western States the expense might be too high and that makes those ships and an easy target for the pirates.\textsuperscript{125}

The Somali government doesn’t take the responsibility for securing their own coastline and suppressing piracy in their territorial waters. In the last decade, there has been a dramatic reduction in pirate attacks in Southeast Asia. Following the conclusion of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships (ReCAAP), governments in the Southeast Asia region have begun to implement a system for coordinating anti-piracy efforts which were very effective.\textsuperscript{126} However, East African and Middle Eastern States fail to have the financial and legal resources for a similar agreement to cope with the piracy threat.\textsuperscript{127} Therefore, international

\textsuperscript{122} P. Lennox, ‘Contemporary Piracy off the Horn of Africa’, Canadian Defence & Foreign Affairs Institute, December 2008, p. 2.


\textsuperscript{126} J. Ho, ‘Combating Piracy and Armed Robbery in Asia: The ReCAAP Information Sharing Centre (ISC)’, Maritime Policy, Volume 33, Issue 2, March 2009, p. 433.

naval forces are present in the Gulf of Aden and the Indian Ocean to protect maritime traffic. But some argue that the presence might be too weak. Roger Middleton even claims that “this effort may well turn out to be more symbolic than practical”.\textsuperscript{128} He argues that the range of pirates operating in Gulf of Aden and the Indian Ocean is too large to adequately patrol. Regarding the legal countermeasures one can say that they have limited impact.\textsuperscript{129} There are no onshore legal institutions that can deal with the acts of piracy and a lot of countries have returned pirates to the beach without taking any legal action.\textsuperscript{130}

\textit{§2.5 Modus operandi}

In the beginning of the piracy era, pirates were only armed with knives and pistols and were operating in small rubber or wooden motorboats. In the majority of cases, violence was limited to assault and threatening of the victims.\textsuperscript{131} But over the last several years, piracy has become more sophisticated and there has been an increase in the levels of violence. Pirates started to use heavier firearms such as AK-47 automatic machine guns, rocket-propelled grenades and even dynamite to commit their attacks and threaten crewmembers. They also employ new technologies such as GPS devices, satellite phones and advanced money counting machines.\textsuperscript{132}

The small groups of pirates (who are usually ex-fishermen, ex-militiamen or technical expert coming from northeastern region of Somalia),\textsuperscript{133} operate using small speedboats with powerful engines that can be pulled up onto the beach. The advantage is that these boats are fast and maneuverable, but a disadvantage is that they lack


the necessary range.\textsuperscript{134} Therefore, pirates use so-called ‘mother ships’ as staging posts for attacks further out to sea. The ‘mother ships’ are generally Russian fishing trawlers that the pirates hijacked closer to shore.\textsuperscript{135} The use of the ‘mother ships’ explains how the pirates have managed to increase the ‘threat zone’ in the Gulf of Aden and the Indian Ocean so dramatically. A few years ago this zone was approximately 50 nautical miles (NM) off the coast, but that it increased last year already around 1000 NM\textsuperscript{136} off the Somali coast.\textsuperscript{137}

In the past, pirates only hijacked unguarded, low crew numbers, low speed and low sides cargo ships because they were an easy target and easy to board from their own speedboats. Nowadays, pirates tend to favor larger vessels because they have larger crewmembers on board, meaning a higher ransom. Most cargo ship crewmembers are not equipped with defensive weapons, nor trained to fight pirates.\textsuperscript{138} The boarding of the ship takes most of the time only fifteen minutes.\textsuperscript{139} After the ships are hijacked, the pirates order the crew to sail for one of the Somali ports or coastal towns/pirate villages. It is said that the pirates treat the hostages relatively humane.\textsuperscript{140} From there, the negotiators take over the lead, bargaining for ransoms: the only objective of the Somali pirates. They have earned more than millions of dollars ransom and piracy is believed to be Somali’s biggest industry.\textsuperscript{141} Individual pirates in Somalia are among the wealthiest persons: “Young men are attracted to piracy by aspirations of big

\textsuperscript{136} In May 2009, the Malta-flagged Greek tanker Ariana, carrying soy from Brazil to Iran was attacked by Somali pirates in the Indian Ocean, approximately 950 NM of Mogadishu.
houses, fast cars and pretty women that the life affords.” It has not been proven that government officials or clan leaders are directly involved in piracy, but it is widely believed that they receive some form of compensation for their activities.  

3. Universal Jurisdiction and Somali Piracy

This chapter will answer the question what is meant by ‘universal jurisdiction’. The concept of universal jurisdiction will be explained and applied to piracy off the Somali coast.

§3.1 The General Principles of Universal Jurisdiction

States began to exercise universal jurisdiction over piracy on the high seas as early as the sixteenth century. Hugo de Groot (Grotius) propounded in 1609 the idea of the open sea (Mare Liberum) and he considered the sea to be the joint property of humankind (Communis) as the basis of free trade between nations. The pirate was an outlaw, endangered the Mare Liberum and an enemy of all mankind (Hostis Humani Generis).

Universal jurisdiction became most apparent in State practice with regard to the crime of piracy and therefore piracy is also called the ‘original universal jurisdiction crime’. But what is meant by ‘universal jurisdiction’? In general, the principle of universal jurisdiction allows a State to prosecute individuals who have committed certain international crimes, even if the State has no link to the crime in question other than “the bonds of common humanity.” But judge Van den Wyngeart suggested in her dissenting opinion in the Arrest Warrant case that “there is no generally accepted definition of

§3.2 The Scope of Universal Jurisdiction

The first case where the principles of international jurisdiction were outlined and presented was the Lotus case.\textsuperscript{157} In short, in August 1926 there was a collision on the high seas between the French steamship the Lotus and the Turkish collier Boz-Kourt. The Boz-Kourt split in two and sank involving the death of eight Turkish nationals.\textsuperscript{158} Turkish authorities launched joint criminal proceedings in pursuance of Turkish law against the French and Turkish commanders and the Turkish court found both guilty of involuntary manslaughter.\textsuperscript{159} France challenged Turkey’s jurisdiction before the Permanent Court of International Justice (PCIJ) with the question: “Has Turkey acted in conflict with the principles of international law?”\textsuperscript{160} The Court ruled in favor of Turkey and it held that “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.”\textsuperscript{161} The ‘Lotus principle’ was born and held that sovereign States have a right to extend their jurisdiction as long as it is not prohibited by an international convention or custom.\textsuperscript{162} In other words, as judge Loder wrote in his dissenting opinion: “under international law, every door is open unless it is closed by treaty or by established Custom.”\textsuperscript{163} It is debatable if this is still true, because the new international order is governed and protected by new values such as humanity, human dignity and human rights.\textsuperscript{164}

\textsuperscript{157} France v. Turkey (Lotus case), 7 September 1927, PCIJ Rep., Series A, No. 10.
\textsuperscript{160} France v. Turkey (Lotus case), 7 September 1927, PCIJ Rep., Series A, No. 10, para. 5.
\textsuperscript{161} Ibid, para. 18.
\textsuperscript{163} France v. Turkey (Lotus case), 7 September 1927, PCIJ Rep., Series A, No. 10, para. 34.
\textsuperscript{164} M. Rotter, ‘The International Legal Order’, Vienna Symposium, Keynote speech, 21
Beside piracy, the trading of slaves has also been recognized as an offense subject to every State’s jurisdiction, referring to Article 110, para. 1(b) UNCLOS, Conventions about slavery and customary law. After the Second World War, the scope of universal jurisdiction has been expanded, influenced in the Nuremberg and Tokyo Tribunals, by the ratification of the Genocide Convention, the Geneva Conventions and the Convention against Torture. The expansion of the scope of universal jurisdiction began at the postwar trials of individuals who committed war crimes and crimes against humanity. Since Israel’s prosecution of Adolf Eichmann in 1961, universal jurisdiction was no longer an unnoticed principle in the international public law arena. Jurisdiction of the Israeli Court in the Eichmann case was founded on the universality principle (but referred also to both the passive personality and protective principles).

Afterwards, universal jurisdiction continued to expand and also certain terrorist activities and human rights violations were covered. As Randall noted: “terrorists and human rights offenders are comparable to pirates, slave traders and war criminals, because their offenses involve particularly reprehensible acts that often indiscriminately endanger human lives and property interests.” These modern offenses are the concern of the international community rather than individual States and should therefore be subject to universal jurisdiction, according to some scholars.

November 2002, para. 3-4.

For example the Convention to Suppress the Slave Trade and Slavery, the Protocol amending the Convention and the Supplementary Convention of the Abolition of Slavery.


§3.3 Universal Jurisdiction Cases

Judge Kaufmann wrote in the United States Filártiga v. Peña-Irala case that “the torturer has become, like the pirate and slave trader before him, Hostis Humani Generis, an enemy of all mankind.”172 In the Pinochet case,173 universal jurisdiction was brought to the attention of European States. Spain asserted universal jurisdiction over dictator Augusto Pinochet for his commission of crimes against humanity against the people in the wars against Argentina and Chile.174 In the Guatemala case,175 Spain limited its application of universal jurisdiction,176 but the Spanish court relied on universal jurisdiction in the Scilingo case177 again. The case concerned crimes against humanity and genocide committed during the Guerra Sucia between 1976 and 1982.178 In Belgium, also called the ‘world capital of universal jurisdiction’,179 national law was amended after the Arrest Warrant case.180

In 2000, an arrest warrant was issued under a Belgium ‘national law of universal jurisdiction’ against the Minister of Foreign Affairs of the Democratic People's Republic of the Congo. The Democratic People's Republic of the Congo filed in the Registry of the Court an application

172 Filártiga v. Peña-Irala, United States Court of Appeals, Second Circuit, 30 June 1980, 690 F.2d 876, Part IV.
173 In Re Pinochet, Spanish National Court, Criminal Division, 4 November 1998, Case 19/97.
instituting proceedings against the Kingdom of Belgium in respect to the international arrest warrant.\textsuperscript{181} The ICJ ruled that “the issue violated international obligations in that they failed to respect the immunity from criminal jurisdiction and the inviolability which a foreign minister enjoyed under international law.”\textsuperscript{182} Reading the Arrest Warrant case, the wide range of views concerning universal jurisdiction among the judges of the ICJ is very remarkable. President Guillaume suggested in his separate opinion that “International law knows only one true case of universal jurisdiction: piracy.”\textsuperscript{183} He concluded that universal jurisdiction only exists in relation to piracy. On the other hand, judge Oda recognized in his dissenting opinion that “the scope of extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc.” Universal jurisdiction is increasingly recognized in cases of terrorism and genocide.\textsuperscript{184}

In the Ariel Sharon case, Belgium filed a criminal complaint on behalf of a group of witnesses and survivors against Israeli Prime Minister Ariel Sharon and others for their roles in the massacre at the refugee camps Sabra and Shatila in Beirut in 1982.\textsuperscript{185} They were charged with war crimes, crimes against humanity and genocide.\textsuperscript{186} In 2002, the Belgian Appeals Court dismissed the case because Sharon was not present on Belgian soil.\textsuperscript{187} The Belgian Court of Cassation reversed that decision determining that Ariel Sharon enjoyed personal immunity for the duration of his term as Prime Minister of Israel.\textsuperscript{188} Those rulings made clear that universal jurisdiction expanded to other crimes than piracy and slave trade, but also has its limits.

\textsuperscript{182} Ibid, Judgment, para. 2.
\textsuperscript{183} Ibid, sep. op. Guillaume, para. 12-13.
\textsuperscript{184} Ibid, diss. op. Oda, para. 11.
\textsuperscript{188} Ibid, p. 800.
§3.4 Universal Jurisdiction: International Courts and Tribunals

The ICC was created to have jurisdiction over “the most serious crimes of concern to the international community as a whole.”189 Article 5 of the Rome Statute describes that “the Court has jurisdiction in accordance with this Statute with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.”190 The Rome Statute rejected universal jurisdiction for the ICC.192 Article 12, paragraph 2 of the Rome Statute provides that the ICC may exercise its jurisdiction in relation to crimes that have taken place on the territory of the State party or the person accused of the crime is a national of the State party. The UNSC, acting under Chapter VII of the UN Charter, can refer a situation to the Prosecutor of the ICC to initiate an investigation192 and the UNSC is involved in any situation through a resolution adopted under Chapter VII of the UN Charter.193

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) were established by respectively UNSC Resolutions 827(1993) and 955(1994). The tribunals do not base their jurisdiction on universal jurisdiction either, but gain their powers from the UNSC.194 If States join the UN and agree to the UN Charter, States delegate certain powers to the UN. On the basis of these powers, the UNSC implied the competence,195 acting under Chapter VII (Article 39) of the UN Charter, to establish criminal tribunals in order to maintain or restore international peace and security.196 The only exception is the hybrid East Timor Tribunal.

189 Rome Statute of the International Criminal Court, 17 July 1998, Preamble, para. 4
190 Ibid, Article 5, para. 1.
193 Ibid, Article 16.
195 The SC implied the competence using a creative reading of Chapter VII and therefore, a number of legal issues concerning the legality of the establishment of this Tribunals and the SC competence in this regard is debatable. See for example Y. Aksar, ‘Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court’, Routledge, 2004, p. 18-25.
196 M.R. von Sternberg, ‘A Comparison of the Yugoslavian and Rwandan War Crimes
(Special Panels of the Dili District Court) where the panels had universal jurisdiction over the serious crimes of genocide, war crimes and crimes against humanity: “With regard to the serious criminal offences listed under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.” However, as far as I know, the panels haven’t used this provision of universal jurisdiction in practice.

§3.5 Provisions Universal Jurisdiction in UNCLOS

Let us go back to the ‘original universal jurisdiction crime’: piracy. The first chapter of this book focused upon the international law definition of piracy (Article 101 UNCLOS). But piracy under international law is not necessarily the same as piracy under the domestic law of States. States may define piracy more broadly under domestic law than under international law. But the State can only obtain universal jurisdiction over persons committing acts constituting piracy under international law. As judge Moore says in his dissenting opinion in the Lotus case: “I say ‘piracy by law of nations’, because the municipal laws of many States denominate and punish as ‘piracy’ numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations.” Article 19 of the 1958 Geneva Convention and Article 105 UNCLOS affords the right to exercise universal jurisdiction over pirates and reads the following:

---

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

UNCLOS is a widely ratified treaty, but the States that haven’t ratified UNCLOS are nevertheless bound by this provision by the 1958 Geneva Convention. In fact any State is bound by this Article as a matter of customary international law. Reading Article 105 UNCLOS carefully, the language seems to indicate that parties have a right (‘may’), but not an obligation to exercise jurisdiction: “every State may seize”, “the courts... may decide” and “may also determine”. Nevertheless, Article 14 of the 1958 Geneva Convention and Article 100 UNCLOS sets out the ‘duty’ to cooperate:

“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.”

But the rule in Article 105 UNCLOS does not establish the exclusive jurisdiction of the seizing State’s courts. The international law rules on action to be taken against pirates permit action, but the UNCLOS does not ensure that such action is effectively taken. The fact that

---

206 The SUA Convention has certain advantages over UNCLOS as a basis for jurisdiction. SUA requires in Article 3 to prosecute anyone who “seizes or exercises control over a ship by force or threat of force or any other form of intimidation.” SUA makes the exercise of jurisdiction obligatory in some circumstances (see Article 6, paragraph 4), while UNCLOS requires only taking active measures and does not oblige prosecution. SUA obliges contracting governments either to extradite alleged offenders or submit cases to their competent authorities for the purpose of

37
States “may” (rather than “shall”) prosecute does not mean that States will be eager of will have appropriate national laws.207 This issue was addressed by the UN in Resolution 1918(2010) where the UNSC calls on all States in the region to criminalize piracy under their domestic law and “favorably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia.”208 In the absence of an applicable aut dedere aut judicare (to extradite or to prosecute) obligation, UNCLOS contains no express obligation for a capturing State to submit a pirate to their national authorities for trial (if it is not possible to hand the pirate over to third State for trial).209 States are only encouraged to cooperate with each other to determine the disposition of suspects and which (if any) State claiming jurisdiction will prosecute them.

Under the UNCLOS, the high seas are viewed as ‘no man’s land’ and jurisdiction belongs to all nations.210 But as we saw in the first chapter of this book, no nation has the right to enter the territorial or inland waters of a State (Article 3 UNCLOS limits the territorial sea to 12 NM off shore).211 In 2007, Somali pirates took advantage of this situation by quickly returning to the Somali territorial waters where they were immune for naval ships patrolling in the Gulf of Aden and the Indian Ocean.212

---

211 Article 3 UNCLOS extended the territorial seas to 12 NM from the coast, which is a significant expansion of the traditional 3 NM zone.
§3.6 Provisions Universal Jurisdiction in UN Resolutions

On 23 January 1992, the UNSC imposed a general and complete arms embargo upon Somalia in Resolution 733(1992), invoking Chapter VII.\textsuperscript{213} To address the issue of Somali piracy described in the last paragraph, the UNSC adopted on 2 June 2008 unanimously (with Somalia’s consent) Resolution 1816(2008). The UNSC stated that the situation in Somalia “continues to constitute a threat to international peace and security in the region.”\textsuperscript{214} It is important to note that not piracy in itself, but the situation in Somalia constituted a threat to international peace and security. Resolution 1816(2008) encourages States to “cooperate with each other, with the IMO and, as appropriate, with the relevant regional organizations”\textsuperscript{215} and “to provide technical assistance to Somalia and nearby coastal States.”\textsuperscript{216} But paragraph 7 attracts the most attention and reads the following:

“Decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General, may:

(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.”\textsuperscript{217}

Resolution 1816(2008) extended the authorization of States to enter Somalia’s territorial waters and to use ‘all necessary means’ to repress

\textsuperscript{214} UNSC Resolution 1816(2008) of 2 June 2008, second preamb. para..
\textsuperscript{215} Ibid, para. 3.
\textsuperscript{216} Ibid, para. 5.
\textsuperscript{217} UNSC Resolution 1816(2008) of 2 June 2008, para. 7.
acts of piracy.\textsuperscript{218} The UNSC used Chapter VII powers to authorize foreign military and law-enforcement action for a six-month period. The use of force needs to be reasonable and necessary, according to customary international law. Resolution 1816(2008) does not clearly make the international law of piracy directly applicable in the territorial waters of Somalia. The question rises if universal jurisdiction applies to pirates captured in territorial waters of Somalia under this Resolution. The enforcement jurisdiction (legal authority to pursue and arrest the pirates) is granted by the Resolution, but if the prescriptive and adjudicative jurisdiction (legal authority to try the pirates) is granted, is debatable. Paragraph 11 of the Resolution addresses jurisdiction. The UNSC calls upon all States to “cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia... providing disposition and logistics assistance.”\textsuperscript{219} Several approaches are possible, implementing this paragraph. On the one hand, following the customary principle allowing the State where the pirate is present to assert jurisdiction. In that case, Somalia is the coastal State and should have jurisdiction. On the other hand, a broad interpretation of ‘all necessary means’ of Resolution 1816(2009) could extend to asserting prescriptive and adjudicative jurisdiction, given the limited capacity of the State Somalia.\textsuperscript{220}

On 2 December 2008, the UNSC adopted Resolution 1846(2008). Acting under Chapter VII of the Charter, the UNSC extended the authorization of other States to enter Somalia’s territorial waters provided by Resolution 1816(2008) for another twelve months.\textsuperscript{221} In paragraph 15 the UNSC emphasized the need for States to implement their obligations under the SUA Convention: “provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of

\textsuperscript{219} UNSC Resolution 1816(2008) of 2 June 2008, para. 11.
\textsuperscript{221} UNSC Resolution 1846(2008) of 2 December 2008, para. 10.
The UNSC also emphasized to cooperate with the IMO “to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.”

On 16 December 2008, The UNSC adopted Resolution 1851(2008). Acting under Chapter VII of the Charter, the UNSC invited all States and regional organizations fighting piracy off the coast of Somalia “to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (‘shipriders’) from the latter countries, in particular countries in the region” and “to establish an international cooperation mechanism to act as a common point of contact between and among States.”

Again, States and regional organizations may undertake “all necessary measures” that are appropriate in Somalia, in a manner consistent with applicable international humanitarian and human rights law. Chapter 4.4 of this book will provide more information about those special agreements.

With the above UN Resolutions, the UNSC has taken measures within the framework of Chapter VII in response of the growing amount of pirate’s activities off the Somali coast. In my opinion, the Resolutions are of practical importance. In the first place, several countries have sent their warships to Somalia to combat piracy attacks. In the second place, naval ships are permitted to enter the territorial waters of Somalia to combat piracy. While in Somali waters, they could use ‘all necessary means’ which have proven to be an important tool for naval ships. In the third place, the UNSC invited States to conclude special agreements with countries willing to take custody of pirates. Thus far the United Kingdom, United States, European Union, Denmark, Canada and China have been entered bilateral prosecution agreements with Kenya that allow for the extradition of suspected pirates.

---

223 Ibid.
225 Ibid, para. 4.
226 Ibid, para. 6.
pirates for prosecution in Kenya. More than 100 suspected Somali pirates have faced trial in Kenya. Finally, the CGPCS was established to “coordinate to facilitate discussion and coordination of actions among States and organizations to suppress piracy off the coast of Somalia” and they work closely together with the IMO to develop internationally recognized best management practices.

§3.7 Anti-Piracy Efforts of the International Community

On 25 September 2008, the Secretary-General of the United Nations, Ban Ki-moon, requested the North Atlantic Treaty Organisation (NATO) to start Operation Allied Provider: a temporary protection force (between October and December 2008) for World Food Programme (WFP) assistance shipments in the region. This operation was succeeded by Operation Allied Protector under the command of Standing NATO Maritime Group 1 (SNMG1). Between March and August 2009 the operation helped to “deter, defend against and disrupt pirate activities in the Gulf of Aden and off the Horn of Africa”, according to NATO. On 17 August 2009, the anti-piracy missions has been replaced by operation Ocean Shield, under the command of Standing NATO Maritime Group 2 (SNMG2). The focus continues to be counter-piracy operations at sea, but a new element of the mission is participation in regional-State counter-piracy capacity building efforts which aims to assist regional governments,

---

upon their request, in developing their own capacity to combat piracy activities.\textsuperscript{235} This mission will last until the end of 2012.

On 8 December 2008, the European Union (EU) launched in support of the above-mentioned UNSC Resolutions a naval operation against piracy called EU NAVFOR Somalia – Operation ATALANTA in order to “help deter, prevent and repress acts of piracy and armed robbery off the coast of Somalia.”\textsuperscript{236} The aim of Operation ATALANTA is to “contribute to the protection of vessels of the World Food Programme (WFP) and the protection of vulnerable vessels sailing in the Gulf of Aden and off the Somali coast.”\textsuperscript{237} It is the first naval operation of the EU and conducted in the framework of the European Security and Defence Policy (ESDP). The operation was scheduled for an initial period of twelve months (until December 2009), but has been extended by the Council on the EU until December 2012.\textsuperscript{238} A total of 26 countries\textsuperscript{239} contributed to the operation until December 2010. EU NAVFOR consisted of a total of around 2,000 military personnel, including land-based personnel.\textsuperscript{240} The operation has shown signs of effectiveness because EU NAVFOR ships have successfully deterred

\begin{itemize}
\item \textsuperscript{239} Including Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Ukraine and the United Kingdom (also hosting the EU NAVFOR Operational headquarters).
\end{itemize}
attacks, arrested numerous pirates and have also protected many vessels chartered by the WFP.\textsuperscript{241}

Two U.S.-led tasks forces are active in the Gulf of Aden and off the Somali coast as well. Combined Task Force 150 (CTF 150) has an anti-terrorism mandate and its mission is “to conduct Maritime Security Operations (MSO) in the Gulf of Aden, Gulf of Oman, the Arabian Sea, Red Sea and the Indian Ocean.”\textsuperscript{242} MSO help develop the conditions for security and stability in the maritime environment that promotes stability and global prosperity.\textsuperscript{243} The primary aim of CTF 150 is to fight terrorism at sea but a problem arose when some navies of the coalition did not have the authority to conduct counter-piracy missions.\textsuperscript{244} Therefore, Combined Task Force 151 (CTF 151) established in January 2009, has been specially engaged in counter-piracy operations. Their mandate is to “actively deter, disrupt and suppress piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations.”\textsuperscript{245}

In April 2008, an IMO conference was held in Tanzania to discuss the establishment of a regional counter-piracy document (similar to the ReCAAP which have been successful in reducing piracy in the Strait of Malacca region).\textsuperscript{246} The Tanzanian conference produced a draft non-binding regional memorandum of understanding. On 29 January 2009, leaders from 17 States in the region adopted in Djibouti a regional agreement at a meeting convened by the IMO.\textsuperscript{247} They developed a regional framework to cooperate and share and report information

\begin{footnotes}
\item[242] B.J. Finman, ‘Maritime Security on the Horn of Africa: Threading the Needle At a Seam of Responsibility’, Naval War College, LCDR, USN, 6 November 2007, p. 5.
\item[244] C. Wilson, ‘Naval Diplomacy and Maritime Security in the Western Indian Ocean’, Strategic Analysis, Volume 33, No. 4, July 2009, p. 495.
\end{footnotes}
through a system of national focal points and information centers in the repression of piracy and armed robbery against ships.\textsuperscript{248} The non-binding Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden recognizes “the extent of the problem of piracy and armed robbery against ships in the region and, in it, 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.”\textsuperscript{249} The parties agreed that three regional facilities\textsuperscript{250} are planned to support the information sharing components. They also agreed to resolutions on technical cooperation and the establishment of a regional training center in Djibouti.\textsuperscript{251} In Resolution 1918(2010) the UNSC welcomed the progress being made to implement the IMO Djibouti Code of Conduct.\textsuperscript{252}

On 14 January 2009, the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established, encouraged by Resolution 1851(2008) and led by the Bush Administration.\textsuperscript{253} The CGPCS is a voluntary ad hoc international forum, which meets quarterly at the UN. In its first year, the CGPCS doubled in size to more than 50 countries and international organizations,\textsuperscript{254} including the African Union, the European Union, the Arab League, NATO, the UN Secretariat, the UN Office of Drugs & Crime, INTERPOL and the IMO.\textsuperscript{255} They are coordinating political, military, and other efforts to


\textsuperscript{250} The Maritime Rescue Coordination Centre in Mombasa (Kenya), the Sub-Regional Coordination Centre in Dar es Salaam (Tanzania) and a regional maritime information center that is to be established in Sana'a (Yemen).


\textsuperscript{252} UNSC Resolution 1918(2010) of 27 April 2010, para. 3.


bring an end to piracy off the coast of Somalia and to ensure that pirates are brought to justice.\textsuperscript{256} They identified six tasks\textsuperscript{257} and categorized four Working Groups\textsuperscript{258} that meet regularly around the world to develop and implement national counter-piracy policies and programs.\textsuperscript{259} The experience of the CGPCS is that this collaboration is fruitful, but that great challenges remain in terms of stemming the problem of piracy.\textsuperscript{260} In Resolution 1897(2009), the UNSC commended the work of the CGPCS to facilitate coordination and urged States and international organizations to continue to support their efforts.\textsuperscript{261}
4.1. Prosecution Solutions, Option 1: Prosecution in Somalia

Chapter 3 clarified that UNCLOS and other legal instruments offer a clear legal regime for the prosecution of pirates. Powerful legal tools are available in international law to combat piracy. There has been concerted action against piracy at the UN level in passing Resolutions, military responses from the United States CTF and the EU mission ATALANTA. But those UN and military actions alone are unsuccessful in fixing the ineffective legal response that has to be part of the solution.¹⁶² Navy ships patrolling in the Gulf of Aden capture pirates, because States acknowledge that piracy is a crime under international law and a common threat for the international community. But in most cases States are unwilling to prosecute pirates. This chapter will answer the question how the captured pirates could be and should be prosecuted. Five different prosecution options will be discussed, starting with the possibilities for prosecution in Somalia.

§4.1.1 Jurisdiction of Somalia

On the basis of territorial jurisdiction (if the pirate is captured on Somali land or in the Somali territorial waters) and active personality jurisdiction (if the pirate is a national of the Somali State), Somalia has jurisdiction to prosecute suspected pirates. Ideally, suspects should be prosecuted in the country where they come from, but most States do not see this as an option. There are several reasons for that: Somalia’s lack of an effective and functioning central government since Siad Barre was expelled in 1991,²⁶³ Somalia has no functioning navy,²⁶⁴ the criminal justice system is weak and there is a probability that the pirates would be subject to unfair trials or human rights breaches.²⁶⁵

---


²⁶³ See Chapter 2 of this book.


§4.1.2 Human Rights Concerns

European governments are concerned about cruel treatment and even the death penalty in case of repatriation and that would conflict with the obligation of non-refoulement under international law. This fear is well founded because Somalia’s deputy Prime Minister Abdurrahman Haji Adam said during a conference in April 2009 the following: “Becoming a pirate is a crime and Islam says if you become a pirate you should definitely be killed because you are killing the people.”266 Under Shari’a law, Islamic courts in Somalia sentence people to have their right hand cut off when found guilty for robbery and the death penalty is ruled for murder, rape, armed robbery and drug trafficking.267

The UN Convention Against Torture (UNCAT)268 describes in Article 3 the following: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Non-refoulement in case of Somali piracy prohibits sending pirates to States where they will be likely be abused. Somalia has one of the worst human rights records and it is likely that suspected pirates would face human rights abuses when they will face trial in Somalia.269 Nevertheless, France navy officers frequently handed over Somali pirates to Somalia. On 1 January 2009, the French warship Premier Maitre L’Her captured eight pirates when they tried to hijack a cargo ship from Panama and they were handed over to Somali authorities.270

In March 2010, France handed over 22 Somali pirates to Somalia and

---

268 UN, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly, 10 December 1984, Article 3, para. 1. Somalia is a party to UNCAT since 24 Jan 1990.
they will be prosecuted in local courts. France concluded an agreement with Somalia, including assurances that they will not be tortured. It is debatable whether such assurances justify refoulement.

Several States, including Denmark, release captured pirates rather than transferring them to the Somali authorities, because they don’t want to take the risk of breaching their obligations under UNCAT, the International Covenant on Civil and Political Rights (ICCPR) or the European Convention of Human Rights (ECHR). Cole, head of the UNODC counter-piracy program said that that there are being held more than 200 Somali piracy suspects in the region of Puntland. In 2008, they had convicted 154 people for involvement in piracy and the number awaiting trial was 72.

§4.1.3 Somalia’s Incapability

The State of Somalia is unable to take coercive action and exercise jurisdiction. The Minister for Foreign Affairs and International Cooperation of the TFG of Somalia acknowledged that during UNSC 6046th Meeting when Resolution 1851(2008) was adopted. He said that “his country had no capacity to interdict or patrol its long coastline to ensure the security of the sea, but it had cooperated with the international community in that fight and it would continue to do so

273 Saadi v. Italy, 28 February 2008, European Court of Human Rights, Appl. No. 37201/06.
fully, now and in the future. That was why it supported resolution 1851.” In April 2010, when Resolution 1918(2010) was adopted, the UNSC acknowledged that the State Somalia is not able to prosecute pirates themselves: “Stressing the need to address the problems caused by the limited capacity of the judicial system of Somalia and other States in the region to effectively prosecute suspected pirates.”

§4.1.4 Conclusion

Somalia is a failed State and has no functioning government. The judicial system of Somalia has limited capacity and lacks to sufficient investigate, detain or prosecute pirates operating within its jurisdiction.6 It is likely that suspected pirates would face human rights abuses when handed over to Somalia for prosecution. Under Shari’a law, the death penalty is ruled for the crime of piracy. Therefore, States risk of breaching their obligations under UNCAT, ICCPR, ECHR or other human rights treaties when handing over pirates to Somalia for prosecution. Although France handed over pirates to Somalia (under an agreement with special assurances), prosecution in Somalia is not a preferable option.

4.2. Prosecution Solutions, Option 2: Prosecution in the ICC

\[\text{§4.2.1 Jurisdiction of the ICC}\]

Piracy is identified as the oldest recognized crime under international law. But when the Rome Statute of the ICC was adopted in 1998, piracy was of less concern of the international community. In early drafts of the Rome Statute, some members of the International Law Commission proposed an ICC with jurisdiction over fourteen crimes which have become known as the ‘treaty crimes’, including crimes covered by the SUA Convention. Over time, opposition has grown to their inclusion within the Court’s jurisdiction and they were excluded from the 1996 Draft Code. Only a catalogue of ‘core crimes’ of international concern would fall within the Court’s jurisdiction. The jurisdiction of the ICC is now limited to genocide, crimes against humanity, war crimes and aggression.

It is not likely that the act of piracy falls within the scope of crimes against humanity or war crimes (when interpreted very broadly). Although some scholars advocate a broad interpretation of crimes against humanity and even claim that drug trafficking or hostage taking should fall within the scope of the ICC jurisdiction, such a broad interpretation is not desirable. Piracy is, in my opinion, neither a crime against humanity, nor a war crime.

---

280 The Rome Statute of the International Criminal Court entered into force on 1 July 2002.
However, it is theoretically possible to include the crime of piracy within the jurisdiction of the Court. The jurisdiction of the Court can be expanded by amendment or protocol. I suggest that (if the crime of piracy would be included within the jurisdiction of the court) it would be easier to include it by protocol, because a protocol would come into effect only to States who have signed it and even States who are no party to the Rome Statute can agree to the protocol. An amendment requires an adoption two-thirds majority of States Parties and must be ratified by seven-eighths of the State Parties to enter into force.

A couple of issues are important to consider. In the first place, a problem is that the Court has limited resources and the Court does not have the capacity to pursue a big amount of piracy cases. In the second place, the Court has jurisdiction over “the most serious crimes of concern to the international community.” The Preamble stated further that States Parties recognize the “grave crimes threaten the peace, security and well-being of the World.” It is debatable if the crime of piracy is comparable to the other four crimes of Article 5 of the Statute and if it has the same support for international prosecution. The wave of piracy attacks in the Gulf of Aden and the Indian Ocean is a major problem for the international community and disrupts global trade. But in my view, piracy does not fit into the description “most serious crimes of concern”. The economic crime piracy cost some States a lot of money, but compared to the high costs of States of war crimes, crimes against humanity and genocide it is relatively low (to most States).

In May 2010, seven years after the entry into force of the Rome Statute, the Secretary-General convened a Review Conference to consider any amendments to the Statute. The incorporation of the

---

287 Ibid, Article 121, para. 4.
288 Ibid, Preamble.
289 Ibid.
crime of piracy into the ICC framework was not on the agenda of the meeting.\footnote{292} According to international criminal lawyer and professor Knoops there was indeed “no chance that the crime of piracy will be included in the Statute during the Review Conference of the Rome Statute.”\footnote{293}

\section*{4.2.2 Conclusion}

Although it is legally possible to include the act of piracy within the jurisdiction of the ICC, it is not a preferable option to prosecute pirates operating off the Somali coast. The advantage of this option is the permanence of the ICC, avoiding extra delay and costs (in comparison with an piracy tribunal) and the ICC has a lot of expertise in the application of international criminal law. Nevertheless, this option has not received much support in the international community and I agree with scholars who argue that the ICC is not the appropriate body to handle piracy prosecutions. Piracy is threatening international peace and security, but the act of piracy cannot be compared with genocide, crimes against humanity, war crimes and aggression.\footnote{294} It is further noteworthy that of the 114 States that are State Parties to the Rome Statute, it is striking that no State off the Horn of Africa (Somalia, Ethiopia, Eritrea and Sudan)\footnote{295} is present.\footnote{296} Joining the Rome Statute will remain voluntary and the East African States who host the pirates can avoid jurisdiction of the ICC.\footnote{297}

\begin{flushright}
\begin{footnotesize}
\begin{itemize}
\item \footnote{294} In my view, piracy involves problems that are of (slightly) less importance than the cases the ICC has currently dealt with. The ICC was designed to handle prosecution of the perpetrators of the worst crimes, rather than any offence of an international nature.
\item \footnote{295} Recently (10 August 2010) the Republic of Seychelles became a party to the Rome Statute.
\end{itemize}
\end{footnotesize}
\end{flushright}
4.3. Prosecution Solutions, Option 3: Prosecution in the Flag State

§4.3.1 Lack of Political Will

The principle of universal jurisdiction in Article 105 UNCLOS calls for domestic prosecution in the arresting State, but in practice this has not been utilized.298 States have proven to be unwilling to bring pirates to their domestic courts for prosecution.299 During a UNSC meeting in December 2008 when Resolution 1851(2008) was adopted, former U.S. Secretary of State Condoleezza Rice emphasized this issue and told the UNSC that: “the Convention on the Law of the Sea, Security Council resolutions and other legal instruments formed a base of sufficient legal authority with which to apprehend and prosecute pirates, but sometimes political will and capacity was lacking.”299

There are many (legal) issues that prevent States from effectively prosecuting pirates. Those problems will be addressed in this chapter.

§4.3.2 The Interest of the State

The German prosecution office notes that “it has direction to prosecute non-German pirates and will only exercise that discretion if the German State has a particular, well-defined interest in the prosecution.”301 Furthermore, the Public Prosecutor in Hamburg states that: “What is totally clear, however, is that the German judicial system cannot, and should not, act as World Police.”302 The interest would be met if German nationals had been killed or injured, when a German ship is hijacked, a ship owned by a German shipping company had been involved or when the German navy had detained the pirates.303

302 Ibid.
303 H. Lanham, ‘Walk the Plank: Somali Pirates and International Law’, Bachelor Thesis,
The same reasoning applies for the Netherlands, the U.S. and France. The Dutch Government has stated that criminal prosecutions of pirates will only be initiated when there is a specific national interest. These include the hijacking of a ship with the Dutch flag, a ship owned by a Dutch shipping company or where Dutch crew is involved.\(^{304}\) Also the U.S. and France government has drawn the line at cases involving national interests.\(^{305}\) This suggests that nations are in general willing to prosecute pirates when it involves their direct and immediate interest, but not if it involves universal jurisdiction.\(^{306}\)

§4.3.3 Inadequate Domestic Legal Structures

The right of universal jurisdiction conferred in UNCLOS is often not implemented in domestic legal structures.\(^{307}\) It is very important that a legal framework exists in domestic law as a foundation to carry out the arrest and prosecution of suspected pirates operating off the Somali coast to prevent pirates being released without facing justice. In April 2010, the UNSC called on States to “criminalize piracy under their domestic law and favorably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law” and the UNSC commended the States that have already amended their domestic law.\(^{308}\) On 19 June 2009, Japan for example enacted the Law on the Penalization of Acts of Piracy and Measures against Acts of Piracy. The law criminalizes acts of piracy under the Japanese domestic legal system, while Japan did not have any law governing piracy before this law entered into force.\(^{309}\) There are still States that

University of Otago, October 2009, p. 43.


\(^{309}\) Prime Minister Taro Aso, ‘Statement on the Enactment of the Law on the
do not recognize the crime of piracy in domestic law (like India and Denmark) and if States have piracy laws, most of them are outdated, often unchanged since the nineteenth century. Other States have the domestic legal frameworks, but they lack the financial resources to take action, they lack sufficient legal capacity or insufficient political-military guidance is given to naval patrols.

§4.3.3 Asylum Claims

A lot of States have concerns about the status of convicted pirates who are released after serving a prison sentence. Countries are reluctant to prosecute pirates because they fear that pirates can claim asylum due to “dismal conditions in Somalia.” Somalia has a record of human rights violations and therefore it would be almost impossible to send the pirates back to Somalia after their conviction. Due to human rights concerns the pirates can take advantage of (European) asylum laws. Suspected pirates could claim that they would be subject to unfair trials, torture and extrajudicial killing if they would be send back to Somalia. At least two of the five suspected pirates who are facing trial in the Netherlands have declared their intention to stay on as residents and seek a better life in a Western country. Sayid, one of the suspected pirates said the following about his experience in a Dutch jail: “Life is good here, I appeal to the government not to send me back to Somalia. The people who live here respect human rights. I


wish to settle here.

He intends to send for his wife and children as soon as he is released from prison. Realizing that a problem had emerged, former Dutch Minister of Foreign Affairs Maxime Verhagen, said the following: “This made me scratch my head; we can’t be on the right track if our punishment is perceived more as a treat than as a threat. This could lead to the strange situation that our attempts to punish pirates actually encourage piracy instead of discouraging it.” For this reason, Great Britain instructed its naval ships patrolling the Gulf of Aden not to capture pirates, because they could claim asylum under European human rights law once the pirates were aboard a British ship and certainly when the suspected pirates would be brought to Britain for trial. The ‘reward’ of an asylum will indeed only worsen the piracy problem. But all nations that have signed and ratified the ECHR or UNCAT need to act in accordance with the provisions given and are not allowed violating human rights of individuals. The fact that the individuals are pirates would have to make no difference.

§4.3.4 Pirates Facing Trial

In March 2002, Shi Lei, a Chinese cook of the Taiwanese fishing vessel Full Means No. 2 stabbed the Captain and first mate to death, while the ship was sailing in international waters off the coast of Hawaii. After killing the men, Shi Lei seized control of the vessel and after five days, the U.S. Coast Guard arrested Shi for violating Title 18 United States Code §2280, which prohibits “acts of violence that endanger maritime navigation.” He was escorted to Honolulu and

318 In the case of Saadi v. Italy (2008) 24 BHRC 123, the Grand Chamber of the European Court of Human Rights underlined that even in cases involving terrorist suspects, the right of Article 3 UNCAT is absolute.
prosecuted by the U.S. Court of Appeals under the SUA Convention.\textsuperscript{320} The prosecuting attorney requested the death penalty, but the U.S. Attorney General did not authorize that. Instead, Shi was sentenced to 36 years in prison.\textsuperscript{321}

On 18 May 2010, Somali pirate Abduwali Abdukhadir Muse pleaded guilty before the U.S. District Court for the Southern District of New York. He was charged that he “unlawfully, intentionally, and knowingly seized and exercised control over a ship by force and threat of force and intimidation, and attempted to do the same, to wit, the defendant, armed with a firearm, attempted to hijack, hijacked and aided and abetted the hijacking of, the \textit{Maersk Alabama}, a United States-flagged cargo ship that was navigating in the Indian Ocean beyond the outer limit of the territorial sea of any country.”\textsuperscript{322} On 8 April 2009 Muse took Captain Richard Phillips hostage in a lifeboat. After five days, the U.S. Navy intervened and killed three of the pirates and arrested Abduwali Abdukhadir Muse. The charge of piracy has a mandatory life sentence (Title 18 United States Code 1651), but the prosecutors dropped four of the six counts, including the crime of piracy as defined by the law of nations. On 16 February 2011 Abduwali Abdukhadir Muse was sentenced to 33 years and 9 months in prison..\textsuperscript{323}

In April 2010, the U.S. navy handed over another 11 suspected pirates for trial in a federal court in Norfolk.\textsuperscript{324} Those pirates were captured in April 2010 after two incidents involving U.S. warships. Five suspected

\textsuperscript{321} \textit{United States v. Shi}, 525 F.3d 709 (9th Cir. 2008).
\textsuperscript{322} \textit{United States of America v. Muse}, United States District Court Southern District of New York, Indictment 19 May 2009, USA-335-274 (Ed. 9-25-58), para. 2.
pirates were charged in an incident on 31 March 2010 when a pirate ship exchanged fire with the U.S. warship Nicholas in the Gulf of Aden and six suspected pirates were charged in an attack on 10 April 2010 on the dock landing ship Ashland off the coast of Somalia. The five Somali pirates who were accused of attacking the U.S. warship Nicholas were found guilty for piracy in November 2010. The ruling marks “what is to believed to be the first piracy trial conviction in the U.S. since 1820”, the U.S. Department of Justice said in a statement. The lawyers of the five pirates want the federal judge to reconsider the conviction, claiming that they did not commit piracy, because the five men never boarded or robbed the ship. Sentencing is scheduled on 14 March 2011. The six Somali pirates who were accused of attacking the ship Ashland were not found guilty for piracy in August 2010. The federal judge dropped one of the eight counts, including the piracy charges, because “the government had not shown that the men’s actions violated American piracy law.” Seven other charges, including assault and attack to plunder a vessel, remained against the six pirates. On 29 November 2010, one of the pirates was sentenced to 30 years in prison. The other five pirates remained in jail waiting
for a ruling from the federal appeals court. It is (yet) unknown when the sentencing will be scheduled.

On 18 May 2010, A Yemeni court has sentenced six Somali pirates to death and sentenced six other pirates to 10 years in prison for the hijacking of an Yemeni oil tanker Quana in April 2009.\(^{331}\) The Somali pirates hijacked the oil tanker; they have killed two crewmembers and wounded four others. The convicted pirates paid 2 million Yemen riyals to the Aden Refinery in compensatory damages.\(^{332}\)

The first European trial of suspected Somali pirates was commenced by the Netherlands District Court of Rotterdam on 25 May 2010. Five Somali pirates were arrested off the coast of Somalia on 2 January 2009 by Danish marines after attacking a Dutch flagged cargo ship Samanyolu with automatic weapons and rocket-propelled grenade. The suspected pirates were handed over to the Netherlands and they were charged of sea robbery for hijacking a cargo ship registered in the Netherlands Antilles. The pirates could face a maximum sentence of 12 years, but prosecutors had asked for seven-year sentences. On 17 June 2010, each of the pirates was sentenced to five years in prison, taking the difficult conditions in Somalia that led the men to piracy into account.\(^{333}\) Presiding judge Klein Wolterink said that “Piracy is a serious crime that must be powerfully resisted.”\(^{334}\) The case is called a landmark in the fight against Somali piracy.

Besides the Samanyolu case, there was recently another piracy case in the Netherlands. On 4 April 2010, a German cargo ship MS Taipan was hijacked 500 NM off the Somali coast by Somali pirates.\(^{335}\) The Dutch


\(^{334}\) Ibid.

On 4 April 2008, a group of six Somali pirates captured the luxury French yacht Le Ponant and held the 30 crew members hostage. The pirates sailed to a village in Puntland and one week later the ransom of 2 million dollars was paid and the hostages released.340 The French Special Forces captured the six Somali pirates in a helicopter raid in the Somali desert when they made their getaway.341 The suspected pirates have been arrested and flown to Paris by military plane (with the consent of the Somali President) where they are facing trial. In addition to the pirates captured in connection with Le Ponant, six other pirates are currently awaiting trial in France. On 2 September 2008, the French Special Forces rescued hostages held on board the yacht Carré d’As IV. The France commandos killed one pirate and captured six pirates. They were arrested and transferred to Paris on 23 September
2008. They are expected to face trial. But because the investigations are still ongoing, no pirate has yet been brought to trial in France.\(^{342}\)

On 21 January 2011, a Korean chemical ship *Samho Jewelry* was hijacked by a group of Somali pirates in the Arabian Sea. The pirates attempted to murder the ship’s captain, but South Korea’s navy intervened and rescued all 21 crew members aboard.\(^{343}\) Five Somali pirates were arrested and eight other pirates were killed. The five pirates were flown to Busan, South Korea’s southeastern port city, to stand trial. They will be charged with maritime robbery and attempted murder.\(^{344}\)

§4.3.5 Conclusion

Chapter 3 of this book pointed out that on the basis of universal jurisdiction, countries are willing to prosecute war criminals, but not willing to prosecute pirates.\(^{345}\) The example Kontrovich gave in his article ‘A Guantánomo on the Sea’ is noteworthy: “Denmark has said that it cannot punish pirates it captures. Yet it was one of the first European countries to prosecute Serb officers for crimes committed against Bosnian Muslims in the Yugoslav civil war. Similarly, when the Spanish Navy captured a group of suspected Somali pirates, a judge ordered them released on the grounds that prosecuting a crime that occurred thousands of miles away would be ‘a bit disproportionate’.

But just a week before, another Spanish magistrate had launched an investigation into an Israeli strike on Hamas leader in Gaza in 2002.”\(^{346}\) States are not willing to prosecute Somali pirates operating in the Gulf of Aden and the Indian Ocean. But as pointed out in this chapter and international criminal lawyer Knoops rightly said: “there are good reasons why many countries do not wish to burn their fingers on the


\(^{344}\) Ibid

\(^{345}\) For example the Pinochet Case, the Arrest Warrant case and the Ariel Sharon case.

pirates.\textsuperscript{347} There have been only a few prosecutions so far of pirates in domestic courts, due to the following problems. A legal framework in domestic law as a foundation to carry out the arrest and prosecution does not exist in many States. If a definition exists in domestic law, the definition and legal framework is often inconsistent with international law.\textsuperscript{348} Political will and capacity is lacking and States are only willing to prosecute pirates when their own interest is harmed. The fact that pirates can claim asylum and other human rights protections upon release worried also a lot of States and overseeing prosecutions are costly and logistically challenging. After all, my biggest concern regarding trial in the flag State is that it undermines the principle of universal and uniform legal protection of suspected pirates.\textsuperscript{349} Domestic prosecution causes problems with regard to legitimacy and accountability. Not only the definition of piracy differs from country to country also the sentences vary significantly. In Yemen the Somali pirates faced the death penalty, in the U.S. they faced relatively 36, 30 and 27 years prison sentence and in the Netherlands the pirates faced a prison sentence of only 5 years. To my mind, those differences are too big and therefore trial in the flag State is not a preferable option.


\textsuperscript{348} The Philippines is a bad example and defines the crime of piracy as: “Any attack upon a seizure of any vessel, or in the taking away of the whole or part thereof ... by means of violence against or intimidation committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters, shall be considered as piracy.” But Kenya is a good example and defines the crime of piracy (Kenya Penal Code (1967) Cap. 63, para. 69) according to the SUA Convention: “Any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offense of piracy.” But see J.W. Carbin, ‘Pirates: Hostis Humanis Generis’, The Federal Lawyer, September 2009, p. 51-52.

4.4. Prosecution Solutions, Option 4: Prosecution in Third Countries

The previous chapter showed that States do not wish to see a large number of pirates serving prison sentences in their domestic prisons and standing trials in their courts.\textsuperscript{350} Another option for prosecution of Somalia pirates is a prosecution agreement (memorandum of understanding) with third countries that are willing to prosecute pirates, encouraged by UNSC Resolutions 1816(2008), 1846(2008) and 1851(2008). Those resolutions call upon flag, port and coastal States to cooperate in “determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia.”\textsuperscript{351} Bilateral prosecution agreements with Kenya have entered into force by the United Kingdom, United States, European Union,\textsuperscript{352} Canada, China and Denmark.\textsuperscript{353} However, Kenyan Foreign Minister Moses Wetangula said that “it would be dealt with on a case by case basis. It is not an open door for dumping pirates onto Kenya soil.”\textsuperscript{354} This chapter will analyze the option of bilateral prosecution agreements with third countries, such as with Kenya and the Seychelles. A legal analysis if such agreements are legally authorized by UNCLOS will be provided as well.

\section*{§4.4.1 Agreements With Kenya}

Neighboring country Kenya has stepped forward to offer itself as regional prosecution venue for Somali pirates. They are holding 123 piracy suspects for trial and another 18 pirates have been convicted.

\textsuperscript{352} NATO does not have a similar agreement with Kenya to provide the transfer of suspects to another nation. Participating nations in NATO’s counter-piracy operations have to refer back to their national procedures.
and sentenced in Kenya since 2007, Alan Cole (head of the UNODC counter-piracy program) said in June 2010.\textsuperscript{355} Under the bilateral prosecution agreements, pirates captured by U.S. and European naval ships on the high seas (or the territorial sea) will be handed over to Kenyan authorities for prosecution. Given the location of Kenya, captured pirates can be quickly handed over on shore and taken into custody. Although the suspected pirates have no connection to Kenya, they could be prosecuted under universal jurisdiction.\textsuperscript{356} The Kenyan Merchant Shipping Act 2009 incorporates the SUA Convention. It extends Kenyan jurisdiction over offences against the safety of ships committed within territorial waters and elsewhere, regardless of nationality.\textsuperscript{357} The law was amended in 2009 and paragraph 371 of the Act removed the death penalty and now provides that the punishment for piracy is life imprisonment. The Kenyan authorities requested support from the international community after they realized that the administrative burden on Kenya was enormous.\textsuperscript{358} As a reaction, the European Commission (EC) and the United Nations Office on Drugs and Crime (UNODC) agreed to a comprehensive program of judicial assistance to cover the cost of pirate prosecutions.\textsuperscript{359} The EU budget for the program is €2.3 million and covers everything from salaries, logistics, police training, office equipment, prison services and investments in the Kenyan criminal justice system.\textsuperscript{360} Denmark signed an additional bilateral agreement with Kenya in which Denmark promises “to help Kenya with the financial cost of taking on the extra legal cases.”\textsuperscript{361} In May 2010, Kenya said it would stop accepting new piracy suspects captured by naval forces, because “they put undue

\begin{thebibliography}{10}
\bibitem{Merchant Shipping Act 2009 (Kenya), Part XVI, para. 370-371.}
\bibitem{Ibid, p. 4-5.}
\bibitem{Ibid, p. 16.}
\end{thebibliography}
strain on the country’s justice system.” Cole (head of the UNODC counter-piracy program) said in June 2010 that donor countries would spend another $9.3 million “to help Kenya and Seychelles prosecute suspected Somali pirates and improve those countries’ criminal justice systems.” On 24 June 2010, a court mainly to try suspected pirates has opened in Mombasa, funded by international donors. Kenya has convicted 26 Somali pirates and more than 100 suspected Somali pirates are being held in Kenyan prisons.

§4.4.2 Agreements With Seychelles, Tanzania and Mauritius

The Indian Ocean island nation of Seychelles followed Kenya and has also offered itself as a venue to prosecute Somali pirates seized by foreign naval ships. The country has been working with the UN and recently amended their criminal code to enable it to prosecute pirates under universal jurisdiction. The transitional agreement with the EU relating to the prosecution of pirates was concluded on 30 October 2009. The EC and UNODC provide assistance to Seychelles, including interpreters for the police and courts and further extensive assistance is planned directed at the police, the courts and prisons.

---

In the Seychelles, the judicial process up to a conviction is in most cases completed within a few months.\footnote{Kenya has the capability of achieving a conviction within approximately a year.} In response to a EU call for other nations in the region to share the financial and security burden on Kenya and the Seychelles, Tanzania agreed on 20 May 2010 to prosecute Somali pirates. Tanzania’s Attorney General Werema said that “the Parliament has already approved amendments to the penal code to ensure that Somali pirates can now be prosecuted in Tanzania.”\footnote{F. Ng’wanakilala, ‘Tanzania Agrees to Prosecute Somali Pirates’, Reuters, 20 May 2010 <http://www.iol.co.za/index.php?set_id=1&click_id=87&art_id=nw20100520152644978C728950> [Last Accessed 1 March 2011].} Ashton, the EU’s special representative for foreign affairs and security policy, said that “the EU would help Tanzania develop the necessary infrastructure to detain pirates and put them on trial.”\footnote{Ibid.} Prime Minister Navinchandra Ramgoolam of Mauritius said on 12 June 2010 that his country is ready to try and jail suspected Somali pirates: “During a meeting with Catherine Ashton, I have expressed our wish to try and judge suspected pirates.”\footnote{Neptune Maritime Security, ‘Mauritius Says Ready to Try Imprisoning Pirates’, 13 June 2010 <http://neptunemaritimesecurity.posterous.com/?tag=tanzania> [Last Accessed 1 March 2011].} Additionally he said that Mauritius needed financial assistance and training.

The EU has also opened negotiations with other countries in the region, including South Africa in the hope of reaching agreements. Convicted pirates could be held in UNODC prisons in Somaliland and Puntland to avoid an ‘unreasonable burden’ upon prosecuting States. So far, two prisons (Hargeisa and Qardho) have been built to international standards, but not yet occupied.\footnote{J. Knott, ‘United Kingdom: Piracy Off Somalia: Prosecutions, Procrastination And Progress’, Mondaq, 21 January 2010 <http://www.mondaq.com/article.asp?articleid=92442> [Last Accessed 1 March 2011].}
§4.4.3 Problem with Article 105 UNCLOS?

The general clause of Article 100 UNCLOS\textsuperscript{373} may be the basis for transfer or extradition of pirates to another State than the State who captured the pirates.\textsuperscript{374} But it is questionable if Article 105 UNCLOS authorizes the delegation of jurisdiction to third States. Kenya nor the Seychelles or other future prosecuting States has a connection with the alleged pirates and the question rises if they might be prosecuted under universal jurisdiction. Article 105 UNCLOS describes that “every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed...” The words “the state which carried out the seizure” are important and suggest that while ‘every State’ may seize the pirates, only the flag State who captured the pirates may prosecute them. Elaborating thereon, it suggests that transferring pirates to third countries for prosecution is outside the permitted use of universal jurisdiction under UNCLOS.\textsuperscript{375} It is said that the drafting history of the Article supports the reading that the “Article precludes transfers to third-party States.”\textsuperscript{376} However, in my opinion, UNCLOS prohibits the practice of transferring pirates to third countries. Therefore, third countries have no jurisdiction to prosecute suspected pirates. There is no State practice yet explicitly elucidating Article 105 UNCLOS, but most States have not adopted the limited reading.\textsuperscript{377} The effect of Article 105 UNCLOS has not been raised in any piracy trial yet.\textsuperscript{378} The uncertain language of UNCLOS explains that States emphasized the SUA Convention, which allows

\textsuperscript{373} “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”

\textsuperscript{374} The Exchange of Letters that is concluded between the EU and Kenya for the transfer of suspected pirates states Article 100 UNCLOS specifically as the basis for conclusion of such an agreement.


\textsuperscript{377} Ibid, p. 271.

each State Party with personal jurisdiction over a defendant to prosecute.\textsuperscript{379}

\section*{\textit{§4.4.4 Human Rights Concerns}}

The bilateral agreements with third countries in the region raise human rights issues. The agreement between the EU and Kenya contains the following provisions: “The signatories confirm that they will treat persons transferred under this Exchange of Letters, both prior to and following transfer, humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial.”\textsuperscript{380} Further on, suspected pirates “will receive adequate accommodation and nourishment, access to medical treatment and will be able to carry out religious observance”\textsuperscript{381} and “any transferred person will be brought promptly before a judge or other officer authorized by law to exercise judicial power, who will decide without delay on the lawfulness of his detention and will order his release if the detention is not lawful.”\textsuperscript{382} In addition, any suspected pirate “will be entitled to trial within a reasonable time or to release.”\textsuperscript{383} The agreement also offers other safeguards in Article 3, 4 and 5. The agreement between the EU and the Government of the Republic of the Seychelles contains the same provisions.

But the question rises if those human rights guarantees are put into practice.\textsuperscript{384} If the reports are to be believed, Kenya has a seriously

\begin{flushleft}
\textsuperscript{379} Article 6, para. 1 SUA Convention.
\textsuperscript{381} Ibid, para. 3(a).
\textsuperscript{382} Ibid, para. 3(b).
\textsuperscript{383} Ibid, para. 3(c).
\textsuperscript{384} S. Holovaty, ‘The Necessity to Take Additional International Legal Steps to Deal With Sea Piracy’, Report Legal Affairs and Human Rights Committee Council of Europe, Doc. 12194, 6 April 2010, para. 91.
\end{flushleft}
deficient human rights record. Shortly after the bilateral agreements with the U.S. and the EU were announced, the report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions showed that the Kenyan police and justice system systematically failed. Alston noted that “the criminal justice system as a whole was widely described as ‘terrible’. Investigation, prosecution and judicial processes are slow and corrupt.” Additionally, the UN Special Rapporteur called for “the dismissal of Kenya’s police commissioner and attorney general over the country’s failure to address widespread killings by the police.” The report also showed the poor treatment of prisoners. Hillary Clinton also criticized Kenya during her visit in August 2009 for “the absence of strong and effective democratic institutions which has permitted ongoing corruption, impunity, politically motivated violence and a lack of respect of the rule of law.” Various human rights organizations proved their concerns about the use of torture and cruel and degrading treatment in Kenya. Kenya’s courts faced in 2008 already a backlog of 800,000 cases and suspects suffer in jail for over a year before a judge hears them. I cannot draw another conclusion after reading various reports that there are substantial grounds for believing that a captured pirate facing trial in Kenya would face a great risk of being tortured. The same problem arises for prosecution in the Seychelles, Tanzania or Mauritius. Under Article 3 UNCAT, the nonrefoulement principle ensures that “No State Party shall expel, return (‘refouler’) or extradite

a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” State who extradite pirates to Kenya breach, as far as I am concerned, their international human rights obligations. Not only under UNCAT, but also under the ICCPR and the ECHR.

§4.4.5 Shipriders

It has been suggested in UNSC Resolution 1851(2008) and in the Djibouti Code of Conduct that shipriders could be used in order to collect evidence in accordance with the prosecuting state’s evidentiary rules.\(^{391}\) There is no official legal definition of shipriders, but in short they are law enforcement officers from a coastal State (for example from Kenya, the Seychelles or Tanzania) who are embarked on a foreign naval ship. A shiprider arrangement would allow an law enforcement officer to arrest pirates in the name of their country and have the pirates sent to their national court for prosecution and detention. Shipriders also collect the necessary evidence and can act as a witness at the trial. For example Kenyan shipriders could be embarked on Dutch naval ships and they will carry out the arrest and detention of suspected pirates and gather evidence for prosecution in Kenya under Kenyan law.\(^ {392}\)

The UNSC invited all States fighting piracy off the coast of Somalia “to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (‘shipriders’) from the latter countries, in particular countries in the region.”\(^ {393}\) Traditionally, shipriders are used to combat drug trafficking and illegal fishing and the practice has been employed successfully to fight drug traffickers, for the protection of fishing resources and maritime environment and in removing jurisdictional barriers to investigation and prosecution.\(^ {394}\) Sophisticated bilateral arrangements

---

392 R. Beckman, ‘Somali Piracy – Is International Law Part of the Problem or Part of the Solution?’, Presentation RSIS, 23 February 2009, p. 65.
are required, but not yet in place for Somali piracy. After all, the use of shiprider arrangements in itself cannot replace other agreements. They are not a permanent, long-term solution for the piracy problem off the coast of Somalia and the Indian Ocean. As far as I know, countries in the Horn of Africa have not made extensive use of this innovative arrangement and it has only limited effect.395

§4.4.6 Conclusion

It is preferable to prosecute pirates in courts in the region, because captured pirates can be quickly handed over on shore and taken into custody. But the countries on Africa’s east coast like Kenya, the Seychelles, Tanzania and Mauritius do not have the required legal systems and are lacking in resources for law enforcement and the judiciary.396 Third countries “bear the burden of holding, prosecuting and incarcerating pirates”, but they do not have the capacity to handle all of the suspected pirates that are apprehended.397 Additionally, States should not ignore human rights concerns. Although the agreements contain promising provisions and human rights guarantees, it is debatable if they are put into practice. Countries on the East African coast have seriously deficient human rights records.398 Kenya and other third countries cannot ensure that trials of suspected pirates are procedurally fair, there is a backlog of cases with the result that piracy suspects suffer in jail for over a year before they are heard by a judge and there is a big risk that piracy suspects will be tortured and treated inhumanely in jail. State who extradite pirates to Kenya or


other third countries breach, in my opinion, their international (and European) human rights obligations.
4.5. Prosecution Solutions, Option 5: Prosecution in an International Piracy Tribunal

In line with Article 105 UNCLOS, it was widely recognized that the prosecution of pirates was a national responsibility. Only recently the discussion for having an international tribunal for the suppression of piracy started when States faced challenges regarding the prosecution. The Netherlands has proposed in the CGPCS that the UN should establish an international tribunal.\(^{399}\) Germany and Russia supported the Dutch Proposal,\(^{400}\) although the CGPCS has emerged a consensus that tribunals are not a viable option.\(^{401}\) On 27 April 2010 the UNSC adopted Resolution 1918(2010) where the UNSC requested the Secretary-General to present “within 3 months a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the CGPCS, the existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results.” This chapter will analyze if the creation of a piracy tribunal (in different forms) to prosecute suspected pirates operating off the Somali coast will be an adequate solution.

§4.5.1 The Creation of an Ad Hoc Piracy Tribunal

As pointed out in §3.4 of this book, the ICTR and ICTY do not base their jurisdiction on universal jurisdiction, but gain their powers from the UNSC.\(^{402}\) The UNSC relied on Chapter VII of the UN Charter to create


\(^{401}\) Ibid.

the tribunals and imposes on all States a duty to cooperate.\textsuperscript{403} However, there is a threshold before an ad hoc tribunal can be established, namely piracy needs to constitute “a threat to peace and security”. Whether such a threat exists is doubtful. In Resolutions 1816(2008), 1838(2008), 1851(2008) and 1897(2009), the UNSC did not say that piracy is a threat to peace and security, but indicated more generally that “the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region.”\textsuperscript{404} In Resolution 1918(2010), the UNSC expressed to be “gravely concerned by the threat that piracy and armed robbery at sea against vessels pose to the situation in Somalia and other States in the region, as well as to international navigation and the safety of commercial maritime routes”, but does not explicitly say that piracy is a threat to international peace and security. There is an indication that China would support a Resolution acknowledging that piracy is such a threat. He Yafei, Vice-Minister for Foreign Affairs of China, said during the adoption of Resolution 1851(2008) the following: “his country had been a victim of the piracy, with six vessels attacked. Piracy was threatening international peace and security.”\textsuperscript{405} But so far, no other State has publicly adopted this position.\textsuperscript{406} Although piracy off the Somali coast is an economic crime and not comparable to the type of crimes addressed by other ad hoc tribunals or the ICC, piracy these days seems to constitute a threat to international peace and security for the following reasons. Piracy hampers the stability and safety of international trade. It is estimated that present-day piracy cost between U.S.$13 billion and U.S.$15 billion every year and could cost substantially more in coming years.\textsuperscript{407} In addition to the personal


danger, piracy threatens property and ships, endangers critical sea lines of communication and the free flow of commerce. It also undermines humanitarian aid, food security and stability in the region. Finally, piracy is mordant to political and social development, disrupting economic growth.408 Nevertheless, it is interesting that the UNSC did not refer to the qualification of piracy as a “threat to peace and security” in UNSC Resolution 1918(2010) or any other SC Resolution. If the UNSC will hold on to this view, it means that there is no legal basis for the establishment of an international piracy tribunal based on Chapter VII UN Charter.

If the UNSC would change its view and acknowledge that piracy off the Somali coast and the Indian Ocean is a threat to international peace and security, the UNSC could establish an international Piracy Tribunal similar to the ICTR and ICTY under Chapter VII UN Charter. The establishment of the ICTR, ICTY was justified on social and political grounds: the existence of an emergency resulting in the collapse of a legal system.409 The tribunals were in particular established to “aid the restoration of peace, redress violations and fulfill a deterrent function.”410 It is arguable that these factors also apply to the situation in Somalia. If a Piracy Tribunal under Chapter VII will be established, it will be a subsidiary organ of the UN. I would propose that the Piracy Tribunal should be competent for the prosecution of persons responsible for acts of piracy. The applicable law should be international law (UNCLOS or SUA). However, the Tribunal’s jurisdiction should be limited geographically and by time and it should have concurrent jurisdiction (has primacy over the national courts).411 The Tribunal should consist of the following organs: (a) the Chambers, comprising three Trial Chambers and an Appeals Chamber, (b) the Prosecutor and (c) a Registry, servicing both the Chambers and the

---

408 Ibid.
411 To my mind, the Piracy Tribunal should have geographical limitations (it should only to deal with regional piracy in the Horn of Africa). It is not my intention to establish a ‘World Court against the suppression of piracy’. The Piracy Tribunal should also have limitations in time.
Prosecutor.412 Although the Netherlands have proposed that the location for the court should be The Hague, because it is after all “the legal capital of the world”,413 I would propose that the Piracy Tribunal should have its seat in the region and convicted pirates must serve their prison sentences there.

§4.5.2 Advantages of an Ad Hoc Piracy Tribunal

The former Dutch Minister of Foreign Affairs, Maxime Verhagen, is a fervent supporter of an ad hoc Piracy Tribunal. His main argument is that “the lack of a uniform standard in bringing suspects to justice is disturbing” and he believes that “a more standardized and international approach is needed.”414 Elaborating on that, a tribunal could standardize substantive law and legal procedures, such as evidence gathering and witness procedures.415 Another advantage is that a tribunal could create its own capacity and resources.416 Zegveld also pleads for an ad hoc Piracy Tribunal: “Such a tribunal could collect evidence and use specialized indicters. For suspects there’s also legal certainty concerning the applying law. The current Dutch system under which pirates are only prosecuted if there is a national interest at stake for the arresting country, is not working.”417 From the perspective of universality and uniformity, an ad hoc Piracy Tribunal is one of the best solutions. Chapter 4.3 showed that a lot of pirates have to be released because European States are not willing to prosecute. This situation demonstrates a lack of political will of having purely a domestic solution to the problem of prosecuting pirates.418 Therefore,

412 Article 11 of the Statue of the ICTY.
416 Ibid.
an international solution needs to be found. Additionally, an ad hoc Piracy Tribunal could fill the legal void left by UNCLOS by defining crimes in such a manner that prosecutors could bring multiple charges against a suspect.419

§4.5.3 Disadvantages of an Ad Hoc Piracy Tribunal

There exist, however, a number of arguments against the establishment of ad hoc tribunals, which have been well documented. In the first place, the creation of such an ad hoc tribunal could take too long. Although no international conference is required, the establishment of an ad hoc tribunal will probably take a couple of years. Also the ratification process can take a significant amount of time.420 In the second place, the establishment of an ad hoc tribunal would be very costly and the question raises if a tribunal would be cost-effective.421 To indicate, the ICC budget for 2009 was €101.229.900,- and the two year ICTY budget for 2008-2009 was $342.332.300,-.422 In the third place, it is said that a Piracy Tribunal would neither be efficient nor practical. A Piracy Tribunal would have to make for example arrangements for the travel and accommodation of accused persons, witnesses and others.423 It would also be necessary that interpretation take place into one or more official languages. Evidence would have to be taken to the Piracy Tribunal and have to be presented in conformity with the Tribunal’s rules on evidence. Convicted pirates would have to be imprisoned somewhere, and in

420 It took for example 10 years to adopt the Statute of the ICC and another 4 years to enter into force.
accordance with conditions concerning sentencing and imprisonment that are laid down by the Tribunal.\textsuperscript{424} The fourth counter-argument is that the primary aim of the Piracy Tribunal would be to put suspected pirates to trial instead of preventing piracy. It is said that an International Piracy Tribunal does not focus on local law-enforcement measures and that a Piracy Tribunal will therefore be a misdirection of effort.\textsuperscript{425} States fear that when the Piracy Tribunal closes down, the experience will be dispersed as international staff return home and will not contribute to the building of the local judicial system.\textsuperscript{426} Strengthening the local onshore law-enforcement measures are indeed necessary but could, in my opinion, be implemented alongside the establishment of an international Piracy Tribunal.

\textsection{4.5.4 The Creation of a ‘Hybrid’ Tribunal}

Because it might be unlikely that the legal basis for the establishment of a future tribunal would be Chapter VII of the UN Charter, other possibilities need to be considered. A Special Court similar to that for Sierra Leone could be established to prosecute suspected Somali pirates. A ‘hybrid’ court combines elements of a domestic court and an international tribunal. During a CGPCS meeting in August 2009, Portugal proposed the establishment of a Somali ‘hybrid’ court for the prosecution of piracy related crimes off the coast of Somalia.\textsuperscript{427}

In line with the Sierra Leone Special Court, a Special Piracy Court could be established by an Agreement between the UN and the Government of Somalia (TFG) or Kenya that will be “a treaty-based sui generis court of mixed jurisdiction and composition.”\textsuperscript{428} The applicable law could be international law (UNCLOS or SUA) and domestic Somali or Kenyan law. The Court or Special Chamber should consist of international

\begin{footnotesize}
\begin{enumerate}
\item S. Holovaty, ‘The Necessity to Take Additional International Legal Steps to Deal With Sea Piracy’, Report Legal Affairs and Human Rights Committee Council of Europe, Doc. 12194, 6 April 2010, para. 46.
\item Ibid.
\item Ibid, para. 86.
\item UNSC ‘Report of the Secretary-General on the establishment of a Special Court for Sierra Leone’, 4 October 2000, UN Doc S/2000/915, para. 9.
\end{enumerate}
\end{footnotesize}
judges and judges selected by the TFG of Somalia or Kenya. The Special Piracy Court or Chamber could have the power to prosecute persons of acts of piracy. The Court’s jurisdiction should again be limited geographically and by time and it should have concurrent jurisdiction (has primacy over the national courts). The Special Piracy Court should consist of the following organs: (a) The Chambers, comprising two Trial Chambers and an Appeals Chamber; (b) The Prosecutor and (c) The Registry.

§4.5.5 Advantages and Disadvantages of a ‘Hybrid’ Tribunal

In the light of capacity building, the creation of a Special Piracy Tribunal or an ‘international chamber’ within the courts of a State in the region could be a step in the right direction to strengthen regional justice systems and local capacity to bring pirates to justice. On top of that, the experience will be kept where it is needed. But establishing a ‘hybrid’ tribunal in Somalia will pose a security threat, since there is no functioning government in Somalia. If such a tribunal will be located in Kenya (Kenya will be the most likely country in the region), we have to ask the famous question: “Can we drop our common problem on one country’s doorstep?” I do not believe so. Building on the existing courts in the region may be more effective and I agree that the presence of a ‘hybrid’ tribunal would have a positive effect on the rule of law in that State. But I do not see a real advantage in creating a two-tier criminal law system for the crime of piracy in Kenya. Kenya does not have the judicial capacity and has already has a backlog of 800,000 cases. The Kenyan legal system suffers from under-resourcing,

430 Ibid, para. 25-28 and Article 1 of the Statute of the Special Court for Sierra Leone.
431 Ibid, para. 10 and Article 8 of the Statute of the Special Court for Sierra Leone.
432 Article 11 of the Statute of the Special Court for Sierra Leone.
inefficiency and corruption. Another problem is that there are substantial grounds that pirates will face human rights abuses in a Kenyan trial. The setting up of a mixed tribunal in Kenya does not guarantee a fair trial and the proposal was also rejected by most members of the UN in November 2009.

§4.5.6 Other Prosecution Options?

Dutch shipowners proposed the possibility of bringing seized pirates to face trial in the Netherlands at the International Court of Justice in The Hague (ICJ). The ICJ has only the authority to adjudicate disputes between States (with the consent of the governments involved) and it may give advisory opinions on legal questions requested by the United Nations General Assembly (UNGA) or UNSC. The ICJ has no jurisdiction to investigate or prosecute individuals and therefore it is not an option to prosecute suspected Somali pirates at the ICJ. The same applies to trials of pirates in the International Tribunal for the Law of the Sea (ITLOS). The ITLOS is competent to settle disputes concerning the interpretation and application of UNCLOS. Disputes between States may be submitted to ITLOS by agreement of the parties or unilaterally. Disputes about piracy may arise for example between the flag State of the victim ship and the flag State of the pirate ship (if the ship retains a nationality). It may occur if the acts of violence are attributable to a State or if a State has failed to exercise due diligence. For this kind of dispute, the ITLOS has compulsory

---

437 See also §4.4.4 of this book.
440 See ITLOS website [http://www.itlos.org/start2_en.html] [Last Accessed 1 March 2011].
jurisdiction of UNCLOS. But, similar to the ICJ, the ITLOS has no jurisdiction to prosecute individuals of a State. Prosecution of suspected Somali pirates at the ITLOS is not an option.
4.6. Practical Prosecution Implications

When it comes to the prosecution of suspected pirates, there are some practical complications. Kieserman, chief of the U.S. Coast Guard's Operations Law Group emphasized the following: “You get flags from one country, witnesses from another, suspects from another: how do you put that all together in court?”442 As a result of today’s globalized world, the international shipping and global commerce are organized in such a way that the following example of this complex piracy case is reality: “pirates captured by a British naval vessel after trying to attack a Liberian-flagged ship, owned by a Canadian company, crewed by Ukrainians, Indians, and Filipinos, with a Russian captain and carrying cargo owned by a Turkish company, en route for delivery to a company in Dubai.”443 This Chapter will shortly address the difficulties and problems in piracy trials. These complications also explain why States have been hesitant to undertake piracy trials.444

§4.6.1: Evidence Gathering

Europe's first trial of suspected Somali pirates in the Netherlands in June 2010 showed a notable lack of physical evidence.445 In general, pirates use excuses in trials for why they have been caught on the high seas with serious firepower. Kadima, a Kenyan lawyer confirms that and explained that all his clients use the same excuse in court: “pirates say that they were just fishermen who needed to protect themselves.”446 It is difficult to prove that somebody is a pirate when

firearms are thrown overboard and the suspected pirate explains in court: “well, I initially had the intention to hijack a ship but I actually decided to withdraw from my intentions when our skiff ran out of food, water and fuel.” As with every criminal case, it is very difficult to prove the intent of the pirate.

§4.6.2: Witness Problem

UK Defence Minister Baroness Taylor said in January 2010 after a British naval ship released several pirates that there was “insufficient evidence to arrest anyone.” A spokesman added: “If there is insufficient evidence, including uncooperative witnesses, to ensure a successful prosecution, then any equipment is destroyed and the suspected pirates released with enough fuel and supplies to allow them to return to land, in accordance with our international legal obligations.” The practical problem of witnesses plays an important role in piracy cases, because key witnesses are most of the time sailors, marines or crewmembers with no mailing address who spend all year at sea. It is very difficult for those witnesses to provide testimonies. An additional problem is the language and finding Somali translators. Proceedings must often be translated twice, and sometimes even three times, depending on the language of the defendants and witnesses.

[Last Accessed 1 March 2011].


449 Ibid.

5. Conclusion

This book looked into piracy off the Somali coast and focused on possibilities for prosecution of suspected Somali pirates within the framework of international law.

The first option is prosecution of Somali pirates in their own State. Somalia is a failed State and has no functioning government. The judicial and criminal justice system is weak and it is likely that pirates face human rights abuses during their trial in Somalia. Therefore, this is not a preferable option.

The second option is prosecution in the ICC, but this is not a preferable option either. The act of piracy is not comparable with genocide, war crimes, crimes against humanity or aggression. Piracy involves problems that are of less importance than the cases the ICC has dealt with up to now and therefore it is not the appropriate body to handle piracy prosecutions.

Piracy is the ‘original universal jurisdiction crime’, which means that every State may capture and prosecute pirates operating off the Somali coast. But UNCLOS contains no aut dedere aut judicare obligation, which means that States do not have an obligation under UNCLOS to extradite or prosecute Somali pirates. States are not willing to prosecute pirates in their national courts (only when their national interest is harmed). Asylum claims and human rights protections worry a lot of States. An additional problem is that a lot of States have not effectively implemented and updated their domestic legislation on piracy after ratifying UNCLOS. As a consequence, a legal framework as a foundation to carry out the prosecution does not exist or is outdated. Therefore, prosecution in the flag State is not a preferable option.

The fourth option is prosecution in third countries. Although it is debatable whether UNCLOS permits the extradition of pirates to third countries, this is not a preferable option. Third countries in the region do not have the required legal systems and are lacking in resources for law enforcement and the judiciary. Additionally, third countries in the region of Somalia have deficient human rights records. Given those documented human rights abuses, States who hand over pirates to
third counties in the Horn of Africa, breach their human rights obligations.

The fifth option is the prosecution in an international Piracy Tribunal. UNSC Resolution 1918(2010) made clear that the proposal of an international Piracy Tribunal is no longer a vague proposal only, but an agenda item at UN level.\textsuperscript{451} So far, a Piracy Tribunal under the umbrella of the UN did not have enough support. Some UN diplomats said that “such special tribunals are complicated, expensive and might not be worth the trouble.”\textsuperscript{452} They suggested that it would be better “to assist countries prepared to prosecute pirates in national courts”.\textsuperscript{453} Indeed, the ICTY and ICTR have been criticized for their week enforcement powers, slow progress in starting trials and bureaucracy-laden institutions.\textsuperscript{454} These perceptions of the ad hoc tribunal system can contribute to a lack of political will to establish another ad hoc Piracy Tribunal. But in fact ad hoc tribunals have substantially contributed to international justice\textsuperscript{455} and there is no reason to assume that trials before an ad hoc Piracy Court would occur at the same pace as the ICTR or ICTY.\textsuperscript{456} Moreover, the crime of piracy is not as complex as for example genocide or crimes against humanity and procedural rules could be developed to speed the trial process.\textsuperscript{457}

Although it is very costly and the creation will take probably long, the establishment of an ad hoc Piracy Tribunal, based on Chapter VII of the UN Charter is in my opinion the best solution to prosecute Somali pirates and is the most effective way to put an end to impunity. An ad hoc Piracy Tribunal will assure a uniform sentencing regime, it will aid

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item States does in general not perceive the ICTY and ICTR as having succeeded in reaching their goals.
\item Ibid.
\end{enumerate}
\end{footnotesize}
the development of piracy law and most importantly: a Piracy Tribunal assures a uniform application of international law.

The creation of a ‘hybrid’ tribunal or an ‘international chamber’ within the courts of a State in the region is not a preferable option, because I do not see the advantage of combined elements of domestic courts and international tribunals. Somalia is a failed State and has no functioning government; therefore it is unlikely that a ‘hybrid’ court will be established in Somalia. The most likely location in the region to establish such a mixed court will be Kenya. This is not a preferable option either, because of human rights concerns, lack of judicial capacity, inefficiency and corruption.

In my opinion, the international crime of piracy needs an international solution. The establishment of an ad hoc Piracy Tribunal is the most logical step, although there are many political hurdles to be overcome in the (near) future. I would like to conclude with the old quote of David Lloyd George, which is still of relevance today:

“What do you want to be a sailor for? There are greater storms in politics than you will ever find at sea. Piracy, broadsides, blood on the decks. You will find them all in politics.”
Bibliography

Books

Articles
R. Beckman, ‘Somali Piracy – Is International Law Part of the Problem or Part of the Solution?’, Presentation RSIS, 23 February 2009.


J. Ho, ‘Combating Piracy and Armed Robbery in Asia: The ReCAAP Information Sharing Centre (ISC)’, Maritime Policy, Volume 33, Issue 2, March 2009.


Websites/Internet Sources


Deredactie, ‘Piraten Niet Vervolgd Door Belgisch Parket’, 30 November 2010
http://www.deredactie.be/cm/vrtnieuws/binnenland/1.915821.
DPA, ‘Somali Pirates Extradited to Germany’, The Local, 14 April 2010,
http://www.thelocal.de/national/20100414-26543.html.
Dutch Ministry of Defence, ‘Evertsen Onderschept Piraten’, 3 December 2009,
http://www.defensie.nl/missies/nieuws/wfp/2009/12/03/46141705/
Evertsen_onderschept_piraten.
http://www.defensie.nl/missies/nieuws/wfp/2010/03/19/46151496/
Hr_Ms_Tromp_zet_laatste_piraten_van_boord.
D. El Zein, ‘Country Summary Somalia’, Human Rights Watch, January 2010,
http://www.hrw.org/sites/default/files/related_material/somalia_0.pdf.
EU, ‘Fact Sheet: EU Naval Operation Against Piracy: EU NAVFOR Somalia – Operation ATALANTA’, European Security and Defence Policy, April 2010,
EU Naval Force Somalia - Operation Atalanta, ‘Mandate’,
Federal Bureau of Investigation Norfolk, ‘Five Somalis Convicted of Piracy Against USS Nicholas’, Department of Justice Press Release, 24 November 2010,
The Fund for Peace, ‘Country Profile Somalia’,
The Fund for Peace, ‘Failed States Index Scores 2010’,


Norway Mission to the United Nations, ‘Contact Group on Piracy off


Reports

CGPCS, 1st Meeting of the CGPCS, United Nations New York, 14 January 2009.

CGPCS, 3rd Meeting of Working Group 2 on Legal Issues, Chairman’s Conclusions, Copenhagen, 26 – 27 August 2009.


Newspaper Articles
Conventions
European Convention of Human Rights.
International Covenant on Civil and Political Rights.
United Nations Convention Against Torture.

Resolutions
European Parliament Resolution on a Political Solution to the Problem of Piracy off the Somali Coast, Strasbourg, 26 November 2009.

Statutes
Rome Statute of the International Criminal Court.
Statute of the International Tribunal of Rwanda.
Statute of the International Criminal Tribunal for the former Yugoslavia.
Statute of the Special Court for Sierra Leone.

Cases
*Castle John v. NV Mabeco* (Belgium, Court of Cassation, 1986), 77 ILR 537.
Filártiga v. Peña-Irala, United States Court of Appeals, Second Circuit, 30 June 1980, 630 F.2d 876, Part IV.


In Re Pinochet, Spanish National Court, Criminal Division, 4 November 1998, Case 1997/1.

Saadi v. Italy, 28 February 2008, European Court of Human Rights, Appl. No. 37201/06.


United States v. Shi, 525 F.3d 709 (9th Cir. 2008).

Other Documents


Merchant Shipping Act 2009 (Kenya).