

Combating Piracy off the Coast Of Somalia. Jurisdiction over Interdiction and Prosecution.



University of Oslo
Faculty of Law

Candidate Number: 501
Date of Delivery: 26.04.2010

Number of words: 17 956

22.04.2010

Contents

<u>1</u>	<u>INTRODUCTION</u>	<u>1</u>
1.1	Background	1
1.2	The legal aspect of the piracy problem	2
1.3	Structure of this report	4
<u>2</u>	<u>THE LEGAL FRAMEWORK</u>	<u>5</u>
2.1	Historical perspective on Piracy Law	5
2.2	Universal Jurisdiction	6
2.3	IMO – International Maritime Organization.	7
2.3.1	The interrelation of UNCLOS and IMO	8
2.4	UNCLOS – United Nation’s Convention on the Law of the Sea.	8
2.4.1	UNCLOS and definition of piracy	9
2.5	The SUA convention – The Suppression of Unlawful Acts against the Safety of Maritime Navigation.	12
2.5.1	The 2005 Protocol to the SUA convention.	13
2.6	Recent Security Council Resolutions concerning Piracy off the coast of Somalia	15
<u>3</u>	<u>A LAW ON INTERDICTION?</u>	<u>16</u>
3.1	UNCLOS and the mandate to use force.	17
3.1.1	Applicability of the definition of piracy.	18
3.1.2	Limits to the use of force by UNCLOS.	19
3.1.3	Implications of the UNSCRs on the Law on Interdiction.	21

3.2	Current Use of the Laws on Interdiction	25
3.2.1	Operation ATALANTA -European Union Naval Operation against Piracy	26
3.2.2	Operation Ocean Shield	28
3.2.3	US-led Coalition Maritime Force (Combined Task Force 151)	28
3.2.4	A homogeneous take on use of force against pirates?	29
<u>4</u>	<u>A LAW ON PROSECUTION?</u>	<u>31</u>
4.1	Prosecution under UNCLOS.	31
4.2	Implication of the UNSCR on the law on prosecution.	32
4.3	SUA and the prosecution of pirates	35
4.3.1	Obligation to prosecute or extradite under the SUA convention.	37
4.4	Status of apprehended pirates. Human rights issues.	38
4.5	Prosecution in Kenya and other third states.	39
4.6	Practical application of the laws on prosecution of pirates,	41
4.6.1	Prosecution of suspected pirates under operation ATALANTA	41
4.6.2	Prosecution of suspected pirates under Operation Ocean Shield and CTF 151	43
4.6.3	USA	44
4.6.4	Germany	44
4.6.5	Denmark	46
4.6.6	France	47
4.6.7	The Netherlands	47
<u>5</u>	<u>CONCLUSION</u>	<u>48</u>
<u>6</u>	<u>REFERENCES</u>	<u>51</u>

1 Introduction

1.1 Background

Piracy has existed as long as maritime trade, all though the form and methods of piracy has varied throughout history.

In 2008, there was a significant increase in the number of pirate attacks on international shipping in the Gulf of Aden, double the number of attacks in 2007.¹ By September 2009, the number of piracy hijackings reported by the International Maritime Bureau (IMB) of the International Chamber of Commerce had surpassed the total number of hijackings of 2008. The total number of attacks reported to the IMB's Piracy Reporting Centre (PRC), by September 2009 was 294. Of these, 34 resulted in successful hijackings of vessels. A total of 559 hostages were in those hijackings.² Ninety-seven of the 294 attacks took place in the Gulf of Aden, whilst a further 47 took place off the rest of the coast of Somalia. Somali pirates accounted for 32 hijackings with 532 crew taken hostage. Four crew members were killed.³

A key base of operation for pirates in the Gulf of Aden, Somalia stands for all intents and purposes as a failed state. Aside from the autonomous, broadly self-governed enclaves of Somaliland and Puntland in the northern parts of the country, Somalia has suffered under "governance" by a succession of tribal factions, warlords, Islamist groups, and foreign

¹ IML (International Legal Materials) Infocus 090812 "Introductory Note to Exchange of letters between European Union and Kenya to Prosecute Pirates.

² "Analysis of Somali Pirate Activity in 2009" UNITAR

http://unosat-maps.web.cern.ch/unosat-maps/SO/Piracy/2009/UNOSAT_Somalia_Pirates_Analysis

³ http://www.icc-ccs.org/index.php?option=com_content&view=article&id=374:piracy-figures-for-2009-surpass-those-for-previous-year&catid=60:news&Itemid=51. (Updated numbers for the whole of 2009 are currently not yet available.)

interventions for the past 18 years.⁴ After the U.N. withdrew from Somalia in March 1995 without restoring a central government, little progress has been made in creating a security infrastructure—including administrative and legal institutions—on land. Since 2004, the U.N. has supported the Transitional Federal Government of Somalia (TFG) diplomatically and financially in an attempt to promote a functioning central government. Although the TFG is internationally recognized as the government of Somalia, it has proven to be a weak institution hindered by a lack of legitimacy among the Somali population. Since it has no navy or coast guard it cannot participate in the security of coastal area.⁵ Since 2008, the UN Security Council has passed several resolutions in an attempt to curb the piracy problem off the coast of Somalia.⁶ On the background of these resolutions, several military operations of both a national and international nature have been launched to secure the maritime navigation in the area and to combat the piracy problem.

1.2 The legal aspect of the piracy problem

While many suspected pirates have been captured by nations operating in the different operations, a recurring problem has been the lack of prosecution. Several countries have resorted to a “catch and release”-policy, where the pirates are captured and disarmed, and subsequently released again. Countries, who do so, have claimed to not have sufficient jurisdiction over pirates to have them prosecuted in their own courts. However, this lack of jurisdiction has not prevented them from apprehending the pirates in the first place. In other cases, countries have had the captured pirates transferred to their national courts for prosecution, while yet others have had pirates transferred to third State Parties who have been willing to prosecute. The pirates that have been transferred to national courts for

⁴ ”Maritime Security: Fighting Piracy in the Gulf of Aden and Beyond”

By James Jay Carafano, Ph.D., Richard Weitz, Ph.D., and Martin Edwin Andersen

The Heritage Foundation. <http://www.heritage.org/Research/NationalSecurity/sr0059.cfm>

⁵ ”Maritime Security: Fighting Piracy in the Gulf of Aden and Beyond”

By James Jay Carafano, Ph.D., Richard Weitz, Ph.D., and Martin Edwin Andersen

The Heritage Foundation. <http://www.heritage.org/Research/NationalSecurity/sr0059.cfm>

⁶ Resolutions by the Security Council 2008 and 2009.

<http://www.un.org/Docs/sc/>

prosecution face very arbitrary consequences, depending on what country has decided to prosecute them. One example is the difference in the length of prison sentence that the suspected pirate may risk in different national penal systems: a pirate prosecuted in the USA faces possible life in prison, while a pirate tried for the same crime in the Netherlands may face up to a maximum of twelve years.

The resurgence of piracy off the coast of Somalia has renewed the focus on the international regulations on jurisdiction over piracy. The States involved in combating piracy off the coast of Somalia are faced with several legal problems. Some of these problems are related to the lack of precedence on the applicability and interpretation of international law on piracy in modern times. It's only the past couple of years that the international community have attempted to apply the various laws on piracy. The international community has also undergone major changes during the past centuries in areas such as universal human rights, and other parts of international law, while the regulations on piracy has remained fairly unchanged, which suggests that what once was sufficient legislation on piracy, might not be that today.

This thesis will discuss if and on which grounds States can use force against pirates and what options exist in the international society to have suspected pirates prosecuted, with the specific focus on the pirate situation off the coast of Somalia. The two major legal questions that this thesis will attempt to answer are:

- 1. To what extent does the current legal framework allow for use of force against Somali pirates?**
- 2. To what extent does the current legal framework allow for the prosecution of Somali pirates**

1.3 Structure of this report

Chapter 2 gives an overview over the different legal instruments that are relevant for the question of interdiction and prosecution of suspected pirates, as well as the definition of piracy from international law.

The rest of this report is divided into two major parts, chapter 3 and chapter 4.

Chapter 3 discusses the existence of a law on interdiction of pirates, in the light of the United Nations Convention on the Law of the Sea and the several Security Council Resolutions from 2008 and 2009 on Somali piracy. The impact these resolutions have had on the international law on piracy is also considered. The conduct of the major international operations against pirates is also described and evaluated, as it shows how the mandate to use force against pirates have been interpreted and applied by the different states and regional organizations. What limitations exist to the right to use force against pirates?

Chapter 4 discusses the legal mandate in international law to have suspected pirates prosecuted. UNCLOS and the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA conventions) are especially considered in this context, as well as the relevant parts of the Security Council Resolutions from 2008 and 2009. This is then considered in relation to the various solutions for prosecuting pirates that have been chosen by the United States of America and selected European countries who are taking part in the anti-piracy operations off the coast of Somalia, and have had suspected pirates in custody. Variances in piracy law in the domestic law of the individual countries will be briefly considered. The possibility to prosecute pirates will be considered against the structure and mandate of the various anti-piracy operations in so far it's applicable. Human Rights law is also considered in this context: what limitations does HR place upon the states concerning the possibility to prosecute pirates? The Memorandums of Understandings between many states and Kenya and/or The Seychelles to have suspected pirates transferred there for prosecution is also discussed.

In chapter 5 summary is given of the legal (and to a certain extent, political) limitations on the states to use force against pirates, as well as to prosecute pirates, as well as possible de lege ferenda solutions to the various problems.

2 The legal framework

2.1 Historical perspective on Piracy Law

A law addressing the issue of piracy can be traced back to the Seventeenth Century. The English act on piracy enacted in 1698 was probably the first law of piracy at the national level. Other States such as Germany and the United States then followed suit to enact their laws of piracy. These older pieces of legislation show that when piracy was first criminalized by law, it was punishable only within the domestic legal domain of a state. Later, the piracy issue came into the international scene since it threatened transnational maritime commerce and transportation. The first legal document governing piracy in international law was the 1856 Treaty of Paris, which ended privateering⁷ by commissioned pirate ships. The 1889 Montevideo Convention accepted the principle that the suppression of piracy was the responsibility of mankind. The Nyon Agreement of 1937 defined the unidentified attacks in the Mediterranean as “acts of piracy”. However, the most important treaty which codified the international law of piracy was the 1958 Geneva Convention on the High Seas⁸, which contains eight provisions concerning the suppression of piracy on the High Seas. The 1982 UN Convention on the Law of the Sea (UNCLOS) simply

⁷ A privateer was a private person or private warship authorized by a country's government by letters of marque to attack foreign shipping. Privateers were only entitled by their state to attack and rob enemy vessels during wartime. Privateers were part of naval warfare of some nations from the 16th to the 19th century.

⁸1958 Geneva Convention on the High Seas

http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf

incorporates the anti-piracy provisions of the 1958 Convention without any change⁹ Those few states who have yet to ratify UNCLOS, are party to the 1958 Geneva Convention on the High Seas, and are thus bound by the same regulations on piracy.

2.2 Universal Jurisdiction

Under international law, pirates are subject to so called universal jurisdiction. Normally, international law regards criminal jurisdiction as the prerogative of sovereign states. This is the case for legislative, executive and judicial jurisdiction. As a result, the traditional limits on national criminal jurisdiction are largely coextensive with the limits of national sovereignty. States have territorial jurisdiction over offenses committed within the confines of their territory; the control over national territory is the hallmark of sovereignty. Furthermore, states sometimes have jurisdiction over offenses committed elsewhere, called extraterritorial jurisdiction. Since the extraterritorial conduct necessarily occurs within the territory of some other nation, extraterritorial jurisdiction will often involve competing jurisdictional claims between states.¹⁰ Extraterritorial jurisdiction seeks to prevent such problems by dividing jurisdictional responsibility among states in those situations where these responsibilities would likely overlap. Thus a nation can exercise extraterritorial jurisdiction over an offense only when it has a clear nexus with the offense that gives it jurisdictional priority over other nations. Under traditional rules of international jurisdiction, a sufficient nexus exists when the crime is committed by or against a country's nationals (respectively known as the nationality and passive personality principles of jurisdiction).¹¹

For as long as sovereignty-based jurisdictional principles have existed (at least since the early seventeenth century), any nation could try any pirates it caught, regardless of the

⁹ Chinese Journal of International Law Advance Access: "New Developments in the International Law of Piracy" by Zou Keyuan. <http://chinesejil.oxfordjournals.org/cgi/content/abstract/jmp006>

¹⁰ <http://www.harvardilj.org/print/28> Eugene Kontorovich: "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation." Harvard International Law, vol. 45. P. 188-189

¹¹ P. 589 "International law" by Malcolm Nathan Shaw 5th edition 2003

pirates' nationality or where on the high seas they were apprehended. Some legal commentators have suggested that universal jurisdiction existed merely because the traditional jurisdictional categories did not cover piracy, seeing as the high seas lay outside the territorial jurisdiction of any state. However, the ships that pirates attacked were registered in a particular nation and thus were within that nation's jurisdiction; those on board the victim ship were nationals of some state and hence within its passive personality jurisdiction. Thus, thus the act of piracy was never without the standard jurisdiction of some sovereign state. Today, international law continues to regard piracy as to fall under universal jurisdiction. The legitimacy of the principle of universal jurisdiction over piracy has been recognized by the international community throughout the past several hundred years¹² and is reaffirmed in the United Nation's Convention on the Law of the Sea.¹³

2.3 IMO – International Maritime Organization.

The most important organization concerning the establishment of rules against piracy is The International Maritime Organization (IMO). The global mandate of the IMO as a specialized agency within the United Nations system was established by the Convention on the International Maritime Organization (the "IMO Convention") which was adopted by the United Nations Maritime Conference in Geneva on 6 March 1948. IMO's main task has been to develop and maintain a comprehensive regulatory framework for shipping and its remits today include safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping.¹⁴ The purposes of the Organization, as summarized by Article 1(a) of the Convention, are "to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters

¹² Eugene Kontorovich: "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation." Harvard International Law ,vol. 45. P. 190-191

<http://www.harvardilj.org/print/28>

¹³ Article 105, UNCLOS

¹⁴ "Introduction to IMO" http://www.imo.org/About/mainframe.asp?topic_id=3

concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships". Under the IMO, a lot of work has been done in order to better establish jurisdiction over piracy and armed robbery at sea.

2.3.1 The interrelation of UNCLOS and IMO

From 1973 the Secretariat of IMO (formerly IMCO) actively contributed to the work of the Third United Nations Conference on the Law of the Sea (UNCLOS) in order to ensure that the elaboration of IMO instruments conformed to the basic principles guiding the elaboration of UNCLOS. Before the UNCLOS entered into force in 1994, explicit or implicit references to its provisions were incorporated into several treaty and non-treaty instruments of the IMO. Although IMO is explicitly mentioned in only one of the articles of UNCLOS (article 2 of Annex VIII), several provisions in that convention refer to the “competent international organization” in connection with the adoption of international shipping rules and standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution.. In such cases the expression “competent international organization”, when used in the singular in UNCLOS, is to be understood as to apply exclusively to IMO, bearing in mind that global mandate of the IMO as a specialized agency within the United Nations system.¹⁵ Hence, the provisions of The United Nation's Convention on the Law of the Sea and the Conventions established by the IMO must be considered in the light of each other.

2.4 UNCLOS – United Nation’s Convention on the Law of the Sea.

The laws of piracy are found mainly in The United Nation's Convention on the Law of the Sea (UNCLOS) of 1982(. UNCLOS) which can be seen as the legal framework for all life at sea. UNCLOS is acknowledged to be an “umbrella convention” as most of its provisions are of a general kind, and have to be implemented by specific operative regulations in other

¹⁵ ” Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization” Study by the Secretariat of the International Maritime Organization (IMO), LEG/MISC.6 www.imo.org/includes/blastData.asp/doc_id=4671/6.pdf

international agreements.¹⁶ It is one of the more comprehensive conventions the UN has produced, and it “consolidated” much of previous customary international law, as well as, in many respects established new rules on the several areas concerning regulation of the world seas.

UNCLOS art. 100 to art. 107 is dedicated to establishing a legal framework concerning piracy. Art. 100 establishes a duty of all State Parties to cooperate to the fullest possible extent in the repression of Piracy. Art. 101 gives the definition of piracy as it is to be understood in the context of UNCLOS; art. 102 -103 expands upon this definition. Art. 105, 106 and 107 concern the interdiction of pirates and pirate ships, liability for wrongful seizure, as well as who may interdict pirates.

2.4.1 UNCLOS and definition of piracy

UNCLOS Art. 101 defines piracy as three different acts: (a) any illegal acts of violence or detention, or any a act of depredation, committed for private ends by the crew or passengers of a private ship (..) and directed (..) on the high seas, against any other ship (...), or against person or property on board such a ship (..), or (ii) against a ship, (..) persons or property outside the jurisdiction of any State.

(b) Any act of voluntary participation in the operation of a ship (...) with knowledge of facts making it a pirate ship, and (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

As can be seen, the primary definition of piracy in UNCLOS sets up several criteria for what is to be considered piracy. Firstly, the legislation on piracy is only concerned with acts perpetrated on the high seas, or “in a place outside the territorial jurisdiction of any state.” The latter phrase refers primarily to an island constituting *terra nullius* or the shore of an unoccupied territory.¹⁷ Any acts of piracy committed in territorial or inland waters

¹⁶ ” Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization” Study by the Secretariat of the International Maritime Organization (IMO), LEG/MISC.6 www.imo.org/includes/blastData.asp/doc_id=4671/6.pdf

¹⁷ “ Principles of Public International Law” by Ian Brownli. Sixth edition 2003. Page 230

are not addressed, and are legally considered “armed robbery at sea,” rather than piracy.¹⁸ Criticism has been raised against the UNCLOS on account of this, as it would mean that pirates would be able to escape capture by moving into the territorial waters of a coastal state. In such situations, the pirates would be out of bounds for any other legal intervention than that of the coastal state. The foundation for this principle stems from the strong belief in sovereign rights and domestic law of States. Two problems arise concerning this limitation in the definition of piracy. Firstly, it would require that states enact and enforce sufficient domestic legislation. Secondly, for the definition to have any considerable value, it would require the area of effect to not be too limited, or from another point of view: that the territorial waters of the states are not too extensive. With the establishment of UNCLOS, the territorial waters of the State Parties was extended from 3 to 12 nautical miles (art. 3 UNCLOS) in which the State has exclusive jurisdiction , thus greatly reducing what was to be considered as the High Seas. In addition, with the UNCLOS came the establishment of the Exclusive Economical Zones (EEZ), extending out to 200 nautical miles from the coast. These areas are neither part of the territorial waters, nor the High Seas. The assumption that the universal jurisdiction over pirates also includes the EEZ has so far gone unchallenged. However, art. 58 (3) states that in exercising the high sea rights that apply to the EEZ, permitted under arts. 88-115, states must pay due regard to the rights and duties, laws and regulations of the coastal state insofar as these are not incompatible with the UNCLOS. This could mean that the coastal state could claim the right to impose restriction on any military activities therein, also anti-piracy operations. It is this potential that drives the need to take into consideration the EEZ’s as well, when discussing the jurisdiction over pirate ships.¹⁹ Concerning the state of Somalia, it should be mentioned that Somalia in 1972, before the establishment of UNLCOS and contrary to its regimes, filed a claim to extend its territorial waters to 200 nautical miles of the coast.²⁰ However, in

¹⁸ ”Violence at Sea. Piracy in the Age of Global Terrorism.” Peter Lehr. Chapter 7: “Piracy and UNLCOS: Does International Law Help Regional States Combat Piracy?” Martin Murphy.

¹⁹ ”Sketching the Debate on Military Activities in the EEZ: An Editorial Comment” by Sienho Yee Chinese Journal of International Law 2010 9(1):1-7; doi:10.1093/chinesejil/jmq009

²⁰ <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SOM.htm>

recent counter-piracy activity this claim has been left unmentioned by the Transitional Federal Government of Somalia, as well as by the various nations part-taking in counter-piracy mission

The UNCLOS' definition limits piracy to acts committed to "private" ends, as opposed to "public" or "political" ends. As a result of this distinction, the definition of piracy under UNCLOS excludes acts carried out by warships or other government vessels, unless these have been seized unlawfully and the used to perpetrate piratical acts. It has been debated whether the criteria "private ends" excluded acts of piracy committed for political ends; this could mean that UNCLOS might not be applicable to acts of maritime terrorism or acts by political insurgents, all though the acts in nature may be the same as piracy.²¹ In relation to the situation in Somalia, this possible limit to the definition of piracy can prove to be of high importance in the future. The past years have seen an increase in organized extremist groups fighting the Transitional Federal Government of Somalia, and several terrorist attacks against the government and NGO's working in the country. A credible link between such groups and pirates working off the Coast of Somalia has yet to be established; however, should any such link be established, i.e. that the piracy was funding such terrorist groups, it would be important to clarify if the rules of the UNCLOS concerning combating piracy still would be applicable. On way of considering the criteria of "private ends" is in a historical context; it was used to differentiate between "piracy" and "privateering," the latter being a form of piracy under license of a State Government which existed up until it was abolished by the Declaration of Paris in 1856.²² Hence, the criterion "private ends" would refer to an act of piracy that is not sanctioned by governmental authority:

"The test of piracy lies not in the pirate's subjective motivation, but in the lack of public sanction for his or her acts. (...) To claim that 'political' motive can exclude an act from the definition of piracy is to mistake the applicable concept of 'public' and 'private' acts.

²¹ "Shipping Interdiction and the Law of the Sea" Douglas Guilfoyle (2009). Page 36-37

²² "Violence at Sea. Piracy in the Age of Global Terrorism." Peter Lehr. Chapter 7: "Piracy and UNLCOS: Does International Law Help Regional States Combat Piracy?" Martin Murphy.

The essence of a piratical act is that it neither raises 'the immunity which pertains to state and governmental acts' nor engages state responsibility."²³

By this definition, any maritime criminal act or act of terrorism might fall under the definition of piracy in UNCLOS, as long as the acts in their nature fit the definition given in international law. By extension, this might mean that the universal jurisdiction over piracy to include any form of hijacking of a ship by another ship, as long as the hijacking ship is not operating on behalf of any state. This would extend the universal jurisdiction, including the right to intervene against such actions, to all maritime acts of terrorism that fit the description. However, the sovereignty of the flag state over its ships would be equally reduced. Such an interpretation of the term "private ends" has not yet been put to the test in the international community, but it might well become relevant in the current "war on terrorism."

2.5 The SUA convention – The Suppression of Unlawful Acts against the Safety of Maritime Navigation.

Concern about unlawful acts that threaten the safety of ships and the security of their passengers and crews grew during the 1980s and motivated states to negotiate and subsequently adopt The Convention on The Suppression of Unlawful Acts against the Safety of Maritime Navigation. This concern stemmed from reports of crews being kidnapped, ships being hijacked, deliberately run aground, or blown up by explosives. Due to these developments, especially the 1985 hijacking of the *Achille Lauro*, the UN General Assembly adopted Resolution 40/61 in 1985, urging States to co-operate in contributing to the elimination of causes underlying terrorism and invited the IMO to study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures. In response to the *Achille Lauro* hijacking, the Governments of Austria, Egypt, and Italy made a proposal in November 1986 that the IMO prepare a convention on the subject of unlawful acts against the safety of maritime navigation.²⁴ To supplement their

²³ "Shipping Interdiction and the Law of the Sea" Douglas Guilfoyle (2009). Page 36-37.

²⁴ International Maritime Organization

http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686

efforts, the Maritime Safety Committee of the IMO issued a circular (MSC/Circ.443) on measures to prevent unlawful acts against passengers and crews on board ships. According to the circular, governments, port authorities, administrators, ship-owners, shipmasters, and crews should take appropriate measures to prevent unlawful acts that may threaten passengers and crews. As a result, the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted in 1988.²⁵

The SUA convention does not target piracy as such. Rather, it lists a number acts that should be considered illegal. Article 1 and 2 lists the offences that the convention is designed to cover, which include taking control over a ship by force; performing an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; destroying a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; and injuring or killing any person, in connection with the commission or the attempted commission of any of the offences mentioned above.²⁶ While piracy is not mentioned explicitly in the SUA conventions, it is still considered to be an important and relevant legal instrument on piracy.

2.5.1 The 2005 Protocol to the SUA convention.

In October 2005, the International Conference on the Revision of the SUA Treaties was held at the IMO Headquarter to consider the draft protocols prepared by the Legal Committee. The Conference adopted the Protocol of 2005 to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol of 2005 to the protocol on the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf.²⁷

The 2005 Protocol to the SUA Convention added a new Article 3 which extended the

²⁵The SUA convention

<http://cns.miis.edu/inventory/pdfs/maritime.pdf>

²⁶ Convention for the Suppression of Unlawful acts of violence against the safety of Maritime Navigation (SUA) http://www.nti.org/e_research/official_docs/inventory/pdfs/aptmaritime.pdf

²⁷ International Maritime Organization

http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686

number of acts considered unlawful under the convention.²⁸ The new unlawful acts included on the most part the use of explosive, radioactive or BCN material, on, against or from a ship, when the purpose of the act is to intimidate a population, or to compel a Government or an international organization to do or abstain from any act. Also unlawful are the transportation of such materials, and the intentional transportation of a person who has committed acts considered unlawful under the convention. The protocol also made it an offence to unlawfully and intentionally injure or kill any person in connection with the commission of any of the offences in the Convention; to attempt to commit an offence; to participate as an accomplice; to organize or direct others to commit an offence; or to contribute to the commissioning of an offence. This part of the protocol relates mainly to the combating terrorism, and is in a lesser degree relevant to the combating of piracy. The 2005 Protocol to the SUA Convention also covered the provisions for boarding. The new article 8bis in The 2005 Protocol to the SUA Convention. covered co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in the commission of an offence under the Convention.²⁹

The authorization and co-operation of the flag state is required before such a boarding. A State Party may notify the IMO Secretary-General that it would allow authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response from the flag state within four hours. A State Party can also notify that it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine if an offence has been, or is about to be, committed. The use of force is to be avoided except when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed to the execution of authorized actions. Article 8bis includes important safeguards when a State Party takes

²⁸ 2005 protocol to the SUA convention

<http://www.unhcr.org/refworld/pdfid/49f58cee2.pdf>

²⁹ The SUA Convention http://www.nti.org/e_research/official_docs/inventory/pdfs/aptmaritime.pdf

measures against a ship, including boarding. The safeguards include: not endangering the safety of life at sea; ensuring that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law; taking due account of safety and security of the ship and its cargo; ensuring that measures taken are environmentally sound; and taking reasonable efforts to avoid a ship being unduly detained or delayed. As of December 31st 2009 The 2005 Protocol to the SUA Convention had been signed by 10 different states and had yet to enter into force. The original Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 has been in force for the contracting parties since 1992 with 156 contracting parties.³⁰

2.6 Recent Security Council Resolutions concerning Piracy off the coast of Somalia

The growing piracy problem off the coast of Somalia caused grave concern within IMO, and led to the IMO encouraging the Transitional Federal Government of Somalia to give its consent to foreign warships to enter its territorial sea when combating piracy³¹. The TFG consented to this and advised the UNSC thereof, which resulted in UNSCR 1819 (2008) In this resolution the Security Council decided that for a period of 6 months from the date of the resolution, that States and regional organizations cooperating with the Transitional Federal Government of Somalia in the fight against piracy and armed robbery at sea off the coast of Somalia might:

- (a) Enter into 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 Such action permitted on the high seas with respect to piracy under relevant

³⁰ Status of conventions by country.

http://www.imo.org/Conventions/mainframe.asp?topic_id=248

³¹ IMO resolution “Piracy and armed robbery against ships in the waters off the coast of Somalia.”

Doc. A 25/Res.1002 (December 2007) <http://www.vta.ee/atp/public/1002.pdf>

International law, all necessary means to repress acts of piracy and armed robbery at sea. By UNSCR 1846 (2008) the Security Council extended the mandate by 12 months. This was reaffirmed in the UNSCR 1851 (2008) which further extended the mandate by inviting 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 (“ship riders”) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG was obtained for the exercise of third state jurisdiction by ship riders in Somali territorial waters and that such agreements or arrangements did not prejudice the effective implementation of the SUA Convention.

3 A Law on Interdiction?

Does a law on interdiction against pirates exist? On what grounds can states use force and apprehend pirates on the open sea and, within the territorial waters of Somalia?

The right to use force against ships on the high seas is a question of who has jurisdiction. By art. 92 (UNCLOS) ships shall sail under the flag of one State only and (...) shall be subject to its exclusive jurisdiction on the High Seas in administrative, technical and social matters. Art. 92 (UNCLOS) is, however not clear on the limits of this jurisdiction. What is meant by administrative, technical and social matters? It has long been a general customary rule of international law that the Flag state has exclusive jurisdiction over everything that happens on board a ship flying its colors.³² The Flag states jurisdiction over a ship is closely linked to the principle of sovereignty. That the UNCLOS does not state this in any obvious manner, does not negate the existence and validity of this rule. The UNCLOS is considered to codify customary law on the Seas, but it should not be considered to remove

³² ICJ: The case of the SS Lotus. http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/

customary rules that were not specifically included in the Convention. This means that on board the ship it is the national rules and regulations of the Flag state that apply. This can be seen as an extension of the territorial principle, in which a state may have jurisdiction over anything that occurs within its territory. By art. 97 (UNCLOS), in case of penal responsibility of any person in service of the ship, no arrest or detention of the ship can be ordered by any authorities other than those of the flag State.³³ Crime committed on board ships on the High Seas is as such first and foremost considered a matter of the Flag state. There are, however, special rules concerning the use of force against pirates.

3.1 UNCLOS and the mandate to use force.

UNCLOS Art. 105 states that on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship (...), or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.

This places 2 criteria for the use of force against pirates. Firstly, the definition of piracy must be satisfied. Otherwise the regulations on piracy would not apply. Secondly, the ship that is to be seized on account of piracy has to be considered either hijacked by pirates (again, the definition of piracy becomes relevant) or a pirate ship in itself. By article 103 “a ship (...) is considered a pirate ship (...) if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101 (the definition of piracy). The same applies if the ship (...) has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.”

Acts of piracy committed by a warship or a government ship whose crew has mutinied and taken control of the ship are assimilated to acts committed by a private ship, and are also considered pirate ships.³⁴

Illegal attacks on or seizures of innocent merchant ships by warships or government ships result in the delictual responsibility of the aggressor’s flag state, but the offending ship does

³³ UNCLOS Article 97 (3)

³⁴ UNCLOS article 102

not become a pirate ship under the definition of UNCLOS, and does not trigger the universal jurisdiction over piracy.

Although UNCLOS mandates “any state” to seize pirate ships, this does not mean that any ship may interdict pirates. . Article 107 expands on who specifically has the mandate to such use of force: “A seizure on account of piracy may be carried out only by warships or (...), or other ships (...) clearly marked and identifiable as being on government service and authorized to that effect.” Thus, no private ship is authorized to use force against ships hijacked by pirates; only governmental vessels can be used to that effect. That being said, all and any State has the opportunity to undertake such a mission, provided that the hijacked ship is not within the territorial jurisdiction of any State. By the rules of UNCLOS this right of any State to take action against pirates must be seen as to supersede the flag states exclusive jurisdiction over the ship³⁵.

3.1.1 Applicability of the definition of piracy.

As mentioned above, one criterion for the use of force against pirates is that the suspects and/or their acts satisfy the definition of piracy. This raises the question of when the criteria of the definition are fulfilled. As can be seen by the definition of piracy in article 101, both the act of piracy and any facilitating thereof is considered illegal. Hence both the pirates as well as anyone accessory to piracy may well be subject to the universal jurisdiction of UNCLOS. It’s important to clarify that the regulations on piracy is not meant to establish any international penal law. What the regulations do however is to establish that when the definition of piracy is satisfied, the suspected pirates are “fair game” to any state that wishes to apprehend them and establish jurisdiction; the universal jurisdiction can be applied. Up until that point, the jurisdiction over any criminals who board another ship, or

³⁵ The question of liability for any damage to the ship, crew or cargo during any military or police operation against a ship hijacked by pirates remains unresolved. Unjustful seizure of ships hijacked by pirates is covered by UNCLOS article 106: “Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.” This does not, however, cover the question of liability for damage to the vessel or personnel in a justfull seizure. This is currently not a debated issue, but may become so in the future, when considering the number of different nationalities that may be among the crew as well as the private stakes in the ship and the cargo.

steal from another ship are subject to the other customary principles of jurisdiction of the high seas. The question remains when the criteria of the piracy regulations is fulfilled. *Attempts* to commit piracy is not covered by the wording of the regulations in UNCLOS. Whether or not a certain act is sufficient to be called piracy and trigger the universal jurisdiction must be a matter of interpretation. However, by which standards this interpretation should happen is not quite clear. The International Tribunal of the Law of the Sea has jurisdiction over any dispute which is submitted to it in accordance with Part XV of UNCLOS concerning the interpretation or application of the Convention, and would have competence to decide the applicability of the piracy laws in UNCLOS. The tribunal has only competence to settle disputes which State Parties bring forward concerning the interpretation and application of UNCLOS.³⁶ It cannot take upon itself to interpret the regulations of UNCLOS further than the limits of any disputes between State Parties. There has been no cases concerning the interpretation of art. 101 of UNCLOS brought before The Tribunal as of yet. This would mean that currently it may be up to the individual states to decide whether the situation at hand is covered by the law on piracy in UNCLOS. . This may give varying results, depending on which State is considering the case at hand. The line between attempt and actual act is interpreted differently in different traditions of penal law theory. As a consequence, it may be up to the individual countries to decide if the concept of universal jurisdiction of UNCLOS is applicable at all.

3.1.2 Limits to the use of force by UNCLOS.

It is generally agreed that a right to resort to a threat or use of force to effect visits, search and seizure if a ship only exists in the case of a known pirate ship or a ship the behavior of which gives reasonable grounds for suspecting her of piracy.³⁷ The question remains to what extent a state's warship may use force against a suspected pirate ship, or a ship hijacked by pirates. The mandate to use force by UNCLOS is the right of every State to "seize" a ship under the control of pirates, and arrest the persons and seize the property on

³⁶ http://www.itlos.org/start2_en.html. STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. Art 21

³⁷ "Principles of Public International Law" by Ian Brownli. Sixth edition 2003. Page 233

board, meaning that the warship of any state may have the right to board and take control of the ship and any persons or cargo on board. The right to use force in this process is becomes relevant only when the suspected pirates in control of a ship are mustering a resistance. The limits to the use of force are not covered by the wording of the relevant articles in UNCLOS.

International law does not say much about the manner or the amount of force that may be used on the High Seas when combating pirates. What rules apply to the use of force against pirates may be dependent on whether the interdiction of pirates is considered an armed conflict or a police operation. The use of military efforts (warships) against pirates³⁸ might indicate that action taken against pirates be considered to fall under the definition of armed conflict, and hence, International Humanitarian Law (IHL) would apply. When considering other aspects of piracy, this is quite unlikely. Pirates do not fall under the definition of combatants³⁹ in IHL, and the use of force against pirate does not amount to an armed conflict of an international⁴⁰ or national⁴¹ character. Rather, the use of force against pirates should be considered a policing operation against criminals, in which case it's the law of the intervening ship and customary international law that apply. Article 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that “Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life”. This should be applicable to the use of force against pirates.

³⁸ UNCLOS article 107.

³⁹ Article 43-44 Additional Protocol I to the Geneva Conventions.

⁴⁰ Common Article 2, Para 1 Geneva Conventions

⁴¹ Common Article 3 of the Geneva Conventions and Additional Protocol II cover the rules for internal armed conflicts.

In general, it should be assumed that any use of force should be consistent with the general legal principles for the use of force in any police or military action: any use of force must be necessary and proportionate to the threat.⁴²

3.1.3 Implications of the UNSCRs on the Law on Interdiction.

The Security Council has linked the activities of pirates off the coast of Somalia with the notion of a threat to international peace and security. Since Resolution 733/1992, the Security Council has routinely invoked Chapter VII as regards the situation in Somalia,⁴³ and has stated that such a situation constitutes ‘a threat to international peace and security,’ and in its first resolution on piracy off the coasts of Somalia, ‘determine[d]’ that such piracy ‘exacerbate[s] the situation in Somalia which continues to constitute a threat to international peace and security in the region’⁴⁴ The link is made indirectly, avoiding the criticism which the Council often incurs when applying the notion of threat to international peace and security, to matters hitherto not considered to be covered by it. It nonetheless achieves the objective that action against piracy off the Somali coasts be conducted within the framework of Chapter VII of the UN Charter.⁴⁵

These resolutions, while using the term “piracy,” do not define it. References to the provisions of UNCLOS and the statement that these provisions ‘provide guiding principles for cooperation to the fullest possible extent in the repression of piracy’ indicate that the starting point is definition of piracy in the Convention. These resolutions, however, always mention “armed robbery” together with piracy. Armed robbery is not defined. It is a term routinely used within the framework of IMO, and may be understood to include all acts of violence the purposes of which are identical or similar to those of piracy but are not

⁴² ”Shipping Interdiction and the Law of the Sea” Douglas Guilfoyle (2009). Page 66

⁴³ SC Res 733 of 23 Jan. 1992, at Para. 5.

⁴⁴ SC Res 1816 of 2 June 2008, penultimate preambular Para., and thereafter in all the Council’s resolutions on piracy off the Somali coast.

⁴⁵ The European Journal of International Law Vol. 20 no. 2 “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia.” Tullio Treves

Downloaded from <http://ejil.oxfordjournals.org> at University of Oslo, Norwegian Institute of Human Rights on April 20, 2010

covered by the conventional definition of it, in particular because they may be perpetrated without using a ship against the target ship.⁴⁶ In IMO “armed robbery,” however, refers only to activities in waters under the jurisdiction of a state, so that it does not extend the scope of provisions on piracy to acts committed on the high seas unless two ships are present. This is what the Security Council Resolutions do, as they use the expression ‘ piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia ’⁴⁷ As two or more ships are involved in most of the Somali cases, the mention of ‘ armed robbery ’ would seem not to be strictly dictated by the needs of existing practice, and rather inspired by the aim of including all acts connected with piracy (such as preparatory acts) and future acts involving only one ship.

Resolution 1816 (2008), Resolution 1846 (2008), Resolution 1951 (2008) and Resolution 1897 (2009) all reaffirm the right of foreign states to enter into Somali territorial waters to combat piracy. It was emphasized in all above mentioned resolutions that this extension of jurisdiction on piracy only would apply to the situation in Somalia, and should not affect the rights or obligations of Member States under International law. This included any rights or obligations under the Convention on the Law of the Sea, with respect to any other situation. It was also underlined that this resolution was not to be considered as establishing international law, and that this extension of authorization was based on the consent of the Transitional Federal Government of Somalia.

The enforcement jurisdiction over suspected pirates was reiterated in the UNSCR 1851 (2009). Paragraph 6 states that

⁴⁶ IMO Res A 922(22) of 29 Nov. 2001 adopting the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships: ‘armed robbery against ships means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy” directed against a ship or against persons or property on board such a ship within a State’s jurisdiction over such offences; the definition is almost literally repeated in Art. 1(2) of the Regional Cooperation Agreement on combating piracy and armed robbery against ships in Asia of 28 Apr. 2005, 44 ILM (2005) 829; and in Art. 1(2) of the IMO -sponsored Code of Conduct concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, adopted in Djibouti on 29 Jan. 2009, available at: www.imo.org/Newsroom/mainframe.asp?topic_id _ _ 1773&doc_id _ _ 10933 (visited on 20 Feb. 2009).

⁴⁷ Res. 1816, penultimate preambular Para.; res. 1846, penultimate preambular Para

States and regional organizations cooperating 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 undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.

This grants the cooperating states authority to conduct counter-piracy on Somali soil. It is, however, quite clearly subject to Somali consent. The scope of authority is limited by Somalia's request for such action to be taken and does not widen the mandate of the forces involved.⁴⁸ Interestingly the resolution refers to "applicable humanitarian law" which could suggest the possible application of the law of armed conflict. This should not be construed to establish the existence of an armed conflict between the pirates and the international naval forces in the region. One way of interpretation would be that the Security Council is acknowledging that some Somali pirates may also be civil war insurgents and in those cases any international counter-piracy forces on land may be best considered forces intervening in an otherwise internal conflict at the invitation of the government. This does not mean that the law of military targeting would be applicable to any pirates at shore; pirates are criminals to be captured using reasonable force, not combatants that may be lawfully killed in armed conflict.⁴⁹ Moreover, this resolution shows the problems concerning combating piracy within the territory of another state, and the lack of applicable international law, namely, which laws are applicable to policing operations conducted by foreign military personal on within the ground territory of another state.

The question arises in what manner the recent resolutions by The Security Council extend the legal mandate to use force against pirates, by the wording "all necessary means." The wording is the same as used in Security Council resolutions on military enforcement and peace-keeping operations. The mandate to use force that the UNSCR's establish is not

⁴⁸ Shipping Interdiction and the Law of the Sea" Douglas Guilfoyle (2009). Page 69.

⁴⁹ Shipping Interdiction and the Law of the Sea" Douglas Guilfoyle (2009). Page 70

without restrictions. Firstly, only States co-operating with the TFG (States that have permission from the Somali government) may act under the mandate of the resolutions. Somalia has been considered to be almost without governance, but it retains its sovereignty over its territorial seas.

The actual mandate to use force is found in the initial UNSCR 1816 (2008) paragraph 7 letter A, which authorizes the States cooperating with the TGF to enter Somalia's territorial waters for the purpose of combating piracy. Once within the territorial waters of Somalia, the States may "*in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law*" use all necessary means to repress acts of piracy and armed robbery

As mentioned under chapter 3.1.2, the use of force against pirates should be governed by the same principles as the any policing operation. More unclear is the mandate to use "all necessary means." This is a mandate that is more commonly used in military operations than policing operations, which raises the question as to whether the permissible use of force against pirates goes beyond that of any policing operations. Considering the statements in Resolution 1816 (2008) that it was not intended to expand or change international law, it should be presumed that the Security Council Resolutions do not extend the right to use force against pirates beyond that which is accepted as customary international law. This means that the enforcing states presumably cannot for example just sink the ship where the pirates are. The actual use of force will be limited to pursuing pirate or hijacked vessels, seizing it and arresting the suspected pirates.

In summary, the UNSCR's have not been intended to change international law in the area of piracy. The resolutions do not allow for increased use of force against the pirates, and the right to apprehend pirates within the territorial waters of Somalia is still dependent of the permission of the TGF.

Seeing as the resolutions of the Security Council does not change international law and is dependent on the permission of the TFG for any anti-piracy activity within the Somali territorial waters, one could ask if such resolutions are at all necessary. The permission to use force against pirates is already part of international law by UNLCOS, and States might well have been able to enter into agreements with the TGF to combat pirates within the

territorial seas without the UNSCR's. One might say that the permission given by the TGF is quite "pointless" as the TGF wields very little power and control in the state of Somalia. Therein lays also much of the political reasoning behind the resolutions. In addition to bringing focus to the problem of piracy and promote it on the international agenda, the UNSCRs also recognizes the TGF as a legitimate government and strengthens its sovereignty by explicitly making any action in its territorial sea dependent on its permission.

3.2 Current Use of the Laws on Interdiction

There are several military operations conducted off the Coast of Somalia as a result of the Resolutions by the Security Council. The three main ongoing operations are The European Union Naval Operation against Piracy (ATALANTA) Operation Ocean Shield (NATO Maritime Group) and the US-led Coalition Maritime Force (Combined Task Force 151)

The various international operations operate on different organizational mandates, and consist of many different nations. This has a consequence to which legal system is applicable in their work to repress piracy; and affects both the applicability of national and international law. Particularly, which set of laws apply to the actual interdiction of ships and use of force and detention of pirates are important questions that need to be clarified. The varying mandate and nature of this military operation has direct effect on the jurisdiction over captured pirates.

When defining the jurisdiction over interdiction and prosecution of suspected pirates on both the High Seas as well as within the territorial waters of Somalia, there are as mentioned several factors that may come in to play. Not only the universal jurisdiction of the UNCLOS, the domestic law of the participating states and the general international principles on jurisdiction are of relevance, but also the structure and the mandate of the various anti-pirate operations. The varying mandate and nature of these military operations has direct effect on the jurisdiction over captured pirates.

3.2.1 Operation ATALANTA -European Union Naval Operation against Piracy

The European Union is currently conducting a military operation to help deter, prevent and repress acts of piracy and armed robbery off the coast of Somalia.

This military operation, named European Union Naval Force Somalia – Operation ATALANTA, was launched in support of Resolutions 1814, 1816, 1838 and 1846 which were adopted in 2008 by the United Nations Security Council.

Its mandate is to contribute to the protection of vessels of the World Food Program (WFP) delivering food aid to displaced persons in Somalia; the protection of vulnerable vessels sailing in the Gulf of Aden and off the Somali coast.; employ the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where they are present. This operation – the European Union’s first naval operation – is being conducted in the framework of the European Security and Defense Policy (ESDP). The mandate of the operation is based on the Council of the European Union’s of December 8 2008.⁵⁰

The operation which was scheduled for an initial period of twelve months has now been extended by the council until Dec 2010. During this period up to 12 EU ships and a number Maritime Patrol Aircraft will operate at any one time. At the present time (January 2010), eight EU member states are making a permanent operational contribution to the operation: Italy, Netherlands, Germany, France, Spain, Belgium, Luxemburg and Greece. Contributions from third countries such as Norway are participating as well. Also, a number of Cypriot, Irish, Finnish, Maltese and Sweden military personnel supplement the team at the Northwood Operation Headquarters⁵¹.

3.2.1.1 Operational mandate of ATALANTA

The presence of the EU naval forces operating in off the coast of Somalia is mandated in the recent UNSC resolutions and the decisions of the Council of the European Union; more

⁵⁰ DECISION 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (ATALANTA)

⁵¹ <http://www.eunavfor.eu/about-us/mission/>

specifically the “COUNCIL JOINT ACTION’s” (2008/851/CFSP of 10 November 2008) decision to establish a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.” By article 1 of this decision, the European Union shall

”conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), in a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea signed in Montego Bay on 10 December 1982 (..) and by means, in particular, of commitments made with third States, hereinafter called ‘ATALANTA’ in order to contribute to:

— the protection of vessels of the WFP delivering food aid to displaced persons in Somalia, in accordance with the mandate laid down in UNSC Resolution 1814 (2008),

— the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UNSC Resolution 1816 (2008),”

The participating nations are under a central EU command. Under the responsibility of the Council, the Political and Security Committee exercises the political control and strategic direction of the EU military operation and is authorized to take the relevant decisions in the planning and execution of operation ATALANTA.⁵²

The participating nations are not solely acting on behalf of the European Union. The individual military contingents are still under the command of their respective national states and domestic law, which places them in a dual role.

The decision to apprehend pirates will be made by the Commander of the respective ships; the officer will at that point be acting as an EU naval Commander. The actual apprehension of the suspected pirates will be conducted under the common Rules of Engagement for NAVFOR.⁵³

⁵² COUNCIL JOINT ACTION 2008/851/CFSP Article 7-8.

⁵³ It should be mentioned that the apprehension or detention of pirates is not necessarily considered the same as an actual arrest of the pirates in the legal sense of the word. The pirates might not be “arrested” per say until they have been transferred to a legal institution with authorization to prosecute. See case of *Medvedev v*

3.2.2 Operation Ocean Shield

In late 2008, NATO started to provide escorts to UN World Food Program vessels transiting through these dangerous waters under Operation Allied Provider (October-December 2008). This operation was succeeded by Operation Allied Protector (March-August 2009) and currently Operation Ocean Shield, which additionally offers training to regional countries in developing their own capacity to combat piracy activities.⁵⁴ This operation was approved by the North Atlantic Council on 17 August 2009 with reference to the United Nations Security Council Resolutions 1816, 1846 and 1851 and is currently being implemented by the Standing NATO Maritime Group 1 (SNMG 1).⁵⁵ The operation is mandated by the above-mentioned UN Security Council Resolutions.

Operation Ocean Shield is led and executed by a central command. The nations currently participating in Operation Ocean Shield are USA, Canada, United Kingdom, the Netherlands and Denmark.

3.2.3 US-led Coalition Maritime Force (Combined Task Force 151)

Combined Task Force (CTF) 151 is a multinational task force established to conduct counter piracy operations throughout the Combined Maritime Forces (CMF) area of responsibility. Their mission 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. United States Naval Forces Central Command (NAVCENT) commands the Combined Maritime Forces operating in the Arabian/Persian Gulf, Gulf of Oman, Gulf of Aden, Red Sea, Arabian Sea, and Indian Ocean. In January 2009, the command established

France, European Court of Human Rights (Application No. 3394/03), Judgment, 10 July 2008 This distinction is for the member states of the EU participating in Operation ATALANTA of noteworthy importance, as it may have impact on when certain human rights are triggered.

⁵⁴ Article on counter-piracy operations.

http://www.nato.int/cps/en/natolive/topics_48815.htm?selectedLocale=en

⁵⁵ Fact sheet on Operation Ocean Shield

<http://www.aco.nato.int/page208433730.aspx>

Combined Task Force 151 (CTF-151), with the sole mission of conducting anti-piracy operations in the Gulf of Aden and the waters off the Somali coast in the Indian Ocean. In August 2008, CTF 150 and partner forces agreed to the establishment of a Maritime Security Patrol Area (MSPA) in the Gulf of Aden to serve as a dedicated, more secure transit zone for merchant vessels. The MSPA has been credited in part with lowering the success rate of Somali pirates in the Gulf of Aden transit zone. Within the MSPA, eastbound and westbound Internationally Recommended Transit Corridors (IRTC) have been established “to deconflict commercial transit traffic with Yemeni fishermen, provide a measure of traffic separation, and allow maritime forces to conduct deterrent operations in the [Gulf of Aden] with a greater degree of flexibility.” The list of countries participating in CTF-151 is fluid and consists of personnel and ships from the United States, the United Kingdom, Canada, Denmark, France, Germany, Greece, Italy, the Netherlands, Pakistan, Saudi Arabia, Spain, South Korea, Turkey and Yemen, among others. Task force operations are coordinated from the NAVCENT command center in Bahrain. U.S. Coast Guard Law Enforcement Detachments (LEDETs) operate aboard CTF-151 vessels and perform support and advisory missions during boarding operations and provide training to task force personnel on evidence procedures, maritime law, and related issues. As of August 2009, NAVCENT reported that, since January 2009, CTF-151 and other cooperating naval forces had “encountered 527 pirates; 282 of which were disarmed and released, 235 disarmed and turned over for prosecution, and 10 were killed.” The task force works in close co-operation with other naval forces engaged in anti-piracy operations in the area, which include the EU Naval Force Somalia, the NATO task force and units from individual countries.

3.2.4 A homogeneous take on use of force against pirates?

All three major anti-piracy operations off the coast off Somalia are founding their mandate in the Security Council resolutions described above. As mentioned, despite the wording of the resolutions (all necessary means,) the resolutions were not intended to give legitimize a greater use of force against pirates that which is already implied in the UNCLOS. Recent events have shown that some countries however, are less reluctant to use deadly force to achieve their goals in their combat against piracy. Both France and USA have used military

special forces to “take out” pirates when negotiations have failed.⁵⁶ The use of lethal force against Somali pirates has caused some pirates to “vow to kill French and American hostages.”⁵⁷ It remains to be seen whether this use of deadly force will act as a deterrent against pirates or make the situation escalate to a political conflict. While the three international anti-piracy operations mentioned above have common sets of rules of engagement that apply to the participating states, there are several states who are conducting national anti-piracy operations. These may have different rules of engagement and a different take entirely on the use of force against pirates. There is, nevertheless, a general consensus among most international actors, that the rules on use of force against pirates are sufficient to combat pirates effectively. Rather, it is operational rather than legal challenges that are most apparent during the enforcement face of antipiracy operations. The investigation following the identification and interception of a pirate ship that have been considered a major operational challenge. In that phase which is crucial for the gathering and collection of evidence for later criminal proceedings, the dual nature of counter-piracy missions becomes evident: military means and military personnel are used for a genuine law enforcement task. Military personnel are first and foremost trained and equipped for the conduct of hostilities and not for policing functions. Thus, it has happened again and again that “the militaries poisoned the investigation” in not securing evidence correctly.⁵⁸

⁵⁶ “French Forces kill two pirates”

http://www.upi.com/Top_News/2009/04/10/French-forces-kill-two-pirates/UPI-51441239392723/

“The Maersk Alabama”

http://en.wikipedia.org/wiki/MV_Maersk_Alabama#November_2009_pirate_attack

⁵⁷ “Pirates vow to kill U:S, French sailors”

<http://edition.cnn.com/2009/WORLD/africa/04/13/somalia.pirates.revenge/index.html>

⁵⁸ “Counter-Piracy Operations in the Gulf of Aden

Expert Meeting on Multinational Law Enforcement & Sea Piracy held at the Max Planck Institute for Foreign and International Criminal Law” Press Release January 15th 2010.

<http://www.mpg.de/english/illustrationsDocumentation/documentation/pressReleases/2010/pressRelease20100115/index.html>

4 A Law on Prosecution?

4.1 Prosecution under UNCLOS.

As described earlier, Piracy by its definition can only occur on the High Seas, or in any case outside the jurisdiction of any State. Hence, the right of the enforcing State to prosecute pirates is only valid if the suspected offense is within the UNLCOS definition of piracy.

The mandate to prosecute pirates is found in article 105 of UNLCOS: “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.”

By its wording, UNCLOS only gives prosecutorial rights to the state of the capturing warship; in the way that it may try the suspected pirates before its own courts without consulting others. The wording of art. UNCLOS does not provide prosecutorial rights to any other parties, such as the flag state, the national states of the crew, nor the national states of the suspected pirates. So while the jurisdiction over the interdiction of pirates is indeed universal, the jurisdiction over prosecution of pirates according to UNCLOS may seem limited to one state, the state that took the suspected pirates captive. It is the capturing state that initially “owns” the pirates.

The right to prosecute pirates, however, does not necessarily become the exclusive right of the seizing State alone. As a matter of customary international law, every State has jurisdiction to prosecute a pirate subsequently present within their territory, irrespective of any connection between the pirate, their victims or the vessel attacked and the prosecuting State.⁵⁹ States may also have jurisdiction over suspected pirates on other grounds as a matter of national law. Following ordinary principles of criminal jurisdiction, the State of

⁵⁹ ICJ: ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM) Summary of the Judgment of 14 February 2002. Separate opinion of Judge Guillaume, President. Page 7

the suspected pirate's nationality, the State of nationality of the suspected pirate's victim and the flag State of any involved vessels may all also have valid claims of jurisdiction over a suspected pirate.⁶⁰ One problem with the universal jurisdiction over piracy supplied by UNCLOS is the lack of conflict resolution when several states can claim jurisdiction over pirates. This has not yet been a problem in the international community, as it seems most states would rather not have full jurisdiction over pirates.

Another problem is that UNCLOS does not obligate states to apprehend and prosecute pirates. While UNCLOS art. 100 obliges State Parties "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," this does not put any obligation on the individual states to take it on themselves to apprehend and prosecute pirates. One could claim that that entire universal jurisdiction adds to conventional categories of international jurisdiction is the ability of unaffected nations to prosecute. Given that prosecution is costly, rational, self-interested states would not expend scarce resources to punish crimes that did not directly harm them. Nations using universal jurisdiction would bear all of the costs of enforcement while receiving none or little of the benefits.⁶¹

Given that the universal jurisdiction of UNCLOS neither gives jurisdictional priority nor obligation to apprehend and prosecute, the jurisdiction over pirates on the High Seas seems to be victim to a mix of political will and "first come, first served" policy. Should any pirates be apprehended and prosecuted under the universal jurisdiction of UNCLOS, their fate will be at the arbitrary mercy of the piracy laws of the country that happened to capture them.

4.2 Implication of the UNSCR on the law on prosecution.

The UNSCR 1816 does not make international law of piracy directly applicable in Somali waters. On the high seas the capturing warships determines where the pirates will be tried and may try them before their own courts without consulting others. This raises a question

⁶⁰ <http://ucl.academia.edu/DouglasGuilfoyle/Papers/116803/Treaty-Jurisdiction-over-Pirates--A-Compilation-of-Legal-Texts-with-Introductory-Notes>

⁶¹ <http://www.law.gmu.edu/pubs/papers/04-25> . Eugene Kontorovich "A Positive Theory of Universal Jurisdiction"

as the disposition of any pirates captured in Somali territorial waters under the resolution. Legal authority to pursue or arrest pirate vessels as granted by UNSCR 1816 is not the same thing as authority to try offenders aboard (prescriptive and adjudicative jurisdiction).

Under the resolution:

*Flag, port and coastal States, States of the nationality of victims and perpetrators of piracy or armed robbery, and other States with relevant jurisdiction under international law and national legislation (are called upon) to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to person under their jurisdiction and control, victims and witnesses and person detained (as suspects).*⁶²

Clearly, any attacks against or aboard a vessel at sea may leave multiple states capable of asserting jurisdiction to prosecute if they can lay hands on the offender. On its face, UNSCR 1816 simply lists every conceivable head of jurisdiction, leaving it to the states involved to settle “disposition and logistics.” For victims and witnesses this is obviously a matter of getting them home safely or on their way, while taking measures to make their evidence available for any subsequent trial. In the case of captured pirates, cooperation in “determining jurisdiction... disposition and logistics” might be thought a euphemism for working out to which they should be handed for prosecution. In fact, there is a prior legal choice to make. The eventual disposition of criminals captured in Somali territorial waters is either a matter for Somalia (on the theory that the territorial principle applies and enforcement jurisdiction has been exercised with Somalia’s consent) or for the interdicting state (on the theory that it has direct authority to deal with the pirates under universal jurisdiction of UNCLOS which is extended by the UNSCRs). The matter may simply be treated in a memorandum of understanding between cooperating states and Somalia. If not, several approaches are possible. On the one hand, the customary principle allowing the state where the offender is present to assert jurisdiction over pirates who have fled the high seas, may indicate that the coastal state, if any state, should have jurisdiction to prosecute.

⁶² SC res. 1816 (2008), Para 11.

Similarly, one could argue that the exercise of criminal jurisdiction within Somalia's territorial waters would ordinarily be Somalia's sole concern and Somalia should determine if who and where the captured offenders are to be tried. On the other hand, the UNSCRs allow the use of "all necessary means" to suppress piracy, including action compatible with that taken on the High Seas. On the High Seas, the flag state of the interdicting vessel has a right to try suspected pirates before national courts. On a broad understanding of "all necessary means" and a strained reading of the word "compatible," this might be thought to extend to the capturing state the right to assert prescriptive and adjudicative jurisdiction. As states exercising this power are meant to be cooperating with Somalia, it could seem that the UNSCR leaves the question of disposition to Somalia. However, as a practical matter, given the limited capacity of the Somali state, the interdicting state having custody will likely have the joy of finding a forum to try the suspects.

Paragraph 9 of UNSCR 1816 provides that the resolution:

applies only (..) to Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under (UNCLOS), with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law.

This was intended to meet the concern of states, such as Indonesia, wishing to avoid any implication that the resolution involved the "modification, rewriting or redefining" of the principles of UNCLOS.⁶³ Indonesia has previously rejected any suggestion that other states might conduct counter-piracy operations within areas of the Malacca Strait falling under territorial waters.

The UNSCR 1846 (2008) gave one notable addition to the initial resolution 1816 (2008) that is notable, concerning the prosecutorial jurisdiction over suspected pirates. The Security Council notes in paragraph 15 of Resolution 1846 (2008) that 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

⁶³ "Security Council condemns acts of piracy, armed robbery off the coast of Somalia", United Nations Department of Public Information press release, 2 June 2008. www.un.org/News/Press/2008/sc9344.doc.htm

or threat thereof or any other form of intimidation.⁶⁴ This would appear expressly to acknowledge the problems encountered in finding states prepared, both in terms of political will and adequate national laws, to prosecute acts of piracy lacking any connection with their vessels or nationals. The hope seems to be that more states may have national criminal laws implementing their obligations under SUA convention than their optional jurisdiction under the law of piracy.⁶⁵

In summary, it may be concluded that states operating in Somali territorial waters, may have the right to prosecute pirates, as long as TFG is consensual to the operation in general.

4.3 SUA and the prosecution of pirates

The SUA convention and its 2005 Protocol are steps taken by the IMO to improve the conditions for combating violent crime against maritime navigation. As of the 2005 Protocol to the SUA Convention it was extended to include acts of maritime terrorism. With The 2005 Protocol to the SUA Convention not yet entered into force, there is little in these conventions authorizing the use of force against ships hijacked by pirates beyond that of the regular jurisdiction of the coastal state to use force within its territorial waters. The implication of the SUA Convention of 1988 is that it obliges the State Parties to make certain acts illegal when committed towards ships under their flag, ships in their territorial water or against their own national.

The SUA convention takes the form of penal law for the State Parties. It strives to cover violent acts against maritime navigation, when these are committed within the territory of a State Party. The convention obliges each State Parties to take measures to establish jurisdiction over the offenses committed against or on board a ship under their own flag; in their own territory, including its territorial sea; by a national of that State; by a stateless person whose habitual residence is in that State; in an attempt to compel that State to do or abstain from doing any act; or when a national of that State is seized, threatened, injured, or

⁶⁴ SUA convention, Articles 2, 5, 6, 8 and 10. The same point was emphasized in the preamble to UNSCR 1851 (2008)

⁶⁵ "Shipping Interdiction and the Law of the Sea" Douglas Guilfoyle (2009). Page 69

killed during the commission of the offense.⁶⁶ Thus it strains to establish jurisdiction over acts of piracy that are not committed on the High Seas only, but also acts committed in territorial waters, usually referred to as “armed robbery at sea.” Hence, the SUA convention is applicable everywhere, even in territorial water

There are however certain limits to the applicability of the SUA convention. One prerequisite is that the ship under attack is coming from or proceeding to an international destination (art. 4 SUA convention.) Secondly, the SUA convention requires the State Parties to make convention offences punishable by domestic law. Thus, it is up to the State Parties to ensure the enforcement of the convention.⁶⁷

Another possible weakness of the SUA conventions is that they require a national or territorial link between the State Parties and the alleged offense. A State Party without a national or territorial link to the offense committed has no jurisdiction over any such offense. Neither does the SUA convention mandate any use of force against persons suspected of such acts, leaving it to the political will of the State Parties on how they will enforce the regulations of the conventions.

The main focus of the convention is prosecution and not prevention; its focus is to ensure that the State Parties prosecute or extradite. The actual enforcement of the domestic law is still at the State Parties discretion. The SUA convention does not authorize any preventive activity, such as rescue missions on board hijacked ships. It is not applicable if the violence on board is insufficient to compromise maritime safety, and it does not apply to intra-state coastal traffic.⁶⁸

⁶⁶ Convention for the Suppression of Unlawful acts of violence against the safety of Maritime Navigation (SUA)

http://www.nti.org/e_research/official_docs/inventory/pdfs/aptmaritime.pdf

⁶⁷ ”Violence at Sea. Piracy in the Age of Global Terrorism.” Peter Lehr. Chapter 7: “Piracy and UNLCOS: Does International Law Help Regional States Combat Piracy?” Martin Murphy.

⁶⁸ ”Violence at Sea. Piracy in the Age of Global Terrorism.” Peter Lehr. Chapter 7: “Piracy and UNLCOS: Does International Law Help Regional States Combat Piracy?” Martin Murphy.

4.3.1 Obligation to prosecute or extradite under the SUA convention.

For cases of “armed robbery at sea,” the right to prosecute will be dependent on whether the coastal state has established jurisdiction over such crimes, but also the domestic law of the flag Ship, the national states of the crew and the suspected pirates. The SUA convention 1988 obliges the State Parties to establish penal law against pirates in all cases where there interests are involved, whether it is as flag state, coastal state or as the home state of crew *members or suspected pirates. Although this has not been an issue in the international community so far, it could eventually result in overlapping prosecutorial jurisdiction.

Under Article 6, State Parties must make the offences in Article 3 a crime under national law, when committed: (a) against or on board their flag vessels; (b) within their territory, including their territorial sea; or(c) by one of their nationals.⁶⁹In addition States parties may establish criminal jurisdiction where a relevant offence is committed, against one of their nationals or in an effort to compel their government to do or abstain from doing any given act.⁷⁰ The most important jurisdictional provisions are those dealing with the obligation to either extradite or submit the case for consideration by prosecutorial authorities. Where a State finds a suspect or offender within its territory and another State party or parties have jurisdiction under Article 6, then the territorial State: “shall ... if it does not extradite him, be obliged ... to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.” To this end each party is obliged to establish jurisdiction over such offenses that are made illegal by the convention.⁷¹

The question arises whether a suspect held aboard a warship is within that flag state’s “territory” for the purposes of the SUA Convention duty to extradite or prosecute This is somewhat unclear. As described under chapter 6.2 in this thesis, ships are considered by customary law to be under the jurisdiction of the flag state. That does not necessarily mean

⁶⁹ The SUA Convention

http://www.nti.org/e_research/official_docs/inventory/pdfs/aptmaritime.pdf

⁷⁰ <http://ucl.academia.edu/DouglasGuilfoyle/Papers/116803/Treaty-Jurisdiction-over-Pirates--A-Compilation-of-Legal-Texts-with-Introductory-Notes>

⁷¹ Article 10(1), SUA Convention. http://www.nti.org/e_research/official_docs/inventory/pdfs/aptmaritime.pdf

that the physical hull of the ship is to be considered part of the flag state's jurisdictional territory. Some legal experts consider warships not to be "territory" per se, but an object with a special status at international law. Human rights bodies or courts have found vessels flagged to, or under the effective control of, a State fall within its "jurisdiction" under human rights treaties having principally territorial application⁷². A State's sovereign control over a warship is much stronger than in the case of other flag vessels: warships on the high seas enjoy complete immunity from the jurisdiction of other States. However, simply because it is possible for "territorial" obligations to apply on board a warship on the high seas, it does not mean that the Flag state will be obligated to prosecute any suspected pirates on board. Under the SUA conventions, the State Parties are obliged to submit the case to competent authorities for a decision; it's not an absolute obligation to prosecute in their own national courts. Second, despite the reference to "extradition" any such obligation could be considered satisfied where a suspect is put off in the port of a SUA Convention party.

4.4 Status of apprehended pirates. Human rights issues.

One important legal question is the status of suspected pirates that have been detained by warships but not yet transferred to any judicial authority for prosecution. This has to be considered in correlation to the legal definition of what the naval forces are doing when they are apprehending pirates. Under French law, a captain may apprehend and hold pirates, but only a judicial authority can arrest and detain them. The issue of terminology is an important one; between capture and their handing over to a judicial authority the pirates are 'in the hands of' the navy, to give one example of the language used.⁷³ Navies whose

⁷² E.g. *PK et al v Spain*, Committee against Torture, Decision, 21 November 2008, UN Doc. CAT/C/41/D/323/2007, paragraph 8.2; *Medvedev v France*, European Court of Human Rights (Application No. 3394/03), Judgment, 10 July 2008.

⁷³ "Pirates and How to Deal With Them: Legal Issues"

International Law Discussion Group of the Chatham House, London

Participants: Agustin Blanco-Bazan, Senior Deputy Director Legal Affairs, IMO

Cdre Neil Brown, Royal Navy, Dr Douglas Guilfoyle, University College London

Chair: Elizabeth Wilmshurst, Associate Fellow, International Law, Chatham House

<http://www.chathamhouse.org.uk/events/view/-/id/1135/>

states are parties to the European Convention on Human Rights are obliged to comply with the requirements of that Convention. In the case of *Medvedev* before the European Court of Human Rights, a French naval ship had captured a Cambodian-flagged vessel suspected of drug- running. The Court ruled against France for failure to properly inform judicial authorities of the navy's actions and on the grounds that it did not have a secure basis in both international and national law for their arrest. France has appealed to the Grand Chamber and is making changes to its system of *préfets maritimes*. However, the Court dismissed a claim that the applicants in *Medvedev* had not been brought promptly before judicial authorities as there was no reasonable alternative to holding them for the 13 days required to take them to port.

Given that it can take many days to get from the Gulf of Aden to Kenya, the most popular destination for captured pirates, navies cannot be expected to hand over pirates immediately to a judicial authority. There is the question is as to whether this raises problems of compatibility with the ECHR (Article 5). Pirates captured in the Gulf of Aden are not arrested until they arrive in Kenya, where they see a judge within 24 hours. There is a considerable length of time when pirates are not free but have yet to be arrested. Drawing on the *Medvedev* case, one could argue that if the pirates are held in order to be handed over to judicial authorities for arrest and detention, and the pirates were in fact taken to the appropriate country to be handed over, holding them for the necessary period of time for the naval vessel to get to that country should not breach the ECHR. This is a legal issue that has yet to be settled in international law. Naturally, the time pirates can be held on board is limited. States that choose to apprehend suspected pirates have very little time to decide what to do with them, before they are in danger of violating ECHR. In stead of trying to find a legal recourse to have suspected pirates prosecuted, it would seem simpler to have them released at shore, which would still fulfill the obligations of UNCLOS and the SUA convention.

4.5 Prosecution in Kenya and other third states.

The unwillingness by states to use universal jurisdiction to prosecute Somali pirates domestically and the ineffective "catch and release" method that has been the practice by

some states, have caused the patrolling nations to find other solutions. One solution has been to find another country willing to prosecute the pirates.⁷⁴ In a Memorandum of Understanding signed on January 16, 2009 between Kenya and the United States, Kenya agreed to try captured pirates.⁷⁵ This is not the first time Kenya has agreed to such an arrangement. In another, Memorandum of Understanding of December 11, 2008, Kenya agreed to receive and prosecute suspected pirates captured in the High Seas by the United Kingdom. The British regarded Kenya as an alternative to trying suspects in Somalia, which the British argued had “no effective central government or legal system.” Further, on Friday, March 6, 2009, Kenya signed a similar agreement with the European Union⁷⁶ Through these agreements hundreds of pirates have been transferred to the jurisdiction of Kenya so far. The material content of all these memorandums have not been disclosed yet; however, it the transfer of suspected pirates to Kenya relies on the willingness of the Kenyan government to take responsibility for prosecuting the suspects.

The various agreements between Kenya and the different western states have been criticized by Human Rights Groups because of the lack of guarantees that Human Rights will be respected. All though Kenya has been considered far better than its neighbors concerning Human Rights, critics have pointed out several breeches to Human Rights in the Kenyan penal system.⁷⁷

In December 2009 a group band of suspected Somali pirates captured by the Dutch warship participating in the EU operation ATALANTA after a failed attack on a cargo ship were to be freed after no country would agree to prosecute them. The decision was made by the EU after they had tried in vain to find a country that was willing to prosecute. Despite the fact

⁷⁴The American Society of International Law: Infocus 090812. Introductory Note to the Exchange of Letters between European Union and Kenya to Prosecute Pirates.

⁷⁵ ”Shipping Interdiction and the Law of the Sea” Douglas Guilfoyle (2009). Page 70

⁷⁶ “Jurisdiction to Prosecute Non-National Pirates Captured By Third States Under Kenyan and International Law” By James Thuo Gathii (Associate Dean for Research Scholarship and Governor George E. Pataki Professor of International Commercial Law at Albany Law School, Advocate, High Court of Kenya.) <http://ssrn.com/abstract=1360981>

⁷⁷ “Germany Turns Somali Pirates Over to Kenya for Prosecution”

<http://www.dw-world.de/dw/article/0,,4087344,00.html>

that EU has signed agreements with the Seychelles and Kenya for them to press charges against suspected pirates, the two countries declined to do so.⁷⁸

The capacity for the courts of the Seychelles and Kenya is not unlimited, and as this recent example shows; Kenya is not obliged by its agreements to accept the transfer of suspected pirates to their jurisdiction. A growing concern has been that the pirates being transferred to Kenyan jurisdiction will bring further backlog to an already overworked penal system.⁷⁹ Just recently, Kenya refused to accept any more transfers of suspected pirates, on the grounds that it did not have the capacity to prosecute more pirates. Also The Seychelles have stated that their capacity is overwhelmed.⁸⁰

4.6 Practical application of the laws on prosecution of pirates,

Despite the general consensus that all States may have jurisdiction over pirates, one major problem with the many nations participating in the various naval operation mentioned above, is that more often than not they practice a “catch and release”- policy with captured pirates. By this policy, the apprehended pirates are disarmed and the subsequently released at shore or back into their own vessels. When a reason for this act is given, it is often that the interdicting state finds that it “does not have jurisdiction” to prosecute in national courts. This is striking, since most, if not all, countries agree on the universal jurisdiction supplied by UNCLOS on the prosecution of pirate, are parties to the SUA convention; even more so since all States participating in anti-piracy seem to have jurisdiction to interdict suspected pirate ships.

4.6.1 Prosecution of suspected pirates under operation ATALANTA

While the apprehension of suspected pirates is executed under a common set of rules, there is no common penal law under the EU that allows for the EU to prosecute pirates. The

⁷⁸ 'Somali pirates' held by Dutch freed: defense ministry

<http://www.eubusiness.com/news-eu/netherlands-somalia.20n/?searchterm=None>

⁷⁹ “ U.S. Navy Hands Over 17 Pirates to Kenya”

http://www.javno.com/en-world/us-navy-hands-over-17-pirates-to-kenya_264580

⁸⁰ “Kenya rejects suspected pirates”

<http://www.news24.com/Africa/News/Kenya-rejects-suspected-pirates-20100326>

military personnel involved in the operation can apprehend, detain and transfer persons who are suspected of, or who have committed, acts of piracy or armed robbery in the areas where they are present. They can seize the vessels of the pirates or the vessels captured following an act of piracy or an armed robbery and which are in the hands of the pirates, as well as the goods on board. While the mandate of operation ATALANTA provides for the right to use force against suspected pirates, the right to prosecute comes from the general right to prosecute pirates under UNCLOS art. 105. This results in the interesting situation where the Commanding Officer of a vessel may apprehend suspected pirates on behalf of the European Union, but it provides the Flag state of that specific vessel with the right to prosecute.

Should the apprehending state be unwilling to prosecute the suspected pirates, the suspected pirates may be transferred to “to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.”⁸¹ This does not mean that the power to decide if and where to transfer the suspected pirates lies exclusively with the apprehending state. Under the NAVFOR command, should the apprehending state be unwilling to have the suspected pirates transferred to its jurisdiction, it is the Central Command of EUNAVFOR that decides if the suspected pirates should be transferred to a third state party or released.

In February 2009 the Council of the European Union, adopted an agreement with Kenya to have suspected pirates transferred to Kenya’s jurisdiction. This agreement was made in accordance with Article 24 of the EU Treaty and was based on the an exchange of letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR). In December 2009 a similar agreement was concluded with the Seychelles. These agreements allow for the transfer of suspected pirates to the jurisdiction of Kenya and Seychelles.

That the EU can conclude such an agreement on behalf of its member States is based on the EU treaty article 24; the legal grounds for Kenya and the Seychelles to prosecute suspected

⁸¹COUNCIL JOINT ACTION 2008/851/CFSP Article 12.

pirates to a third country is based on customary international law that any state may prosecute a suspected pirate present within their territory. The legal grounds for the actual transfer may be found in The SUA Convention article 6.

4.6.2 Prosecution of suspected pirates under Operation Ocean Shield and CTF 151

The ships participating in the NATO operation Ocean Shield as well as the ships participating in the US led operation Combined Task Force 151 are under respective central military command. The NATO does not, however, have a common set of rules on how to allow for the prosecution of suspected pirates (nor does the CTF 151). Since there are no uniform international laws on how to prosecute these pirates, each state uses its own national law. This practice means that even when working under the NATO-led operations, it is left up to each state to decide the fate of apprehended pirates. If a state does not have any legal recourse, captured pirates are set free. The European Allies participating in NATO the operation also do not transfer these pirates to any country that still possesses the death penalty as a legal recourse.⁸² It is up to the individual participating nations to establish relevant domestic law, or conclude bilateral extradition treaties with countries willing and able to prosecute suspected pirates.

On January 16, 2009, Kenya and the United States signed a Memorandum of Understanding (MOU) under which Kenya agreed to try suspected pirates captured by the U.S.⁸³ This allows for the transfer of suspected pirates captured by U.S forces to be transferred to the jurisdiction of Kenya, and formalizes an ad-hoc agreement between the

⁸²“NATO’s Anti-piracy Operations: Strategic and Political Implications”

Nathan G.D. Garrett and Ryan C. Hendrickson

www.atlcom.nl/upload/Garrett%20&%20Hendrickson.pdf

⁸³ “Jurisdiction to Prosecute Non-National Pirates Captured By Third States Under

Kenyan and International Law” By James Thuo Gathii (Associate Dean for Research Scholarship and

Governor George E. Pataki Professor of International Commercial Law at Albany Law

School, Advocate, High Court of Kenya.)

two respective countries. This MOU is similar to the agreement between the European Union and Kenya, as well as the agreement between United Kingdoms and Kenya. As with the EU operation ATALANTA, right to prosecute pirates that are apprehended under Operation Ocean Shield or Combined Task Force 151 stems from the universal jurisdiction provided in UNCLOS. This mean that while the order to capture suspected pirates may come from a central command, the responsibility for the suspected pirates lies solely with the flag states of the capturing warship. Should the interdicting states not wish to prosecute, they are not obliged by the mandate of their operations to transfer them to a state party who is willing to prosecute (unlike EU countries under operation ATALANTA).⁸⁴

4.6.3 USA

U.S. courts are reluctant to exercise jurisdiction unless the vessel involved is American.⁸⁵. The United States of America currently has ships operating in two different anti-piracy operations in the Red Sea: the NATO operation Ocean Shield, as well as the US-led operation Maritime Force (Combined Task Force 151). The vast majority of pirates apprehended by US ships in the two operations have been either disarmed and released, or transferred to Kenya for prosecution. Only in the case of the hijacking of Maersk Alabama, and the following rescue of the ship and later the captain, it was decided to bring the surviving pirate to the United States for arrest and prosecution. This decision was made based on the fact that Maersk Alabama was sailing under the flag of the United States of America and all of the crew members where American citizens.

4.6.4 Germany

Similar to USA, Germany has been unwilling to prosecute pirates without a direct threat to national interests. Under the German Code of Criminal Procedure criminal acts that have

⁸⁴ They might, however, be obliged to transfer the suspected pirates into the custody of a state party that is willing to prosecute on the basis of the obligations under the SUA conventions.

⁸⁵ "What to do with pirates?" By Taylor Dalton. Published in The Cornell Daily Sun
<http://cornellsun.com/section/opinion/content/2009/12/04/what-do-pirates>

been committed on the High Seas, outside German territory, as is the case when a vessel flying the German flag has been attacked, are usually dealt with by the Public Prosecutor's office at the ship's port of registry (10 StPO).⁸⁶ In the case of attacks affecting maritime transport (316c German Criminal Code), German law prescribes that prosecution is the responsibility of the German authorities. In case of crimes committed abroad, the Public Prosecutor does not have the same strict obligation to prosecute which it has in domestic crime. Criminal prosecution measures may be initiated by the Public Prosecutor at its discretion (153c StPO). Active prosecution measures will only be initiated if the German State has a particular, well-defined interest in prosecution. By the definition of the German government⁸⁷ that includes cases:

- when German nationals have been killed or injured
- when a ship flying the German flag has been attacked by pirates
- when pirates are blackmailing a German shipping company
- when pirates have been detained by the German Navy

Germany has as of yet not attempted to have pirates prosecuted in German courts. In August 2009 a German warship apprehended a pirate boat near the Somali coast and found AK-47 assault rifles, ammunition and anti-tank weapons on board. Despite the explosive discovery, the pirates went free after being disarmed.⁸⁸

On two separate occasions in the first quarter of 2009 pirates were arrested after attempting to attack German ships. Both these groups were first transferred to German warships, and then transferred to Kenyan authorities for prosecution.⁸⁹

⁸⁶ Statement to International Foundation of the Law of the Sea on Prosecution of acts of piracy off Somalia by German prosecution authorities
<http://www.iflos.org/media/34039/brandt%20statement%20piracy%20maritime%20talks%202009.pdf>.

⁸⁷ Statement to International Foundation of the Law of the Sea on Prosecution of acts of piracy off Somalia by German prosecution authorities
<http://www.iflos.org/media/34039/brandt%20statement%20piracy%20maritime%20talks%202009.pdf>.

⁸⁸ "Governments struggle to combat piracy with legal measures" Sonia Phalnikar
<http://www.dw-world.de/dw/article/0,,4595472,00.html>

⁸⁹ "Germany hands over Somali pirates to Kenya"
<http://www.dw-world.de/dw/article/0,,4163109,00.html>

4.6.5 Denmark

Denmark is currently operating in the NATO operation Ocean Shield and the US-led operation Maritime Force. Denmark has no provisions in their penal codes to treat piracy as a punishable offence. It should however, be mentioned that Denmark is party to the 1988 SUA convention which obliges them to make such offences punishable by law.

Lacking a legal recourse to prosecute pirates, Denmark has elected to find other ways of dealing with apprehended pirates. In the start of the anti-piracy operations, Denmark followed the catch and release policy, by disarming and releasing apprehended pirates.⁹⁰

The Danish Navy ship Absalon on 17 September 2008 captured 10 pirates in the waters off Somalia. After six days' detention and the confiscation of their weapons, ladders, and other implements used to board ships, the Danish government decided to free the pirates by putting them ashore on a Somali beach. The Danish authorities had come to the conclusion that the pirates risked torture and the death penalty if surrendered to (whatever) Somali authorities. This was unacceptable, as Danish law prohibits the extradition of criminals when they may face the death penalty. Moreover, they were not ready to try them in Denmark as it would be difficult (in light of the possible abuses they would risk) to deport them back to Somalia after their sentences were served⁹¹.

In May 2009, five suspected Somali pirates nabbed by the Danish navy went on trial in a court in the Netherlands.⁹² All though Denmark is a member of the European Union, it cannot participate in the EU transfer agreement due to its defense opt-out, and has therefore worked to enter its own individual bilateral agreements with Kenya and Tanzania. These agreements will contain regulations for compliance with fundamental human rights,

⁹⁰ "Danish navy releases 10 Somali pirates" by Marcus Hand

<http://www.lloydslist.com/ll/news/danish-navy-releases-10-somali-pirates/20017574257.htm>

⁹¹ The European Journal of International Law Vol. 20 no. 2 "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia." Tullio Treves

⁹² "Governments struggle to combat piracy with legal measures" Sonia Phalnikar

<http://www.dw-world.de/dw/article/0,,4595472,00.html>

including the inapplicability of the death penalty in connection with the receiving country's treatment of suspected pirates. An agreement with Kenya was finalized in July 2009.⁹³

4.6.6 France

While France is participating in the EU operation ATALANTA it has the option to transfer apprehended pirates to Kenya or the Seychelles on the basis of the agreements between EU and the two respective countries. Unlike most western countries, France has also made the decision to try a group of suspected pirates before a national court, after a hijacking incident in 2008.⁹⁴

France is also participating in the US-led coalition Maritime Force. On several occasions where the French ships participating in this operation have apprehended pirates, the French government decided to send the suspected pirates to Puntland for prosecution⁹⁵, Somalia's northern breakaway region.

4.6.7 The Netherlands

The Netherlands are participating in the EU operation ATALANTA as well as the NATO operation Ocean Shield. For the duration of these operations, the Dutch warships have on several occasions apprehended suspected pirates. The consequences for the pirates for being apprehended by the Dutch have been arbitrary at best.

The Dutch ship participating in the EU operation, is under the policy of the EU and Somali pirates apprehended by it may be transferred to Kenya, if the Netherlands do not want to prosecute. The Dutch ship participating in the NATO operation does not have such an option. In April 2009 Dutch navy soldiers from the frigate 'De Zeven Provinciën' boarded a fishing boat in the Gulf of Aden with nine Somalis on board who had attempted to kidnap a Greek-owned freighter. The soldiers confiscated machine guns and an anti-tank missile,

⁹³ "Politikpapir for Danmarks Engagement i Somalia" Danish Foreign Ministry

<http://www.afrika.um.dk/NR/rdonlyres/4534134B-6930-4357-8209->

⁹⁴ "6 Somali pirates arrive in Paris for trial"

http://www.usatoday.com/news/world/2008-04-16-france-pirates_N.htm

⁹⁵ "French navy hands over four pirates, two dead to Puntland"

http://www.terradaily.com/reports/French_navy_hands_over_four_pirates_two_dead_to_Puntland_999.html

and freed sixteen Yemeni fishermen who had been held captive on their own boat and used for forced labor for the past week. After interrogating the Somalis, the Dutch commander let the pirates go. The decision to release the suspected pirates was made by a deputy officer from the Dutch Justice Ministry on board the ship. In this case, the decision whether or not to prosecute detained pirates was left up to the Netherlands because De Zeven Provinciën was part of the NATO-mission and the alliance had not made any agreements about prosecution

In the Netherlands, it is still disputed whether or not the Netherlands have jurisdiction to prosecute pirates. While some experts argue that the UNCLOS allows for any country to prosecute pirates, the official policy from the Dutch government has been that prosecution in the Netherlands should only happen if there is a “clear Dutch interest.”

In early 2009, the Netherlands did detain and prosecute five suspected pirates who had hijacked a ship sailing under the flag of the Dutch Antilles.⁹⁶ Although piracy is outlawed in the Netherlands by article 381 of the criminal code, it had never before been applied in a Dutch criminal court.⁹⁷

5 Conclusion

The international legal framework establishes a series of different options to have suspected pirates apprehended and prosecuted. While the International community seems to have no problems interdicting suspected pirates on the high seas, the failure to prosecute suspected pirates has been a recurring problem. One problem seems to be that UNLCOS which regulates the jurisdiction over pirates on the High Seas does not oblige any states to prosecute the suspected pirates. The SUA convention on the other hand, obliges the

⁹⁶ 'Somali pirates' held by Dutch freed: defense ministry

<http://www.eubusiness.com/news-eu/netherlands-somalia.20n/>

⁹⁷ “Pirates tried under never used Dutch law” by Sebastiaan Gottlieb

http://www.nrc.nl/international/article2122573.ece/Pirates_tried_under_never_used_Dutch_law

member States to either prosecute pirates or extradite them to countries that are having the possibility to prosecute. However, as stated above, obligation to extradite may simply mean handing suspected pirates over to some other state that has jurisdictional claims over them, i.e. setting them ashore in another SUA member state. Furthermore, should a state follow all its international obligations, whether it can or will prosecute suspected pirates under its jurisdiction is still dependent on domestic law. While the SUA conventions obliges its member states to amend domestic law in order to provide jurisdiction over suspected pirates in any case, it does not oblige them to actually prosecute. Piracy is considered an international crime, but it is not subject to an international obligation to prosecute, unlike other international crimes.⁹⁸ Hence, the obligation to prosecute would have to be incorporated in domestic law. In the penal system of most States the obligation to prosecute criminal acts is never completely absolute, but subject to an evaluation of whether the crime in itself is worth prosecuting on the background of its heinousness and not the least, what damaging effects it has had to the society in question. The standards for this evaluation are set by the political governance of the state in question. This means that in the end, it's up to the political will of the respective countries whether the suspected pirates are prosecuted or not.

The logistical and legal burdens involved in transporting pirate suspects to Western countries can be daunting. Building a trial, gathering the evidence and witnesses is both costly and time consuming, and the benefit for the prosecuting state may be questionable. If a prosecution fails, the burden lies with that country. Furthermore, there is always the prospect the suspected pirate might then claim asylum.⁹⁹

Some countries, such as Germany and Russia, have argued for the establishment of an international court to prosecute pirates. As the option for to transfer the suspected pirates to Kenya or The Seychelles seems to be no longer viable, and the willingness to prosecute pirates in national courts is lacking, this might be the only solution with a future. However,

⁹⁸ “The Obligation to Prosecute International Law Crimes” Jan Wouters

<http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>

⁹⁹ <http://news.bbc.co.uk/2/hi/africa/8059345.stm>

while it may solve the jurisdictional concerns, and may ensure that all apprehended pirates are prosecuted, it does not solve the question of where the pirates should be imprisoned after an eventual verdict. An international court would certainly require high Human Right standards off the prisons where the pirates would be incarcerated. This means that the pirates in effect would not be returned to Somalia, because of the failing prison system. Any State that accepts Somali pirates either to be prosecuted in a national court or to serve a prison sentence, would still run the risk of the pirates being “non-returnable” on humanitarian grounds, because of the situation in Somalia. This is one of the main reasons for the States being unwilling to attempt to prosecute pirates in the first place; an international court would not solve this problem.

Another way to solve the problem of the reluctance to prosecute might be to make the prosecution of apprehended pirates obligatory in international law, at the same level as other international crimes.¹⁰⁰

Without a change in the practice of international law or a major shift in the political will of the states involved in anti-piracy operations, the majority of apprehended pirates will not be prosecuted, and the practice of catch-and-release will be continued. In any event, the final solution to the piracy problem must be sought not only in the context of the legal framework, but in the political will of the international community to resolve the situation in Somalia. Without a more stable Somali state, the prospect of solving the piracy problem remains dim.

¹⁰⁰ “The Obligation to Prosecute International Law Crimes” Jan Wouters

<http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>

6 References

CASES

ICJ: The case of the SS Lotus.

http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/

ICJ: ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM) Summary of the Judgment of 14 February 2002. Separate opinion of Judge Guillaume, President. Page 7

<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=36&case=121&code=cobe&p3=5>

J.H.A v Spain, Committee Against Torture, Decision, 21 November 2008, UN Doc.

CAT/C/41/D/323/2007, paragraph 8.2;

<http://www.unhcr.org/refworld/docid/4a939d542.html> [accessed 13 April 2010]

Medvedev v France, European Court of Human Rights (Application No. 3394/03), Judgment, 10 July 2008.

TREATIES AND STATUTES

1958 Geneva Convention on the High Seas

http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf

Law No. 37 on the Territorial Sea and Ports, of 10 September 1972 of Somalia

<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SOM.htm>

STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA.

http://www.itlos.org/start2_en.html

United Nation's Convention on the Law of the Sea

http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

The Convention on Suppression of Unlawful Acts against the Safety of Maritime Navigation

<http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf>

2005 protocol to the SUA Convention

<http://www.unhcr.org/refworld/pdfid/49f58cee2.pdf>

Status Of IMO conventions by country

http://www.imo.org/Conventions/mainframe.asp?topic_id=248

RESOLUTIONS

IMO Doc. A 25/Res.1002 (December 2007)

<http://www.vta.ee/atp/public/1002.pdf>

Resolution 1816 (2008) Adopted by the Security Council at its 5902nd meeting on 2 June 2008

http://www.un.org/Docs/sc/unsc_resolutions08.htm

Resolution 1846 (2008) adopted by the Security Council at its 6026th meeting, on 2 December 2008

http://www.un.org/Docs/sc/unsc_resolutions08.htm

Resolution 1951 (2008) Adopted by the Security Council at its 6046th meeting, on 16 December 2008

http://www.un.org/Docs/sc/unsc_resolutions08.htm

Resolution 1897 (2009) Adopted by the Security Council at its 6226th meeting, on 30 November 2009

http://www.un.org/Docs/sc/unsc_resolutions09.htm

DECISION 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (ATALANTA)

<http://eur->

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0019:0020:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0019:0020:EN:PDF)

COUNCIL JOINT ACTION 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast

<http://eur->

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:301:0033:0037:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:301:0033:0037:EN:PDF)

LITERATURE

“Principles of Public International Law” by Ian Brownli. Sixth edition 2003

“Analysis of Somali Pirate Activity in 2009” UNITAR

<http://unosat-maps.web.cern.ch/unosat->

[maps/SO/Piracy/2009/UNOSAT_Somalia_Pirates_Analysis](http://unosat-maps/SO/Piracy/2009/UNOSAT_Somalia_Pirates_Analysis)

IML (International Legal Materials) Infocus 090812 ”Introductory Note to Exchange of letters between European Union and Kenya to Prosecute Pirates.”

“Piracy figures for 2009 surpass those for previous year ” International Maritime Bureau

http://www.icc-ccs.org/index.php?option=com_content&view=article&id=374:piracy-figures-for-2009-surpass-those-for-previous-year&catid=60:news&Itemid=51.

”Maritime Security: Fighting Piracy in the Gulf of Aden and Beyond” Published on June 24, 2009 by James Carafano, Ph.D. , Richard Weitz, Ph.D. and Martin Andersen

<http://www.heritage.org/Research/NationalSecurity/sr0059.cfm>

Chinese Journal of International Law Advance Access: “ New Developments in the International Law of Piracy” by Zou Keyuan.

<http://chinesejil.oxfordjournals.org/cgi/content/abstract/jmp006>

Eugene Kontorvich: ”The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation.” Harvard International Law ,vol. 45. P. 188-189

<http://www.harvardilj.org/print/28>

“About IMO”

http://www.imo.org/About/mainframe.asp?topic_id=3

” IMPLICATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA FOR THE INTERNATIONAL MARITIME ORGANIZATION” Study by the Secretariat of the

International Maritime Organization (IMO), LEG/MISC.6

www.imo.org/includes/blastData.asp/doc_id=4671/6.pdf ‘

”Violence at Sea. Piracy in the Age of Global Terrorism.” Peter Lehr. Chapter 7: “Piracy and UNLCOS: Does International Law Help Regional States Combat Piracy?” Martin Murphy.

“Shipping Interdiction and the Law of the Sea” Douglas Guilfoyle (2009).

Douglas Guilfoyle: Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes

<http://ucl.academia.edu/DouglasGuilfoyle/Papers/116803/Treaty-Jurisdiction-over-Pirates--A-Compilation-of-Legal-Texts-with-Introductory-Notes>

Eugene Kontorovich “A Positive Theory of Universal Jurisdiction”

<http://www.law.gmu.edu/pubs/papers/04-25>

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS OF VIOLENCE
AGAINST THE SAFETY OF MARITIME NAVIGATION (SUA CONVENTION)

<http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf>

Fact sheet on the SUA Convention.

http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686

Fact sheet on the SUA convention

<http://cns.miis.edu/inventory/pdfs/maritime.pdf>

The Report of the Monitoring Group Of Somalia (Under the Security Council Committee)

www.consilium.europa.eu/uedocs/cmsUpload/N0865501.pdf

”Security Council condemns acts of piracy, armed robbery off the coast of Somalia”,

United Nations Department of Public Information press release, 2 June 2008.

www.un.org/News/Press/2008/sc9344.doc.htm

Fact sheet on Operation ATALANTA

<http://www.eunavfor.eu/about-us/mission>

Article on Counter-piracy operations.

http://www.nato.int/cps/en/natolive/topics_48815.htm?selectedLocale=en

Fact sheet on Operation Ocean Shield

<http://www.aco.nato.int/page208433730.aspx>

NATO's Anti-piracy Operations: Strategic and Political Implications"

Nathan G.D. Garrett and Ryan C. Hendrickson

www.atlcom.nl/upload/Garrett%20&%20Hendrickson.pdf

"Jurisdiction to Prosecute Non-National Pirates Captured By Third States Under Kenyan and International Law" By James Thuo Gathii (Associate Dean for Research Scholarship and Governor George E. Pataki Professor of International Commercial Law at Albany Law School, Advocate, High Court of Kenya.)

http://works.bepress.com/james_gathii/16/

Article: "What to do with pirates?"

<http://cornellsun.com/section/opinion/content/2009/12/04/what-do-pirates>

Statement to International Foundation of the Law of the Sea

[http://www.iflos.org/media/34039/brandt%20statement%20piracy%20maritime%20talks%](http://www.iflos.org/media/34039/brandt%20statement%20piracy%20maritime%20talks%20)

Statement to International Foundation of the Law of the Sea

[http://www.iflos.org/media/34039/brandt%20statement%20piracy%20maritime%20talks%](http://www.iflos.org/media/34039/brandt%20statement%20piracy%20maritime%20talks%20)

"Governments struggle to combat piracy with legal measures" Sonia Phalnikar

<http://www.dw-world.de/dw/article/0,,4595472,00.html>

"Germany hands over Somali pirates to Kenya"

<http://www.dw-world.de/dw/article/0,,4163109,00.html>

"Danish navy releases 10 Somali pirates" by Marcus Hand

<http://www.lloydslist.com/ll/news/danish-navy-releases-10-somali-pirates/20017574257.htm>

”Politikpapier for Danmarks Engagement i Somalia”

Danish Foreign Ministry

<http://www.afrika.um.dk/da/servicemenu/Aktuelt/DanmarksSomaliapolitikBredIndsatsTiVandsOgTiLands.htm>

”6 Somali pirates arrive in Paris for trial” 1

http://www.usatoday.com/news/world/2008-04-16-france-pirates_N.htm

“French navy hands over four pirates, two dead to Puntland”

http://www.terraily.com/reports/French_navy_hands_over_four_pirates_two_dead_to_Puntland_999.html

'Somali pirates' held by Dutch freed: defense ministry

<http://www.eubusiness.com/news-eu/netherlands-somalia.20n/>

“Pirates tried under never used Dutch law” by Sebastiaan Gottlieb

http://www.nrc.nl/international/article2122573.ece/Pirates_tried_under_never_used_Dutch_law

“Pirates and How to Deal With Them: Legal Issues”

International Law Discussion Group of the Chatham House, London

Participants: Agustin Blanco-Bazan, Senior Deputy Director Legal Affairs, IMO

Cdre Neil Brown, Royal Navy , Dr Douglas Guilfoyle, University College London

Chair: Elizabeth Wilmshurst, Associate Fellow, International Law, Chatham House

<http://www.chathamhouse.org.uk/events/view/-/id/1135/>

“The Obligation to Prosecute International Law Crimes” Jan Wouters

<http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>

“Germany Turns Somali Pirates Over to Kenya for Prosecution”

<http://www.dw-world.de/dw/article/0,,4087344,00.html>

“ U.S. Navy Hands Over 17 Pirates to Kenya”

http://www.javno.com/en-world/us-navy-hands-over-17-pirates-to-kenya_264580

“Kenya rejects suspected pirates”

<http://www.news24.com/Africa/News/Kenya-rejects-suspected-pirates-20100326>

“Counter-Piracy Operations in the Gulf of Aden Expert Meeting on Multinational Law Enforcement & Sea Piracy held at the Max Planck Institute for Foreign and International Criminal Law” Press Release January 15th 2010.

<http://www.mpg.de/english/illustrationsDocumentation/documentation/pressReleases/2010/pressRelease20100115/index.html>

The European Journal of International Law Vol. 20 no. 2 “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia.” Tullio Treves