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"Current challenges in international law with regards to maritime piracy".

Master's Thesis

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Abstract.

Piracy is an ancient phenomena or practice which has being going on for a long time. Piracy was then described as hostes humani generis by Cicero. Hostes humani generis therefore means that, a pirate under the law of nations is an enemy of human race and being an enemy of human race or of all, is therefore liable to punishment by all. Before, the crime of piracy was not of immense importance to be discussed at the International level. However, it was first brought at up at the League of Nations in 1924 even though nothing was discussed about it on the grounds that it was not considered important.

Thus, this paper, will give a brief history of piracy and how it became recognised at the International level (UNCLOS 1982). While explaining this, the historical evolution of the legal rules relating to international maritime piracy has been discussed.

While examing the main topic of this paper, which is the current challenges in International law with regards to piracy, it is important to note that the definition of piracy itself by the UNCLOS in 1982 purses as a main challenge, to restricting piracy. Therefore, the main aspect of the definition is critically analysed. The challenges related to the definition of piracy is as follows: (a) the problem of piracy being committed for “private ends” (b) the problem of the “geographical scope of piracy” and (c) the “two ship criteria”.

There are also other legal challenges which are; difficulties in prosecuting pirates, the intervention of human rights, lack of trust between the shipping industries and the government authorities. Thus, this paper discusses the international legal challenges to combat piracy at the regional, national or domestic level.

Key words: United Nation Convention on the law of the sea, challenges, maritime piracy, private ends, two ship criterial, geographical scope of piracy, legal challenges.

Declaration

I hereby declare that this master Thesis on the topic “Current challenges in International Law with regards to Maritime piracy” is entirely done on my own.

Signed: Jingwa Anastasia. F

Date:09 -O5-2023

Place: Olomouc

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List of Abbreviations and Acronyms.

Article – art.

Example – e.g.

Human Right – HR.

United Kingdom - UK

Convention of the High Seas - CHS

United Nations Security Council - UNSC

INTERPOL – International Criminal Police Organisation.

Convention for the Suppression of Unlawful Acts against the safety of Maritime Navigation–SUA.

United Nations Office on DRUGS and Crime – UNODC.

International Covenant on Civil and Political Right – ICCPR.

International Maritime Bureau – IMB.

Palestine Libration Front – PLF.

Palestine Liberation Organisation – PLO.

Convention on the High Seas – CHS.

International Law Commission – ILC.

League of Nations – LON.

Exclusive Economic Zone – EEZ.

United Nation Convention on the Law of the Sea – UNCLOS.

High Sea Convention – HSC.

Convention Against Torture – CAT.

European Convention on Human Rights – ECHR.

International Maritime Organisation – IMO.

International Convention on Civil and Political Rights – ICCPR.

The African Charter on Human and Peoples Right – ACHPR.

International Human Rights Law – IHRL.

Exclusive Economic Zone – EEZ.

Convention of the High Seas – CHS.

United Nation Security Council – UNSC.

International Court of Justice – ICJ.

1.Introduction.

1.1. Introduction to the topic.

Maritime piracy existed long ago in ancient times, but it was in the 20th century that, the process to determine laws related to Maritime Piracy customary law and practice was initiated. The frequent piratical attacks[1] have led to a rapid development of this law as time goes on. The laws relating to the repression of piracy in international law was provided by the 1982 United Nation Convention on the Law of the Sea (UNCLOS).[2] Since piracy also has an impact on the international community art. 100 of the UNCLOS states that "all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State". In the Lotus case, which was heard before the Permanent Court of International Justice in 1927, Judge Moore described piracy as "an offence against the law of nations" and pirates as "the enemy of mankind – hostis humani generis – whom any nation may in the interest of all capture and punish".[3] This therefore implies that, since international customary law prohibited piracy, anyone who was caught in the act of piracy was considered as an enemy to human kind[4] and the act of piracy means waging war against all states but not just an individual[5] and therefore pirates are subject to universal jurisdiction by any state.[6]

The reason for the frequent piratical attacks was because, piracy was considered in some countries to be a lucrative form of business. For example, in Somali villages, piracy did not only enrich individuals or pirate groups, but it also brought wealth to the entire villages. Coastal villages made

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[1] See Wall Street Journal article by Rivkin and Casey: Pirates Exploit Confusion in International Law, http://online.wsj.comlarticle visited 03/19/09 (asserting that: "by the 1970s, as a part of a growing chaos in parts of Africa and Asia, incidents of piracy began to pick up. But it was not until the 21 51 century that piracy has experienced a meteoric rise, with the number of attacks increasing by double- digit rates per year."); Kantorovich supra note 6 (noting that: "the international crime of piracy, like the slave trade, was believed to have largely disappeared in modern times, or at least to have fallen to levels that would not demand international attention. Contrary to that belief, for the past several years, piracy has become endemic off the coast of Somalia, which has not had a government capable of broadly asserting its authority over the country since 1991.").

[2] The General Assembly has frequently emphasized that "the Convention sets out the legal framework within which all activities in the oceans and seas must be carried out". See, e.g., General Assembly resolution 65/37 of 7 December 2010, preamble. As at February 2011, the number of States Parties to UNCLOS is 161, including the European Union.

[3] The Lotus Case (France v Turkey) (1927). PCIJ Series. A No.10: 70.

[4] Douglas R. Burgess, Hostis Humani Generi, Piracy, Terrorism and A New International Law, 13 U. Miami Int'l & Compo L. Rev. 293, 315 (2006) (asserting that: "the central premise of hostis humani generi is that a pirate is not an enemy of the state but of humankind itself.")

[5] Burgess supra note 2 at 307.

[6] 4. W. E. HALL, INTERNATIONAL LAW, PP. 222-223, (1880) (London, Oxford University Pres.

money by providing food to pirates and hostages who were waiting for negotiations to end favourably. Local negotiators made their own money by bringing ship owners to pay ransom through cash either on sea or land.[7] There were some people who also encourage piracy financially and they were known as pirate financiers. These pirate financiers and pirates invested in pirate crews that went to capture vessels on the high seas. The wives of the pirates were compensated with money before their husbands left for the mission. Pirates also purchased tools which they used for the piratical activities. Such tools included, satellites phones, global positioning systems (GPS) and weapons like guns. It is estimated that pirate financiers spent about US$30,000 on a pirate group that "hunt" in Indian ocean and about US$10,000 on pirates operating in the gulf of Aden.[8] Pirates in order to protect themselves and their operations paid local militias (gun for hire) as much as US$10,000 per month to protect them from sub-clan rival or external threats. Ransom payments were also a significant source of wealth.[9] For example, the coastal villages around Haradheere received around 5% of a total ransom payment for allowing pirated ships to anchor there. All ransoms were paid in cash, and distributed between pirates, financiers, negotiators and local village elders.[10] According to the private sector research, it was discovered that the ransom payment was distributed as follows; : (I) financiers (and sponsors) receive 50%; (ii) the pirates, pirate commander, mothership crew and attack squads split 30%; (iii) village elders receive 10%; and, (iv) the security squad (guns for hire to protect hostages and vessels) receives 10%. Interestingly, while the individuals who risk their lives on a piracy operation split 30% of the ransom money, the bankrollers ends up with 50% of their own share.[11] However, most pirate "soldiers" are illiterate, and happy to receive large amounts of cash without knowing the true value of their services.

The development in innovations, has also led to an increase in piracy especially with the modernisation in boats and weapons. Thus, setting up measures to combat maritime piracy, participation and coordination at different levels was required, such as, at the regional and international level. At the International level, measures in combating maritime piracy has been set up by International conventions. For e.g. following the 1982 UNCLOS, each state had the power to control piracy within their national laws. Thus, states could capture and prosecute pirates using their domestic laws especially if the piratical act was committed within their maritime jurisdiction. While at the regional level many states came together to fight against piracy, e.g. Japan, Malaysia and

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[7] [7] de Groot, Olaf J. Barrgh-gaining with Somali Pirates Economics of Security Working Paper, No. 74 2012.
[8] Lansing, P., & Petersen, M. (2011). Ship-Owners and the Twenty-First Century Somali Pirate: The Business Ethics of Ransom Payment. *Journal of Business Ethics, 102*(3), 507-516. Retrieved May 24, 2021.
[9] Hunter, Robyn. 2008. Somali Pirates Living the High Life. BBC News (28 October), http://news.bbc.co.uk/1/hi/7650415.stm.
[10] In practice, ransom negotiations involve more than these two classes of agent. Insurers, who bear the ultimate liability, are not typically involved directly in the negotiation process. Insurers selling "kidnap and ransom" (K&R) insurance, however, usually ensure their interests are represented by recommending the ship-owner the services of a professional negotiator, whom they hold on a retainer contract. For ship-owners without K&R insurance, the emergence response team is organised by lawyers, generally drawn from a small pool of firms specialising in piracy cases. National law enforcement agencies may also seek involvement. On the pirate's side, an English-language speaker will negotiate on behalf of a pirate committee made up of the captain and financiers of the pirate venture and representatives of the local militias that provide protection while a ship is at anchor. Sometimes the pirate negotiator may become a distinct party, by attempting to secure a separate personal settlement, unbeknown to the pirate committee.
[11] This is a rough estimate based on current reports but is subject to changes given the frequent changes in ransom payment.

Indian organised a join patrol to combat piracy. However, regional attempts are most often not effective, due to inadequate finance and the complications and difficulties in extraditing pirates.[12]

There has been an increase in maritime piracy for several years according to the International Maritime Bureau's (IMB) Piracy Reporting Centre. In 2008, pirates off the coast of Somalia attack and hijack a ship which was full of oil tankers. Unfortunately, this incident draw very little attention from the international community. However, by 2009 more than twelve countries had sent navies to the Gulf of Aden to fight against piracy. Hence, measures were taken to combat piracy which include: the onboard defence system, the naval deployments and pre-emptive strikes. Thus, even when these pirates were being caught, the complexity in international laws made it difficult or complicated to prosecute them. Hence, despite the naval cooperation in the Gulf of Aden, many people still anticipate an increase in piratical attacks. It is also important to note that pirate attacks are concentrated in four main regions: The Gulf of Aden, near Somalia and the southern entrance to the Red Sea; · The Gulf of Guinea, near Nigeria and the Niger River delta; · The Malacca Strait between Indonesia and Malaysia; The Indian subcontinent, particularly between India and Sri Lanka. Thus, fighting piracy is of general interest to all these states.

1.2. Objectives.

The objective of this thesis paper is to investigate the current legal challenges or factors hindering the fight against maritime piracy. Thus, in discussing these challenges, it has been observed that, the definition of piracy itself by the UNCLOS in 1982 is also a main challenge in combating piracy. Therefore, before talking about the challenge, it will be very important to discuss how this definition came about by looking at the evolution of the legal rules. The analyses of the definition of maritime piracy as a main challenge in fighting piracy will be discussed in three parts.

-The geographical scope.

-Private ends.

-The two ship criteria.

Research question and hypothesis

The research question that will be discussed and the questions that will be responded included:

-Can the definition of piracy itself serve as a challenge to combating piracy? or how can the definition of piracy lead to a challenge in combating piracy?

With this question in mind, this thesis paper will also discuss the next hypothesis which will be:

- The other legal challenges face in combating piracy aside from the definition, which therefore implies that, aside from the definition pursing as a challenge in fighting against piracy, there are other factors pursing as obstacles in combating piracy which are:

- Difficulties in prosecuting pirates.

[12] Zou, above n 2.

- The intervention of Human Rights.

- The right to hot pursuit.

-. Lack of trust between the shipping industry and the government authorities.

1.3. Methodology.

For the investigation of this question to be properly carried out the following must be analysed. Thus, before beginning with the thesis proper, a deep analysis of the historical literature must be carried out. Following the complexity of the topic several other elements of the topic will be discussed.

My thesis is divided into three parts:

-The first part deals with the historical evolution of rules relating to maritime piracy.

-The second part gives a detail analysis of the definition of maritime piracy by the UNCLOS of 1982 and how this definition has become an obstacle in fighting piracy.

- And the third part presents other legal factors which have hinder the fight against piracy.

-Finally, a conclusion will be given lining it to the main topic of the paper.

2.The evolution of legal rules relating to piracy.

This chapter focuses mainly on the historical development on how the definition of maritime piracy by the UNCLOS in 1982 came about. It deals first with some attempts made by the League of Nations, then it goes to non-binding Harvard draft convention, the ILC works of codification and the Convention on High Seas. Finally, it portrays basic defining features contained in the 1982 United Nation Convention on the law of the sea.

2.1. The league of Nation.

As early as 1924 during the era of the League of Nations, an attempted effort was made to provide international agreement on piracy. All the efforts failed as it was believed that piracy was not an urgent problem by then and it was also realised that no agreement would be reached.[13] This was

[13] The Assembly of the League of Nations formally requested the Council of the League to prepare a provisional list of subjects of international law the regulation of which would seem to be most desirable and realizable. The Committee responsible for drawing up this list included piracy and also included Draft Provision for the Suppression of Piracy, but these were dropped from the conference on the grounds that piracy was no longer a pressing issue to the international community and that the realization of a universal agreement seemed somewhat difficult at that time. See RUBIN supra note 28 at PP. 333-334.

because when the question on piracy was reported to the committee on the subject of piracy[14] there were mixed answers. These responses were as follows: nine governments replied affirmatively; but with reservations; three Governments though not opposed found the question of no urgency and of limited interest; six Governments refrained from expressing any opinion and two Governments did not think the conclusion of a convention to be either possible or desirable.[15] Also, according to the Polish representative Zaleski, he said that:

"It is perhaps doubtful whether the question of piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the (proposed) conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every State, or one of the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement. "[16] Hence, the topic of piracy was then left out. But this was not the end as the issue of piracy was again brought up in the Harvard Draft.

2.2. The Harvard Draft Convention of 1932.

The topic on piracy was first introduce by the League of Nations in 1924, by the committee of experts but it did not yield any fruits. Due to this, it attracted the attention of the Harvard law school who decided to draft a convention in 1932 on the topic of piracy. The main aim of the Harvard draft convention was to organise certain aspects of International Law which was ready for classification or codification. Again, the conference which was held by the Harvard draft did not yield much fruits. Though this conference did not yield much fruit, the Harvard draft however set as a beginning for the discussion of the definition of piracy at the International Law Commission, the United Nations, and its Member States. The drafters of the Harvard Convention then defined piracy as ; "Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state: any act of instigation or of intentional facilitation of [the direct commission of piracy or the knowing and voluntary operation of a pirate ship]."[17] In addition to this simplified definition of piracy, there was also a clause which accompanied the definition and it stated that: "By this clause, instigations and facilitations of piratical acts, previously described in the article are included in the definition of piracy. Obviously, convenience is served by this drafting device. The act of instigation or facilitation is not subjected to the common jurisdiction unless it takes place outside territorial jurisdiction".[18] Thus it was generally agree by the International community in 1932 that for one to be considered a

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[14] See: United Nations Documents on the Development and Codification of International Law, 'American Journal of International Law' 1947, Supplement, Vol. 41, No. 4, at pp. 66–68

[15] Ibidem, at p. 71. Among States opposed to the draft convention on piracy were United States of America. As reported by J.S. Reeves, Progress of the Work of the League of Nations Codification Committee, 'American Journal of International Law' 1927, Vol. 21, No. 4, at p. 665: "With regard to the sixth subject enumerated in the communication of the Secretary-General, namely, Piracy, it is the view of the Government of the United States that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement" (emphasis added).

[16] RUBIN supra note 28 at 334.

[17] Harvard Draft Convention, supra note 23, at 743.

[18] Id. at 822 (emphasis added).

facilitator to piracy, that person needs to be physically present on the high sea for the person to be subject to universal jurisdiction and also, the perpetuator of the act of piracy must commit the act out of the territorial waters in order for the perpetuator to be subject to universal jurisdiction.[19] The Harvard draft has attracted the attention of International community especially the International Law Commission, when it attended to the outlined articles on the Law of the Sea which comprised of the ground of the four Geneva Conventions on the Law of the Sea in 1958.[20]

2.3. The International Law Commission (ILC) Draft Articles and the 1958 Geneva Convention on the High Seas.

The next definition of piracy was in 1955 when the ILC was preparing its 1956 article concerning the law of the sea commentaries. The ILC use the Harvard draft Convention and the special Rapporteur which included both the commentary attached to the articles and the Harvard draft. The Special Rapporteur then explained the definition of piracy jure gentium, based on three important principles: the principle that animus furandi did not have to be present; the principle that only acts committed on the high seas could be described as piracy; and the principle that acts of piracy were necessarily acts committed by one ship against another ship, which did not include acts committed on board a single vessel. After introducing and describing the three main principles from the Harvard Draft Convention, the Special Rapporteur invited the ILC members to vote on each of the three principles one by one. Out of the ten ILC members surveyed, two accepted the Special Rapporteur's contention that universal jurisdiction over piracy was limited to acts on the high seas, seven were silent as to a high sea's requirement, and only one specifically rejected the high seas requirement. The person who rejected was a, French jurist by name Georges Scelle, who argued against a formalistic definition for piracy jure gentium and was in favour of the one based only on "the nature of the act." Scelle agreed that acts committed within the territorial jurisdiction of a state would come under the jurisdiction of the local courts. However, to Scelle, the question of jurisdiction had no connection with the definition of piracy under international law. The 1958 Geneva Convention on the High Seas includes the ILC debates and stresses the importance of the Harvard Draft Convention. Article 39 of the 1956 ILC Draft Articles appeared in the 1958 Geneva Convention on the High Seas though not in exact words and only a change was made, which was that: an aircraft can be the victim of piracy on the high seas.[21] The definition in the 1958 Geneva Convention was copied word verbatim into UNCLOS in its article 101, where it has remained untouched.

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[19] [19] Id. at 822 (emphasis added).

[20] Articles 100–107 of the UNCLOS repeat almost literally Articles 14–22 of the Geneva Convention on the High Seas of 1958. Almost all states are parties either to one or the other which entails that these provisions state the international law as currently in force. See Churchill and Lowe (1999, p. 210).

[21] Compare 1956 ILC Draft Articles, supra note 46, art. 39, with Geneva Convention, supra note 24, art. 15. Article 39.

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2.4. The United Nation Convention on the Law of the Seas of 1982.

From article 100-107 of the UNCLOS, which are the articles dealing with piracy, it can be concluded that the convention reflects or review customary international law.[22] Therefore, these norms are binding by all states not taking into consideration weather they express their will to be bound by the convention. Hence, the definition of piracy is limited to acts committed in the high seas and it also contains the "two ship criteria". It was decided that for an action to be considered as piracy, the piratical act most have been committed by one ship against another ship. This therefore implies that if an act is committed by the crew on board the same ship, such an act will not be considered as piracy.

Another rule of the UNCLOS of the sea stated that: "all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State"[23] It was again stated by the UNCLOS that: "every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under control of pirates, and arrest the persons and seize the property on board".[24] Hence, the seizing state has the right to impose the sanctions to be taken and can decide what actions to be taken on the vessel, aircraft or property once the state or third party is acting in good faith.[25] The right to visit was also discussed in this convention (UNCLOS), which is, the right that war ships have to board a foreign ship, when this foreign ship is suspected to have been involve in piracy.[26]

Also, the UNCLOS provision clearly explained that, only a war ship or military aircraft or other ships or aircraft which has been marked and identified as performing the services of the government with the authorisation of the government can seize a ship or aircraft on the grounds of suspicion of piracy.[27] Also, in the case where a vessel or aircraft has been seized on the claim of piracy and it is later proven that the vessel and aircraft were not guilty, the seizing state would be liable to the nationality of the vessel or aircraft in case of any damages cause from the seizing.[28]

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[22] That assertion is supported for example by: D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge University Press 2009, at pp. 31–32; D.R. Rothwell, T. Stephens, The International Law of the Sea, Hart Publishing 2010, at p. 162; R.R. Churchill, A.V. Lowe, op. cit., at p. 210; H.L. Jesus, Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects, 'International Journal of Marine Coastal Law' 2003, Vol. 18, No. 3, at pp. 374–375. I. Brownlie, Principles of Public International Law, Oxford University Press, 6th Edition 2003, at p. 229. Notable exception to this view is A.P. Rubin. About Harvard Research Draft, A.P. Rubin considers it as an "exercise de lege ferenda", not reflecting international law (customary or otherwise); A.P. Rubin, op. cit., at p. 345. The cited Author is much of the same opinion on the ILC Draft and, consequently, on the 1958 Geneva Convention on the High Seas and UNCLOS. See Ibidem, at pp. 353 and 367.

[23] Article 100 UNCLOS; Article 14 CHS; Article 38 ILC Draft

[24] Paige, Tamsin. "Piracy and universal jurisdiction." Macquarie Law Journal 12 (2013): 131-154.

[25] Jin, Jing, and Erika Techera. "Strengthening universal jurisdiction for maritime piracy trials to enhance a s4 Article 110(1)(a), UNCLOS. Sustainable anti-piracy legal system for community interests." Sustainability 13.13 (2021): 7268.

[26] 4 Article 110(1)(a), UNCLOS. Additional circumstances that trigger a right of visit are enumerated in article 110(1)(b)–(e).

[27] Article 110(5), UNCLOS.

[28] ILC's Commentary on Article 44, United Nations (1956). Report of the International Law Commission Covering the Work of Its Eighth Session, 23 April to 4 July 1956. Commentary to the Articles Concerning the Law of the Sea. A/3159, page 29.

However, piracy has been a great problem in many states and the efforts made by states and the International Communities at the domestic, regional and International level to discourage, prevent and punish pirates has reduce piratical activities in some states but has not completely eradicated it. This is so because of the difficulties or challenges which states and the International Communities face in fighting against piracy. The factors limiting the fight against piracy ranges from broad areas such as; legal, financial, economic and cultural factors. However, in this paper it shall be analysed just the legal challenges.

2. International legal challenges in combating piracy.

While discussing the legal challenges to combating piracy, it is necessary to note that the same definition of piracy itself save as a main legal challenge in combating piracy aside from the other legal challenges. This definition will be explained in three parts in other to illustrate how it hinders the fight against piracy. The first part will be the geographical scope of the definition, the "private ends" concept of the definition and the last part which is the two ship criteria.

3.1. The geographical scope of the definition.

This geographical extent of this definition is also attributed to acts of piracy that place "on the high seas" or "in a place outside the jurisdiction of any state".[29] Thus acts of piracy that occur within the territorial or internal waters of a state do not fall within the definition provided by article 101.[30] Hence, article 101 should be read in conjunction with article 58(2), which provides that, rules of international law that apply on the high seas also apply to the exclusive economic zone (EEZ) as long as they are not incompatible with the provisions of UNCLOS that relate to the EEZ.[31] Article 101(a)

[29] For more information see IMO (2011a). Piracy: Elements of National Legislation Pursuant to the United Nations Convention on the Law of the Sea, 1982. Submitted by UN- DOALOS. LEG 98/8/1, paragraphs 10–17. 24 With regard to the meaning of the phrase "in a place outside the jurisdiction of any State", the International Law Commission (ILC), in its Commentary to article 39, which was the basis for article 101 of UNCLOS, states: "[I]n considering as 'piracy' acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction." See United Nations (1956). Report of the International Law Commission Covering the Work of Its Eighth Session, 23 April to 4 July 1956. Commentary to the Articles Concerning the Law of the Sea. A/3159, page 27.

[30] Acts that occur in the territorial waters of a State would instead fall within the definition of "armed robbery against ships". See further below.

[31] With regard to the meaning of the phrase "in a place outside the jurisdiction of any State", the International Law Commission (ILC), in its Commentary to article 39, which was the basis for article 101 of UNCLOS, stated "[I]n considering as "piracy" acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a

implies that the geographical scope of this here include the Exclusive economic zone (EEZ) of any state. [32] Therefore, all acts of piracy in the EEZ are considered are considered to have occurred on the high seas and any state can exercise jurisdiction over the crime since it is outside the territorial waters of all states.

3.2. Private ends.

Moreover, acts which are consider as piracy must be compatible with the definition of piracy in article 101(a) must be committed for private ends. “The plan or aim to rob is not required (animus furandi)” as stated by the ILC. Thus, in the situation of “private ends”, the act most have been cause due to revenge or hatred and not because of the desire to gain.[33] The phrase committed for private ends can be analysed from two perspectives. The first perspective is when the intension of the perpetuator is private. In the case where the act is committed for private motive, then it will be piracy. The second perspective is when the act is committed for public/political intension. In this situation, if the act is committed by the perpetuator for political or public intension, then such situation will not be considered as piracy. These two analyses can be illustrated in the cases below.

In the case of Castle John v. NV Mabeco, On April 26, 1985, Greenpeace began an extensive campaign against NL Chemicals of Ghent and Bayer of Antwerp, who were freshly licensed by the Belgian government to dump titanium dioxide waste in the North Sea. Greenpeace activists boarded the NL Chemicals dump ship Falco on two occasions, and the Sirius was later used to blockade the passage of Bayer's dump ship the Wadsy Tanker in Antwerp harbour. As a result, Bayer claimed damages against Greenpeace and the Belgian authorities confiscated the Sirius at the beginning of May.[34] The Belgian Court of Cassation held in 1986 that, a Greenpeace vessel (in this case the perpetrators are undoubtedly entirely of "private" character) had committed piracy against an allegedly polluting Dutch vessel when it attacked it, because this act of violence was "in support of a personal point of view" and not political.[35] Since Greenpeace is not a State and did not act in the interest or on behalf of a state, thus its actions were for “private ends”. it was held that the Greenpeace vessel, which had attacked an allegedly polluting vessel of the Netherlands, had

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larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction." Document A/CN.4/104, at p. 282

[32] Subparagraphs (b) and (c) of article 101 respectively on voluntary participation in the operation of a pirate ship or aircraft and incitement and intentionally facilitating an act of piracy, do not explicitly set forth any geographic scope. It is also important to distinguish piracy from armed robbery against ships.
2. any act of inciting or of intentionally facilitating an act described above" (emphasis added).

[33] See the ILC's Commentary to article 39 (A/CN.4/104, at p. 282).

[34] BROWN & MAY, supra note 61, at 120. Greenpeace did not respond to an inquiry of June 18, 1992 for information on the incident.

[35] Reported by: I. Shearer, op. cit., at point 16; D. Guilfoyle, Shipping Interdiction..., at p. 38 and S.T Menefee, Case of the Castle John, or Greenbeard the Pirate: Environmentalism, Piracy and the Development of International Law, 'California Western International Journal' 1993, Vol. 24, No. 1, at pp. 10-16Oppenheim's International Law, Longman 1996, 9 h ed. Vol. 1 (Peace), at pp. 747-752; D.R O'Connell, op. cit., Vol. II, at pp. 975-976; M. Halberstam, op. cit., at pp. 274-276.

committed piracy, as the act of violence was in support of a personal point of view and therefore not political.[36]

Hence an example of a case where it was in support of a political point of view can be illustrated below.

The Santa Maria hijacking was carried out on 22 January 1961.[37] Hence, in 1961 a Portuguese ship Santa Maria was seized in the high seas by some of its passengers, under the leadership of Captain Galvdo, a Portuguese political dissident. He explained that it had been the first step "aimed at overthrowing the Dictator Salazar of Portugal" (as a part of a political controversy between Salazar and General Delgado). It was considered that the act was for political motives and thus was not considered a piratical act.

3.3. The two ship criteria.

The third element of UNCLOS definition required two ships to be involved in any piratical act, as per Article 101. This Article states that two ships must be involved in any act of piracy. It means, the illegal act must be directed against another ship or aircraft or persons or property onboard such ship or aircraft. It particularly requires “private ship” to be used for a piratical act against another ship. Therefore, seizure of the crew or passenger takeover of the same ship does not fulfil the “two-ship” requirement under UNCLOS.[38] In Achille Lauro case, the members of Palestine Liberation Front (PLF) boarded the vessel as passengers and hijacked it off the coast of Egypt while sailing between Alexandria and Ashdod. In this case, no second ship was involved and hence it did not constitute piracy under UNCLOS article 101. After examining these three main aspects of the definition of piracy under the UNCLOS in its article 101, it has been seen that there is no solid agreement as to the definition and this is because of the emergence of the new forms of piracy which was not predicted especially with the modernisation of weapons. In a situation where the act of piracy has been carried out and there is conflict over which jurisdiction has to apply, this may cause the states to apply their discretionary power because of the different interpretations which different states may have.[39] If the definition of piracy has the same interpretation which is generally accepted then such disagreements will come to an end.

[36] Castle John v NV Mabeco (1986), page 540

[37] "The Log of the Santa Maria: 12 Days Off Course—the Chronicle of a Cruise with a Big, Exciting Difference". *Globe and Mail*. Toronto. 1961-02-03. p. 13.

[38] See the ILC's Commentary to article 39 (A/CN.4/104, at p. 282).

[39] Castle John v NV Mabeco (1986), page 540.

4.Current challenges in combating piracy at the regional and domestic level.

In the above chapter, I had been discussing the definition of piracy as a main legal challenge of combating piracy in the pass. This chapter will explain some current legal challenges in combating piracy aside from its definition. Some of these legal challenges are; The intervention of Human Right (HR), difficulties in prosecuting pirates, lack of trust between the shipping industry and the government authorities, the right to hot pursuit, difficulties in effective criminal investigation, the issue of jurisdiction and the duty to cooperate. From the current legal challenges mentioned above, I will be explaining four of them in the subsequent paragraphs below. My reason for explaining just these four factors is because: Firstly, there are many other current legal challenges in combating piracy and thus explaining all the factors will be too cumbersome. Secondly, I explained these four points because I consider them to be very important or the main factors. Thus, the four legal challenges which I am going to explain are; the difficulties in prosecuting pirates, the intervention of Human Rights Law, the rights to hot pursuit and difficulties in prosecuting pirates.

4.1. Difficulties in prosecuting pirates.

Though piracy is a crime which started long ago, it has not been successfully suppressed due to some legal issues. One of such issues is the lack of national laws on how piracy should be sanctioned. However, piracy is a crime which has universal jurisdiction. Universal jurisdiction here means that, every state has the right on the high seas or outside the jurisdiction of any state to seize a pirate ship or aircraft taken by piracy and arrest the persons and seize the property on board.[40] This has also been stated in art. 105 of the UNCLOS. The exception to this principle, is the exclusive jurisdiction over the flag state.[41]

However, the notion of the flag state through the evolution of the customary use of the flag is a symbol and an identification to which the state, the ship sailing in the sea belongs.[42] The flag state of a merchant vessel means, the jurisdiction under whose laws the merchant ship or vessel has been registered or licenced and is considered the nationality of the vessel.[43] This is very practical when

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[40] Paige, Tamsin. "Piracy and universal jurisdiction." Macquarie Law Journal 12 (2013): 131-154.

[41] See id. art. 92(1), at 433 ("Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."). See also M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 3 ITLOS Rep. 10, 48 ("[T]he ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State."); Medvedyev v. France, Judgment of Mar. 29, 2010, para. 85 (Eur. Ct. H.R. 2010), http://hudoc.echr.coe.int/webservices/content/ pdf/001-97979?TID=ufyxypubrf (mentioning the principle of universal jurisdiction over piracy acts as an exception to the rule of the exclusive jurisdiction of the flag state); TANAKA, supra note 7, at 152–55.

[42] . The freedom of the ships to navigate or sail on the high sea is enshrine under customary laws and these customary laws is codified under the 1958 high sea convention and in the 1982 UNCLOS in its art.87 and 90.

[43] A flag state is a state which grants vessels using international waters, regardless of type and purpose, the right to fly its flag and, in so doing, gives the ships its nationality. There must be a genuine link between the

ships on the high sea always carry a flag. The nationality of the owner of the ship, must not be the same nationality with the ship or vessel of the flag state. It is possible for the vessel to be registered under the same jurisdiction of the owner of the ship and it is also possible for the owner of the ship to register the vessel under the jurisdiction of another state other than his state.[44] It is compulsory for the merchant vessel to be registered and the merchant ship or vessel can only be registered in one jurisdiction. When a ship owner registers a Merchant ship under a different jurisdiction or in a different country other than his country, the term use to describe this is "flag of convenience".[45]

The reason for registering a merchant ship in a different country other than the country of the owner of the ship is for business motives. This is done at times to reduce expenditure as the taxing rate of the country of the owner of the merchant vessel might be very high compared to the flag state. Thus, the exception to art. 105 of the UNCLOS is stated in the UNCLOS[46]in its art.92(1) which explains that, the flag state has exclusive jurisdiction over the ships on the high seas. This means that, the flag state can legislate over the vessel, adjudicate over it and use force on or against it. In this case no other state has the right to exercise jurisdiction over the vessel. In territorial waters, art.92 of the UNCLOS does not apply as it only applies on the high seas and the exclusive economic zone (EEZ). The flag state may also have jurisdiction on ships when they are in foreign territorial waters and ports even though this has not been stated in the UNCLOS.[47] The principle of exclusive jurisdiction of the flag state is the main pillar of international law of the sea and it started from the principle of state equality and freedom of the high sea.[48] The ICJ (International court of Justice) use the lotus case to explain this principle of exclusive jurisdiction.

The lotus principle has therefore been the foundation of international law of the sea which stated that, sovereign states could act in any way they wish if they do not go against any prohibitions or laws. The application of this principle further led to the jurisdiction of people on the high seas but this was change by art.11 of the 1958 High Seas Convention (HSC).[49] This 1958 HSC which was held in Geneva made a decision that, only the flag state or the state in which the offender is a national has jurisdiction over the vessel in the situation where the offense was committed on the high

state and the ship (UNCLOS Article 91(1)), and the state shall issue ships granted the right to fly its flag documents to that effect (UNCLOS Article 91(2)).

[44] Ibid.

[45] Boczek, Boleslaw Adam. Flags of convenience: An international legal study. Harvard University Press, 1962.

[46] United Nations Convention on the Law of the Sea, United Nations Treaty Series, Vol. 1833.

[47] Douglas Guilfoyle, Shipping Interdiction and the Law of the Sea (2012), p. 16; Doris König, "Flag of Ships," in Rüdiger Wolfrum ed., Max Planck Encyclopedia of Public International Law (2009, available at www.mpil.de), paras 30-32. This is implied by the UNCLOS Articles 94(2)(b), 211(3), 218(2) and 220.

[48] These principles-the exclusivities of flag-state jurisdiction, the freedom of the seas, and the equality of states-go hand in hand; the exclusivity rule follows from the freedom of the high seas which in turn follows from the equality of states. This proposition is cogently set out in the English case of Le Louis, in which Lord Stowell observed: [A]ll nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all.

[49] Convention of the High Seas (1958).

seas.[50]A ship on the high seas that fly more than one flag, is describe as "stateless"[51] since a vessel is entitle to fly just one flag[52] and any ship which is involve in the act of piracy, for jurisdictional reasons is considered "stateless" as it will not be subject to exclusive jurisdiction of the flag state but to universal jurisdiction.[53]

Pirates who are caught, are arrested, prosecuted and punished[54] and their vessel is ceased. Despite the frequent piratical attacks most nations are shying away from their judicial responsibility to prosecute pirates who commit the act of piracy in their territory. In international law, any country has jurisdiction on the crime of piracy committed on the high seas, but in practice very few do so except there are national interests at stake: e.g. "around 90% of suspected pirates detained by naval forces in multinational operations off Somalia are released without trial".[55]

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[50] Geneva Convention on the High Seas, opened for signature Apr. 29, 1958, art. 6(1), 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter Convention on the High Seas]. The article most relevant to the present inquiry is article 22, which provides: 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting: (a) That the ship is engaged in piracy; or (b) That the ship is engaged in the slave trade; or (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. 2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration. 3. If the suspicions prove to be unfounded and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained. Id. art. 22.

[51] Meyers observes: The possibility of two allocations existing simultaneously is contrary to the maintenance of good order at sea. If the existence of multiple allocations should be possible, it would be difficult to reconcile with the "exclusive jurisdiction", which is such an essential legal construction for the whole of the Convention on the High Seas. What law would apply on board, what treaties would be applicable to the ship-users? H. MEYERS, supra note 131, at 173. See United States v. Marino-Garcia, 679 F.2d 1373, 1378 n. 3 (11th Cir.1982) offsite link.

[52] Anderson, Andrew W. "Jurisdiction over stateless vessels on the high seas: An appraisal under domestic and international law." J. Mar. L. & Com. 13 (1981): 323.

[53]This is not to say that a pirate vessel is stripped of her flag. Rather, the pirate vessel merely loses the protection of that flag. The 1982 Convention on the Law of the Sea provides that a "ship ... may retain its nationality although it has become a pirate ship .... The retention or loss of nationality is determined by the law of the State from which such nationality was derived." Convention on the Law of the Sea, supra note 7, art. 104; see Convention on the High Seas, supra note 6, art. 18; see also I L. OPPENHEIM, supra note 4, § 272; 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 650 (1965) [hereinafter WHITEMAN'S DIGEST]; van Zwanenberg, Interference with Ships on the High Seas, 10 I.C.L.Q. 785, 805 (1961). But see 1 J. WESTLAKE, INTERNATIONAL LAW 182 (2d ed. 1910) ("There is. .no state flag in the case [of piracy]. If the piratical ship was ever entitled to carry one, her title to do so has been withdrawn.").

[54] See, for example, Nairobi Report at 31 (cited in note 7); John Knott, United Kingdom: Somalia, The Gulf OfAden, And Piray: An Overview, And Recent Developments (Mondaq 2009); Drew H. Pearson, Can The Somali Pirates Be Stopped?, 42 Sea Classics 14, 20 (2009); Fernando Peinado Alcaraz, Chasing pirates is all well-but who is going to lock them up?, El Pais (English), Aug 17, 2009, online at http://web2.westlaw.com /Find/default.wl?bhcp=1 &cite=2009+WLNR+1 5970667&rs=LAWS2.0&strRecreate=no&sv=S plit&vr=1.0 (visited May 3, 2010); Mike Corder, Nations look to Kenya as venue for piray trials, Bay News 9, Apr 17, 2009, online at http://www.baynews9.com/content/36/2009/4/17 /461573.html?title=Nations+look+to+Kenya (visited May, 2010). Consider Eric Ellen, Bringing Pirates to Account, 102 Jane's Navy Intl 29 (Apr 1997).

[55] House of Commons Foreign Affairs Committee, Piracy off the coast of Somalia, HC 1318 2010-12, 5 January 2012, para 74.

The UK for example has brought no Somali suspected pirates to the UK for trial though British citizens have been taken hostage.[56] This is because some states do not have adequate national laws or do not have any national law at all to prosecute pirates.[57] Also some judges are said to be impartial thereby letting the pirates free without being punished and also because of the difficulties in getting evidence against the pirates and the difficulties of keeping evidence.[58] Also some judges may be inexperience because they have never handle a case on piracy and do not know how to go about it, thereby hindering judgement. Sometimes pirates may be stateless and do not have any document showing their real identification such as their date of birth and nationality, making court proceedings complicated. When pirates are not punished, they are not scared of being prosecuted and the act of piracy continues and even escalate. However, some nations have decided to form naval patrols around the areas where pirate attacks are high. Despite this proposed solution piratical attacks are still increasing.[59]

Secondly, customary international law does not state any clear definition on what can be considered an international crime of piracy.[60] However, there are two international treaties that govern the act of piracy and lay out jurisdictional bases for states to prosecute the act of piracy domestically. The first is the United Nations Convention on the Law of the Sea (UNCLOS)[61] and it constitutes about 160 states which particularly define piracy.[62] The second is the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).[63] This convention also have a total number of 156 states who are parties.

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[56] Henry Bellingham, 6 July 2011, Oral evidence to the House of Commons Foreign Affairs Committee, Piracy off the coast of Somalia, HC 1318 2010-12, 5 January 2012, Q268.

[57] See, for example, Statement of Rear Admiral Brian M. Salerno (cited in note 5) (stating that many nations lack sufficient legal structures to prosecute piratical acts); Nairobi Report at 25 (cited in note 7) (noting that even as to those states with national legislation to punish acts of piracy, the laws do not permit the exercise of jurisdiction beyond territorial waters); Report: The Role of the European Union in Combating Pirates at 13 (cited in note 1) (stating that few states have adapted national laws to apply international treaty provisions regarding the repression of piracy, and indeed, within the EU, only Germany, Finland, the Netherlands, and Sweden can exercise jurisdiction over acts of maritime piracy); Alcaraz, Chasing pirates is all very well, El Pais (English) (cited in note 10) (noting that Spain's Penal code, for example, does not cover maritime piracy); 'Hijacked" spotted in the Atlantic: Russian warship is on its way to save the crew, The Times (UK), Aug 15, 2009, online at http://web2.westlaw.com/find/default.wl?fn= top&rs=WLW10.03&rp= /find/default.wl&ifm=NotSet&vr=2.0&sv=Split&cite=2009+WLNR+15912145 (visited May 3, 2010) (noting that Portuguese law does not permit it to prosecute those accused of committing acts of maritime piracy

[58] See, for example, Cordera, Nations Look to Kenya (cited in note 10).

[59] See IMB October 2009 Report at 7 (cited in note 2).

[60] In fact, in connection with their efforts in the early twentieth century to contribute to the attempts to codify the international law regarding piracy, the drafters of the Harvard Research Draft noted the lack of universal agreement on what exactly constituted the crime of piracy. Harvard Research in International Law Draft Convention and Comment on Piracy ("Harvard Research Draft'), 26 Am J Intl L 739, 749, 769 (Supp 1932).

[61] United Nations Convention on the Law of the Sea ("UNCLOS"), Arts 100-08, 110, Dec 10, 1982, 1833 UNTS 397.

[62] For a list of state ratifications, see UN, Chronological list of ratifications of accessions and successions to the Convention and the related Agreements as at 08 January 2010, online at http://www.un.org/Depts/los/reference-files/chronological ists_ofratifications.htm (visited Apr 3, 2010). Notably, although the US is not a party to UNCLOS, it did ratify an earlier version

[63] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") (Mar 10, 1988), 1678 UNTS 221 (1998).

Thirdly the SUA convention does not seem to put an end to offenses that are concern with modern piracy. Though the convention demands the signatory state to either extradite or prosecute the pirates found in its territory,[64] the SUA convention has only been used once[65]. This means nations are not willing to use this tool to combat piracy. It has been analysed that, the reason for this might be due to confusion in the treaty's applicability and the fact that some nations believe that, it can only apply to acts of terrorism.[66]

lastly, though the SUA convention applies to all offenses committed on the vessels regardless of location as long as long as they are engaged in international navigation, pirates can still go unpunished because, only states who are parties to the treaty and who are link with the offense can prosecute the pirate.[67] For example, the parties to the SUA convention may prosecute the pirate if the offense is committed against or on board a ship flying a flag of that state, or the offense occurs within the state's territory or is committed by one of its nationals, or where a state's national is seized, threatened, injured, or killed in connection with the offense.[68] This is different from the UNCLOS which allows all signatory states to prosecute pirates weather or not they have a connection to the offense.[69] Hence, if the state party to the treaty which is concern with the offense does not prosecute the pirate or if the state in connection to the offense are not parties to the SUA convention, pirates and maritime terrorist will go unpunished.[70] With the SUA convention not all states will have jurisdictional powers to prosecute.[71]

However, some codes have been passed by the International Maritime Organisation (IMO) to carry out investigation on suspected pirates and armed robbery attacks on vessels.[72] The document helps to carry out investigation on acts of piracy and armed robbery on vessels.[73]

After, discussing the difficulties in prosecuting pirates and some solutions to these difficulties, the best solution will be that since piracy is a criminal offense, pirates should be criminally prosecuted and such sanction will scare many future pirates.[74] Thus the international criminal court(ICC) is

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[64] See id, Arts 7, 10.

[65] See Eugene Kantorovich, "A Guantanamo on the Sea": The difficulties of Prosecuting Pirates and Terrorists 18, online at http://papers.ssm.com/sol3/papers.cfm?abstractid=1371122## (visited May 3, 2010) (stating that the SUA Convention has only been used once-in a case the US originally brought in the US District Court for the District of Hawaii against a cook put who commandeered a fishing trawler). For a record of the facts of that case, consider United States v Shi, 525 F3d 709 (9th Cir 2008).

[66] See Beckman, 33 Ocean Dev & Intl L at 330 (cited in note 44).

[67] See id, Art 6.

[68] Id.

[69] See UNCLOS, Art 100 (cited in note 27).

[70] See George D. Gabel, Jr, Smoother Seas Ahead: The Draft Guidelines As An International Solution To Modern-Day Piracy, 81 Tul L Rev 1433, 1445 (2007) (citing Tina Garmon, Comment, International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th, 27 Tul Mar L J 257, 273 (2002)).

[71] Id.

[72] Resolution A.1025(26) on IMO's Code of Practice
for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.

[73] Resolution A.1025(26) on IMO's Code of Practice
for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.

[74] Deterrence and the prevention of future criminal activity are primary goals of criminal prosecutions-including international criminal prosecutions. For example, the Preamble to the Rome Statute creating the ICC emphasizes the potential deterrent effect of the court, noting that it is being created "to put an end to impunity for the perpetrators of [the covered crimes] and thus to contribute to the prevention of such crimes."

considered to be the best to handle cases of piracy. Putting piracy within the ICC mandate will suit well as it will provide it with jurisdiction over serious crimes of concern to the international community.[75]

4.2. The intervention of human rights

The intervention of human right in prosecuting pirates is also an obstacle in combating piracy. International human rights law has to do with the arrest, detention, transfer of pirates or suspected pirates.[76] Captured and suspected pirates have the right to humane treatment, including the absence of arbitrary detention, the right to be brought promptly before a judge, the right to a fair trial, freedom from transfer to a country that will apply the death penalty and conflict with fundamental human rights. Also, the seafarers, crew members and master of a ship are entitled to the right to life which creates an obligation on states to protect, respect and fulfil the right to life of persons within their jurisdiction. The UN security council resolution also affirmed in some resolutions that, human rights law is relevant when fighting piracy.[77] Also art. 98 of the UNCLOS acknowledges the state responsibility to assist persons in torture or in trouble at sea. Thus the duty of the coastal state is, to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring states for this purpose".[78]

Due to the conflicting jurisdiction in combating piracy, it therefore implies that, human rights law Mechanisms are involved. Thus, in combating piratical activities, the human rights mechanisms which will be discussed below are, the International Covenant on Civil and Political Rights (ICCPR),[79]

Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, UN Doc A/CONF.183/9 (1998), reprinted in 37 ILM 999, Preamble, 1 5. See also M. Cherif Bassiouni, Combating Impunity for International Crimes, 71 U Colo L Rev 409, 410 (2000) ("The pursuit of justice and accountability, it is believed, fulfils fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflicts."); Michael P. Scharf, The Prosecutor v. Dusko Tadic, An Appraisal of the First International War Crimes Tribunal since Nuremberg, 60 Alb L Rev 861, 868 (1997) (quoting Richard Goldstone for the idea that international criminal tribunals will provide an enforcement mechanism to punish those who commit atrocities, thereby aiding in deterring future atrocities).

[75] The Preamble to the Rome Statute states that the parties have agreed to create a permanent ICC with jurisdiction over the most serious crimes of concern to the international community. Rome Statute at Preamble, 1 4 (cited in note 15). In addition, Article 1 also emphasizes that the court will have jurisdiction over the "most serious crimes of international concern." Rome Statute, Art 1 (cited in note 15). At the present time, the crimes over which the ICC does have jurisdiction are genocide, crimes against humanity, and war crimes. The parties to the Rome Statute also have declared that the ICC will have jurisdiction over the crime of aggression once a provision is adopted defining that crime and setting out the conditions under which the court can exercise jurisdiction over it. See id, Art 5.

[76] Anna Petrig, Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects (Brill 2014) 157.

[77] 192 See, among others, Security Council Resolution 1851 (2008), §6.

[78] UNCLOS (n 2) art 98(2).

[79] Taylor, Paul M. A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights. Cambridge University Press, 2020.

the European Convention on Human Rights (ECHR),[80] and the African Charter on Human and Peoples Rights (ACHPR)[81] The discussion below will be focused on the suspected pirates, the victims and the state.

Firstly, the right to liberty of suspected pirates and law enforcements in combating piracy. The problem originates from the conflict between human rights law and the mechanism in combating piracy. The right to liberty and security is a fundamental right enshrined in many human rights instruments, national constitutions and domestic legislation.[82] This right entails the right to be brought promptly before a judge. For example, Article 5(3) ECHR states that, " Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to a release pending trial.[83] When a suspected pirate is captured, the pirate is detained while waiting for investigation to be carried out[84] and sometimes the investigation might be complicated due to difficulties in gathering information and due to the respect for human rights,[85] the pirate might be release pending trail which might lead to the pirate's escape.

Another situation is when the pirate is a minor. The process for the prosecution of pirates or a pirate who is a minor is very complicated due to human rights intervention to protect minors from severe penalty or sanctions.[86] Thus, juvenile who are involve in piracy have a reduce penalty such as

[80] Nowlin, Christopher. "The protection of morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms." Human Rights Quarterly 24, no. 1 (2002): 264-286.
[81] Gittleman, Richard. "The African Charter on Human and Peoples' Rights: A Legal Analysis." Va. J. Int'l L. 22 (1981): 667.
[82] See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3; See also ICCPR (n 53) art 9; See also ECHR (n 54) art 5.
[83] ECHR (n 54) art 5(3).
[84] Such agreements are common practice in current counterpiracy operations. For reference to an agreement under which more than 120 suspected pirates were delivered by foreign vessels to Kenya for prosecution, see UN Office on Drugs and Crime, Counter-Piracy Programme, Support to the Trial Related Treatment of Piracy Suspects, Issue 6 (June 2011). See also Foreign and Commonwealth Office, 'Prisoner transfer agreements.
[85] For example, Article 5, ECHR; Article 9, UDHR; Article 9, ICCPR; Article 6, ACHPR; Article 7, ACHR; and Article 14, AbCHR. Also, of relevance is the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), though it should be noted that these principles are 'soft law' rather than legally binding rules. The European Court of Human Rights has explained that 'in order to determine whether someone has been "deprived of his liberty"… the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'. See Medvedev and Others v. France, ECtHR, App. No. 3339/03 [2010], §73. The Court also noted that the difference between deprivation and restriction of liberty is 'merely one of degree or intensity, and not one of nature or substance'. See Guzzardi v. Italy, ECtHR, App. No. 7367/76 [1980]. Deprivation of liberty includes arrest and detention, as well as other forms of detention such as house arrest. See Mandani v. Algeria, HRC Comm. No. 1172/2003 [2007].
[86] Article 37 of the UNCRC requires that no child be subject to torture and inhuman or degrading treatment, capital punishment, or life in prison without possibility of release. Arrest, detention or prison shall be used only as a measure of last resort and for the shortest appropriate time. The Convention goes on to specify safeguards and procedures to ensure that juveniles who may be accused of crimes are protected and treated with dignity. It should be noted that it is recommended that juveniles are reintegrated into society as quickly as possible.

a reduced sentence.[87]In some countries, minors are tried in specific courts which are established just for juvenile cases. The minor can therefore be asking just the rule in piracy operation if he or she was just a spy. This has been a hinderance as some minors even go unpunished especially if they are not within the age to face court judgement since minors are vulnerable and could easily be manipulated.

Furthermore, when a suspected pirate is detained, need might sometimes arise for the pirate to be transported to where they will be judge. This so because, the pirate might have been capture far off into the high seas and the pirate to be detained and transported for trial. Sometimes the condition for detention pending trial is deplorable,[88] like pirate being locked up in a vessel which does not have the provision of a detention cell which is against fundamental human rights. The detention period may also be too long[89], to liberty leading to a deprivation to freedom [90] and sometimes the arrest may be an arbitral arrest which might be an intentional act.[91]Despite that, pirates are criminals, they are human beings and their wellbeing must be guarantee. Therefore, the suspected pirates must be brought quickly and promptly before the court which means without delay in detention. Sometimes this delay might be due to language barrier in proceeding with the trail. Also, since the act of piracy often involve people from different nationality, communication between the naval officer and the suspected pirate is difficult and sometimes impossible and there by prolonging the period of detention. Human. Human rights law have also insisted on the use of translator to ensure that the pirate understands the reason for his or her arrestor detention.[92] The call for the concern for the respect of the fundamental human rights of pirates have deterred some states from prosecuting pirates who are scared of going through the complications of detention till the judgement or trial. Due to this some states even catch and release pirate suspects without trial.[93]

In addition, the prohibition of the use of firearms or the use of force is also a hinderance in combating piracy. This is because it might be difficult for the naval officers to intercept the vessels of the pirates on the high seas without the use of force or firearms. Most often the firearms are just to

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[87] The minimum age of criminal responsibility is determined as age at which an individual can be tried for a serious crime. This age appears to vary between 10 and 16 years with England and Wales at the low end of the spectrum and Scandinavian countries and Canada at the upper end (Cipriani, 2009).

[88] According to Philip Alston, the Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 'while the proportionality requirement imposes an absolute ceiling on the permissible level of force based on the threat posed by the suspect to others, the necessity requirement imposes an obligation to minimize the level of force applied regardless of the level of force that would be proportionate'. 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', annexed to UN doc. A/66/330, 30 August 2011, §29, citing the former Rapporteur, as set out in UN doc. A/61/311, §41. In the view of a former Special Rapporteur on Torture, 'disproportionate or excessive exercise of police powers amounts to cruel, inhuman or degrading treatment and is always prohibited'. 'Report of the Special Rapporteur on the question of torture, Manfred Nowak', UN Commission on Human Rights, UN doc. E/CN.4/2006/6, §38.

[89] Ibid. at 12.

[90] 6 Article 9(4), ICCPR; Article 5(3), ECHR; Article 7(5), ACHR; and Article 14(5), AbCHR.

[92] Article 9 (2), ICCPR; Article 7 (4), ACHR; Article 5(2), ECHR; Article 14(3), AbCHR; Principle 14, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The ACHPR contains no such guarantee, although the African Commission on Human and Peoples' Rights has stated that the right to fair trial includes a requirement that those arrested 'shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them'. See ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Comm. No. 224/98, 28th session (23 October – 6 November 2000), §43.

[93] Medvedev and Others v. France, ECtHR, App. No. 3339/03 [2010].

scare the pirates to surrender. Though, there could be an error where firing a gun shoot in the air might mistakenly kill a pirate, there by violating his or her right to life which ought to be respected.[94]

Thus, the U.N define Convention Against Torture (CAT) as " Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind"[95] Thus the total prohibition or restriction of torture and other forms of cruel, inhuman, or degrading treatment[96]

Again, talking about the conventions which have first been mentioned above, there are three important conventions which applies when discussing competing jurisdictions in anti-piracy operations and the various human rights law instruments which must come into play. Firstly, the European Convention on Human Rights(ECHR) which applies only for the council of European states for e.g. is an international convention to protect human rights and political freedom in Europe and it also applies to the effective control of people within a state.[97] Secondly, the International Covenant on Civil and Political Rights(ICCPR) and lastly, the African Charter on Human and Peoples Rights (ACHPR).[98] Countries are obliged to respect these conventions and must therefore ensure that suspected pirates get a fair trial. Also, countries who are parties to the United Nation Convention against Torture and against other forms of inhuman treatment and punishment would not hand over pirates to a state who do not respect these conventions.

Furthermore, for pirates to be prosecuted certain conditions are taken into consideration such as; the right to fair trial, the lengths of time which they can be detained and the prison conditions. The potential HR issue for holding pirates at sea states that, "For those states which are parties to the European Convention on Human Rights, there is no legal problem with their public vessels holding pirates on board for the purpose of taking them to a proper jurisdiction for arrest and prosecution. They may, however, be a problem in relation to the holding of pirates on their own vessels, and not allowing them to go, for the purpose of disruption of piracy, rather than of detention for prosecution".[99] For e.g. in 2008 a case concerning the breaching of human rights by the captured state was explained as follows:

"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

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[94] Adopted by UN General Assembly Resolution 34/169 of 17 December 1979. Melzer affirms that it is 'widely recognized as an authoritative guide for the use of force by State agents engaged in law enforcement activities.' N. Melzer, Targeted Killings in International Law, Oxford Monographs in International Law, Oxford University Press, Oxford, 2009, p.196.

[95] Article 1, CAT. This definition is limited to torture committed by state officials or agents. But see below for a brief discussion of the provisions of the Statute of the International Criminal Court which give the court jurisdiction over torture committed by organized armed groups. For further discussion regarding the definition of torture, see, for example, M. Nowak and E. McArthur, The United Nations Convention against Torture – A Commentary (Oxford: Oxford University Press, 2006).

[96] Meaning that the prohibition may not be limited or derogated from under any circumstances.

[97] Chatham House, Pirates and How to Deal with Them, 22 April 2009, p11.

[98] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 231.

[99] Chatham House, Pirates and How to Deal with Them, 22 April 2009, p8.

Somali beach. The Danish authorities had concluded that, the pirates risked torture and the death penalty if surrendered to 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 (considering the possible abuses they would risk) to deport them back to Somalia after their sentences were served. Human rights considerations, or perhaps reasons of expediency presented as human rights concerns, prevailed over considerations concerning the fight against piracy."[100]

The war enforcement ship or the warships are assigned to carry out maritime enforcement operations, oversee arrest, detention and transfer of suspected pirates. Since piracy is a severe offense, it is punishable under criminal law except it is provided in the individual states. For example, states which are in the Gulf of Guinea like Nigeria for instance have an administration of criminal justice law which applies to the military. Moreover, the criminal procedure law of some countries like Denmark and Germany do not use or apply to their military.[101] States partaking in combating piracy are not restricted to their domestic criminal procedural laws. Though Criminal procedural law defines the requirements for lawful deprivation of liberty such as arrest and detention, it is not sure if piracy laws suits such requirements under IHRL. Article 105 UNCLOS states that, "all states have been given the power to seize a pirate ship and arrest piracy suspects.

Hence, Article 105 UNCLOS provides a universal arrest warrant, though it is not clear if it fulfils the lawfulness of arrest for such counter-piracy operation. Article 107 UNCLOS gives the naval warships the power to conduct seizures on account of piracy, including the ability to board a vessel reasonably suspected of engaging in piracy."[102] Even though Article 105 of UNCLOS and many UNSC resolutions supply the legal authority to detain suspected pirates,[103] the lawfulness criteria relates to the "quality of the law" from an ECHR perspective.[104] According to the ECtHR, this includes "the existence of clear legal provisions for ordering detention, for extending detention, and for setting time limits for detention; and the existence of an effective remedy by which the applicant can contest the lawfulness and length of his continuing detention".[105] Since it is considered a framework, UNCLOS does not state all these, but national laws or the operations' mandate should

[100] 1 Danish Shipowners' Association, 'The Challenge of Piracy'; Soefart.dk, 'Pirater Koster Milliarder', Soefart.dk, 2012 [accessed 25 August 2014].
[101] ibid 220-221.
[102] UNCLOS (n 2) art 110.
[103] Alice Priddy & Stuart Casey-Maslen, 'Counterpiracy under International Law' (Geneva Academy of International Humanitarian Law and Human Rights 2012) 34; The authors mention that "Article 105 of the LOS Convention, Article 19 of the High Seas Convention, and various UN Security Council resolutions provide the legal authority to detain suspected pirates."
[104] JN v The United Kingdom App No 37289/12 (ECtHR, 19 May 2016) para 77.
[105] applicant can contest the lawfulness and length of his continuing detention".87 As a framework, UNCLOS does not state all these, but national laws or the operations' mandate should meet the criteria. Also, national laws authorising deprivation of liberty must be sufficiently accessible, precise and foreseeable in their application; otherwise, they are arbitrary.88 Other components of the right to liberty and security under human rights law are the right to be informed at the time of arrest of the reasons for arrest; the right of detainees to be brought promptly before a judge or other judicial officers; and the right to be tried within a reasonable time.

meet the criteria. In addition, national laws authorising deprivation of liberty must be accessible enough, precise and foreseeable in their application; otherwise, they are arbitrary.[106]

Lastly , the right to the principle of non-refoulement prohibits removing a person to a state where there are risks of facing torture, inhuman and degrading treatment.[107] In international human rights law, neither the ICCPR, ACHPR nor the ECHR explicitly explains this principle of non-refoulement. However, the right to life and the prohibition of torture and other ill-treatment is always extended to cover the non-refoulement obligation.[108]The scope and content of the non-refoulement means that no person will be return to a country where the life of the person is in danger[109] such as cruel, inhuman and degrading treatment despite the offense the person committs. There exist no exception or limitation to this principle."[110] Therefore no exemption or derogation of the law is accepted even in the situation of suspected pirates.[111] In combating piracy, the non-refoulement provisions apply extraterritorially based on the flag state principle (de jure jurisdiction) and when a suspected pirate is on board a vessel in view of a decision to transfer him/her to a third state (de facto jurisdiction).

Hence, a good example here is the case of Hirsi Jama and others v. Italy. In this case, the Court held that the Italian government's interception of migrants and their immediate transfer to Libya as a result of a Memorandum of understanding (MOU) between both countries without assessing individual cases was a violation of the convention.[112] This case shows that individual assessment of each case is necessary before any form of transfer.

4.3. The right to Hot pursuit.

Hot pursuit is a doctrine in maritime which is codified in art 111 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[113] This doctrine of hot pursuit acknowledges that when a vessel has committed a crime or has violated the laws while in the territorial waters of another state, then pursued begins and only ends when the vessel enters the high seas. This definition explains that the right of hot pursuit as an extension of criminal jurisdiction by the state pursuing the vessel. This action confirms the freedom of the high seas but this freedom ends as soon as the vessels enters its own territorial waters or the territorial waters of a third state.[114] The right to pursue a vessel and cease it on the high seas is an exception to two key or important principles in

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[106] ibid, para 77; See Nasrulloyev v Russia App No 656/06 (ECtHR, 11 October 2007), para 71; See also Khudoyorov v Russia App No 6847/02 (ECtHR, 11 July 2005) para 125.
[107] Kees Wouters, International Legal Standards for the Protection from Refoulement (Intersentia 2009) 25.]
[108] ICCPR (n 53) arts 6 and 7; See also ECHR (n 54) arts 2 and 3; See also ACHPR (n 55) arts 4 and 5.
[109] CHURCHILL, Lowe. Almost all states are parties either to one or the other which entails that these provisions state the international law as currently in force. 1999, pp, 210.
[110] Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Erika Feller et al (eds), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (Cambridge University Press 2003) 163.
[111] Petrig (n 51) 321-29.
[112] Hirsi Jamaa and others v Italy (n 101) paras 110-138.
[113] United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS].
[114] Article 111(3), UNCLOS.

international law. Firstly, the freedom of navigation on the high seas, and secondly, the principle that a vessel is subject to the exclusive sovereignty of the state whose flag it flies. However, the right of hot pursue has been limited in its expansion due to the principles of freedom of navigation and exclusive flag state jurisdiction which is deemed to be very important.

Thus, hot pursue in maritime develop as a doctrine in customary international law,[115] before being codified in art 23 of the 1958 Geneva Convention on the High Seas (CHS).[116] UNCLOS provides the basic constitution for oceans. Firstly, it regulates the rights and duties of coastal states in the various maritime zones in their territory or sovereignty. And secondly, it classifies the freedom of navigation within coastal waters which are, the rights of innocent, transit and archipelagic sea lanes passage and the freedom of navigation through the exclusive economic zone (EEZ). Hence, UNCLOS is trying to equalize the rights of coastal states to control their maritime areas and the rights of maritime states to enjoy the freedom of navigation over the ocean. The CHS and the UNCLOS state that; "the right of hot pursuit ends the moment the pursued foreign vessel enters into the territorial sea of its own country or of a third State."[117] Thus the continuation of hot pursuit into the territory of another state is an exception. This was well explained by the UNSC.[118] This doctrine of hot pursue was earlier formulated from the case of I'm Alone.[119] This doctrine was also formulated with the assistance of some private academic institutions like the e Harvard Research in International Law of 1929 and many others.[120] The right of hot pursuit had become universally accepted by the middle of the 20th century.[121]

Furthermore, maritime piracy drastically increases in Somalia territorial waters and this affected most of the commercial ships sailing through the Gulf of Aden. This was a serious problem as the Somalia interim government said that they were unable to exercise criminal jurisdiction to pursue

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[115] Nicholas M Poulantzas The Right of Hot Pursuit in International Law (2nd ed, Martinus Nijhoff, The Hague, 2002) at 39; D P O'Connell The International Law of the Sea (Oxford University Press, Oxford, 1982-1984) vol 2 at 1076.

[116] Geneva Convention on the High Seas (opened for signature 29 April 1958, entered into force 30 September 1962) [High Seas Convention].

[117] UNCLOS, Art. 111(3)

[118] Resolution 1816 and succeeding related Resolutions (UNSC Resolutions 1846(2008), 1851(2008) and 2007(2012)) relating to anti-piracy measures in Somalia In its Resolution 1816, the UNSC authorized States cooperating with the Transitional Federal Government of Somalia (TFG) to: (1) enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and (2) use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery. However, the UNSC was careful to underscore the extraordinary and sui generis nature of the authorized measures by clearly limiting their ratione temporis and ratione loci (Treves, 2009:399-414). Thus, cooperating States would only be allowed to make use of such authority for a period of six months (later extended for one year by UNSC Resolution 2077) and only with respect to the situation in Somalia. Resolution 1816 further states that it "shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law… (para. 9)."

[119] I'n Alone (1935) 29 AJIL 326.

[120] O'Connell, above n 5, at 1078.

[121] O'Connell, above n 5, at 1079. Again, note that the only controversy was over in what zone the pursuit could begin.

and prosecute the perpetrators of these crimes even though this jurisdiction is in accord with both its constitution and international law. Somalia which has been considered as a fail state have therefore raise the concern of the International Maritime Organisation (IMO)and have resulted to the creation of two legal instruments which may play a great rule in combating piracy at the regional level. These two instruments are, firstly the UN Security Council Resolutions 1816 which uses the powers of chapter VII in its resolution 1618, 1816, 1838, 1846 and 1851 to call on Members of the UN and even regional organisations such as European Union and African Union to pursue pirates in both the Somali Territorial Sea and on the mainland, and to place them before their national court or the courts of another country.[122] This is to be effective within a period of six months. Secondly, the IMO, organised an African Regional Conference and produce a draft Memorandum of Understanding on piracy, which even though it is in a non-binding form, could create practical and effective structures to fight against piracy in the region. Article 1851 authorises "cooperating States" to move forward or use all necessary measures to fight against piracy and embark in suppressing piracy at sea in accordance with relevant international law.[123]

In other to be considered a cooperating state under the Resolutions, it is necessary to operate with the consent of the Somali Transitional Federal Government (the TFG) which is notified in advance to the UN Secretary General.[124] This makes the Resolutions not important or not necessary because Somalia itself is capable of authorising foreign law-enforcement action in its waters and on its soil. An example is when the French commandoes seized the *Le Ponant* hijackers on Somali soil in summer 2008, the TFG expressly consented to the mission. Chapter VII is not required to permit consensual operations. Many states do not recognise the TFG because it seems to them that authorisation will not be given on time. Thus, in the *Le Ponant* affair, it is not clear if France receive authorization in advance.

The Resolutions 1816 and 1848 accept the use of force in Somalia's territorial sea to combat piracy in a way consistent with action acceptable on the high seas, but do not contain an important rule on which State will have jurisdiction to try pirates captured there.[125] The law of piracy mention very little about which manner pirates might be seized and does not proposes specific rules on the use of force. Instead, the applicable law is the general international law applicable to maritime police actions.

Also, for captured pirates at sea, Resolutions 1816 and 1846 explains that "applicable international human rights law" must be in accordance with Earlier Resolutions, encouraged States to cooperate to decide who has jurisdiction to try pirates.[126] UNSCR 1851 therefore remind States that in certain circumstances, they might have a duty to accept delivery of pirates and to try them for offences

[122] Twenty-one countries responded to this call, often through the deployment of warships, including African countries (Kenya, the Seychelles, Tanzania and Mauritius), Arabian countries (Oman, the United Arab Emirates, Yemen and Saudi Arabia), Asian countries (China, South Korea, India, Taiwan and Japan), European countries (the Netherlands, Belgium, France, Germany, the United Kingdom, Russia and Italy), and the United States. Mainiatas, La Piraterie en Afrique, 23 Neptunes revue (2017) 2 ; avalable at : https://cdmo.univ-nantes.fr/neptunus-e-revue/ annees-2017/.

[123] Ibid., §10.

[124] UN Security Council Resolution 1851 (2008), §6.

[125] T. Treves, 'Piracy, Law of the Sea, and Use of Force', op. cit.

[126] Resolutions 1897 (2009), 1950 (2010), and 2020 (2011) all extend for a further period of one year the authorizations provided in Resolution 1846 (2008), §10, and Resolution 1851 (2008), §6.

under the SUA Convention. This could to be an attempt to apply positive obligations in the SUA convention to fill the gap in the general law of piracy.

4.4. Lack of trust between the shipping industry and the government authorities.

Sharing important or relevant information amongst states or international bodies is necessary for supressing piracy. Sharing relevant information which could be very useful is sometimes difficult due to the lack of trust between the shipping industry and the government authorities. The function of the shipping company in sharing information is very important since they are the ones to enable the collection of evidence by the police and they also have access to very important data. UNSC Resolution of 1976, the UNSC, acting under Chapter VII of the U.N. Charter: (1) invited states, individually or in cooperation with regional organizations such as INTERPOL to study the domestic procedures to protect evidence and help other states with measures to combat piracy. States and international organisations are being asked to share evidence and information in order to ensure the effective prosecution of piracy.[127]

An important challenge is the lack of trust between the shipping industry and the government authorities such as the navies and the law enforcement agencies. The obstacle in sharing information has been particularly relevant in the situation of ransom payments. Normally, negotiations over ransom payments are negotiated directly between the pirates or their representatives and the shipping company or its representatives.[128] In the situation of such negotiations, information of relevance for future investigation and prosecution might be obtained, including names of negotiators and phone numbers. Most often, the shipping company concerned has been hesitant to share such information with governmental authorities. This may be due to the fact that, the information may be business incline or a business secret and a presumption that sharing information might stop the present or future negotiation or even a fear of potential criminal proceedings against the representatives of the shipping industry in countries where paying ransom to pirates is criminalized. Putting an end to this trust gap will provide the population of international criminal databases with important information to be used for future analytical reports and for the prosecution of pirates' master. Also, to maintain the positive strength, it is important that the private sector receive feedback on the information it provides to governmental authorities so that it can appreciate the effects of its collaboration thereby encouraging them to give further information when necessary. Thus, this phenomenon can easily be regulated at the domestic level, that is within the state, since trust can easily be built within a state than at international level.

A solution to this problem would be for the people of the international criminal databases with important or relevant information to be used for future investigative reports and likely the prosecution of pirate kingpins. Also, it is important for the private sector to receive feed backs on information which they provide to the government authorities, in other that it can acknowledge the information the consequences or effects of its collaboration.

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[127] S.C. Res. 1976, supra note 52, 16,18,19.

[128] See Vivienne Walt, Why the Somali Pirates Keep Getting Their Ransoms, TIME (Apr. 20, 2009), http://content.time.com/time/world/ article/0,8599,1892366, 00.html (noting how shipping companies routinely conduct the negotiations with pirates and pay ransom sums).

5.Conclusion.

Piracy is the first offense to be acceptable as a crime in international law and subject to universal jurisdiction and no international convention use to eradicate maritime piracy has been created. The provisions in the 1982 UNCLOS presents the present international legal framework for fighting piracy. This provision is compulsory to all states who are members of the UNCLOS though it is thus reflected in customary international law.

Also, there is the right for any state to exercise jurisdiction on crimes on the high sea established by this convention for crimes such as piracy and this right is incorporated in the definition of piracy. States also have a general obligation in that, they must "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 provision of the UNCLOS does not apply in all cases of piracy. For example, any piratical attacks on the territorial waters of any state does is not included in this provision. Also, criminal offenses which are not describe as piracy are not included in this provision. The UNCLOS does not lay out any procedure for the prosecution and investigation of pirates.

Furthermore, aside of the UNCLOS, there are other conventions which are used to combat piracy and prosecute pirates which includes, The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, (SUA), 1988 and its Protocols. International Convention against the Taking of Hostages adopted by the General Assembly of the United Nations on 17 December 1979.

As for domestic law, it has played a vital in the development of legislative framework that has enable the essential and well organise way of the prosecution of pirates. Hence the UNCLOS and the SUA convention, needs the application of important provisions into the legislations of the states who are parties to this convention. In other to accelerate this procedure, the IMO Assembly and Resolutions have adopted guidelines and recommendations on how the provisions of this conventions can be used to fight piracy and how pirates can be prosecuted. The increase in cooperation at the international level and the regional level to combat piracy and arm robbery in the seas have expanded over time. This was as a result of acts of piracy off the coast of Somalia, but it has led to a positive example for cooperation in other regions or states to copy. An example is in west African waters where there is very high rate of piratical activities.

Lots of efforts have been made at the international and regional level to combat piracy such as cooperation mechanisms and even the intervention of the military and the naval forces. Though a lot of efforts have been put in at the international and regional level to combat piracy, these efforts are still insufficient as piratical activities have not been eradicated. The International Maritime Organization (IMO) and the United Nations Security Council, have been leading the international efforts to fight against piracy. Despite all the efforts made to combat piracy, there are a lot of challenges, ranging first from the definition of piracy itself to other legal factors.

Thus, the first part of this paper analyses the major legal problem which is that of the definition of piracy. This is because the definition stresses on the "two ship" criteria, the "private ends" criteria and the "high seas" criteria. This problem has been resolved by the adoption of the SUA Convention and International Maritime Organization (IMO)'s Code. For many years now the problem of the definition of piracy by the UNCLOS has been resolved and firmly established. Though several

countries have assimilated the UNCLOS definition into their domestic law, there are still a few countries which have not done so. A good example here is the Indian domestic law which does not define piracy totally.

The second step is another legal challenge which is the difficulties in prosecuting pirates. Though customary international law does not provide any precise definition for acts that constitute international crime of piracy, there are however, two international treaties that control or govern piratical acts and provide jurisdictional bases for nations to prosecute their pirates at the domestic level. These two international treaties are; the United Nation Convention of the Law of the Sea (UNCLOS) and the second treaty is the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention). The SUA convention has 156 states who are parties to the convention while the UNCLOS has 160 nations who are parties to the treaty and have adopted the definition of piracy by the UNCLOS.

Another step is the is the challenge cause by the intervention of human rights (HR). This has also been resolved in that, capturing countries must sure that countries to which suspected pirates have been transfer have good prison conditions and favourable trials which meet international standard. Also, prisons are frequently checked to ensure that human rights are not violated. The United Nations Office on Drugs and crime (UNODC) sponsors programs which take charge in visiting prisons.

Furthermore, pirates who commit offenses on the high seas are aware that, if they stay in the high sea or the exclusive economic zone they will be pursued and what they do is that after committing a crime they enter into the territorial water of any state so as to avoid hot pursuit by the foreign vessels and the capture of any state on the grounds of universal criminal jurisdiction. In other to address this issue, the UNSC Resolution, in an exceptional way, gave foreign naval forces the authority of pursuing pirates into the Somalian territorial waters from the high seas and the exclusive economic zone (EEZ), to capture them. The security council again authorized the foreign naval ships to enter Somalia's territorial water with the consent of the Somalian government in other to capture pirates' vessels. The security council also clear stated that, "the provisions of this resolution apply only with respect to the situation in Somalia and do not affect the rights and obligations or responsibilities of Member States under international law".[129] This implied that this provision should be implemented in the legal framework in the fight against piracy as enshrine in the 1982 Convention on the law of the Sea58 and rules of customary international law.

The last step here is the lack of trust between the shipping industry and the government authorities. In other to resolve this problem it will be important for the private sector to receive reply on information it provides to the government authorities so that it will build trust between the government authorities and the shipping industries.

Though the international community focuses more on piracy off the coast of Somalia, hope this focus will be tilted to other areas suffering from high rates of piratical attacks in other that the challenges of combating piracy could be successfully eradicated.

[129] UNSCOR, 66th Year, 6635th Mtg, UN Doc S/RES/2015 (2011) at Preamble.

6.sources.

6.1. Conventions.

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Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 231.

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") (Mar 10, 1988), 1678 UNTS 221 (1998).

UNCLOS, supra note 6, art. 105, 1833 U.N.T.S. at 437.

The General Assembly has frequently emphasized that "the Convention sets out the legal framework within which all activities in the oceans and seas must be carried out". As of February 2011, the number of state parties to the UNCLOS is 161, including European union. See, e.g., General Assembly resolution 65/37 of 7 December 2010.

Harvard Draft Convention, supra note 23, at PP, 743.

The UNCLOS repeat almost literally Articles 14–22 of the Geneva Convention on the High Seas of 1958, PP, 100-107, Article 14-22.

Compare 1956 ILC Draft Articles, supra note 46, art. 39, with Geneva Convention, supra note 24, art. 15. Article 39:

6.2. Articles

Id, Art 100.

Article 111(3), UNCLOS.

See id, Arts 7, 10. Article 100 UNCLOS; Article 14 CHS; Article 38 ILC Draft

Article 105 UNCLOS; Article 19 CHS; Article 43 ILC Draft.

Article 110 UNCLOS ; Article 22 CHS ; Article 46 ILC Draft.

Article 107 UNCLOS ; Article 21 CHS ; Article 45 ILC Draft.

Article 106 UNCLOS (Article 20 CHS ; Article 44 ILC Draft.

The ILC's Commentary to article 39 (A/CN.4/104, at p. 282).

Article 111(3), UNCLOS Article 9(4), ICCPR ; Article 5(3), ECHR ; Article 7(5), ACHR ; and Article 14(5), AB CHR.

8 Article 5(1), CAT.

Article 11 in Annex I.

ICCPR (n 53) arts 6 and 7; See also ECHR (n 54) arts 2 and 3; See also ACHPR (n 55) arts 4 and 5.

DUBNER. This was proposed by the Harvard Research in International Law Group., n. 1, at 78-80 for an evaluation of their draft articles.

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Id, Art 100

6.3. Books and Journals.

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POULANTZAS, No. 63, pp, 187.

RUBIN supra note 28 at PP, 334. BROWN, May. Greenpeace did not respond to an inquiry for information on the incident. June 18, 1992, supra notes 61, pp, 120.

House of Commons Foreign Affairs Committee, Piracy off the coast of Somalia, HC 1318 2010-12, 5 January 2012, para 74.

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CHATHAM House, Pirates and How to Deal with Them, 22 April 2009, pp,11.

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Liberty in this context is concerned with a person's physical liberty. About the principle of legality, the Human Rights Committee has stated 'it is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation'. McLawrence v. Jamaica, HRC Comm. No. 702/1996 (1997), §5.5.

9 'Amnesty Demands Dutch and Danish Take Care of Pirates', Amnesty International, 2009; and 'Navy Releases Accused Somali Pirates Held on Warship for Six Weeks', Washington Post, 28 May 2010.

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Ibidem. Among States opposed to the draft convention on piracy were United States of America. As reported by J.S. Reeves, Progress of the Work of the League of Nations Codification Committee, 'American Journal of International Law'. "With regard to the sixth subject enumerated in the communication of the Secretary-General, namely, Piracy, it is the view of the Government of the

United States that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement" (emphasis added).1927, vol. 21, No.4, pp,71-665.

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RUBIN. Notable exception to this view about Harvard Research Draft, as an "exercise de lege ferenda", not reflecting international law (customary or otherwise); pp. 345. The cited Author is much of the same opinion on the ILC Draft and, consequently, on the Geneva Convention on the High Seas and UNCLOS 1958. See Ibidem, at pp. 353 and pp, 367.

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6.5. Legal sources.

The Assembly of the League of Nations formally requested the Council of the League to prepare a provisional list of subjects of international law the regulation of which would seem to be most desirable and realizable. The Committee responsible for drawing up this list included piracy and also included Draft Provision for the Suppression of Piracy, but these were dropped from the conference on the grounds that piracy was no longer a pressing issue to the international community and that the realization of a universal agreement seemed somewhat difficult at that time. See RUBIN supra note 28 at PP. 333-334. Security Council Resolution. 1976, supra note PP,52, 16,18,19.

6.6. Website.

For a list of state ratifications, see UN, Chronological list of ratifications of accessions and successions to the Convention and the related Agreements as at 08 January 2010, online at

http://www.un.org/Depts/los/reference-files/chronological ists_ofratifications.htm (visited Apr 3, 2010). Notably, although the US is not a party to UNCLOS, it did ratify an earlier version.

See Eugene Kontorovich, "A Guantanamo on the Sea": The Difficulties of Prosecuting Pirates and Terrorists 18, online at http://papers.ssm.com/sol3/papers.cfm?abstractid=1371122## (visited May 3, 2010) (stating that the SUA Convention has only been used once-in a case the US originally brought in the US District Court for the District of Hawaii against a cook put who commandeered a fishing trawler). For a record of the facts of that case, consider United States v Shi, 525 F3d 709 (9th Cir 2008).

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6.7. Others.

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Id. At PP, 822 (emphasis added).

Right of visit is not traditionally discussed in the context of piracy, however it seems to be relevant in the present context insofar it establishes the right of warships to board vessels they suspect of piracy.

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House of Commons Foreign Affairs Committee, Piracy off the coast of Somalia, HC 1318 2010-12, 5 January 2012, para 74.

192 See, among others, Security Council Resolution 1851 (2008), §6.

African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3; See also ICCPR (n 53) art 9; See also ECHR (n 54) art 5.

Medvedyev and Others v. France, ECtHR, App. No. 3339/03 [2010].

9 ‘Amnesty Demands Dutch and Danish Take Care of Pirates’, Amnesty International, 2009; and ‘Navy Releases Accused Somali Pirates Held on Warship for Six Weeks’, Washington Post, 28 May 2010.

PK et al v. Spain, Comm. No. 323/2007 [2008] §8.2.

UN Committee Against Torture, General Comment No. 2: Implementation of Article 2 by State Parties, UN doc. CAT/C/GC/2, 24 January 2008, §7.

UN Security Council Resolution 1851 (2008), §6.

T. Treves, ‘Piracy, Law of the Sea, and Use of Force’, op. cit.

Resolutions 1897 (2009), 1950 (2010), and 2020 (2011) all extend for a further period of one year the authorizations provided in Resolution 1846 (2008), §10, and Resolution 1851 (2008), §6.