BRILL
NIJHOFF

THE INTERNATIONAL JOURNAL OF
MARINE AND COASTAL LAW 31 (2016) 279–314

THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW

brill.com/estu

Developing the Concept of Maritime Piracy: A Comparative Legal Analysis of International Law and Domestic Criminal Legislation

Ilja Van Hespen
Lieutenant Commander, Belgian Navy; Doctoral Researcher, Royal Military Academy (KMS), Ghent University (U Gent), and Free University of Brussels (VUB), Belgium[1]

Abstract

This article deals with the problem of combating international crime related to violence at sea. The question addressed is whether, according to public international law, all violent acts in the maritime domain, such as maritime piracy, drug trafficking, human trafficking and maritime terrorism, can be combined into one legal concept. In order to answer this question, this article takes the traditional notion of "piracy" in the sense used in the 1982 Law of the Sea Convention and explores the possibility of the notion being extended to encompass the other forms of crime to a concept of "universal maritime crime". Jurisdictional issues, the difficulties of incorporating the resulting concept into domestic criminal legislation and challenges related to the prosecution of alleged criminals, such as due process and human rights issues, are also considered.

Keywords

piracy – maritime security – maritime terrorism – universal jurisdiction – Law of the Sea Convention – Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation – human trafficking – migrant smuggling

1 The author expresses his special thanks to Professor David Freestone for sharing his expertise and his guidance, to Charles Van Hespen and Maria Binon, his parents, and to Jurek De Vrij for support and inspiration. E-mail: ilja.vanhespen@mil.be.

© KONINKLIJKE BRILL NV, LEIDEN, 2016 | DOI 10.1163/15718085-12341395

Introduction

Domestic Anti-Piracy Law: the Case of Belgium[2]

On 30 December 2009, the Belgian Federal Parliament (the federal legislative body)[3] took the unusual step of passing the Belgian anti-piracy act.[4] Its intention was to deal in an elegant way with the most common problems experienced in the fight against piracy. The Law provides definitions of a number of key concepts: "piracy", "pirate ship", "pirate group" and "Belgian ship". The crime of "piracy" is defined for the purposes of Belgian national law and criminal punishments are established. The procedure for arresting and prosecuting pirates according to Belgian national law is also established.

The definition of "piracy" in the 2009 Law is much wider than the traditional notion of "piracy" in the sense used in the 1982 Law of the Sea Convention (LOSC)[5] and the authority to arrest alleged pirates is extended to the Commanding Officer of a Belgian military vessel protection detachment on board any merchant vessel. Violent attacks or attempts at such attacks, with or without the "intent to rob", that are committed for private ends by the crew of any private ship against any other ship, are punishable when committed "on the high seas", but Art. 3 § 3 states that these acts are also regarded as "crimes of piracy to the extent as meant by international law" when "committed in other maritime zones than on the high seas".[6]

By this Act, therefore, the Belgian legislator has incorporated a definition of "piracy" in its domestic criminal legislation that goes further than the LOSC and customary international law. This approach is innovative, but there are issues to be considered before accepting it as a model for other nations for legislative improvement of their domestic criminal laws related to maritime violence.

---

2 I Van Hespen and AS Barros, 'Maritime Security: Current Challenges' (Policy Brief No. 20, June 2013, *Leuven Centre for Global Governance Studies* 2013) Available at http://ghum.kuleuven.be/ggs/publications/policy_briefs/pb20-almost-final.pdf; accessed 02 February 2016.

3 Belgium's Federal Parliament is made up of the Senate and the House of Representatives.

4 Published on 14 January 2010. Wet 30 december 2009 betreffende de strijd tegen piraterij op zee, BS 14 januari 2010, zoals gewijzigd op 16 januari 2013 (Belgian anti-piracy act of 30 December 2009, published in the Belgian official gazette on 14 January 2010, as amended by the Act of 16 January 2013).

5 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 397; 21 *ILM* 1245 [hereinafter LOSC].

6 Art. 3 § 3: "De (…) daden die in een andere maritieme zone dan de volle zee gepleegd worden, worden gelijkgesteld met daden van piraterij (…), in de mate bedoeld in het internationaal recht".

Objective of This Article

The issue addressed by this article is whether this 2009 Belgian anti-piracy legislation is responding to a real *lacuna* in the law and whether this could be the basis—*de lege ferenda*—for implementation by the international community, either by coordinated state practice through national legislation or by treaty. First, the article addresses the issue of whether the international law definition of "piracy" is too restrictive and whether, according to public international law, all violent acts in the maritime domain, such as maritime piracy, drug trafficking, human trafficking, and maritime terrorism, could be combined into one legal concept.

In order to answer this question, this article compares the traditional notion of "piracy" in the sense used in the LOSC or, as it is called hereinafter, piracy *sensu stricto,*[7] with a wider definition used by the Belgian anti-piracy legislation. It explores the possibility of the notion being extended even further to encompass other forms of crime to a wider concept of "universal maritime crime".

To see how the wider Belgian concept of "piracy" or, as it will be called hereinafter, piracy *sensu lato,*[8] fits within the current state of jurisdiction over these types of crimes, a range of issues are considered, including jurisdiction, the difficulties of incorporating new concepts into domestic criminal legislation, and challenges related to the prosecution of alleged criminals, such as due process and human rights issues. The specific question of whether the Belgian law is legitimate under international law if enforced against non-Belgians will be considered elsewhere.

Methodology

For the purposes of this research, empirical data have been collected and analysed. Legal texts from 66 countries have been collected, all related to the fight against piracy and other crimes in the maritime domain. Additionally, 38 piracy cases before national courts have been analysed. These have been

7 "International Piracy" or "Piracy *sensu stricto*" or "Piracy *jure gentium*" or "Piracy *according to the Law of Nations*": acts are "piratical in nature", but limited to those that occur "on the high seas" with "the intention to rob"; universal jurisdiction applies.

8 "Maritime Piracy" or "Piracy *sensu lato*": acts are "piratical" in nature, regardless of the maritime zone wherein they occur, but universal jurisdiction does not always apply and the legal framework to prosecute the offenders for the specific crime of "piracy" does not always exist.

dealt with by the competent courts of the United States of America (2 cases), Kenya (10 cases), the Seychelles (10 cases), the Philippines (11 cases), the Netherlands (3 cases), Belgium (1 case) and India (1 case). Political statements on legal issues have been collected from the United Nations Security Council[9] and the European Committee on Crime Problems of the Council of Europe.[10] Other sources of data include reports from the Operational Headquarters of the European Union (EU) Naval Forces[11] and North Atlantic Treaty Organization (NATO) Headquarters in Northwood (UK).[12] This information has been supplemented by data provided by the International Maritime Bureau (IMB) in Kuala Lumpur (Malaysia).[13]

Current Status of Jurisdiction over Maritime Piracy

International Law

The international legal authority for states to fight and prevent sea piracy and other illegal acts related to maritime violence at sea derives from several instruments. For "piracy" *stricto sensu,* these include Articles 14, 15 and

9 United Nations Security Council, *Annex to the Letter dated 23 March 2012 from the Secretary-General to the President of the Security Council* (UNSC S/2012/177, New York, 2012).

10 European Committee on Crime Problems, *Replies to the questionnaire on issues of combating maritime piracy* (CDPC(2012) 15, Council of Europe, Strasbourg, 2012).

11 In response to the rising levels of piracy and armed robbery off the Horn of Africa and in the Western Indian Ocean, in December 2008 the EU launched the European Union Naval Force (EU NAVFOR) Somalia—Operation Atalanta—with Headquarters in Northwood (UK).

12 The Allied Maritime Command (MARCOM) is part of the NATO Command Structure and is the place from which NATO maritime operations, such as Operation Ocean Shield (NATO's counter-piracy operation), are planned and commanded (see *infra* n 65).

13 The ICC International Maritime Bureau (IMB), established in 1981, is a specialised division of the International Chamber Of Commerce (ICC), combating maritime fraud. The International Maritime Organization (IMO), in Resolution A 504 (XII) (5) and (9) adopted on 20 November 1981, urged all governments and organisations to cooperate with the IMB. The increasing threat of maritime piracy led to the creation of the IMB Piracy Reporting Centre in 1992, based in Kuala Lumpur, Malaysia. It maintains a round-the-clock watch on the world's shipping lanes and issues reports on pirate attacks to local law enforcement authorities and shipping.

19 of the Convention on the High Seas (HSC)[14, 15] and Articles 100, 101 and 105 of the LOSC.[16] For "drug-trafficking" the main instrument is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[17] (Article 3 Par. 1 and Article 15). For military operations and law enforcement purposes, Article 108 LOSC on "Illicit traffic in narcotic drugs or psychotropic substances"[18] is also an important legal provision.

The Member States of the EU are also authorized to fight piracy by the Joint Action 2008/851/CFSP on the EU military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery

14 Convention on the High Seas (Geneva, 29 April 1958, in force 30 September 1962) 450 *UNTS* 11; 13 *UST* 2312 [hereinafter HSC].

15 Article 14 HSC reads: "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". Article 15 HSC reads: "Piracy consists of any of the following acts: (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article". Article 19 HSC reads: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith".

16 LOSC (n 5). HSC is still relevant, because the clauses related to "piracy" are almost identical to those in the LOSC, but whereas some important countries such as Israel, the United States and Venezuela have ratified the HSC, they are not parties to the LOSC.

17 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988, in force 11 November 1990) UN Doc. E/CONF.82/15/Corr.1 and Corr.2.; 28 *ILM* 493 (1989).

18 Article 108 LOSC reads : "1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions. 2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic".

off the Somali coast (ATALANTA or *Operation Atalanta*).[19] Article 2 gives them the mandate

> Under the conditions set by the relevant international law and by UNSC Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) (...) (d) [to] take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where (...) present

and to

> (e) in view of prosecutions potentially being brought by the relevant States (...), arrest, detain and transfer persons who have committed, or are suspected of having committed, acts of piracy or armed robbery in the areas where it is present and seize the vessels of the pirates or armed robbers or the vessels caught following an act of piracy or an armed robbery and which are in the hands of the pirates, as well as the goods on board.

This authorization is especially important and relevant for those EU countries that do not have domestic anti-piracy legislation, but do participate in counter-piracy operations, such as Portugal (discussed further below). This mandate is also important for third (non-EU) States, such as New Zealand, contributing to the EU military operation relating to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (*Operation Atalanta*).[20]

With regard to the transfer of alleged pirates between Member States of the EU participating in *Operation Atalanta* and the Government of Kenya, a separate legal instrument has been negotiated. It consists of Council Decision 2009/293/PESC concerning the Exchange of Letters between the EU and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the EU-led

19 Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJL 301/33.

20 Following a recommendation on a contribution from New Zealand by the EU Operations Commander on 11 March 2014 and the advice from the EU Military Committee on 25 March 2014, the contribution from New Zealand has been accepted by the Political and Security Committee of the Council of the EU on 11 April 2014.

naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer.[21] This legal instrument is binding on EU Member States. Articles 3 and 4 of the Exchange of Letters focus on the protection of the human rights of pirates captured by the EU but transferred for prosecution to Kenya.

Finally, Commission Recommendation 2010/159/EU on measures for self-protection and the prevention of piracy and armed robbery against ships,[22] provides best practice to deter piracy in the Gulf of Aden and off the coast of Somalia. In the preamble, the European Commission clarifies:

> . . . (8) The best management practices urge maritime companies and ships to register on the website of the Maritime Security Centre-Horn of Africa (MSCHOA) (http://www.mschoa.org) before passing through the Gulf of Aden . . . Ships that register receive all the information available on the current situation in this particular navigation region and are tracked by the EU NAVFOR-ATALANTA operation forces, reducing the risk of attack. (. . .).[23]

Elements of the Offence of Piracy under International Law

According to international law, not all acts of violence are considered to be an act of piracy. The offence of piracy is defined very strictly. Early attempts to define the international crime of piracy *jure gentium* date back to 1926 and 1932. They are found in the League of Nations' Committee of Experts on the Progressive Codification of International Law[24] and in a collection from

21 'Exchange of letters for the conditions and modalities for the transfer of persons having committed acts of piracy and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya' in OJ (2009) L79/49, annex to EU Council Decision 2009/293CFSP of 26 February 2009.

22 Commission Recommendation 2010/159/EU of 11 March 2010 on measures for self-protection and the prevention of piracy and armed robbery against ships [2008] OJL 67/13.

23 The European Commission continues: "Yet more than one third of ships in transit are still not registered with the MSCHOA and, as a result, cannot benefit from the measures in place to safeguard their transit through this region".

24 League of Nations, Committee of Experts on the Progressive Codification of International Law, 'Piracy' (1926) 20 *American Journal of International Law*, Special Supplement 222–229, at p. 225 [hereinafter 'League of Nations (Piracy)'].

the project Harvard Research on International Law.[25] The exhaustive study by Harvard Law School culminated in the 1932 Harvard Draft Convention with 19 articles on piracy (Harvard Draft (Piracy)). Article 3 is still very relevant, because it clearly implies that acts that are "piratical" in nature, according to the authors, should not be limited to those involving a clear "intent to rob".[26] The League of Nations Experts had suggested that nations should have the right to prosecute pirates operating in the territorial waters of other states that were incapable of doing so themselves. However, conscious of the muscular enforcement exercised in previous centuries by the British Navy, these codification efforts met with disapproval. For this reason, the Harvard Draft (Piracy) limited the definition of piracy to include violence only "for private ends", but it retained the right of pursuit into territorial waters.[27]

The 1956 International Law Commission (ILC)[28] draft articles on the law of the sea[29] were influenced by the 1932 Harvard Draft (Piracy).[30] Articles 38 to 43 of the ILC draft articles became Articles 14 to 21 of the HSC.[31] However, seeking consensus, the drafters of the HSC restricted the definition of piracy even more, to include only violence "for private ends" occurring "on the high seas". This led Birnie to suggest that this restrictive definition resulted in two definitions of piracy: one used in actual practice and a watered-down version used

25 Harvard Research on International Law, 'Piracy' (1932) 26 *American Journal of International Law*, Supplement: Codification of International Law 743–885, at p. 760. [hereinafter 'Harvard Draft (Piracy)')].

26 Article 3 reads: "Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state: 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. (. . .)"

27 C Thedwall, 'Choosing the Right Yardarm: Establishing an International Court for Piracy' (2010) 41 *Georgetown Journal of International Law* 501–523, at p. 505.

28 Article 1, paragraph 1, of the Statute of the International Law Commission provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification". UNGA Res. 174 (II) (21 November 1947).

29 ILC, 'Report of the International Law Commission on the Work of its 8th Session' (23 April–3 June 1956) UN Doc A/3159.

30 Article 39 reads: "Piracy consists in any of the following acts: (1) Any illegal acts of violence, detention or any crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or against persons or property on board such a ship; (. . .)".

31 HSC (n 14).

in treaties.[32] Articles 100 to 107 LOSC are almost exactly the same as Articles 14 to 21 HSC.[33]

Today, the crime prohibited by Article 101(a) LOSC consists of five elements:

(1) Any illegal act of violence or detention, or any act of depredation;
(2) Committed for private ends;
(3) On the high seas or a place outside the jurisdiction of any state;
(4) By the crew or the passengers of a private ship or a private aircraft,
(5) and (if at sea) directed against another ship or aircraft, or against persons or property on board such ship or aircraft.

One of the limitations thus to be found in Article 101 LOSC is that the crime has to be committed "on the high seas". For the seamen on board or for an insurance company that has to pay the ransom requested, it makes no difference whether or not their ship has been seized in the territorial waters of a State, on the high seas or in any other maritime zone. With this in mind, the IMB[34] developed, for statistical purposes only, its own concept of "armed robbery against ships".

The International Maritime Organization (IMO) later took this concept further and in 2009 its Assembly agreed a more comprehensive definition of "armed robbery against ships" as meaning "any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea" or "any act of inciting or of intentionally facilitating" one of these acts.[35]

It is notable that acts committed in the contiguous or the exclusive economic zone (EEZ) are excluded from that definition. This apparent *lacuna* in the definition is not problematic, because, in accordance with Article 58 paragraph 2 LOSC, acts that are "piratical" in nature, but committed within the EEZ

32 PW Birnie, 'Piracy Past Present and Future' in E Ellen (ed), *Piracy at Sea* (ICC International Maritime Bureau, Paris, 1989) 131–158, at p. 139, cited in Thedwall (n 27) at p. 506.

33 Article 15 reads: "Piracy consists of any of the following acts: (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (…)".

34 ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report* (ICC International Maritime Bureau, London, 2012), 1–87, at p. 3.

35 IMO 26th Assembly Session, Resolution A.1025 (26) "Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships".

and thus not committed "on the high seas", can still be regarded as "acts of piracy".[36] The important Article 101 LOSC, as discussed above, is thus applicable as a legal basis to combat piracy in the EEZ.

Another limitation in Article 101 LOSC is the fact that the crime has to be committed "for private ends". The consequence is that the concept of piracy does not cover acts for political motives, such as maritime terrorism. Thus, universal jurisdiction is not applicable to acts of maritime terrorism. However, the commentary to the Harvard Draft (Piracy)[37] suggests that the "private ends" requirement was originally intended to exclude from the definition of piracy only acts performed by non-state actors, such as belligerents or rebels, but who nonetheless operate within the context of the laws of war and of state responsibility and whose acts might, therefore, be considered "public".[38] Under this perspective, if an aggressor were not a state (or state-sanctioned) or a rebel engaged in a civil war, the attack would be considered "private". The opposite of "private", then, would not be "political" but "public". Consequently, this author suggests that although terrorists might act with a proclaimed political motivation, it does not give their acts a public character.

Furthermore, if acts of violence, such as hijacking, theft or murder, are committed on board a ship by members of its crew or some or all of its passengers, these are not considered to be acts of piracy for the purposes of the LOSC. According to Azubuike,[39] the international community did not think this was necessary, because the primary concern of international law, especially in the "no man's land" of the high seas, is to protect third parties and not necessarily the passengers of a given ship.

If a definition is needed that really covers all acts that are in practice treated as piratical, then, according to Lauterpacht,[40] "piracy must be defined as every unauthorized act of violence against persons or goods committed in the open sea by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel". It is interesting that this definition corresponds

36 Article 58 LOSC Par. 2 reads: "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part".

37 Harvard Draft (Piracy) (n 25).

38 M Gardner, 'Piracy Prosecutions in National Courts' (2012) 10(4) *Journal of International Criminal Justice*, 797–821, at p. 815.

39 L Azubuike, 'International Law Regime against Piracy' (2009) 15 *Annual Survey of International and Comparative Law* 43–59, at p. 47.

40 H Lauterpacht, *Oppenheim's International Law: A Treatise* (*Vol I: Peace*) (7th ed., Longmans Green & Co., London, 1948) 608–609 (§272).

to the legal concept of piracy *sensu lato* in this article, as "the intention to rob" is not a necessary condition.[41]

A regulatory framework for the legal concept of maritime piracy can be found in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter SUA or SUA Convention).[42] The main purpose of this instrument is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include: the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.[43]

The SUA Convention aims to remove those offences, clearly listed in Article 3 (1),[44] from the exclusive jurisdiction of the flag state and allow them to be tried in another contracting state. As such, according to Freestone, it changes one of the foundations of maritime jurisdiction, namely the exclusive jurisdiction of flag states over acts committed on vessels outside the territorial sea.[45] The LOSC also confers extended jurisdiction on states other than the flag state over offences related to piracy, but given the restrictions, such as the requirement of "private ends" and the "one ship-two ship" rule, the restrictive definition of piracy *sensu stricto* will seldom be applicable.[46]

---

41 Azubuike (n 39).

42 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988, in force 1 March 1992) 1678 *UNTS* 221; 27 *ILM* 668 (1988).

43 D Freestone, 'The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (1988) 3 *International Journal of Estuarine and Coastal Law* 305–327, at p. 307.

44 Article 3 (1) SUA states: "Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

45 Freestone (n 43).

46 *Ibid.*

However, the jurisdiction over the offences mentioned in Article 3(1) SUA is not universal,[47] because the effect is limited to contracting states.[48] There are other issues: according to Article 10 SUA,[49] states have a positive obligation either to extradite or to prosecute alleged pirates, but without the obligation to find and arrest those pirates. The 2005 Protocol to SUA[50] solved some of the remaining issues and provided for the extension of the offences from maritime piracy to maritime terrorism. Article 4(5) of the 2005 SUA Protocol included an Article 3bis(1) in SUA,[51] referring to acts whose purpose, "by its nature or

47 JSC Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism' (2002) 18 *American University International Law Review* 341–397, at p. 383.

48 As of 21 January 2016, 166 States had ratified SUA, representing 94.45% of the world merchant shipping tonnage (Source: International Maritime Organization, available at: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx, accessed 3 February 2016).

49 Article 10(1) SUA reads: "The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which Article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State".

50 2005 Protocol (London, 14 October 2005, in force 28 July 2010) IMO Doc. LEG/CONF.15/21 to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (n 42) [hereinafter 2005 SUA Protocol].

51 Article 3bis (1) reads: "Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally: (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act: (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or (iii) uses a ship in a manner that causes death or serious injury or damage; or (iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii); or (b) transports on board a ship: (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or (ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or (iii) any source material, special fissionable

context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". However, only relatively few countries have ratified the 2005 SUA Protocol.[52]

The three recurrent themes when studying judgments on the international crime of piracy *jure gentium* are: first, the elements of the offence; second, jurisdiction, and third, due process.[53] The latter two themes are discussed below.

Jurisdiction

Three types of jurisdiction can be distinguished as relevant to this discussion: prescriptive jurisdiction (the legal authority to make laws), enforcement jurisdiction (the legal authority to pursue and arrest pirates), and adjudicative jurisdiction (the legal authority to try pirates).

According to Article 105 LOSC,[54] piracy on the high seas is a serious crime that can be punished by any country, because the principle of universal jurisdiction applies to it.[55] This principle only applies to acts committed "on the high seas, or in any other place outside the jurisdiction of any State" and not in other maritime zones.[56] One of the recurring questions of international

material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose".

52 As of 21 January 2016, 40 States had ratified the 2005 Protocol, representing 39.06% of the world merchant shipping tonnage (Source: International Maritime Organization, available at: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx, accessed 3 February 2016).

53 Gardner (n 38), at p. 822.

54 Article 105 *Seizure of a pirate ship or aircraft* reads: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith".

55 E Somers, 'Can the Law Contribute to Solving the Problem of Piracy?' in K Bernauw, R De Wit, W Den Haerynck, B Goemans, F Stevens and E Van Hooydonk (eds), *Free on Board: liber amoricorum Marc A. Huybrechts* (Intersentia, Antwerp, 2011) 497–515.

56 In view of Article 58 Par. 2 (n 30), it can be argued that Article 105 also applies to acts that are "piratical" in nature, committed in the EEZ, as discussed above, although it is clear that a State does not have the right to seize a pirate or to exercise its adjudicatory powers

law in domestic piracy prosecutions, therefore, is the scope of this universal jurisdiction. Article 105 LOSC states "(…) The courts of the State which carried out the seizure may decide upon the penalties to be imposed (…)". This might lead to the conclusion that only the State apprehending alleged pirates would have jurisdiction to try them. However, this author does not agree with such a conclusion. The ambiguity in Article 105 LOSC derives from its use of the permissive verb "may", but it primarily serves to delimit the scope of enforcement jurisdiction,[57] and the right of any state to visit and search any ship on the high seas suspected of piracy: "(…) every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board (…)". It should thus not be read as precluding the exercise of universal judicial jurisdiction by states other than the capturing state, at least as long as the prosecuting state has physical custody of the defendants.

Although it is not legally binding, the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (hereafter 'Djibouti Code of Conduct'),[58] seems to confirm this view. The Djibouti Code of Conduct states that the capturing state may "in consultation with other interested entities, waive its primary right to exercise jurisdiction and authorize any other Participant to enforce its laws against the ship and/or persons on board".[59]

A similar view is reflected in Article 6(5) of the more recently concluded and also not legally binding Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa.[60] This provides that

> The Signatory which carried out the seizure (…) may, subject to its national laws, and in consultation with other interested entities, waive its primary right to exercise jurisdiction and authorize any other Signatory to enforce its laws against the ship and/or persons on board.

---

within the territory of another state (without that state's consent) UN Doc. A/3159, 1956 UN Yearbook of the International Law Commission 253, at p. 283.

57 Gardner (n 38), at p. 805.

58 29 January 2009, annexed to IMO Doc. C 102/4.

59 Gardner (n 38), at p. 810.

60 Signed by the Governments of Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, Chad, Congo, Côte d'Ivoire, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone, and Togo; 25 June 2013; available at: http://pages.au.int/sites/default/files/Code%20of%20Conduct.pdf, accessed 3 February 2016.

Although contractually codified in Article 105 LOSC, the customary law principle of universal jurisdiction remains permissive and is to be distinguished from mandatory treaty-based universal jurisdiction.[61] The customary law principle of universal jurisdiction reflected in Article 105 LOSC should therefore be more properly seen as the absence of protection of any state and not as a positive right as such. Consequently, Article 105 LOSC cannot be the legal basis for prosecuting pirates under national law.

Thus, although piracy according to the law of nations is subject to universal jurisdiction, there is still the need for a domestic law State to expressly give this jurisdiction to its domestic courts. In such domestic laws, the definition of "piracy" may be different for each nation. An illustration of this can be found in the 2008 Judgment of the Chief Magistrate's Court at Mombasa (Kenya) that will be analysed more extensively below.[62] The judgment states that: "It is not a matter of the court having universal jurisdiction to try pirates but that domestic law has conferred the jurisdiction to this court".

Another illustration can be found in the state practice of Portugal. It stated in its reply to the questionnaire of the European Committee on Crime Problems[63] that in its view the LOSC does not oblige its Parties to prosecute crimes of piracy committed on the high seas, but only allows them to do so. As a result, under present circumstances, the Portuguese criminal law is not applicable to crimes of piracy committed on the high seas. Indeed, except for the crime of rape, Portugal claims to have no universal jurisdiction over any of the offences that could occur during a pirate attack. Consequently, Portuguese courts would only have jurisdiction if the crime is committed on board a ship flying the Portuguese flag, or a Portuguese citizen is its agent or victim and the perpetrator is found in Portugal. Thus, alleged pirates can only be tried for having committed "ordinary crimes on board ships", as discussed below.

Despite this approach, perhaps remarkably, Portugal was integrated into two operations of the NATO Standing Maritime Group 1. The first was with the frigate *Corte-Real* between 24 March and 29 June 2009 in Operation Allied Protector,[64] when Portugal even commanded the naval force. The second

61 M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers, Leiden, 2007) at p. 25.

62 *Republic of Kenya* v. *Aid Mohamed Ahmed & 7 others* (CR 3486/2008) [hereinafter the *Powerful* case].

63 European Committee on Crime Problems, *Replies to the questionnaire on issues of combating maritime piracy* (CDPC(2012)15, Council of Europe, Strasbourg, 2012), at pp. 66–67.

64 The NATO Operation Allied Protector was a counter-piracy operation, conducting surveillance tasks and providing protection to deter and suppress piracy and armed robbery and to improve the safety of commercial maritime routes off the Horn of Africa. Launched in

time occurred with the frigate *Álvares Cabral* between 9 November 2009 and 25 January 2010 in Operation Ocean Shield.[65] The Portuguese war vessels detained some individuals in the Somali region. However, they have been released because they cannot be prosecuted, for the reasons set out above.

Case Law: Ambiguities

After studying several cases of actual piratical attacks, the present author suggests that for practical reasons "piracy *sensu stricto*" as a concept may be too restrictive in the contemporary fight against piracy. Based on the judgments, "piracy *sensu lato*" or "maritime piracy" as a concept could be defined as "robbery on the high seas or as an attempt thereto with or without using violence in the process and with or without putting innocent seamen in fear of their life". An "attempt to piracy" would then be "an attempt to attempt to rob or to use violence or to put people in fear of their lives on the high seas". This concept would then be an extension of the narrower legal concept as defined by the international law of piracy *jure gentium*, in the sense discussed above of "piracy *sensu stricto*" or "international piracy".

An illustration can be found in the 2010 *Republic* v. *Dahir* case[66] before a Seychelles criminal court, where eleven men[67] were sentenced to ten years in prison on a charge of piracy for attempting to attack the *Topaz*, not knowing that this was a patrol vessel belonging to the Seychelles Coast Guard. Although the Seychelles has since updated its piracy statute, the law then in force incorporated the English law of piracy as of 1976, when the Seychelles attained independence.[68] The attack was unsuccessful, but the Court determined that the

---

March 2009, it evolved in August 2009 into Operation Ocean Shield. See http://www.aco.nato.int/page13974522.aspx, accessed 3 February 2016.

65 The still-ongoing counter-piracy Operation Ocean Shield was approved by the North Atlantic Council on 17 August 2009, and the mandate has been extended until the end of 2016. It also contributes to providing maritime security in the region of the Horn of Africa and aims at reducing the overall success rate of pirate attacks. Operation Ocean Shield principally focuses on at-sea counter-piracy operations, such as helicopter surveillance missions to trace and identify ships in the area. More recently, NATO is aiming at eroding the pirates' logistics and support bases. See http://www.nato.int/cps/en/natolive/topics_48815.htm#Protector, accessed 3 February 2016.

66 [2010] SCSC 81 (26 July 2010), § 48, available at http://www.seylii.org/sc/judgment/supreme-court/2010/81, accessed 3 February 2016.

67 Eight men fired on the *Topaz* within the EEZ of the Seychelles, but were captured, after which the *Topaz* hunted down the "mother ship" of the pirates and arrested another three men.

68 [2010] SCSC 81 (26 July 2010) (n 68), at §§ 48–49.

crime of piracy *jure gentium* as of 1976 included attempts to rob or seize a ship, as well as attacks on ships that did not result in any harm or injury.[69] The fact that the attack had been quickly repelled was no defence,[70] as the methods and means of the attack indicated that the defendants' intent was piratical. However, charges of terrorism were dismissed by the Court even though a State vessel had been attacked. The Court rejected the argument submitted by the government that the goal of the accused to attack the *Topaz* had been broader than piratical and also political in nature and that the incidental impacts on governmental function were sufficient to establish the attacks as acts of terrorism.[71] It concluded that the attacks were both too attenuated and lacked the intent to have an impact on governmental functions.

Case Law: Due Process

In order to prosecute alleged pirates for having committed the international crime of piracy *jure gentium*, defined within our framework here as piracy *sensu stricto*, states have first to adopt domestic legislation to incorporate the provisions of the LOSC, generally accepted as customary international law, into their domestic statutes, with respect for the fundamental rights of the accused and for due process.[72] The incorporation can be achieved in two ways: either through general reference (automatic *ad hoc* incorporation of international

69 *Ibid.,* at §§ 50–53, 56–57.

70 Gardner (n 38), at p. 800.

71 C MacLeod 'Piracy Prosecutions in the Seychelles' (2012), available at http://law.case.edu/Academics/Academic-Centers/Cox-International-Law-Center/Grotian-Moment/ArtMID/804/ArticleID/172, accessed 3 February 2016.

72 Due process is an important legal concept that aims to ensure that the government will respect all of a person's legal rights before depriving a person of life, liberty or property. This form of protection is found in most Constitutions (e.g., the Fifth Amendment to the U.S. Constitution: "No person shall be . . . deprived of life, liberty, or property, without due process of law.". . , similar to the earlier provision of the 1215 Magna Carta, where the King of England agreed that "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his peers, or by the Law of the Land".), before issuing new legislation any lawmaker will have to consider whether it respects the limitations placed by due process on the law. The respect for limitations is the substantive aspect of due process. However, there is also a procedural aspect. When enforcing this legislation, any government has to consider whether all of its actions involving the deprivation of liberty have a legal basis. Finally, with regard to prosecuting offenders, due process also places limitations on legal proceedings in order to guarantee fundamental fairness, justice and liberty.

law) or by detailing precisely within national legislation the content of the international norms (statutory *ad hoc* incorporation of international rules).[73]

The first option has the advantage of always being up to date with any changes that might occur on an international level, but the issue of intertemporal law will arise. Over the years, a provision of domestic criminal law could or should perhaps be interpreted differently by judges in domestic courts, due to a change in perhaps even unwritten or uncodified customary international law. Interpreting laws differently over the years is a feature of the common law, but this issue raises a question on the principle that no one should be held criminally responsible for conduct that was not legally prohibited at the time of its commission (*nullum crimen sine lege*). One commentator asks "How can a law that flexibly adapts to an external and, in the case of customary international law, largely unwritten set of laws be adequately specific so as to accord with modern notions of due process?"[74]

To satisfy the requirement of specificity (*nullum crimen sine lege stricta*), being a subset of the overarching principle of *nullum crimen sine lege,* a criminal prohibition must be *foreseeable*, which means it must also be *accessible*. With regard to piracy *sensu stricto*, it can be argued not only that a written codification of the definition of the crime according to customary international law exists in the LOSC, but also that it has remained unchanged from the one set out in the HSC. However, this argument is clearly not valid for a wider concept of "armed robbery at sea" (nor is it valid for "seizing for ransom" as discussed below). Nevertheless, it seems reasonable to take the position of commentators such as Gardner who states that "recognition of a general and consistent practice among the overwhelming majority of the international community necessarily imputes to anyone fair warning of what conduct is forbidden".[75] The present author also accepts the argument by Gardner that, even if the definition of piracy were to be unwritten, "the practical difficulty of accessing unwritten international law is 'greatly mitigated by the fundamental character' of many international crimes".[76] Thus, it can be concluded that the extension of the legal concept of international piracy or piracy *sensu stricto* to the one of maritime piracy or piracy *sensu lato* in order to include the crimes of "armed robbery at sea" and "seizing for ransom", does not necessarily have to be problematic in relation to due process.

73 See generally, Gardner (n 38), at p. 821.

74 *Ibid.*, at p. 822.

75 *Ibid.*, at p. 824.

76 *Ibid.*

The issue of intertemporal law and the difficulties in interpreting domestic criminal law that incorporates customary international law by general reference is reflected in the difference in interpretation of the relevant U.S. statute[77] by the U.S. courts in the 2010 *United States* v. *Said*[78] case and the 2010 *United States* v. *Hasan*[79] case. The *Said* Court, unlike the *Hasan* Court, interpreted 18 U.S.C. § 1651 as limited to acts of armed robbery on the high seas, based primarily on the 1820 U.S. Supreme Court decision, *United States* v. *Smith*. As a result, it dismissed a piracy charge because the defendants did not board or rob the targeted ship.[80] In the *Hasan* case, however, the Court, applying the Article 101 LOSC definition of piracy in an attempt to identify the applicable customary international law, determined that the alleged acts of violence could constitute "piracy" under 18 U.S.C. § 1651, regardless of the so-called *animus furandi* (the intent to rob). It can be argued that the *Hasan* Court better applied the process for identifying customary international law, and as a result reached the correct conclusion that Article 101 reflects customary international law, based on state practice (both *usus* and *opinio juris*) and reinforced by a clear consensus among scholars.[81]

Another issue related to due process concerns the legal obligations imposed by the European Convention on Human Rights (ECHR).[82] According to Article 5(3) ECHR, any person lawfully arrested or detained should be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time. Bringing someone promptly before a judge is not easy to do when a warship is apprehending alleged pirates at a long distance from the home territory of the flag state. As a consequence, about 90% of pirates that are captured are released.[83] An illustration can be found in the 2010 Dutch '*Cygnus*' case,[84] where the Court held that

77 The 18 U.S.C. § 1651 Statute provides that "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life".

78 757 F. Supp. 2d 554 (E.D. Va. 2010).

79 747 F. Supp. 2d 599 (E.D. Va. 2010).

80 Gardner (n 38), at p. 816.

81 *Ibid.*, at p. 818.

82 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (Rome, 4 November 1950, in force 3 September 1953) *ETS* 5; 213 *UNTS* 221 (No. 2889); *UKTS* (1953) 71 [hereinafter ECHR].

83 YM Dutton, 'Gunslingers on the High Seas: A Call for Regulation' (2013) 24 *Duke Journal of Comparative & International Law* 107–160, at p. 118.

84 Rb. Rotterdam 17 juni 2010, Case No. 10/600012–09, *reprinted and translated in* 145 *International Law Reports* 491. Cited by Gardner (n 38), at p. 799.

the forty-day delay in arraigning the defendants violated Article 5(3) ECHR, but nevertheless convicted the five men that had attacked the *Samanyolu* and sentenced them to five years of imprisonment.

The solution could be to conclude agreements with coastal states to accept alleged pirates for prosecution in their domestic criminal courts. The EU has made transfer agreements with Kenya, Seychelles and Mauritius, is negotiating with Tanzania, and has made overtures to Uganda,[85] South Africa and Mozambique. They are designed to guarantee respect for international human rights law, so that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment or punishment, and so that the prohibition on arbitrary detention and the requirement of a fair trial is respected.[86]

Domestic Criminal Anti-piracy Legislation

As mentioned earlier, individual States are free to choose the way to create the necessary robust legal framework to be able to combat maritime crime effectively.

From the perspective of international law, however, the choice of approach is left to the individual state, and it is up to the domestic courts to determine which approach the legislators in fact adopted.[87] Work to establish cooperation between public actors on the international and national levels still remains to be done (see Fig. 1).

A review of the legislation of 66 States indicates the wide variety of approaches taken. Some, including Chile, Austria, Liechtenstein, Turkey and China, have not taken any action at all.[88] The consequence of this arguably

85 This may appear strange to the reader, as Uganda is landlocked, but on 15 February 2010, the EU had already launched a Training Mission in Uganda for Somali security forces (EUTM Somalia). EUTM Somalia has so far supported the training of more than 1,800 Somali soldiers, including officers. The training focuses on developing Command and Control and specialised capabilities and on self-training capacities for the Somali National Security Forces, with a view to transferring EU training expertise to local actors. See Council Decision 2010/96/CFSP of 15 February 2010 on a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia) [2010] OJ L 44/16.

86 European Committee on Crime Problems (n 63), at p. 27.

87 *Ibid.*

88 Norway and Poland consider the international legal framework existing today as sufficient to effectively combat maritime piracy and other illegal acts at sea, including armed robbery.

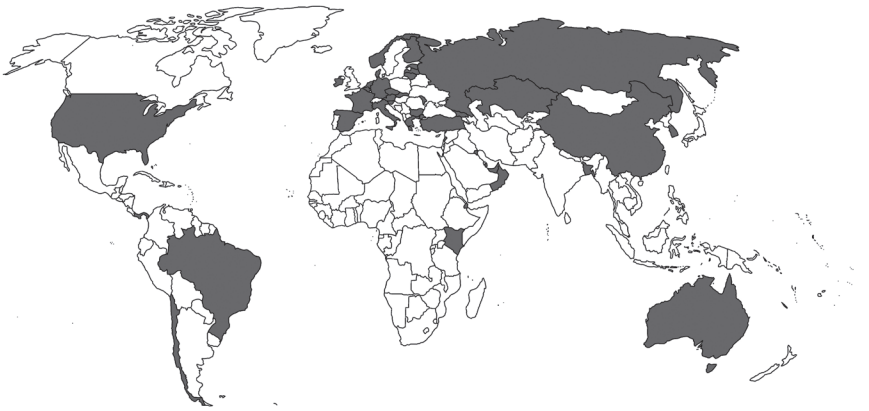

FIGURE 1 *45 countries with anti-piracy legislation as of 31 December 2012*

is that only "ordinary crimes on board of a ship" can be sanctioned, although their domestic law may also accept "piracy *jure gentium*".

Other countries, such as Jamaica, Bahamas, Brazil, Finland, France, Oman, the Russian Federation and Australia, do take action and tend to adapt their domestic criminal laws, but in doing so they merely refer to the stipulations of the LOSC, or even more vaguely to the crime of piracy "as defined by international law". This definition would correspond to this article's definition of "piracy *sensu stricto*". In this case, however, when a statute only refers to an international norm without specifying its content—as the U.S. piracy statute does—it is difficult "to impute to the drafters an intention to automatically incorporate international law, including any developments in that law over time".[89]

Finally, a relatively large number of States, including the Central American country of Panama, the European countries of Belgium, the Czech Republic, Germany, Greece, Italy, Malta, Mauritius, Moldova, the Netherlands, Slovenia, Slovakia and Spain, the Middle Eastern countries of Lebanon, Kuwait, Qatar and the United Arab Emirates, the African countries of Djibouti and Kenya, the trans-Caucasian countries of Kazakhstan and Georgia, and the Asian countries of South Korea and Singapore, have developed their very own interpretation, sometimes already translated into legal texts, of what should be understood by piracy or armed robbery at sea, mostly with the intention to cover all possible violent crimes in the maritime domain. In these countries, the wider concept

89 Gardner (n 38), at p. 821.

of "maritime piracy" or "piracy *sensu lato*" discussed in this article seems to be the approach implemented in domestic criminal law.[90]

Towards a Wider Legal Concept of Maritime Piracy?

As discussed above, the concept "international piracy" or "piracy *sensu stricto*" is an international crime defined by international law.[91] However, there is growing acceptance in national law that a wider concept of "maritime piracy" or "piracy *sensu lato*" is useful in the fight against maritime crimes committed for private reasons.[92] In order to define "maritime piracy" for these purposes as a clear and useful legal concept, it is now argued that it is useful to subdivide it into three separate branches, depending on the intention of the perpetrators and on the maritime zone wherein the crime has been committed.

The two existing legal concepts of "piracy *sensu stricto*" and "armed robbery at sea" cover similar situations, but are not entirely complementary. Thus, a

90 One of the first countries to have done so may well be the Philippines, which, on 13 December 1993, adopted the Republic Act N° 7659, popularly known as the Death Penalty Law, to impose the death penalty for certain heinous crimes, amending for that purpose Section Three, Chapter One, Title One of Book Two of the Revised Penal Code to read as follows:

"Section Three.—Piracy and mutiny on the high seas or in the Philippine waters

Art. 122. Piracy in general and mutiny on the high seas or in Philippine waters.—The penalty of reclusion perpetua shall be inflicted upon any person who, on the high seas, or in Philippine waters, shall attack or seize a vessel or, not being a member of its complement nor a passenger, shall seize the whole or part of the cargo of said vessel, its equipment or passengers.

The same penalty shall be inflicted in case of mutiny on the high seas or in Philippine waters.

Art. 123. Qualified piracy.—The penalty of reclusion perpetua to death shall be imposed upon those who commit any of the crimes referred to in the preceding article, under any of the following circumstances:

1. Whenever they have seized a vessel by boarding or firing upon the same;
2. Whenever the pirates have abandoned their victims without means of saving themselves or;
3. Whenever the crime is accompanied by murder, homicide, physical injuries or rape".

91 See (n 7).

92 See (n 8).

new subcategory has to be established. As "hijacking" is a crime defined by international law and "robbery" is a domestic legal concept, the present author suggests using the more neutral term of "seizing" and naming it "seizing for ransom".

In the previous paragraphs, the international legal framework has already been analysed which envisages a clear definition of each of the three branches and delimit their scope (see Fig. 2).[93]

Clearly, the definition of "piracy" adopted by the Belgian legislator corresponds mainly to this article's concept of "maritime piracy" or "piracy *sensu lato*". However, would it be possible to extend the "Belgian" definitions further in order to really encompass all maritime crimes or to include all crimes committed in the maritime domain?

Crimes Committed in the Maritime Domain

Not all violent acts or crimes occurring in the maritime domain constitute "maritime crimes". "Crimes committed in the maritime domain" include several "ordinary crimes" committed on board ship, such as theft or murder. They are not "maritime crimes", because they do not differ from the crimes committed on land. How do drug trafficking, human trafficking and migrant smuggling by sea fit into this scenario?

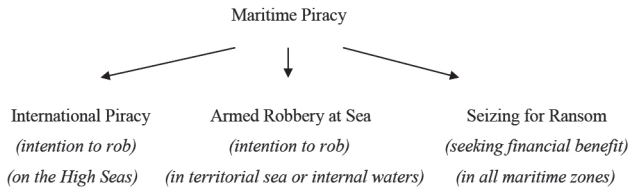

FIGURE 2 *Maritime piracy as a tree of legal concepts*

93 Issues related to jurisdiction, elements of the offence and due process have also been discussed.

Drug Trafficking

Although drug trafficking[94] tends to be a continuous chain of events invariably commencing and ending on land, it very often entails a maritime component. In the Caribbean region, it mostly involves small craft navigating at high speed from the south to the north via small island states with relatively large (in proportion to their land mass) territorial waters and EEZs. In a sense, the means used by drug traffickers are similar to those used by pirates. In view of the means used by drug traffickers, the nature of the forces combating this international security issue,[95] and case law,[96] this type of crime[97] should be considered one of the crimes of a transnational or multi-jurisdictional nature that can be committed in the maritime domain. However, as the crime of drug trafficking does not take place exclusively at sea and often small boats or ships are merely used as a means of transportation, without endangering navigation or the safety at sea of innocent seafarers, it should not be considered a "maritime crime". There it is suggested that a new subcategory of "crimes with a maritime component" be created within the broader category of "crimes in the maritime domain" (see Fig. 3).[98]

---

94 According to the United Nations Office on Drugs and Crime (UNODC), drug trafficking is "a global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws" (https://www.unodc.org/unodc/en/drug-trafficking/index.html), accessed 8 February 2016.

95 It has been a serious problem for decades, but has been under close investigation by the U.S. Coast Guard and the navies of members of the international community from 2002 onwards.

96 In ECtHR case law, the *Medvedyev* case and the *Rigopoulos* case, as discussed below in this article, are now the leading cases on detention at sea. Both cases concern the seizure of a vessel on the high seas. The crew was in both cases apprehended for drug trafficking and detained on board their vessels.

97 International law permits actions against drug traffickers, but, unlike piracy or war crimes, does not define drug trafficking. As no treaty proscribes it, it is not an international crime, but a crime with an international dimension over which international law permits extended jurisdiction.

98 The same need as expressed in this article for a broader concept has also been experienced by the signatories to the Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa (see n 60). With regard to "piracy" and "armed robbery at sea", this Code reproduces the definitions of the LOSC and those proposed by IMO, respectively, but in Article 1 Paragraph 5, it also adds a new category of "Transnational organized crime in the maritime domain", that "includes but is not limited to any of the following acts when committed at sea: (a) money laundering, (b) illegal arms and drug trafficking, (c) piracy and armed robbery at sea, (d) illegal oil bunkering, (e) crude oil theft, (f) human trafficking, (g) human smuggling, (h) maritime

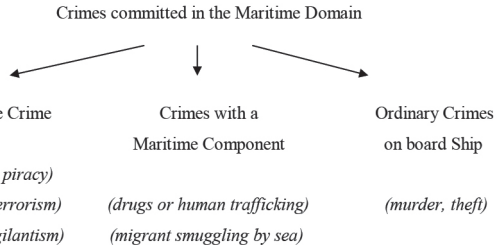

FIGURE 3 *Crimes in the maritime domain as a tree of legal concepts*

Human Trafficking and Migrant Smuggling by Sea

Human trafficking has been defined by Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons[99] as "trafficking in persons".[100] The related but distinct practice of "human smuggling" or "migrant smuggling" has been defined by Article 3, paragraph (a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air[101] as "smuggling of migrants".[102] With regard to the purpose of the activities, trafficking must involve an exploitative purpose, whereas smuggling only requires that the perpetrator obtain a financial or another material benefit. Regarding the means,

---

pollution, (i) IUU fishing (j) illegal dumping of toxic waste (k) maritime terrorism and hostage taking (l) vandalisation of offshore oil infrastructure". As the present author also proposes to include the "ordinary crimes on board ship", the term "crimes committed in the maritime domain" is preferred, as it is more general.

99 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000, in force 25 December 2003) 40 *ILM* 335; UNGA Resolution 55/25, Annex II, U.N. GAOR, U.N. Doc. A/45/49 (2001) [hereinafter "Anti-Trafficking Protocol"].

100 Article 3, paragraph (a) defines "Trafficking in Persons" as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

101 Protocol against the Smuggli against Transnational Organized Crime (New York, 15 November 2000, in force 28 January 2004) 40 *ILM* 335; UNGA Resolution 55/25, Annex II, U.N. GAOR, U.N. Doc. A/45/49 (2001) [hereinafter "Anti-Smuggling Protocol"]

102 Article 3, paragraph (a) defines "Smuggling of migrants" "shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".

the threat or use of force is not a condition, because most people are smuggled willingly. With regard to the *nature* of the crime, human trafficking often occurs within the borders of a single country,[103] whereas human smuggling is always transnational in nature. The final distinction suggested by Jenna Shearer Demir is that there is also a difference that goes beyond the legal definition, as most adult victims of trafficking are women, whereas most smuggled adults are men.[104]

As such, human trafficking is not an act of violence likely to endanger safe navigation, but it is an abuse of the maritime supply chain. People are shipped in containers, often without any knowledge of the crew. Additionally, as with drug-trafficking and migrant smuggling, it tends to be a chain of events invariably beginning and ending on land, often not entailing a maritime component at all. Even migrant smuggling by sea generally occurs as part of a wider smuggling process often involving land and/or air movements. For these reasons, it is suggested that neither human trafficking nor human smuggling should be considered a "maritime crime" as such. Still, they might respond to the criterion of "crimes in the maritime domain" and be grouped in the new subgroup that is distinct from the one of "maritime crime", which the present author has suggested should be called "crimes with a maritime component". The reason for doing so would not only be that naval forces are occupied with the fight against human trafficking[105] and human smuggling at sea,[106] but also and more importantly that much of the suffering of the victims occurs at sea and that most casualties occur within the maritime domain.[107] All "crimes with a maritime component" can be thought of as international in that they are of a transnational or multi-jurisdictional nature, but they are not all international crimes, hence the use of the more general term.

---

103 However, Article 4 of the "Anti-Trafficking Protocol" limits its application to transnational trafficking, stating that "[t]his Protocol shall apply . . . where those offences [i.e., human trafficking] are transnational in nature and involve an organized crime group as well as to the protection of victims of such offences".

104 JS Demir, *The Trafficking of Women for Sexual Exploitation: A Gender-based and Well-founded Fear of Persecution?* (New Issues in Refugee Research: Working Paper No. 80, UNHCR, Geneva, March 2003), at p. 7. Available at http://www.unhcr.org/research/RESEARCH/3e71f84c4.pdf, accessed 08 February 2016.

105 This is in accordance with Article 7 of the "Anti-Smuggling Protocol", which states that "States Parties shall cooperate to the f ullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea".

106 Although it is true that smuggling by sea only accounts for a small portion of overall smuggling of migrants around the world, the particular dangers of irregular travel at sea make it a priority concern for response by naval forces.

107 Although more migrant smuggling occurs by air, it is clear that more deaths occur by sea.

Maritime Crime

Based on recent judgments by the Kenyan courts, one of the criteria for any violent action at sea to be considered as "piratical" is the fact that it is "putting innocent seamen in fear of their lives". As a result, the concept of "maritime crime" could be defined, which would correspond to all acts of maritime violence that involve putting seafarers in fear of their lives. This wide concept of "maritime crime"[108] would comprise the concepts of "maritime piracy", "maritime terrorism" and "maritime vigilantism".[109] This distinction is made in view of the motive of the criminals as discussed below (see Fig. 4).

The 2008 Judgment of the Chief Magistrate's Court at Mombasa (Kenya)[110] states: "the accused are charged with the offence of piracy contrary to section 69(1)".[111] It reports that:

> the particulars of the offence stipulate that on the 11th day of November 2008, upon the high seas of the Indian Ocean jointly with others not before the court, being armed with offensive weapons namely AK47 rifles and RPG-7 portable rocket launcher, [the accused] attempted to hijack a ship, the MV POWERFUL, thereby putting in fear the lives of the crew of the said ship.

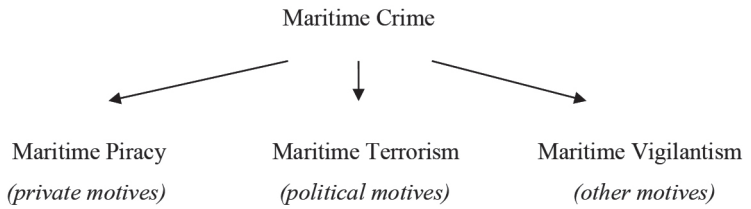

FIGURE 4 *Maritime crime as a tree of legal concepts*

108 "Maritime Crimes" are acts that are criminal in nature and occur almost exclusively in the maritime environment, resulting in maritime violence, putting seamen in fear of their lives.

109 "Maritime Vigilantism" includes acts sometimes referred to as "eco-piracy" or "eco-terrorism", but that are neither "piratical" nor "terrorist" in nature, such as ramming ships for ecological reasons.

110 The MV *Powerful* case (n 62).

111 Section 69(1) of the Kenyan Penal Code provides: "Any person who in territorial waters or upon high seas, commits any act of piracy *jure gentium* is guilty of an offence of piracy".

In the *Powerful* case, the Court refers to Archbold's definition of "Piracy *jure gentium*":[112] "Every one commits piracy by the law of nations who (…) a) seizes or attempts to seize any ship on the High Seas (…) by violence or by putting those in possession of such ship in fear".[113] The Court concludes: "This was an act of piracy. (…) evidence (…) clearly proves beyond doubt that that there was an attempt to hijack the ship and as a result members of the crew were put into fear".

Maritime Piracy or "Piracy Sensu Lato*"*

Some ten years ago, most piracy-related incidents took place in the Strait of Malacca. In the six-year period of 2003–2008, according to the IMB's statistical data of the International Maritime Bureau (IMB), 1,885 piracy-related incidents have taken place, causing 3,115 victims.[114] In 2008 alone, 293 piracy-related incidents were reported, with 1,011 victims.[115] Since 2008, the problems have shifted to Somalia, located near the Gulf of Aden, linking the Indian Ocean to the Mediterranean Sea via the Suez Canal. Over 25,000 ships transit through these waters yearly.[116] By 31 January 2012,[117] ten pirated vessels and 159 hostages were held by Somali pirates, compared with twenty-eight vessels and 654 hostages at the equivalent time the previous year, on 1 January 2011.

In 2013, the number of actual piracy attacks appears to have reached the lowest level in 11 years,[118] but at the same time the number of days seamen were held in captivity rose from 59 days in 2008 to over 85 in 2009 to 150 days in 2010. The average amount of ransom paid has risen from 1.45 million USD in 2008 over 1.9 million USD in 2009 and 4.0 million USD in 2010 to 5.3 million USD in 2011.

---

112 JF Archbold, *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, London, 2008), paragraphs 3051 to 3058.

113 This book is considered to be of great authority for criminal lawyers in England and Wales and other common law jurisdictions and has been in print since 1822. Since 1992, after 43 revisions, it has been published annually. The work is often quoted in court.

114 See http://www.iccwbo.org/News/Articles/2016/IMB-Maritime-piracy-hotspots-persist-worldwide-despite-reductions-in-key-areas/, accessed 8 February 2016.

115 *Ibid.*

116 Commission sénatoriale pour le contrôle de l'application des lois, *Rapport sur l'application de la loi n°2011–13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police de l'Etat en mer* (Le Sénat de France 2012), 8.

117 *Ibid.*

118 Van Hespen (n 2), at p. 10.

In 2015, 246 incidents were reported to IMB's Piracy Reporting Centre,[119] one more than in 2014. The number of vessels boarded rose by 11% to 203. Only one ship was fired at, but 15 vessels were hijacked in 2015, down from 21 in 2014. 271 hostages were held on their ships, compared with 442 in 2014. The number of gun attacks also dropped from 62 reported incidents in 2014 to 33 in 2015. Kidnappings doubled from nine in 2014 to nineteen in 2015, all the result of five attacks off the coast of Nigeria. In 2015 South East Asia still accounts for most of the world's incidents, but most attacks in this region were aimed at low-level theft. Nigeria became the hotspot for violent piracy and robbery. No Somali-based attacks were reported in 2015.

Maritime Terrorism

Apart from well-publicized incidents, such as the *USS Cole* incident[120] and the explosion of the oil tanker *Limburg*,[121] the threat of maritime terrorism is not that visible to the general public.[122] However, for terrorists, using a ship as a weapon in an attack for political reasons is an option, especially in the light of 9/11.[123] Additionally, as most of the shipping nowadays is containerized, the scenario posited in 2002 by Commander Stephen Flynn of the U.S. Coast Guard is not unrealistic.[124] His scenario envisaged an explosive device hidden in a container equipped with GPS and shipped from a distant port, passing through several intermodal transshipment points in different countries, in order to

119 For the most recent information, visit the website of the Piracy Reporting Centre (PRC), a subdivision of the IMB, part of the ICC: http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures, accessed 8 February 2016.

120 On 12 October 2000, the U.S. Navy Destroyer *USS Cole* was refueling in the Yemeni port of Aden, when suicide terrorists exploded a small boat alongside the vessel. The blast ripped a 40-foot-wide hole near the waterline, killing 17 American sailors. See http://www.fbi.gov/about-us/history/famous-cases/uss-cole, accessed 8 February 2016.

121 On 6 October 2002, the French supertanker *Limburg*, chartered to the Malaysian oil firm Petronas, was approaching the Yemeni port of Mina al-Dabah when it was rammed by a small high-speed vessel, causing a huge explosion. See http://www.theguardian.com/world/2002/oct/07/alqaida.france, accessed 8 February 2016.

122 Mellor (n 47), at p. 364.

123 On 11 September 2001 the most lethal terrorist attacks in U.S. history took place in New York, where two commercial aircraft flew into the World Trade Towers, causing them to collapse, taking the lives of 3,000 Americans and citizens of other countries and ultimately leading to far-reaching changes in anti-terror operations in the U.S. and around the globe. See http://www.fbi.gov/about-us/history/famous-cases/9-11-investigation, accessed 8 February 2016.

124 Mellor (n 47), at p. 348. Cited in Van Hespen (n 2), at p. 7.

finally explode in a highly populated city or to be detonated at a major rail hub, such as Chicago.

Approximately 200 million containers are moved between ports annually[125] and 8,000 ships make 51,000 port calls each year in the United States alone. Both these facts illustrate the vulnerability of the United States to attack by sea. This vulnerability is increased as only two per cent of the approximately seven and a half million containers yearly delivered to the United States are actually inspected.[126]

The issue of preventing acts of maritime terrorism is thus clearly important. The obvious solution would be to intercept any threat offshore. However, it is not feasible to impose a major delay on a merchant vessel carrying up to 6,500 containers in order to inspect each one. Therefore, Commissioner Bonner of the U.S. Customs Service suggested that the solution might be "to push the U.S. borders outward".[127] This would consist in moving certain aspects of border functions to locations far removed from the physical U.S. border,[128] such as putting U.S. Customs officials in African ports to check on container shipments to the United States. This raises the issue of state sovereignty, as it would mean that African countries would have to agree to allow representatives of a foreign power to perform official duties within their own territory, which may be perceived as "problematic" in the post-colonial era. Still, the U.S. has received permission to place customs officials in the ports of Rotterdam, Antwerp and Le Havre.[129]

Legal Issues Related to the Prosecution of Maritime Crime

The concept of a wider "maritime crime" was proposed above. A distinction was made between "piracy *sensu lato*", "maritime terrorism" and "maritime vigilantism" and other crimes perpetrated in the maritime domain, such as "crimes with a maritime component" (drug or human trafficking) or "ordinary crimes on board ship" (murder or theft). Within the concept of "piracy *sensu lato*", the distinction was made between "piracy *sensu stricto*", committed only for private ends and on the high seas and subject to universal jurisdiction, and

125 *Ibid.*, at p. 351.

126 *Ibid.*, at p. 342.

127 *Ibid.*, at p. 355.

128 GW Bowman, 'Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border' (2007) 44(2) *Houston Law Review* 189–251, at p. 192.

129 Mellor (n 47), at p. 356.

"armed robbery at sea" and "seizing for ransom". This part will focus on legal issues related to the definition of maritime crime as a tree of legal concepts and legal consequences of the effectiveness and efficiency of piracy prosecutions by national courts.

It is interesting that although the crime of maritime piracy *sensu stricto*, and thus, *inter alia*, committed on the high seas and for private ends, is subject to universal jurisdiction, only few countries have actually prosecuted alleged pirates in their national courts on that basis. The fact that "armed robbery at sea" and "seizing for ransom" are not subject to universal jurisdiction would not be an obstacle for individual countries if they were to implement the broader legal concept of "maritime piracy" (see Fig. 5).

By the end of 2012, on the entire North American continent, only 28 alleged pirates had been prosecuted (leading to 17 convictions); these cases were exclusively in U.S. courts. In the Far East, only Japan (4) and South Korea (5) have prosecuted alleged pirates. In Europe, over the same period, only Belgium (1), the Netherlands (29 with 10 convictions), Germany (10), France (15 with 5 convictions)[130] and Spain (8), have prosecuted alleged pirates. The coastal states of the Indian Ocean have proven to be more "willing" to prosecute alleged pirates. One of the reasons for this might be that the EU and its Member States have provided over 10 million USD in 2009 and 2010 to the

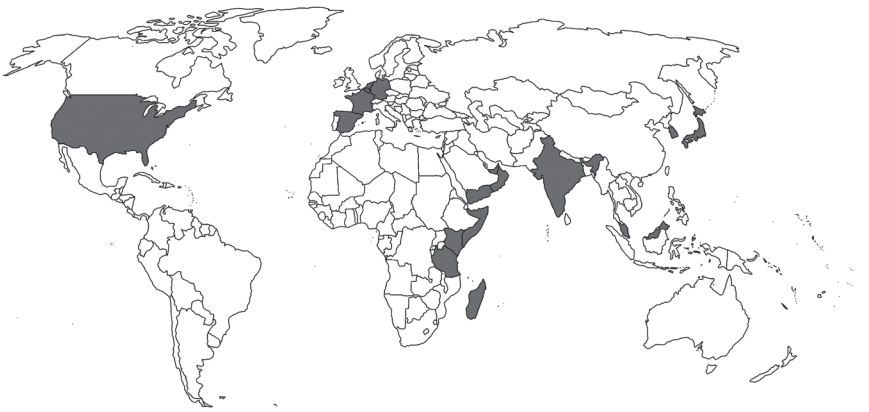

FIGURE 5 *Countries that have prosecuted alleged pirates as of 31 December 2012*

130 France is one of the countries that grouped a number of offences in the Criminal Code into one instrument, Act No. 2011–13 of 5 January 2011 concerning measures against piracy and the exercise of national police powers at sea. The Act adds a new chapter to the Act of 15 July 1994 concerning modalities for the exercise of national police powers at sea, which

regional U.N. Office for Drugs and Crime to fund a program "designed to support trials and related treatment of piracy suspects in the region".[131]

Alleged pirates have been prosecuted in Kenya (143 with 50 convictions),[132] Tanzania (12, leading to 6 convictions), Madagascar (12), the United Arab Emirates (10), Oman (22, all convicted), Yemen (129 with 123 convicted), Somalia—Puntland (290 with 240 convictions), Somalia—Somaliland (24, all convicted), Somalia—South Central Region (18), India (119), Malaysia (7), Maldives (41), Seychelles (88 with 63 convictions) and the Comoros (6). Between 2006 and September 2012, it appears that only about 1,186 suspected pirates had been prosecuted or were awaiting prosecution in 21 states, a small fraction of the men captured while attacking or attempting to attack a ship.[133]

An important issue also to be considered is the limited capacity of prisons in the region of the Horn of Africa. In 2012 the Seychelles Foreign Minister informed the EU Committee of the United Kingdom House of Lords that the Seychelles "held over 100 pirate prisoners", and "had conducted more piracy

already provided for means of action against crimes committed at sea, such as illicit trafficking and illegal immigration, specifically addressing maritime piracy. It specifies the conditions under which French forces may take action to counter the threat, as well as the modalities for prosecution by French judges. Moreover, the original legal framework has been complemented with a specific procedure for the detention of persons suspected of crimes at sea, such as piracy and illicit trafficking. These are detained on the warships that captured them, but at that stage they are still not subject to judicial proceedings in the strict sense. Any French judicial proceedings begin only once the detainees have set foot on French soil and are brought before a French judge. Under the new procedure, the custodial judge takes action within 48 hours of the suspects' capture in order to confirm or modify the detention measures taken on the warship pending a decision on what is to be done with the suspects. The judge then monitors the conditions of detention until the suspects disembark. Note that French courts, which had previously been competent only when the victim was a French national, now have quasi-universal jurisdiction under the new act. The French authorities can still decide whether or not to hold the trial in France, in accordance with Article 105 LOSC, which gives the courts of the State that captured the suspected pirates the option of prosecuting them, but does not impose an obligation to do so.

131 L Leposo, 'Kenya ends agreement with EU to prosecute suspected Somali pirates' (4 October 2010), available at http://edition.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates, accessed 8 February 2016.

132 "Kenya has tried and imprisoned dozens of Somali pirate suspects in return for technical and financial support for its judicial system from the EU. Kenya has similar agreements with the United Kingdom, the United States, Denmark, China and Canada". See Leposo (n 129).

133 Dutton (n 83), at p. 11.

trials than any other country (some 140 to 150)", but "that pirates could not be held there forever, particularly when the Seychelles only had prison places for 60 pirates".[134]

Human Rights

As mentioned earlier, respect for human rights is an important issue. The approach of the European Court on Human Rights (ECtHR), that clarified its position in the *Medvedyev*[135] and *Rigopoulos*[136] cases, is reviewed below.

The European Court of Human Rights

Article 5 (1)(c) ECHR states that:

> Everyone has the right to liberty and security of a person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure established by law: (. . .) (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so: (. .) .

Note the obligation that relevant procedures must be established by law; thus for any deprivation of liberty, also of persons on board a vessel, a legal basis is required, not only for the apprehension itself, but also for acts leading to this apprehension, such as boarding a vessel.[137]

In the ECtHR case law, the *Medvedyev* case and the *Rigopoulos* case are now the leading cases on detention at sea. Both cases concern the seizure of a vessel on the high seas. The crew was in both cases apprehended for drug trafficking and detained on board their vessels, which were subsequently sailed to the

134 See 'Turning the Tide on Piracy, Building Somalia's Future: Follow-up report on the EU's Operation Atalanta and beyond' (2012), at 4; available at: http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/43/4304.htm#note78, accessed 8 February 2016.

135 ECtHR (Grand Chamber), *Medvedyev and Others* v. *France*, Appl. No. 3394/03, 29 March 2010, Judgment, (*Medvedyev*).

136 ECtHR, *Rigopoulos* v. *Spain*, Appl. No. 37388/97, 12 January 1999, Decision on Admissibility (*Rigopoulos*).

137 K Manusama, 'Prosecuting Pirates in the Netherlands: the Case of the *MS Samanyola*' (2010) 49 *Military Law and the Law of War Review* 141–168, at p. 157.

nearest port of the seizing State. The applicants complained in both cases of violations of ECHR Article 5, paragraphs 1 and/or 3 by the apprehending state.[138]

In the 2010 *Medvedyev* case, the ECtHR concluded that under the circumstances whereby French military forces had boarded a Cambodian vessel and sailed it to a French port, "France (...) exercised full and exclusive control over [the vessel] and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France" and thus that the applicants were effectively within French jurisdiction for the purpose of Article 1 ECHR.

According to Manusama, an important conclusion could thus be that from the moment that military units, operating on the inflatable rubber boats of the warship in a law-enforcement capacity, arrest persons suspected of piracy and take control of the pirate ship at gunpoint, the ECHR already starts to apply to such persons, and not from the moment that they step aboard the warship itself.[139]

Also in the *Medvedyev* case, the ECtHR examined whether existing treaty arrangements and/or the consent of the flag state Cambodia through a diplomatic note could serve as the legal basis for boarding a vessel and subsequent detention of the crew on suspicion of drug trafficking.[140] In order to board a foreign vessel, the existing treaties[141] require consent of the flag State as an exception to exclusive flag state jurisdiction. The ECtHR considered that the existing treaty arrangements did not by themselves provide for such an exception without the express consent of the flag state. Moreover, the consent by diplomatic note of the flag state in question, Cambodia, was given outside of the existing treaty arrangements, because Cambodia was not a party to them. Although that note could serve as the basis for boarding the vessel, by France in this case, it could not serve as a separate, independent legal basis for France to detain the crew. The ECtHR argued that the diplomatic note did not contain a consent to the foreign jurisdiction over the crew, and did not meet the standard of foreseeability because it constituted only an *ad hoc* agreement.[142]

138 *Ibid.*

139 *Ibid.*, at p. 156.

140 *Ibid.*, at p. 159.

141 Article 110 (1)(e) LOSC (n 5) states that a warship that encounters a foreign merchant vessel on the high seas is not justified in boarding it unless there are reasonable grounds for suspecting "that, ... though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship". See also Article 22 (1)(c) HSC (n 14). In these circumstances the right to board a foreign vessel is limited, and may only be undertaken to verify the nationality of the ship in question.

142 Manusama (n 137), at p. 159.

Finally, it is interesting that in both the *Medvedyev* case and the *Rigopoulos* case, the ECtHR acknowledged that "because of the physical distance between the detainees and the appropriate judicial authorities of the detaining State it was "materially impossible" to bring the detainees before such authorities more promptly".[143] Moreover, an additional test has been formulated in *Rigopoulos*,[144] namely that any delay other than physical distance must be attributable to the detaining State in order for that State to have violated Article 5, paragraph 3.6 ECHR. In both cases, the ECtHR concluded that there had been no violation of that provision.

Conclusion

This research shows that there is a widespread consensus among legal scholars and criminal judges on the international law definition of "piracy *jure gentium*" or "international piracy" or what has been called here "piracy *sensu stricto*". However, it has also been established that this legal concept is so restrictive that it does not help the international community in the fight against the Somali type of situation. Not only does it not cover all possible acts related to maritime violence in every maritime zone, but also it does not even include all acts that might be regarded as "piratical" in nature. The innovative approach that the Belgian legislator has taken, by passing a domestic criminal law implementing a definition of "piracy" which goes further than the LOSC/customary law definition, therefore responds to a real *lacuna* in the law. This article has sought to show that it could usefully be used as a model for other nations. As it appears also to meet the requirements of due process, it could be the basis—*de lege ferenda*—for implementation by the international community, either by coordinated state practice through national legislation or by treaty.

The present author suggests that this could be achieved by introducing the concept of "maritime piracy" or "piracy *sensu lato*". Except for the case of mutiny, it broadly corresponds to the definition of piracy introduced by the 2009/2010 Belgian legislation, but this article suggests extending it even further to the concept originally proposed by Lauterpacht: "piracy must be defined as every unauthorized act of violence against persons or goods committed in the open sea by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel".

143 *Ibid.*, at p. 160.

144 *Ibid.*

"Piracy *sensu stricto*" as defined in Article 101 LOSC has long since passed the due process tests of foreseeability and accessibility, but this research demonstrates that also the extended notion of "maritime piracy" or "piracy *sensu lato*", although not subject to universal jurisdiction, passes the same tests. Additionally it has sought to show that the absence of universal jurisdiction for such crimes is not necessarily an obstacle for countries to prosecute alleged pirates. It is argued that this extended legal concept of "maritime piracy" is viable, as it has already *de facto* been incorporated into the domestic criminal law of several countries other than Belgium.

Within the category of "maritime piracy" or "piracy *sensu lato*", the distinction has been made between "piracy *sensu stricto*", committed only for private ends, with the intent to rob and on the high seas and as a consequence subject to universal jurisdiction, and "armed robbery at sea", that consists of violent acts that are piratical in nature, often with the intent to rob, but that are not committed on the high seas but within the territorial sea of a State or even in port (and not therefore subject to universal jurisdiction). A new subcategory of "seizing for ransom" would have to be created to complement the existing subcategories of "maritime piracy" in order to cover all acts that are "piratical" in nature, but that are either committed without the intent to rob or in a maritime zone that is not covered by the concepts of "piracy *sensu stricto*" or "armed robbery at sea". This proposed new subcategory is the second result of this research.

The third result is the definition of the concept of "maritime crime", consisting of acts putting innocent seafarers "in fear of their lives". Within the category of "maritime crime", the distinction was proposed between "maritime piracy" or "piracy *sensu lato*", consisting of crimes that are "piratical" in nature and committed "for private ends", and other crimes, committed for different motives, such as "maritime terrorism" or "maritime vigilantism". "Crimes in the maritime domain" other than "maritime crimes", but that are transnational and multi-jurisdictional in nature and with a maritime component, such as drugs or human trafficking, may, it is suggested, be referred to as "crimes with a maritime component" or, as is the case for murder or theft, as "ordinary crimes on board ship".