Hostis Humani Generi: Towards an Effective Legal Framework to Combat Maritime Piracy – A South African Perspective

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Summary

In recent history the international community has witnessed the re-emergence of maritime piracy at an alarming rate such that it has featured in the agendas of multilateral institutions and regional bodies as a security matter in need of urgent attention. Piracy is an international crime under customary international law and its status as such has been crystallised in the United Nations Convention on the Law of the Sea ("UNCLOS"). The definition of piracy under the Convention is criticised for being vague and thus making it impossible to establish with a degree of certainty what the meaning, scope, and content of piracy is. South Africa incorporated the definition of piracy in the Defence Act 42 of 2002, and by doing so also imported the issues that arise in the interpretation and enforcement of the UNCLOS provisions. This dissertation constitutes an analysis of piracy from both legal and security points of view, thus it focuses on piratical activity and the essential elements thereof – and it also looks at the evolution of law and state policy on piracy which eventually led to the adoption of the UNCLOS.

Chapter I introduces the topic of piracy as an international crime and it introduces the research question and also give adequate information about the concepts and principles that will inform the schematic theme of the entire research work. This chapter further highlights the importance of the research project, states the objective of the research project and gives an overall course and stages that the dissertation will take.

Chapter II focuses on the history of the crime of piracy and how it has evolved from manner of execution to the way in which sovereign states have dealt with the crime

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historically. The objective of the chapter is to establish a lucid understanding of the historical foundations of piracy, more than that the chapter will discuss concepts such as privateering, letters of marque, piracy on the high seas, and the development of international law to address piracy.

Chapter III focuses on the definition of Piracy as provided for by international customary law and codified in the UNCLOS. The *primary objective* is to determine which internationally proscribed activity falls within the purview of the definition of Piracy, thereby precluding international crimes such as robbery on high seas, maritime terror and so on. This chapter also analysis some of the practical problems in investigating piracy on the high seas and their constitutional implications. Further, there is also an analysis of regional legal and security responses to piracy.

Chapter IV constitutes a prognosis on the prosecution of piracy in a South African courts, this is done by analysing the South African approach to international criminal law and justice, recent developments such as the effort to withdraw from the ICC, and the manner in which the courts have interpreted international instruments and legislation providing for international crimes. The analysis is done against the backdrop of the constitutional supremacy in South Africa, and whether the piracy provisions in the Defence Act are aligned with the prevailing South African international criminal law framework.

Chapter V focuses on developments in regional and international legal and institutional frameworks. The analysis here is largely on the richness of the international criminal law framework and whether it may offer some solutions to the

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piracy quagmire. Policy from international bodies like the United Nations Security Council and judgments of international tribunals are discussed, particularly how developments at the international level impact on piracy.

Chapter VI concludes and makes recommendations for changes from an international and South African perspective. It is argued that the elements of the crime of piracy must not deviate from the essence of the crime the meaning of which is universal. It is further argued that some of the elements in the UNCLOS are outdated and find no relevance to contemporary piracy or modern international criminal law principles, and therefore must be abandoned in favour of a realistic practical elements which address the security threat posed by piracy.

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For my folks, my wife, my children, and for Swaziland

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List of Abbreviations

ACJHR – African Court of Justice and Human Rights

AU – African Union

AUSC – African Union Peace and Security Council

CGPCS – Contact Group on Piracy off the Coast of Somalia

COMESA – Common Market for Eastern and Southern Africa

DRC – Democratic Republic of Congo

ECHR – European Court of Human Rights

EEZ – Exclusive Economic Zone

EU – European Union

EU NAVFOR – European Union Naval Force

ICC – International Criminal Court

ICJ – International Court of Justice

ICTY – International Criminal Tribunal for the former Yugoslavia

ILC – International Law Commission

IMO – International Maritime Organisation

INTERPOL – International Criminal Police Organization

NATO - North Atlantic Treaty Organisation

NGO – Non-Governmental Organisation

NYWGA - New York Working Group on Amendments

ReCAAP – Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia

SALC – Southern African Human Rights Litigation Centre

SCSL - Special Court for Sierra Leone

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SHADE – Shared Awareness and Deconfliction

SUA - Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

UK – United Kingdom

UN – United Nations

UNCLOS – United Nations Convention for the Law of the Sea

UNCTAD – United Nations Conference on Trade and Development

US – United States (of America)

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CHAPTER I: ORIENTATION

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1 1 Introduction

Piracy is a concept that attracts a diversity of opinion as regards its very nature, meaning, scope, and content. While there is a codification of international customary law on the definition of piracy, there is no universal understanding of piracy or the customary law substantive meaning of the *crime*. Generally speaking, one can note that piracy is a crime that is as old as international maritime trade. Regardless of its antiquity there still persists volumes of literature (old and contemporary) debating on what exactly piracy is and what interpretations of its definition are courts to adopt when hearing piracy cases. During the course of this research the point is made that sovereign States have the latitude to regulate piratical activity occurring within their territorial waters, and to assign to that activity any criminal label as they deem appropriate. This is problematic in the sense that when a universal definition is needed, the biases and contextual experiences of maritime nations is bound to inform their contributions and views about maritime security, piracy, and other

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ocean borne crimes. For instance, some commentators make a compelling argument that piracy under a field of law called *Islamic international criminal law* is conceptualised differently from (traditional or universal) international criminal law in that the term of art "piracy" is not used in isolation but land piracy is very much used when referring to plunder by bandits on the desert plains.[1] This is obviously a view of piracy informed by culture, religion and geographical location. It is contrasted with the European or Anglo/Saxon idea of piracy on the high seas that is oft presented in the media and entertainment spaces. Thus, even from an academic point of view it would be unwise to think of piracy in stringently defined ideas, but rather one can focus on the essential elements universal to all acts deemed piratical by a variety of stakeholders. This difference in understanding of piracy is the main reason why the prosecution of piracy is controversial, whether drawing from the international criminal law framework or from national laws. From a South African perspective, the prosecution of piracy under the current framework is likely to raise constitutional issues since the definition itself is vague and open to a variety of interpretations which cannot be explained away by reliance on customary international law codified in the United Nations Convention on the Law of the Sea ("UNCLOS"). This instrument is generally accepted as constituting the codification of customary international law and thus having the status of law binding all states regardless of whether or not they ratified and adopted the treaty.[2] The UNCLOS definition of piracy,[3] is analysed in greater detail in chapters that follow. Suffice it to say at this point that the definition in the UNCLOS casts the scope of the crime of piracy far and wide, making the piracy provisions vague. The UNCLOS definition also is based on dated and primarily western views of piracy which make the prosecution of global

[1] F Malekian *Principles of Islamic International Criminal Law: A comparative Search* 1ed (2011) 300. See also M T Ghunaimi *The Muslim Conception of International Law and Western Approach* 1ed (1968) 15.

[2] L Azubuike "International Law Regime Against Piracy" (2009) 15 *Ann. Surv. Int'l & Comp. L.* 43 49.

[3] Art 101 United Nations Convention on the Law of the Seas of 1982. See also Art 14-22 of the Geneva Convention on the High Seas of 1958.

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contemporary piracy a challenge.[4] This is the point of departure in trying to understand the problems associated with bringing pirates to justice.

The history of piracy is helpful in providing insight as to the issues that have arisen in modern international law. Customary international law prohibits piracy and in ancient times pirates were deemed to be enemies of mankind.[5] Today pirates are (in theory at least) international criminals in that they are associated with all things inimical to the positive progression and civilization of humankind,[6] and this is pronounced when the effects of piracy are considered against general maritime security. However, this has not always been the case. In the 16th Century, during times of war States used so-called privateers, these were private persons authorised by official letters of marque and reprisal issued by their States to carry out piratical activity, while on the high seas, against ships, cargo and crews of enemy States during times of war, for their own private benefit.[7] Given the geo-political and historical context, the law afforded *de facto* pirates exemption from prosecution; their activities were pigeonholed as acts of war by States rather than acts of piracy by individuals.[8] However, privateers were in actual fact pirates – only they were authorised to carry out piratical attacks as a war strategy. It should not therefore be assumed that pirates were soldiers at war, they

[4] Mensah "Piracy at Sea – A New Approach to an Old Menace" in Hestermeyer, Matz-Luck, Seibert-Fohr and Voneky (eds) *Law of the Sea in Dialogue* 161 161.

[5] For a general historical perspective, see Alfred Rubin *The Law of Piracy* 2 ed (1998) tracing the ancient history of sea piracy and the evolution of the modern legal framework to combat this international crime.

[6]See *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: http://www.unhcr.org/refworld/docid/40276a8a4.html [accessed 7 September 2011]. In casu, the judge associates pirates with torturers and slave traders as a matter of law.

[7]Nyakwaka "The Third United Nations Law of the Sea Treaty and the Piracy Question: The Case of the East African Coast" 2010 (40) *Africa Insight* 74 78; Dubner "On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof" (42) *J. Mar. L. & Com* 71 81.

[8]Skelton "*The World for Ransom: Piracy is Terrorism, Terrorism is Piracy* by D R Burgess" 2011 (47) *Stan. J. Int'l L.* 275 275.

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were merely a means to an end driven by their desire for ill gains, not patriotic conviction. This would become clear in the late 17th century when war between States involved considerable *naval warfare*, the privateers turned against authorising States that had previously licensed them and started committing piratical acts against ships sailing under the flags of those States.[9] The tide subsequently changed where pirates and piracy were concerned. Five centuries of customary practice in the Western World were consequently abolished in 1856 through the Treaty of Paris.[10]

In the beginning of the 20th Century it was widely assumed (and for all practical purposes accepted) that piracy had died and the law pertaining to it was obsolete[11]. This led to the long-time belief and general attitude of legal scholars and practitioners alike towards piracy that the traditional definition, available case law and the ultimate codification of the traditional definition was adequate basis for establishing the elements of the crime, and furthermore to determine the measures which sovereign states could lawfully use to address piracy.[12] There were however academic commentators who felt that this was not an accurate view. As far back as 1935, Lenoir warned against the view that piracy was of no concern to the international community of civilised nations. In actual fact, he predicted the inevitable rise of piracy and thus advocated for more attention to be given to piracy and for the law to be crystallized in that regard.[13] Piracy has indeed arisen over the decades as predicted. In 1958, the international community attempted to adopt a positive and proactive legal

[9]Sterio "Fighting Piracy in Somalia (and Elsewhere): Why More is Needed" 2010 (33) *Fordham Int'l L.J.* 372 378.

[10]Nyakwaka 2010 (40) *Africa Insight* 78.

[11]Bento "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" 2011 (29) *Berkeley J. Int'l L.* 399 405.

[12] Mensah "Piracy at Sea – A New Approach to an Old Menace" in *Law of the Sea in Dialogue* 162.

[13]Lenoir "Piracy Cases in the Supreme Court" 1934-1935 (25) *Am. Inst. Crim. L. & Criminology* 532 533-535.

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framework. This end was to be achieved by the Geneva Convention of the High Seas of 1958, a multilateral treaty that tendered a formal definition of piracy. Moreover it made it the *responsibility of every state to participate in the war against piracy*. In 1982 the UNCLOS replaced the Geneva Convention. However, the former still restates some provisions of the latter that emphasize the status of piracy as a *crime* under International Law.

The current state of international treaty law *vis-a-vis* piracy is that the UNCLOS leaves too much to invention in that it does not effectively provide a solid legal framework for states to work with when dealing with Piracy.[14] This observation has particular relevance in an international criminal law context, where the focus is obviously on individual criminal liability (and the concomitant foundations underlying this notion – not least of all the fundamental principle of legality - *nullum crimen, nulla poena sine lege).*

As far as *customary international law* is concerned, the theoretical cliché that piracy is one of the oldest crimes under international law (even an international crime *par excellence*) is simply not reflected in the empirical fact that states are – generally speaking – reluctant to follow through and treat piracy as a crime of universal concern, interest and jurisdiction.[15]

The inefficiency (from an international criminal law point of view) frustrates all efforts to combat piracy in that it makes it burdensome on a state desirous of prosecuting pirates to attain that goal, especially where such state does not have well defined anti-piracy laws and

[14] Guilfoyle "Counter-Piracy Law Enforcement and Human Rights" 2010 (55) *ICLQ* 141 142.

[15] Gregory Stanton "Why the world needs an International Convention on Crimes Against Humanity" in Leila Nadya Sadat (ed) *Forging a Convention for Crimes Against Humanity*(2011) 353.

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wishes to incorporate international law by statutory or constitutional provision.[16] The trend seems to be that pirates captured are released without trial or punishment, which has in turn created a culture of impunity.[17] There are exceptions, like the efforts of a multinational fleet and taskforce aimed at eradicating the problem of Somali piracy along the east coast of Africa. Part of that strategy (which originally formed part of the so-called 'War on Terror' led by the United States) is indeed to capture and prosecute pirates.[18] It is submitted that this strategy is neither coherent nor based on a comprehensive legal framework and certainly not a blueprint for South Africa.

There are also jurisdictional complexities that work against the successful prosecution of piracy. The international law principle as codified in the UNCLOS is that the high seas do not belong under the sovereign rule of any state.[19] As such, the high seas are open to all recognised states that form the international community. The International Maritime Organization ("IMO") has made attempts to address the jurisdiction problem by passing resolution A. 1025 (26) which suggests that states must take measures to codify their

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[16]This is especially relevant in dualist systems like South Africa – where international law norms should be transformed into domestic law in order to become applicable and enforceable in domestic courts – including domestic criminal courts. There is a contentious debate about the relevance and applicability (from an international criminal law perspective) of s 232 of the Constitution of South Africa (1996), which provides that customary international law is law in the Republic. See G Erasmus & G Kemp "The Application Of International Criminal Law Before Domestic Courts In The Light Of Recent Developments In International And Constitutional Law" (2002) 27 *S. Afr. Yearbook Int'lL.*64-81 – for the argument that criminal courts in South Africa cannot directly rely on s 232 of the Constitution to exercise substantive jurisdiction over crimes under customary international law (mainly because of problems generated by the legality principle – also a key constitutional norm). For a contrary view see Ward Ferdinandusse *Direct application of International Criminal Law in National Courts* (2006) 82.

[17] See Y Dutton "Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?" 2011 (34) *Fordham Int'l L.J.*236 246 - 254

[18]J Kraska and B Wilson "The Pirates of the Gulf of Aden: The Coalition is the Strategy" (2009) 43 *Stan. J. Int'l L.* 241244.

[19]Art 89 of the UNCLOS.

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universal jurisdiction over piracy and further lay down a clear procedural framework that would support Piracy prosecution.

SECTION A

1 2 Research Statement and Rationale

The primary aim of conducting this research project is to make an original contribution to the existing body of academic discourse in the field of international criminal law, as well as South African domestic criminal law and regional law, on the topic of maritime piracy. The main objective is to identify lacunae and legal problems that frustrate the international community's efforts (via members like South Africa) to combat piracy and try to address these defects. The vast body of international law principles will be examined thoroughly and systematically, but with the central aim in mind, namely the application of international criminal law in South Africa with respect to the crime of piracy. To this end, South African and regional law (to the extent that there is) will be considered in the course of the research project. The purpose of such evaluation is to determine whether the current laws and principles suffice in the war against piracy, or if more needs to be done by the international community, regional bodies and sovereign governments, and, ultimately and crucially, South Africa as a regional power with maritime capabilities and an assumed commitment to international criminal justice and the rule of law.

The domestic, comparative, regional and international criminal justice responses to piracy will ultimately be analysed not only in terms of the positivist content, but also in terms of general international criminal law theories on substantive and enforcement jurisdiction. The aim is to submit a unified framework that would constitute an effective domestic (South

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African) response to maritime piracy, in the context of a complementary regional and international enforcement regime.

The essential premise of this dissertation is that maritime piracy is not only a serious threat to national and regional security, but also threatens the stability of the international legal order. Be that as it may, military responses and use of force under international law cannot be the primary response, but must be complementary to a sound international, regional, and domestic legal (criminal justice) framework.

1 3 Methodology

The research project will be carried out by means of a thorough study of available literature on the subject of piracy. To achieve this endeavour, academic journals, commentaries and books written on piracy (in particular) and international criminal law (more generally) will be consulted extensively so as to facilitate a holistic understanding of piracy and the legal challenges in addressing it.

- Principles and precepts of **international (criminal) law** will be discussed *vis-à-vis* the crime of piracy. Such principles and precepts shall be drawn from **recognised sources of International law***viz*; (i) International instruments such as the UNCLOS, the Rome Statute of the International Criminal Court, 1998 etc; (ii) International custom established over time so as to be given the status of law; (iii) The general principles of law; and (iv) Judicial decisions and precedent. These sources are also those listed in article 38 of the Statute of the International Court of Justice.

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- **South African law** will be studied at length, with focus directed to the *Constitution*,[20] in particular where the provisions of international law are stated. Sections 231 to 233 will be relevant in this regard. *Statutory law* pertaining to legal issues around piracy will also be examined. Statutes to be consulted include *inter alia* the South African Maritime Zones Act,[21] the Defence Act,[22]Merchant Shipping Act,[23] and the Protection of Constitutional Democracy against Terrorism and Related Activities Act.[24]

- A **comparative study of selected jurisdictions** will be conducted, notably the laws of the United States of America, the United Kingdom, Tanzania, Kenya and the Netherlands. These jurisdictions are not selected without reason: States like the United Kingdom, the Netherlands and the United States have long histories of dealing with piracy. The two African states (Kenya and Tanzania) are in the firing line of arguably the most acute contemporary problem of piracy — the activities of the Somali pirates off the east coast of Africa.

- Lastly, there are **numerous protocols and policy papers** directed at making a contribution towards the war against piracy that have been published by various organisations. These will be considered and discussed. These include the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf,[25]Protocol Relating to the Establishment of the Peace and

[20]The Constitution of the Republic of South Africa, 1996.

[21] 15 of 1994.

[22]42 of 2002.

[23] 48 of 1967.

[24] 33 of 2004.

[25] Done at Rome on 10th March 1988.

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Security Council of the African Union,[26] and the Protocol to the African Union Convention on the Prevention and Combating of Terrorism.[27] Of particular interest will be developments regarding the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the "Malabo Protocol"), briefly referred to above.

SECTION B

1 4 Relevance of Piracy Today

Currently there are multiple international organisations concerned with the piracy problems on the world's oceans, including the International Maritime Organisation, United Nations Office for Drugs and Crime, International Chambers of Commerce, African Union, Southern African Development Community, and think tanks such as the Institute for Security Studies. The International Maritime Bureau figures state that 174 piracy incidents were reported in 2018,[28] and it is estimated that on the whole, piracy leaves an exorbitant bill between USD1 billion and USD16 billion a year.[29] While piracy off the coast of Somalia has received widespread attention in the media in recent years, it has been reported that currently the highest recorded piracy incidents globally occur in the Gulf of Guinea – off Africa's west coast.[30] In April 2019, it was reported that two shipping vessels were attacked by pirates 280

[26] Done at Durban 9th July 2002.

[27] Done at Algiers 1999.

[28] https://www.icc-ccs.org/index.php/piracy-reporting-centre/piracynewsafigures.

[29] F C Onuoha "Sea Piracy and Maritime Security in the Horn of Africa: The Somali Coast and Gulf of Aden in Perspective"(2009) 18 *Afr. Sec'y Rev.*31 38.

[30] https://www.economist.com/international/2019/06/29/the-gulf-of-guinea-is-now-the-worlds-worst-piracy-hotspot

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nautical miles off the coast of Somalia, and the international military outfit patrolling that body of water considers it a high risk area.[31]

There is a variety of global developments that when considered together have occasioned the rise in piracy incidents in the world's oceans. The first and perhaps obvious development is the historic rise in seafaring, shipping lanes proven as a commercially viable option for trade and tourism amongst other things. The United Nations Conference on Trade and Development ("UNCTAD") estimates that global ocean borne trade alone accounted saw the transportation of 10.7 billion tons of cargo in 2017, and this is projected to grow by a median rate of 3.8% between 2018 and 2023.[32]Maritime trade and ocean borne transportation of goods have been steadily rising over the years. Recorded statistics are depicted in the table below.[33]

Table 1.3 Development in international seaborne trade, selected years
(Millions of tons loaded)

Year	Crude oil, petroleum products and gas	Main bulks[a]	Other dry cargo[a]	Total (all cargoes)
1970	1 440	448	717	2 605
1980	1 871	608	1 225	3 704
1990	1 755	988	1 265	4 008
2000	2 163	1 295	2 526	5 984
2005	2 422	1 711	2 976	7 109
2006	2 698	1 713	3 289	7 701
2007	2 747	1 840	3 447	8 034
2008	2 742	1 946	3 541	8 229
2009	2 642	2 022	3 194	7 858
2010	2 772	2 259	3 378	8 409
2011	2 794	2 392	3 599	8 785
2012	2 841	2 594	3 762	9 197
2013	2 829	2 761	3 924	9 514
2014	2 825	2 988	4 030	9 843
2015	2 932	2 961	4 131	10 024
2016	3 055	3 041	4 193	10 289
2017	3 146	3 196	4 360	10 702

[31]https://eunavfor.eu/piracy-attack-off-the-coast-of-somalia/

[32]United Nations Conference on Trade and Development *Review of Maritime Transport 2018* UNCTAD/RMT/2018

[33] UNCTAD secretariat calculations, based on data supplied by reporting countries and as published on government and port industry websites, and by specialist sources.

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The rise of valuable cargo transported on the oceans everyday means that ships are easy targets for pirates. Furthermore, crew and passengers onboard seaborne vessels have been treated as lucrative bargaining chips by pirates and ransomed for release. The ransom factor is an important dynamic in the criminal enterprise carried on by pirates, both as regards the release of cargo and hostages. From 2013 to 2017, the recorded number of hostages held for ransom is 201.[34] The highest recorded number of persons taken at sea as hostages held for ransom was in 2009, pirates off the coast of Somalia alone detained 867 hostages – 263 of which were still held by the end of the year.[35] In depth studies of the complex structure that underscores piracy as a lucrative criminal enterprise in Somalia have been conducted, and they clearly indicate that the dire economic status in that country has driven many to opt for piracy as a career of choice – the amount of money to be made is life changing.[36] The same issues that fuel piracy in Somalia ring true for piracy in Southeast Asia where dire economic conditions have seen criminals turn to piracy as a lucrative crime.[37] Piracy off the Coast of Guinea in West Africa is somewhat different from that occurring in East African oceans but have some resemblance to attacks that have occurred in Southeast Asia. Off the West African Coast there operates a self-proclaimed liberation movement made up of numerous militant groups known as Movement for the Emancipation of the Niger Delta, notwithstanding their liberation struggle cause they too have engaged in piracy and held hostages for ransom.[38] So, both cargo and potential hostages coupled with the volume of maritime traffic represent

[34]International Chamber of Commerce - International Maritime Bureau *Piracy and Armed Robbery Against Ships – 2017 Annual Report* 12.

[35]International Chamber of Commerce - International Maritime Bureau *Piracy and Armed Robbery Against Ships – 2009 Annual Report*25.

[36] See generally J Kraska "Freakonomics of Maritime Piracy" (2010) 16 *Brown J. Wld Aff.* 109; and J R Beloff "How Piracy is Affecting Economic Development in Puntland, Somalia" (2013) 6 *J. Strat. Sec'y* 47.

[37]A J Young and M T Valencia "Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility" *Cont. Southeast Asia* (2003) 25 269 274.

[38]A Kamal-Deen "Anatomy of Gulf of Guinea Piracy" (2015) 68 *Naval War College Rev.* 93 97.

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incentives for pirates to continue with piracy. This may also be exacerbated by the fact that ransoms are actually paid by shipping companies for release of cargo and crew. However, from a business perspective, it could be argued that when profit ranks first in priority it may be commercially sound to pay a fraction of the profit rather than have cargo and personnel detained indefinitely pending a very complex investigation and rescue mission.

A second and important reason that allows piracy to flourish with minimal hindrance is the progression of technology and increase of illegal arms and ammunition in the global black market.[39] Piracy incident reports are often detailed with the type of weaponry used to carry out the attack and bring the ship's crew to submission, and there are many reports of injuries or fatalities inflicted by pirates using weapons which they are most likely unlicensed to use. Weapons are treated as an investment into the business of piracy by pirates, and funds collected through ransoms have been used to add on to artillery and tools of the trade.[40] This very fact caused panic in 2008 when the *Faina* was hijacked off the Coast of Somalia, the vessel was hauling a consignment of weapons headed for either Kenya or South Sudan depending on which government is making a statement.[41] It is reported that the incident attracted the attention of governments which resulted in a concerted effort by different navies to monitor the situation and ensure the weaponry consignment does not end up in Somalia.[42] In any event, pirates have found ways to secure traditional weapons and to weaponize gadgetry and use it to commit piracy.

[39] P Chalk,*The Maritime Dimension of International Security* 1ed (2008) 13 -14.

[40]E R Lucas "Somalia's 'Pirate Cycle': The Three Phases of Somali Piracy" (2013) 6 *J. Strat. Sec'y* 55 61.

[41]https://www.nytimes.com/2009/02/13/world/africa/13pirate.html .

[42]http://news.bbc.co.uk/2/hi/africa/7871510.stm .

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1 5 Piracy as a Security Issue

Piracy does not only find relevance in purely legal discourse, it is also a security issue and thus from a policy point of view approaches to combat piracy must bear elements of both legal and security measures. The phenomenon has multifaceted dimensions to it that manifest depending on the perspective from which one observes. It poses a threat to the security of maritime trade, travel, and ocean resources – and the nature of such a threat cannot be met by prosecution only – a military response has its place in the fight against piracy and impunity for piratical acts. For purposes of this research there are two broad themes that are explored. The first being the security issues that arise as a result of piracy, and how regional communities of states have been adversely impacted by the rise of piracy. The second theme pertains to the security implications of having private ship-owners bear the responsibility of protecting their vessels on voyage against pirates. The discussion of these themes constitute a general discussion of piracy in relation to security, specific military approaches and the success thereof are discussed in Chapter III. This analysis only serves to feed into the overarching narrative that piracy is a menace to peace, stability, and security of international maritime navigation.

In times of war, epidemics, famines, and other natural disasters, international humanitarian organisations use the world's oceans to transport and deliver humanitarian aid to countries in need of such support. Such aid includes food, medicines, clothing, and blankets. Humanitarian relief measures are underscored by the mandate to secure the lives of those in need by providing solutions for sustenance and improvement of life.[43] It is therefore important that whatever form of aid is being shipped reaches its destination in time so that it

[43] D Miliband and R Gurumurthy, "Improving Humanitarian Aid" (2015) 94 *Foreign Aff.* 118 118.

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is in the condition required to improve the food or health security of the recipients. Piracy, in the context of delivering humanitarian aid, constitutes a threat to the security of peoples in need of aid. It has been reported that 3 UN ships were hijacked by Somali pirates between 2005 and 2007.[44] Another vessel transporting World Food Programme humanitarian aid for tsunami victims in Somalia was hijacked by Somali pirates.[45] Somalia has been locked in a protracted civil war, and with the right factual, evidentiary and contextual matrix, the hijacking could be in contravention of international humanitarian and international criminal law. For instance, in terms of the Rome Statute of the ICC (which does not provide for piracy as a discrete crime), the obstruction of humanitarian aid delivery can potentially constitute a crime against humanity.[46]

Piracy also poses a threat to the marine environment and economy. This threat is also linked to the nature of cargo onboard some vessels at sea. In the Gulf of Guinea, off the coast of West Africa, piracy cases against offshore oil rigs and oil tankers transporting environmentally hazardous substance with the potential to devastate the marine ecosystem.[47] One commentator has observed that oil and chemical tankers are especially vulnerable to piracy attacks because any resistance to an attack may result in an environmental catastrophe from damage to the vessel's hull and resultant leakage of hazardous cargo into the marine environment – or worse, the explosion of the vessel itself.[48] Another potentially devastating possibility is that pirates may successfully hijack a vessel with hazardous cargo, and due to lack of technical operational knowledge the vessel either sinks or there is a leakage that

[44] https://www.theguardian.com/world/2007/feb/26/international.mainsection .

[45] https://www.voanews.com/archive/wfp-says-tsunami-relief-ship-hijacked-somalia.

[46] Art 7 (1) (b) read with (2) (b).

[47] https://www.bloomberg.com/opinion/articles/2019-07-02/how-to-sink-the-pirates-plaguing-oil-tankers-in-gulf-of-guinea .

[48] J Kraska and B Wilson "The Pirates of the Gulf of Aden: The Coalition is theStrategy" (2009) 45 *Stan. J. Int'l L.* 243 265.

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cannot be met with the expertise to minimise the environmental damage. Any oil or chemical spillage in the oceans would have an adverse impact on coastal communities who rely on ocean resources for food and commerce, thereby threatening their stability and security.

International trade and economic relations between States are also adversely affected by piracy. It is estimated that about 80% of all global shipments are conveyed *via* maritime transportation, thus it constitutes the backbone upon which global trade depends. However when pirates disturb the free flow of maritime traffic, it is bound to have a ripple effect on economies of international trading partners. A rise in piracy incidents has led to diplomatic tensions where ship-owners have boycotted ports in Hong Kong because of rampant piratical activity – and the same fate is reportedly befalling ports in Southeast Asia, the Gulf of Guinea, and the Gulf of Aden.[49] The ability of piracy incidents to destabilise regions has been noted by the United Nations Security Council and has exercised its Chapter VII powers in relation to piracy incidents which were threatening the security of maritime navigation in the Gulf of Aden and the Indian Ocean.[50] Acting in accordance with the said powers the Security Council called upon States and Regional Organisations to:

> "…take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution and relevant international law, by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia, or for which there is reasonable ground for suspecting such use."[51]

[49] Chalk,*The Maritime Dimension of International Security* 16.

[50]UN Security Council, *Security Council Resolution 1846* (2008) [on repressing acts of piracy and armed robbery at sea off the coast of Somalia], 2 December 2008, S/RES/1846 (2008).

[51] Paragraph 9.

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A comprehensive multinational military response was adopted by the Security Council to ensure that piracy is met with force so that peace and security are restored in the region. Like all strategies, no military response is perfect and therefore there arose a practice in the maritime shipping industry to hire private security for the purposes of thwarting piracy attacks when voyaging in piracy prone regions. The analysis of this practice constitutes the second broad theme pertaining to the general security of maritime travel.

1 6 Piracy *Jure Gentium* and Piracy Under Domestic Law

Throughout this research reference will be made to piracy as an international crime, however it must be clarified that the controversy that surrounds the definition of piracy extends to parts of the sea upon which piratical activity has taken place. For certain sectors such as in the insurance industry, the term "piracy" may have a wider scope that is in no way related to the law of the sea. For our purposes and as a point of departure, piratical acts that fall within the territory of a coastal state must be differentiated from piratical acts which happen on the high seas. This research is concerned with the latter. Piracy under international law falls under *delicta juris gentium* and therefore contemporary piracy is governed by the UNCLOS. Piracy under domestic law is left to the states concerned to define as they choose and taking into account the context of their own territorial maritime security issues.[52] The UNCLOS provides for a delineation regime which separates territorial waters from the high seas. In terms of the said regime, waters from the coastline of a maritime state up to twelve nautical

[52] Even when the current definition of piracy was developed in the early 20th Century the differentiation between piracy under international law and domestic law was a feature. See The Harvard Draft Convention on Piracy, art 3. See further M Matsuda "Questionnaire No. 6: Piracy – Report by the Sub-Committee" (1926) 20 *Am. J. of Int'l L.* 222 224.

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miles form part of the territory of that state.[53] The UNCLOS provides for an Exclusive Economic Zone stretching from the base of territorial waters, upon which coastal states enjoy certain exclusive rights,[54] however these rights amount to limited sovereign interests – unlike within territorial waters.[55] The Exclusive Economic Zone is an additional two hundred nautical miles stretch of water.[56] While some authors are of the view that the Exclusive Economic Zone forms part of international waters for purposes of Article 101 of the UNCLOS,[57] Chapter III of this research discusses the UNCLOS piracy regime and the jurisdictional issues that arise.

The prohibition of piracy *jure gentium* is a peremptory norm of international law, otherwise referred to as *jus cogens*.[58] This class of norms are binding on all States notwithstanding any treaty exemption between States or any unilateral objection by a State to be bound by *jus cogens* norms. As regards piracy in particular, there are two rules that flow from its *jus cogens* status. The first being that States bear a duty to ensure that their territorial waters do not become a base from which pirates operate to further their criminal activities.[59] This of course is not to say that there will never be incidents of piracy, but it impresses the point that where a State is aware of a drive by criminals to systematically carry out maritime piracy attacks then such State should mobilise resources to frustrate and bring those criminal efforts to an end. A discharge of this duty found expression in the move by the recognised government of Somalia to go as far as allowing foreign naval ships and military aircraft to

[53] Art 3 of the UNCLOS.

[54] Article 56 of the UNCLOS.

[55] Article 58 (1) and (2) of the UNCLOS.

[56] Article 57 of the UNCLOS.

[57]See M Gardner “Piracy Prosecutions in National Courts” (2012) 10 *J. Int'l Crim. Just.* 797.

[58]M Prence "Torture as Jus Cogens Norm" (2011) *Acta Universitatis Danubius Juridica*87 88 – 89.

[59] G Schwarzenberger "International Jus Cogens" (1965) 43 *Texas L. Rev*. 455 463.

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(subject to consent) enter Somali territorial waters and when necessary use force to eliminate piracy. There is a view that the prohibition of piracy does not enjoy the status of a *jus cogens* norm, the rationale behind this view is as follows:

> "Although such private acts may be illegal under international law, they are not violations of *jus cogens* because they do not in and of themselves address the limits of sovereign authority in the state-subject fiduciary relation. To merit recognition as a peremptory norm, the international norm against piracy would have to be repackaged as a constraint on state authority satisfying the fiduciary theory's formal and substantive criteria. This might be accomplished, for example, by shifting the piracy prohibition's focus from pure private conduct to state-sponsored or state-condoned piracy-practices tantamount to aggression. Absent a clear nexus to the state-subject fiduciary relationship, however, the prohibition against piracy is best classified as a common crime."[60]

This view makes a compelling argument, however it is criticised for seemingly making submissions without considering the historical context of piracy and the development of international humanitarian law to date – focus is solely on the UNCLOS provisions read in isolation. It is well documented in history that there has been a practice by States to weaponize pirates against private vessels sailing under the flag of an enemy State.[61] This was done primarily by authorising piracy *via* letters of marque and reprisals. The question then becomes whether the prohibition of piracy under customary international law includes the prohibition of States to sanction piracy by issuing letters of marque to private persons today. It is submitted that such an authorisation would be in violation of a *jus cogens* norm for a variety of reasons. It must be borne in mind that piracy can only be committed by private

[60] E J Criddle and E Fox-Decent "A Fiduciary Theory of Jus Cogens" (2009) 34:2 *Yale J. Int'l L.* 331.

[61] This topic is discussed comprehensively in Chapter II under topics pertaining to privateering and letters of marque and reprisals.

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individuals against other private individuals, which is why piracy can only be state-sanctioned but cannot be committed by a State, it would therefore be impossible for a State to carry out its duty to ensure that it is not a haven for pirates if that same State itself authorised piracy. Further, international humanitarian law effectively prohibits the use of piracy as a method of warring.[62] This addresses the issue of state sovereignty, in that no State may cause reprisals to be visited upon private persons or their property during armed conflict. The International Criminal Tribunal for the Former Yugoslavia, dealing with the crime of torture, summed up this point as follows:

> "The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition."[63]

[62] Art 33 of the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS, vol. 75

[63] *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998.

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The second rule that flows from the *jus cogens* status of the prohibition of piracy is that every recognised State has the right to exercise jurisdiction over pirates and pirate ships on the high seas.[64] All members of the international community of states have a common interest in the security of the oceans and maritime navigation, piracy is a menace to that interest and thus pirates are not protected by the laws of the flag State of the vessel on which they sail. This rule is also an exposition of the obligation *erga omnes* on all states to apply a zero-tolerance policy for impunity for acts of piracy.[65] It is submitted that the UNCLOS supports this proposition in that it provides for the universal duty to "cooperate to the fullest extent possible" in suppressing piracy and it may well be that legally sound prosecutions constitute an effort to suppress piracy.[66] In the modern fight against piracy *via* the deployment of naval vessels on the high seas, some national navies have adopted a catch-and-release practice in terms of which apprehended pirates are released without having being tried for their crimes by a court of law.[67] This practice is not novel, in medieval England it was used as a diplomacy tool where pirates would be released in return for diplomatic amities.[68] It is submitted that this practice is carried out in contravention of the obligation *erga omnes* as it relates to piracy; the release of captured pirates is at best an inchoate effort to meet international law obligations. States have a duty to prosecute pirates, and this is a duty owed by the capturing state to the international community of states.[69] In contemporary international criminal law, the duty to prosecute pirates is buttressed by the UNCLOS piracy

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[64] Schwarzenberger (1965) 43 *Texas L. Rev.* 463.

[65]M C Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *Law & Contemp. Probs.* 63 66.

[66] Article 100 of the UNCLOS.

[67] L Bento, "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" (2011) 29 *Berkley J. Int'l L.* 399 411

[68]Andrew Kent, "Piracy and Due Process" (2018) 39:3 *Mich. J. Int'l L.* 385 423.

[69]*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*; Second Phase, International Court of Justice (ICJ), 5 February 1970 at para 33.

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provisions which make piracy a crime which falls within the jurisdiction of any capturing State. Further, the Malabo Protocol envisions the very first international court with jurisdiction over piracy *jure gentium*, attesting to *erga omnes* obligations flowing from the *jus cogens* status of the prohibition of piracy.

1 7 Conclusion

Piracy is a crime under international law, and for the longest time there has not been an international institutional framework to address it. During the course of the research it will be shown that international tribunals and national courts have recognised that piracy is a crime under international customary law and that it attracts universal jurisdiction. Be that as it may, there are concerns obtaining *re* the prosecution of piracy. Generally, the definition of piracy is outdated, and it is argued that it must be developed to meet the needs the criminal justice needs in relation to contemporary piracy. Connected to that, some elements of the crime are vague meaning that they do not meet the requirements of the principle of legality which underscores the sound prosecution of crimes both at national and international level. South Africa is a Constitutional state, and it argued progressively throughout this research that although piracy is criminalised under the Defence Act 42 of 2002 the success of a prosecution in a South African court remains doubtful. There is also the anomaly that the Defence Act does not provide for universal adjudicative jurisdiction, meaning if a pirate was to enter the territory of South Africa prosecution would be impossible unless there is a nexus to South Africa upon which jurisdiction could be established. This is termed an anomaly for the reason that in the scheme of legislation criminalising international crimes such as the core crimes, terrorism, and torture – the Defence Act is the only one that does not provide for

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universal adjudicative jurisdiction even when the crime was committed outside South Africa by a non-citizen, against non-citizens of South Africa.

The chapter that follows sheds insight as to the historical foundations of piracy and how it has evolved from the early ages to contemporary times. The chapter analyses both the security and legal aspects of piracy, and in particular how the historical changing attitudes towards piracy have informed the current legal framework of the crime.

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CHAPTER II: MARITIME PIRACY – AN HISTORICAL PRIMER

2 1 Introduction

2 2 Origins of Piracy

2 3 Letter of Marque and Reprisal

2 3 1 Privateering

2 3 2 Reprisals

2 4 Piracy after the Declaration of 1856 – 19th Century to UNCLOS

2 5 Concluding Remarks

2 1 Introduction

The crime of maritime piracy has rich historical foundations which surprisingly still inform the nature of the crime today. The development of international trade by maritime routes centuries ago saw the rise of this ominous crime, such that it is said that piracy is as old as maritime commerce stretching as far back as 77 B.C.[70] With development of technology, maritime travel, ocean tourism, and globalisation over time, piracy like most things also went through numerous stages of evolving from manner of execution to how States perceive and punish the crime. The history of piracy not only as a crime, but also as a concept in marine navigation is particularly chequered and thus is worth study. Its historical foundations and development over time lends insight into how it has become a menace in recent history, and quite costly for shipping and tourism in contemporary times. The history of the world has seen numerous developments such as the rise of civilisations, the emergence and fall of

[70]Azubuike 2009 (14) Ann. Surv. Int'l & Comp. L. 45; and D Paradiso "Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its Cause" (2010) 29 *Penn St. Int'l L. Rev.* 187 189.

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superpowers, two world wars, and piracy features prominently in some major developments both as a crime and as a weapon in the arsenal of States. This chapter therefore seeks to contextualise the rise and seemingly incorrigible scourge of piracy today by relating the historical key highlights relating to piracy in a chronological fashion. The aforementioned goal will be achieved by engaging in a study of piratical concepts and activity such as the letter of marque, privateering, reprisals, and piracy on the high seas. Moreover, this chapter will consider the history of legislative approaches taken by superpowers, maritime nations in different times in history, and the international community by assessing the development of international law *vis-a-vis* piracy. While piracy is not regarded a so-called "core crime" in international criminal law today, the menace and regard of piracy being enemies to all in present times and historically is such that it ranks high in the list of threats to international trade, maritime security, and regional stability.

2 2Origins of Piracy in Early Ages

Available literature on the topic of piracy does not point to a specific person or group of persons as the inventors, in a manner of speaking, of the crime of piracy. However, the antiquity of the crime is so indisputable that it is said that the very instant goods of value were known to leave for sail on a raft, there was a pirate to plunder it.[71] Though it may not be said in certain terms who the first pirate was, active piracy recorded in history dating back to early ages provides insight as to the evolution of the crime and how it found popularity in different parts of the globe.

[71] J L Jesus "Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects" (2003) 18 *Int'l J. Marine & Coastal L.* 363 364.

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The earliest known recording of the oldest form of piracy is found in Homer's *The Iliad* and *The Odyssey* which give an account of piracy not as a crime, but as a profession of esteem, in ancient Greek mythology.[72] This attitude towards piracy is also reflected in writings by Aristotle who recorded that Greek pirates fancied themselves purveyors with a legitimate role to play in trade and business operations of ancient Greece.[73] This created a peculiar view of piracy such that there was little distinction, if any, between piracy, trade and warfare because the spoils of piratical activity in ancient Greece, whether acquired during wartime or times of peace, was to be sold legally.[74] Historians and archaeologists have discovered certain Greek writings estimated to be from as far back as the 6th Century B.C, where the author thereof records the consultation of oracles[75] by persons desirous of conducting piratical activity.[76] These writings are understood to mean that the pirate asked an oracle whether it was justifiable to plunder certain persons; such consultation without impiety is a strong suggestion that unprovoked piracy was not considered to be criminal activity in ancient Greece.[77] Upon consideration of the language used here, one notices that the consultation is not to determine the legality of piratical activity in general, but to ascertain whether a certain class or type of persons may be justly be plundered. It was also not uncommon in ancient Greece that when peoples from foreign destinations arrived by sea, they would be met with common courtesy

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[72] M Sterio "Fighting Piracy in Somalia (and Elsewhere): Why More is Needed" (2010) 3 *Fordham Int'l L. J.* 372 375.

[73] D Stanislawski "Dark Age Contributions to the Mediterranean Way of Life" (1973) 63 *Ann Assoc Am Geogr* 397 402.

[74] C J Hass "Athenian Naval Power before Themistocles" (1985) *Historia-Z Alte Ges* 29 38.

[75] An oracle was a priestess in ancient Greece believed to have precognitive powers, they served as fortune tellers, advisers and mediums through which the gods spoke directly to man.

[76] A H Jackson "An Oracle for Raiders" (1995) 108 *Zeitschrift für Papyrologie und Epigraphik* 95 95.

[77] A H Jackson (1995) *Zeitschrift für Papyrologie und Epigraphik* 95 and 97. The author also makes reference to Bravo who disagrees with the view and/or idea of oracles being consulted *re* piratical activity, see generally B. Bravo "Sulan Represailles et Justice Privee Contre des Etrangers dans les Cites Grecques" (1980) 10 *ASNP* 675-987.

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and asked without concern for safety or security if they travel in their own business of if they were pirates.[78] This too is an indication of the prevailing attitude towards piracy in ancient Greece. This is an important factor to be considered when addressing the question as to how piracy became prevalent, the absence of preventative measures may well have contributed to the ultimate incorrigible rise of piracy as a practice and eventually as an international crime viewed by all maritime as a menace common to all. Piracy and general naval activity for loot became an acceptable way of making money amongst the Greeks, it is actually the Greeks who are credited with initiating piracy in the Mediterranean Sea.[79] Since that era, the Mediterranean has been beleaguered with piracy and remained so till the 19th Century.[80] Historical records show that pirates in ancient times went over and above looting cargo but also detained hostages for ransom,[81] this same *modus operandi* is still used today by contemporary pirates at a more sophisticated scale of course. The antiquity of this motive and the fact that it has sustained till today indicates that this is an essential element of the crime – its commercial roots make a crime for economic gain. There were periods where naval powers of that day were able to monitor maritime routes, and thus suppress piracy.

To understand why piracy flourished from ancient history, it is germane to conduct a contextual assessment of Greece at the time. Ancient Greece did not have a central government that administered all the politico-legal affairs of all of Greece; it was in fact made up of tiny kingdoms and aristocratic states (such as Sparta and Athens) which had their own army, currency and government handling affairs within their respective geographical

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[78]N Luraghi "Traders, Pirates, Warriors: The Proto-History of Greek Mercenary Soldiers in the Eastern Mediterranean" (2006) 60 *Phoenix* 21.

[79] Stanislawski (1973) *Ann Assoc Am Geogr* 403.

[80]E C Semple "Pirate Coasts of the Mediterranean Sea" (1916) 2 *Geo. Rev* 134 135

[81]C Ferone "From ΛΗΣΤΗΣ to ΠΕΙΡΑΤΗΣ: A Note on the Concept of Piracy in Antiquity" (2008) 50 *Archiv für Begriffsgeschichte* 255 258 – 259.

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jurisdictions.[82] Even in their existence, none of the individual states had the military or political power to rule over others, it was a time where the concept of a superpower was virtually non-existent.[83] This meant that all efforts to fight the rising menace of piracy could not be concerted, especially considering that these independent states were often at war with each other, each state would thus have to counter piratical activity as allowed by resources and pressing needs.

The first attempts of a civilised state to counter piracy point to early Crete. The Cretans are recorded in history as the first nation to adopt organised anti-piracy measures,[84] they vigorously defended all maritime trade routes, notwithstanding that total suppression was seldom realised.[85] Whilst some Greek cities fostered the escalation of piracy as a wealth creation stratagem, some cities such as Athens followed Crete by forming so-called anti-piracy fleets to keep trade routes pirate free for their own trading vessels.[86] It was not until the first century B.C when the Roman Empire was gaining impetus as a super power in the west, that the Mediterranean was effectively regulated, and thus pacified.[87] Piracy and the harassment of coastal communities in the Aegean and as far as Italy prompted the Roman senate to adopt a resolution to suppress piracy, for it was feared that the status of Roman Empire would face the threat of economic isolation through the strangulation of trade. This occasioned the passing of the first known anti-piracy law in 101 B.C. which provided, *inter*

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[82] See A S Bradford *Flying the Black Flag: A Brief History of Piracy* (2007) 12.

[83] Bradford *Flying the Black Flag* 12.

[84] These measures were neither legislative in nature, nor were they supported by anti-piracy laws. Rather it appears they were informed by the right to defend the trade routes of the state from any persons whose presence occasions a threat. Later in the text, it will be seen that the first anti-piracy law was passed by the Romans in 101 B.C.

[85] H A Omerod *Piracy in the Ancient World: An Essay in Mediterranean History* (1997)13.

[86] A Konstam *Piracy: The Complete History*(2008) 13.

[87] J Kraska *Contemporary Maritime Piracy: International Law, Strategy and Diplomacy at Sea* (2011)12.

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alia, permanent preventative measures against piracy and a campaign to rulers of free states that formed clientele for the Romans to disallow pirates from their ports.[88] Cicero the Roman orator was involved in the formulation of anti-piracy laws by the senate, he made the argument that *pirata non est ex perdullium numero definitus, sed communis hostis omnium* which was accepted and formed the basis of the declaration of pirates to be *hostis humani generi.*[89]This being the case, the law provided that all nations had the right to prosecute pirates under their laws if the piracy occurred outside the jurisdictional competence of any nation, the creation of universal jurisdiction.[90] Roman law thus provides the basis of piracy being an international crime, however it will be seen later that this did not remain the position in later years.

The law in itself did not deter pirates from perpetrating what was now a criminal offence in the Roman Empire. Piracy continued to exist, and there is a suggestion that the regardless of the Law passed in the end of the second century B.C., the Romans turned a blind eye on the practice when it provided them with slaves to be sold in their market places.[91] However the attitude fast changed when pirates became a nuisance and piratical activity adversely affected Roman interests. This was especially the case when the Cilician pirates supported the slave revolt in 73 – 71 B.C.[92] Furthermore, at some point between 81 B.C. and 75 B.C. a young Julius Caesar was captured and held captive for days by pirates, he was released after a

[88] Konstam *Piracy* 18. H A Omerod "The Campaigns of Servilius Isauricus against the Pirates" (1922) 12 *J. Rom Stud.* 35 35.

[89]D R Burges "Hostis Humani Generi: Piracy, Terrorism and a New International Law" (2006) 13 *U. Miami Int'l & Comp. L. Rev.* 293 302.

[90]M Boot "Pirates, Then and Now How Piracy Was Defeated in the Past and Can Be Again" (2009) 88 *Foreign Aff.* 94 100.

[91] Sterio (2010) *Fordham Int'l L. J.* 376.

[92] Kostam *Piracy* 19.

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ransom was paid on his account.[93] Although the involuntary stay with the pirates was not an unpleasant one, after his release Caesar set sail, captured his erstwhile captors and ultimately had them crucified for their piracy.[94] This was the attitude towards piracy, as it was outlawed by the Romans and its trade partners. In 68 B.C the Republic that was Rome suffered a massive attack at the hands of pirates, this attack prompted a milestone to be recorded in the history of piracy. Pompey, a Roman war general, was granted *imperium pro consulare* by the Senate, and unlimited resources he needed to destroy the pirates responsible for the massive attack. The campaign led by Pompey cleared the western Mediterranean of pirates in 40 days and the eastern Mediterranean and Cilicia in about 50 days.[95] This marked the total annihilation of piracy in the Mediterranean. It was not until 400 years lapsed and the decline of the Roman Empire that piratical activity regained noteworthy momentum.[96] Much of the piracy recorded in the middle ages occurred in the context of Europe. This was an era where there was an overlap between piracy and warfare with no clear distinction between the two, for pirates were a weapon in the arsenal of warring nations.[97] This was also the time when letters of marque and privateering gained popularity, and these are discussed below. Piracy continued to be on the rise and in the 18th century A.D went through what has been phrased as the "golden age", a period in history where piracy was at its prime.[98] This was a time in history when many significant 17th Century wars ended and employment in the maritime labour market decrease, leaving many erstwhile naval employees with piracy as a viable

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[93] Jesus (2003) *Int'l J. Marine & Coastal L.* 364, cf Paradiso (2010) *Penn St. Int'l L. Rev.*189. For clarity on the reasons for the debate as to the exact date of Caesar's capture see A M Ward "Caesar and the Pirates" (1975) 70 *Classical Philology* 267 – 268.

[94] Ward (1975) *Classical Philology* 268.

[95] N Fields *Pompey* (2012) 20.

[96] J R *Carpenter Pirates: Scourge of the Seas* 16.

[97] E Lewis "Responsibility for Piracy in the Middle Ages" (1937) 19 *J. Comp. Leg. & Int'l L.* 77 77.

[98] R Fantauzzi "Rascals, Scoundrels, Villains, and Knaves: The Evolution of the Law of Piracy from Ancient Times to the Present" (2011) 39 *Int'l J. Legal Info.* 346 350.

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lucrative vocation.[99] What is particularly interesting for purposes of this research is that in the golden age, England met piracy with legislative reforms making piracy prosecutions easier – and these reforms are recorded in history as being effective.[100] That said, it must be noted that in those days piracy was a capital crime – and between 1716 and 1726 alone it is estimated that 400 to 600 convicted pirates were given the death penalty as punishment.[101] That of course must also be qualified against the context of the time, namely that pirates were used by sovereign governments in Europe for purposes of war. Queen Elizabeth who was ruler of England in the 16th Century considered pirates as para-military fighting for the Crown in its war with Spain.[102] Thus the progression and evolution of the crime depicts a warped relationship between pirate and state, where they once were labelled enemies of mankind and later on were seen more as comrades – enemies of the contracting state's enemies. Another contextual factor which must be considered is that piracy was not necessarily limited to plunder and attack on the high seas in the context of medieval Great Britain, sea shipping is described as being generally a coast-hugging affair notwithstanding the usage of the term "high sea" to describe the place of occurrence of the crime.[103] It is unclear what the understanding of the term "high sea(s)" was at the time, it was only after 1608 that the Dutch Jurist Hugo de Groot (Grotius) published the *Mare Liberum* that there was a codified principle that the world's oceans and all in them belonged to all.[104]

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[99] Fantauzzi (2011) 39 *Int'l J. Legal Info.* 350.

[100] J W Harlow "Soldiers at Sea: The Legal and Policy Implications of Using Military Security Teams to Combat Piracy" (2012) *21 S. Cal. Interdisc. L.J.* 561 582 at fn 164.

[101] M Boot (2009) 88 *Foreign Aff.* 99.

[102] Sterio (2010) *Fordham Int'l L.* 376.

[103] T K Heebøll-Holm *Ports, Piracy and Maritime War: Piracy in the English Channel and the Atlantic, c. 1280-c. 1330* (2013) 39.

[104] O Spijkers & N Jevglevskaja "Sustainable Development and High Seas Fisheries," (2013) 9 *Utrecht L. Rev.* 24; See also M Lindeberg "Whaling in the High Seas: Conservatory Obligations and Customary Law" (2014) 19 *E & Central Eur. J. Envtl L.* 65 71.

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To consider the exhaustive substantive history of piracy is beyond the scope of this research, however due consideration will be given to the legal concepts that constitute a significant part of the history of piracy. These concepts are relevant to the piracy debate today, in that they give an accurate account of the relationship between piracy and the law. One such concept is to be considered is the practice of privateering. This controversial practice will be considered against the context of the time in which it started, also taking into account the maturity of international law at the time.

16th – 18th Century Developments *re* Piracy and Law

2 3 Letter of Marque and Reprisal

The letter of marque and reprisal ("letter of marque") is an international legal instrument developed in historic maritime law, and especially gained popularity as a legitimate strategy of war in the eighteenth and nineteenth century.[105] It generally refers to the practice of sovereign governments issuing to private individuals a licence, known as a letter of marque, to plunder foreign vessels, usually in return the plundered booty would be shared between the state and the holder of such licence.[106] Initially, there were two different instruments known as the letter of marque, and the letter of reprisal respectively. With time however, a single instrument for all purposes was created and this is the letter of marque as understood today.[107]

[105] A Konstam *Privateers and Pirates 1730 – 1830* (2001) 3.

[106] B H Dubner "On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof" (2011) 42 *J. Mar. L. & Com.* 71 81.

[107] E Kontorovich "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" (2004) 45 *Harv Int'l L. J.* 183 213 n 167. See also G Clark "The English Practice with regard to Reprisals by Private Persons" (1933) 27 *Am. J. Int'l L.* 694 701.

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The letter of marque served two purposes whilst it was operative.[108] The first purpose it served was that of a vindication mechanism, the process for acquiring a letter of marque in medieval England was very similar to the *condictio furtiva* action in modern day South Africa. An earlier recording of this process tells of an incident in 1585 where Spaniards arrested vessels and seized cargo from British ships docked at Spanish harbours, merchants entreated the Queen for redress.[109] The Queens's government ordered that the Lord Admiral assess all claims made by any merchant and to him who proves his claim in a satisfactory manner issue a letter of marque and reprisal.[110] A claim was proved by filing pleadings in the High Court of Admiralty, with the support of witnesses. If successful, an order of the court would be issued detailing the amount compensation sought, and stipulating the rights of the claimant to recover his monetary loss by any means necessary.[111] This was the first use of letters of marque on a large scale by the English.[112] However, the practice had started as far back as the late thirteenth Century. In actual fact, the earliest known issue of a letter of marque was in 1295 when King Edward I authorised a private individual who had been plundered by so-called sea robbers from Lisbon while docked at Lagos (Portugal), to seize by force the goods of the King of Portugal or any of that king's subject wherever he may find

[108] It shall be noted that the letter of marque may (technically speaking) still be issued, and in countries like the United States of America there have been suggestions that the issuance of the letter of marque resume as an anti-piracy measure. In this regard see generally T T Richard "Reconsidering the Letter of Marque: Utilizing Private Security Providers against Piracy" (2010) 39 *Pub. Cont. L. J.* 411. However, it shall also be noted that privateering was abolished in the multilateral 1856 treaty which shall be discussed later in this dissertation, even though the United States and other western states were not party to the aforesaid treaty, it may be argued that the use of the letter of marque has become irrelevant when privateering was abolished in modern international law.

[109] P Croft "Trading with the Enemy 1585 – 1604" (1989) 32 *His. J.* 281 300.

[110] K R Andrews *Elizabethan Privateering: English Privateering during the Spanish War* (1964) 3.

[111] Andrews *Elizabethan Privateering* (1964) 3.

[112] J A C Conybeare & T Sandler "State-Sponsored Violence as a Tragedy of the Commons: England's Privateering Wars with France and Spain, 1625-1630" (1993) 77 *Public Choice*879 881.

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them, up to the amount of the loss he suffered from the robbery.[113] The second purpose for the letter of marque and reprisal was to commission privateers who were also known as men of war, to harass enemy ships during times of war. Available literature often does not differentiate the two uses of the letter of marque, it is invariably associated with only privateering whereas the two functions it served are mutually exclusive in as far as the substantive law of privateering and the law of reprisals are concerned.

2 3 1 Privateering

The term "privateer" refers to an armed vessel owned and officered by private persons, and holding a commission from the government, called 'letters of marque', authorizing the owners to use it against a hostile nation, and especially in the capture of enemy merchant shipping. The term is said to be a derivative term from the combination of the words "private" and "volunteer". The law of nations did not consider privateering to be piracy, thus privateers were not pirates and therefore were not classified as *hostis humani generi*, but enemies of only those whom their attacks were directed.[114] Not only was it used in Europe but it was also used extensively in North America in eighteenth century warfare, where colonial governors encouraged the practice, merchants invested in naval predators and qualified marines signed up to serve on board privateer vessels.[115] Privateering was thus a legitimate war strategy, in naval warfare across all maritime nations.

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[113] Clark (1933) *Am. J. Int'l L.* 694. See also E P Statham *Privateers and Privateering* (1910) 6-7.

[114] J J Lenoir "Piracy Cases in the Supreme Court" (1934 – 1935) 25 *Am. Inst. Crim. L. & Criminology* 532 538. V Barbour "Privateers and Pirates of the West Indies" (1911) 16 *Am. Hist. R.* 529 530.

[115] C E Swanson "American Privateering and Imperial Warfare 1739-1748" (1985) 42 *Wm. & Mary Quart.* 357 358.

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Privateering is the result of a convenient incongruity between principles of international law as it relates to warfare, this being that in naval conflict private property becomes the property of the capturing state, whereas in war fought over dry land the private property of enemy state subjects remains such and is not included in spoils of war.[116] In the instance of privateering, a letter of marque was attained by petitioning a special tribunal known as a prize court, this was an *ad hoc* tribunal set up specifically for maritime and shipping matters during times of war.[117] The relevance of prize courts where privateers are concerned is founded upon the precept that privateering could be carried out only during wartime. A state of conflict between sovereign states was so essential to the concept of privateering such that when a privateer was commissioned to attack ships of a foreign flag that, *per se* would be deemed an act of waging war against the state to which such ship belongs.[118]

It is for its use in warfare that has led some authors to dub privateering as "weapons in the arsenals of states".[119] Furthermore, the link between privateering and war has led to the controversy in legal scholarship surrounding the practice. The controversy emanates from the fact that sometimes individual who were known to be pirates, and thus *hostis humani generi*, were commissioned by sovereign governments as privateers. The distinction between pirate and privateer became increasingly blurred when privateers, post the war they were commissioned for, started to harass and seize naval property of states which maintained friendly relations with the commissioning states.[120] The law around privateering was such

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[116] "The Law on Privateers and Letters of Marque" (1853 – 1854) 19 *L. Rev. & Q.J. Brit. & Foreign Jurisprudence* 159 159.

[117] L Bento (2011) 29 *Berkeley J. Int'l L.* 101 104.

[118] Statham *Privateers* (1910) 7; E Lewis (1937) 19 *J. Comp Legis. & Int'l L.* 83.

[119] Azubuike (2009) *Ann. Surv. Int'l & Comp. L.* 45; Paradiso (2010) 29 *Penn St. Int'l L. Rev.* 190;

[120]E D Dickinson "Is the Crime of Piracy Obsolete" (1925) 38 *Harv L. Rev.* 334 356 at n82. J L Anderson "Piracy and World History: An Economic Perspective on Maritime Predation" (1995) 6 *Journal of World History*175 186. A famous example of privateer turned pirate is that of Captain William Kid, in 1696 Captain

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that even pirates could legitimately seek commissions as privateers from their national governments, however pirates were known to seek defective commissions and thus masquerade unlawful plunders as activity authorised by their government.[121] Some states tried to cure this mischief by passing laws to regulate privateering under a now defunct field of law known as prize law. For instance, in 1803 France passed a law that criminalised privateering under multiple flags.[122] In Honduras, those who engaged in privateering using illegitimate letters of marque were deemed and were to be tried under Honduran piracy laws.[123] What is interesting to note is that the laws passed were, in effect, laws geared at separating de facto pirates from lawful privateers. It is submitted that this may have galvanised the link between piracy and privateering, in that a new crime was not created nor were unlawful privateers tried under fraud law or even treason. They were tried as pirates, and to them was available the defence that they were acting under the authority of a sovereign government. Pirates even did all they could to obtain letters of marque that would hold before a court of law, as a defence against a charge of piracy for their unauthorised activity.[124] Thus legitimate state sponsorship of private individuals and sinister facades and manipulation of laws by pirates have occasioned diluted opinions on the efficacy of privateering. On the one hand there is the point of view that privateering was a necessary measure, especially in history where European and North American nations did not have established navy corps and

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Kidd was commissioned as a Privateer under the authority of King William III, to actually bring pirates and sea robbers to justice. For more details see Richard (2010) *Pub. Cont. L.J.* 412.

[121]L Benton "Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism" (2005) 47 *Comparative Studies in Society and History* 700 709.

[122]S Morrison "A Collection of Piracy Laws of Various Countries" (1932) 26 *Am. J. Int'l L.* 887 963.

[123] Morrison (1932) *Am. J. Int'l L.* 977.

[124] Benton (2005) *Comparative Studies in Society and History* 710.

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organised armies.[125] On the other hand, there are those that hold the view that privateering was state sponsored piracy. The suggestion here is that sovereign states knowingly commissioned individuals widely known to be pirates to carry out privateering activity.[126] This view is also founded on fact, in practice piracy and privateering constituted identical activity, the only difference being that the pirate had no authority to plunder, while the privateer was licensed.[127]

The conflicting views also found way into the court systems of various states. There has been many a case where the courts have had a hard time drawing the line between piracy and privateering. This was mostly the case where such privateers carried out their activity under a commission given by an unrecognised government.[128] The importance of the distinction between the two is that privateering was dealt with under the international law governing warfare, whereas piracy was adjudicated under municipal laws most of which at that time warranted the death penalty.[129]

The line between pirate and privateer was very thin, and one could quite easily find himself on either category of persons. It seems that the test really was whether a holder of a letter of marque held such marque lawfully. Lawful in this context means that such holder was

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[125]C K Marshall "Putting Privateers in their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars" (1997) 64 *University of Chicago Law Review*964 & 966 953; H W Malkin "The Inner History of the Declaration of Paris" (1927) 8 *Brit. Y. B. Int'l L.* 24 1; and Barbour (1911) *Am. Hist. R.* 541.

[126] C Skelton "*The World at Ransom: Piracy is Terrorism, Terrorism is Piracy* by D R Burgess" (2011) 47 *Stan J. Int'l L.* 275 275; Paradiso (2010) *Penn St. Int'l L. Rev.* 190.

[127]W F Craven "The Earl of Warwick, A Speculator in Piracy" (1930) 10 *Hispanic American Historical Review* 258457 – 459; Anderson (1995) *Journal of World History* 3 n4.

[128] Lenoir (1934 – 1935) *Am. Inst. Crim. L. & Criminology* 537 – 538.

[129] Azubuike (2009) *Ann. Surv. Int'l & Comp. L.* 52; and J W Bingham (Reporter) "Part IV – Piracy" (1932) 26 *Am. J. Int'l L.* 739 853 – 855. See also K Keith "Piracy and other Perils: Can the Law Cope" (2002) 16 *Austl. & N.Z. Mar.* L.J. 9 7 who cites an example of 13 pirates executed by the Chinese Government in 2000.

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granted a marque by a recognised government, for specific marine activity, to be carried out during times of war. Anything outside the purview of a letter of marque and lawful privateering activity was not recognised by enemy states, such action was thus punishable under piracy laws. Letters of marque found wanting were simply not acceptable. To illustrate this point, the state of Mexico in 1847 started issuing blank letters of marque for the use of privateers and for arbitrary sale by agents who had authority to insert names of those to whom they sold the letters of marque. The United States did not recognise nor lend any credence to such commissions by Mexico.[130]

The practice of privateering continued to be used during war time until it was abolished through a multilateral treaty which came to be known as the Declaration of Paris Respecting Maritime Law ("Declaration"), in 1856.[131] The Declaration criminalised privateering and all government sponsorship of maritime harassment. Signatories passed laws and formulated policies to give effect to the declaration in their jurisdictions. For example in France, instructions were given to naval officers to the effect that the captain, officers and crew operating under a government commission, and such government is a signatory to the Declaration, shall not be treated as prisoners of war when captured, but must be proceeded against under piracy laws of France.[132] The Declaration represented a multilateral acceptance of responsibility for the unfavourable results of privateering, moreover, it was a vow by signatory States that the practice of privateering would be abolished never again to be resumed.[133] Its effect was not only on privateering, but it also validated the status of pirates as common enemies of all mankind. Pirates were divested of all rights obtaining to citizens of

[130]J W Bingham "Piracy" (1932) 26 *Am. J. Int'l L.* 739 864 – 865.

[131] Azubuike (2009) *Ann. Surv. Int'l & Comp. L.* 46.

[132] Anderson (1995) *Journal of World History* 801 – 802.

[133] D R Burgess "*Hostis Humani Generi*: Piracy, Terrorism and a New International Law" (2006) 13 *U. Miami Int'l & Comp. L. Rev.* 293 315. Paradiso (2010) *Penn St. Int'l L. Rev.*190.

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any State or sovereign governments in themselves, described as malevolent satellites to the law of nations, and isolated entities.[134] There were also strong arguments by British theorists, advocating for European states to deem all governments practising privateering as *hostis humani generi*, and thus accountable to the same extent as pirates.[135] The Declaration thus brought an end to privateering as a legitimate method of war *inter se* the signatory States, moreover it associated all privateering activity with piracy.

2 3 2 Reprisals

Reprisals differ from privateering, although the two actions were concepts obtaining to an identical legal instrument, they are mutually exclusive and are not concepts that complement each other. Reprisals refer to a private law remedy that was available to private citizens of a state, where such citizen has suffered plunder at the hands of a foreign sovereign or its nationals at sea.[136] Like privateering, the practice of authorising reprisals was necessitated by the lack of military power by states to respond to attacks by foreign nationals on their citizens at sea, the ineffectiveness of sovereign states at the time fuelled the rise of reprisal as a legitimate legal recourse.[137] The operation of reprisals was general in that one who was authorised to execute a reprisal was given such authority not only against whosoever attacked him, but against any vessel bearing the flag of the state of those that attacked him.[138]

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[134]Sterio (2010) *Fordham Int'l L. J.* 380; Skelton (2011) *Stan J. Int'l L.* 276.

[135] Skelton (2011) *Stan J. Int'l L.* 276.

[136]J Lobel "Covert War and Congressional Authority: Hidden War and Forgotten Power" (1986) 134 *U. Penn. L. R.* 1035 1041 – 1042.

[137] Anderson (1995) *Journal of World History* 177; and Lobel (1986) *U. Penn. L. R.* 1041

[138]I B Katele "Piracy and the Venetian State: The Dilemma of Maritime Defense in the Fourteenth Century" (1988) 63 *Speculum* 865 885. Teurk "The Resurgence of Piracy: A Phenomenon of Modern Times" (2009) 17 *U. Miami Int'l & Comp. L.* 1 7.

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2 4 Piracy after the Declaration of 1856 – 19th Century to UNCLOS

The Congress of Paris where the Declaration was adopted was not a conference concerned with maritime matters, it was a conference organised to address issues of war.[139] The fact that piracy and privateering made the agenda in a conference concerned with matters of warfare is telling of the attitude and philosophy that maritime nations and the international community were taking towards privateering. Thus the Declaration was agreed upon and signed, thereafter there was no longer room for ambiguity as regards privateering activity. All forms of maritime harassment were abolished, rendering all privateering and reprisal activity classified as piratical as a matter of international law. Although the Declaration was a success in Europe, it did not have the desired effect in the United States in as far as influencing a change in attitude towards privateering activity. The United States continued to regulate privateering as a legitimate practice. An example of recognition of privateering as legitimate is found in the Lieber Code,[140] wherein it is stated, *inter alia*, that men who plunder without commission shall be treated as pirates.[141] This, by necessary implication, means a commission from Government is required for legitimate plunder, however plunder in and of itself was not absolutely prohibited. The Lieber Code was finalised in 1863 and was used by the United States in warfare for years that followed.[142] However, as the years progressed there was a shift in attitude towards privateering in the United States government of the time, which was more or less aligned with the collective view that the rest of the international

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[139] J B Scott "The Work of the Second Hague Peace Conference" (1908) 2 *Am. J. Int'l L.* 1 6 – 7.

[140] Formally known as Instructions for the Government of Armies of the United States in the Field, General Order № 100. O'Donnell T "The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?" (2011) 22 *Eur. J. Int'l L.* 49 59.

[141] Art 82

[142] S Sivakumaran "Re-envisaging the International Law of Internal Armed Conflict" (2011) 22 *Eur. J. Int'l L.* 219 260.

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community was adopting. The Montevideo Convention in 1889 was the first instance where consensus was reached between states that suppression of maritime piracy was a responsibility held by all of mankind.[143]The aforementioned convention was followed by the Washington Treaty[144] that was signed between the United States, Great Britain, France, Italy and Japan in 1922 which also was indicative of the attitude that great powers of those times were gravitating towards. The treaty provided in essence that all signatories therein were in agreement that any citizen of their respective countries shall be tried for piracy if such citizen violates all existing rules of law pertaining to seizure and destruction of merchant vessels, regardless of a defence of superior orders.[145] This meant that even if the act described was committed as an act of war, it would still be deemed piracy. Furthermore, the treaty criminalised all attacks on merchant shipping whether on the sea surface or by submarines. The Washington Treaty was followed by the London Naval Treaty,[146] this changed the position as was provided for by Art III of the Washington treaty. The London Naval Treaty provided that army officers acting on superior orders could not be prosecuted for piracy.[147] The treaty was not renewed in 1936, however a protocol was formulated and signed by the United States, The Dominions of Britain, Japan, France, the United Kingdom and Italy in November 1936. The London Treaty together with the protocol galvanised principles of international law *vis-a-vis* piracy, amongst other matters of combat and warfare.[148] Attacks on

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[143]Z Keyuan "New Developments in the International Law of Piracy" (2009) 8 *Chinese J. Int'l L.* 323 324.

[144]Treaty Relating to the Use of Submarines and Noxious Gases in Warfare.

[145] Art III.

[146]Treaty for the Limitation and Reduction of Naval Armament.

[147] See Part IV dealing with use of submarines and adherence to international law. See also DHN Johnson "Piracy in Modern International Law" (1957) 43 *Trans Grotius Soc.* 63 82 where the author posits the Nuremberg trial as an example of the newly developed international law jurisprudence. In particular the author refers to the judgments relating to Doenitz and Raeder who were convicted of war crimes linked to the illegal use of submarines in warfare, and in the aforesaid judgement the crimes were dealt with under war crimes to the exclusion of piracy.

[148]A G Finch "Piracy in the Mediterranean" (1937) 31 *Am. J. Int'l L.* 659 665.

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ships not involved in warfare during the Spanish civil war necessitated international intervention and understanding around the practice. The necessity was addressed in 1937 *via* the Nyon Agreement which was entered into by 9 world naval powers.[149] The Nyon Agreement provided that attacks directed at neutral shipping attracted a piracy charge, and it went further to exclude the wartime defence of superior orders.[150] The common theme in the aforementioned multilateral agreements is that they all sought to address piracy, not as a crime in and of itself, but in the context of warfare between states. This may be the direct result of the rich privateering culture that had prevailed for a long time amongst naval powers and maritime nations of the time. Nonetheless, the international community at large recognised the need to consider piracy as one of many issues that required attention at international law level.

The establishment of the League of Nations ("League") to handle issues of peace and security common to nations of the world signified an important step, *inter alia*, in formulating a formal definition of piracy in international law. After World War I, the League initiated attempts at codifying an international crime of piracy, however such attempts were thwarted when researchers asserted universal jurisdiction over pirates as a measure appropriate to address the inability (whether due to resources or lack of a proper legal framework) of some states to prosecute pirates.[151] In 1924, during the meeting of the Council of the League in Rome, an *ad hoc* team of international law experts was commissioned to assess a variety of

[149] S P Menefee "The New Jamaica Discipline: Problems with Piracy, Maritime Terrorism and the 1982 Convention of the Law of the Sea" (1990) 6 *Conn. J. Int'l L.* 127 138; W Rech "Rightless Enemies: Schmitt and Lauterpacht on Political Piracy" (2012) 32 *Oxford J. Legal Stud.* 235 244.

[150] See generally "The Nyon Arrangements: Piracy by Treaty" (1938) *Brit. Y.B. Int'l L.* 198. See also Rech (1938) *Brit. Y.B. Int'l L.*

[151] C Thedwall "Choosing the Right Yardarm: Establishing an International Court for Piracy" (2010) 41 *Geo J. Int'l L.* 501 505; and S D Cole "The Highway of the Seas" (1918) 4 *Trans Grotius Soc.* 15 19.

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opinions and arguments from treaties, customary law, municipal laws, legal decisions with international scope, and secondary sources such opinions by authors, in a bid to formulate an appropriate definition of piracy under international law.[152] Moreover, the purpose of this exercise was to also establish the need, desirability and likelihood that the suppression of piracy could be achieved by international convention.[153] On the 29th January 1926, in Geneva, the *rappoteur* of the sub-committee Dr M Matsuda delivered the sub-committee's report to the League. Relevant to the instant discussion in the report was, *inter alia*, the distinction drawn by the sub-committee between piracy *strictu sensu* and practices analogous to piracy. The report stated that piracy *strictu sensu* falls within the ambit of international law, whereas practices analogous to piracy are criminalised by treaty or municipal law.[154] The report by the sub-committee was, by and large, a body of work dedicated to discovering the definition piracy from existing sources, rather than formulating or inventing a *novel* definition under the guidance of the body of knowledge available at the time.[155] The sub-committee Rapporteur M Matsuda and the Chinese representative M Wang Chung-Hui forged a draft treaty on piracy (known as the Matsuda Draft Provisions for the Suppression of Piracy) which was not pursued further because piracy was omitted from the list of

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[152] It must be noted that the team that dealt with the issue of piracy was a sub-committee of the larger Committee of Experts for the Progressive Codification of International Law, which had the collective responsibility of identifying international law issues which at the time could be regulated by international treaty. See R S Morris "The Codification of International Law" (1926) 74 *Univ. Penn L. Rev & Am. L. Reg*452 461.

[153]M O Hudson "The Progressive Codification of International Law" (1926) 20 *Am. J. Int'l L.* 655 664.

[154] Questionnaire No. 6: Piracy – *Annexed Report of the Sub-Committee* (1926) 20 *Am. J. Int'l L.* 222 223. This was the first time that an official distinction of this nature was made, piracy in an international law sense was later called piracy *de jure gentium* to distinguish it from piracy as stipulated in municipal laws.

[155] See generally Questionnaire No.6 above.

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international law topics for codification due to the projected difficulty in reaching universal consensus on the issue.[156]

After piracy was abandoned by the League in 1926, piracy became an ancillary issue to more pertinent issues in international law. Authors and commentators such as Lenoir warned against the view that piracy was of no concern to the international community of civilised nations. In actual fact, he predicted the inevitable rise of Piracy and thus advocated for more attention to be given to Piracy and for the law to be crystallized in that regard.[157] In 1932 the League resuscitated piracy for the attention of the international community once again. The second attempt into addressing the codification of piracy as an international crime was undertaken by the League in 1932. This process involved scholars from Harvard University, in concert they produced an instrument popularly known as the Harvard Draft.[158] The drafters of the proposed convention were charged with, firstly, the responsibility to determine the significance of piracy in international law. In its bid to carry out their mandate, the drafters embarked on a process of assessing the understanding of piracy that nations of the world had from an international law perspective. Their finding was that piracy was not understood in an identical fashion amongst members of the international community.[159]In the process of gathering the differing definitions of piracy, the drafters found that most of the numerous definitions which have been either applied or suggested were inaccurate both as to their scope

[156]R Geiss & A Petrig *Piracy and Armed Robbery at Sea: The Legal Framework for Counter Piracy Operations in Somalia and the Gulf of Aden* (2011) 38; and B Fassbender, A Peters, and S Peter *The Oxford Handbook of the History of International Law* (2012) 127.

[157] Lenoir (1934-1935) *Am. Inst. Crim. L. & Criminology* 533-535.

[158]Harvard Research in International Law, Draft Convention on Piracy with Comments (1932) 26 *Am J. Int'l L.* 739.

[159] Dubner (2011) 42 *J. Mar. L. & Com.* 77.

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as to what they omit.[160] The natural consequence of these diverging opinions was a debate as to whether an international crime of piracy existed as a matter of fact and law, which was ancillary to the pressing question as to how piracy should have been treated in the context of formulating a legal instrument common to all nations for the suppression of the crime. Needless to say, there consensus was not reached regarding the former. These questions demanded a twofold assessment, that being what piracy was been considered to be historically, but also what piracy could be in the future. A dramatic evolutionary approach worth noting in that regard, was the latitude that the drafters had in answering the question as to how the international community was to treat piracy. A paragraph in the Draft illustrates the point:

> "The pirate of tradition attacked on or from the sea. Certainly today, however, one should not deem the possibility of similar attacks in or from the air as too slight or too remote for consideration in drafting a convention on jurisdiction over piratical acts. With rapid advance in the arts of flying and air-sailing, it may not be long before bands of malefactors, who now confine their efforts to land, will find it profitable to engage in depredations in or from the air beyond territorial jurisdiction. Indeed there even may occur thus a recrudescence of large scale piracy. A codification of the jurisdiction of states under the law of nations should not be drafted to fit only cases raised by present conditions of business, the arts, and criminal operations. Continual amendment should be obviated by foresight as far as possible."[161]

Although the assessment of the drafters constituted a rather wide-ranging study of the subject of piracy, their objective fell squarely on expedience and ultimately providing a crime with scope, content and definition that could be accepted by all nations as the international law

[160]N Smith "Piratical Jurisdiction: The Plundering of Due Process in the Case of Lei Shi" (2009) 23 *Emory Int'l L. Rev.* 693 716. See also Dubner (2011) 42 *J. Mar. L. & Com.* 78.

[161] "Harvard Research in International Law" (1932) 26 *Am. J. Int'l L.* 809.

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standard. The final Draft is therefore not to be understood to be a study into international law precedent and theory, however it is to be accepted as an objective legislative proposal**.** Typical of all legal instruments that require international consensus, the Draft did not enjoy immediate acceptance, furthermore, it was not to the benefit of the international community to continue with the research such that it was the ultimate submission of the drafters that piracy was not a field that required immediate attention *vis-a-vis* other international law issues of the time. Consequently, the status of the document as a draft remained indefinitely.

It would be unfair, however, to say that in sum the Harvard Draft was a total failure. On the contrary, it is by and large considered to be the body of work upon which current understanding of piracy as an international crime is primed. After it failed to prevent World War II, the League was dissolved, and the United Nations Organisation ("UN") was founded as the new international organization in 1945. The Harvard Draft having achieved more success and support than its predecessor the Matsuda Draft, paved the way for the 1958 Geneva Convention provisions relating to piracy in particular.[162] The duties that had been borne by the drafters of the Harvard Draft were similar to those assigned to the International Law Commission ("ILC"). The ILC's draft articles pertaining to piracy were so controversial that the General Assembly referred them to a special conference known as the International Conference of Plenipotentiaries to Examine the Law of the Sea to be held in Geneva in 1958 for further scrutiny.[163] The ILC's draft articles and the research carried out on the law of the sea were accepted as suitable for international adoption, and thus they formed the foundational basis for the 1958 Geneva Convention.[164] The success of the Geneva

[162] Geneva Convention on the High Seas, April 29 1958, 450, U.N.T.S 82. See Teurk (2009) *U. Miami Int'l & Comp. L.* 9

[163] Johnson (1957) *Trans Grotius Soc.* 63.

[164] Smith (2009) *Emory Int'l L. Rev.* 719.

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Convention is largely attributed to the approach with which the convention was drafted, in particular its keen observation of the need for practicality and political expedience, given the difference in ideologies amongst UN member states.[165] The piracy provisions as stipulated in the Geneva Convention assumed the status of international law as is clearly laid out by the ILC:

> ‘‘Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the state must be allowed certain latitude as to the measures it should take to this end in any individual case.’’[166]

The Geneva Convention was followed (not succeeded) by the United Nations Convention on the Law of the Sea (“UNCLOS”) adopted in 1982. The piracy provisions in the UNCLOS were identical to those stipulated in the Geneva Convention.[167] The understanding of piracy *de jure gentium* was thus reaffirmed by the UNCLOS to which 160 states are party, making it essentially a codification of customary international law, informally dubbed as the “Constitution for the Ocean”.[168] The obtaining consequence of the status of the UNCLOS is that all states are bound by the piracy provisions, even if not signatory to the convention in question. The international law definition of piracy was galvanised by the UNCLOS.

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[165]P M Wambua “The Jurisdictional Challenges to the Prosecution of Piracy Cases in Kenya: Mixed Fortunes for a Perfect Model in the Global War against Piracy” (2012) *WMU J. Marit. Affairs* 95 99; See also Menefee (1990) *Conn. J. Int’l L.* 140.

[166]Report of the International Law Commission to the General Assembly (1956) 2 *Y.B. Int'l L. Comm'n*282.

[167] See art 14 – 22 of the Geneva Convention and art 100 – 107 of the UNCLOS.

[168]R P Kelley “UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy” (2011) 95 *Minn L. Rev.* 2285 2296.

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2 5 Concluding Remarks

It has been established that piracy has existed from time immemorial, the antiquity of the crime together with the absence of international organisation, and a rich history of war governed by evolving (rather than static) rules, allowed piracy to flourish. The efforts made by certain powerful maritime nations into licensing *de facto* pirates for expedience in times of conflict, worsened the situation. Privateers could not be controlled effectively, nor was there any training provided to execute the activities in which privateers engaged. Therefore it was really just pirates perpetrating piratical activity under official government permit. Moreover, the private law remedy of plunder and reprisals blurred the divide between lawful and unlawful action because it was indiscriminate in its application, focusing on the flag hoisted by a ship rather than the lawful owner thereof. As maritime nations progressed and the rules of armed conflict evolved, issuing of letters of marque was abolished by international consensus. Piracy however continued to exist and it still considered a threat to international trade and security.

Despite the international instruments that have codified international law regarding piracy, the international community still struggles with formulating appropriate legal frameworks for the adequate suppression of piracy, and successful prosecution of pirates. It must be conceded however, that there are gaping holes in the legislative history of piracy that form basis as to why the international community is experiencing difficulty pinning down piracy. Firstly, even though the League had a measure of success regarding the codification of international law at the early years of the twentieth century, it failed to establish international consensus regarding piracy. This was largely due to differences in the understanding and/or definition of the crime of piracy, and international politics which were the direct result of the recent

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history of piracy. Moreover, the international community was inclined to supporting the conclusion that piracy was a non-factor in as far as issues of international interest were concerned because piracy had all but disappeared. Ultimately, the League only produced the Harvard Draft in as far as piracy was concerned, and due its failure to prevent World War II it was dissolved. Secondly, the UN recognising the need to address piracy only achieved international consensus in 1982, thirty seven years from its inception to formulate a convention deemed to be codification of customary international law. It must however be noted that the UNCLOS definition (practically similar to the Geneva Convention definition) is a watered down definition formulated with expedience in mind, leaving much about its scope, content, and substantive meaning open to multiple interpretations.[169] Therefore even if there is an international law definition of piracy, it serves little purpose in a domestic context where courts require substance and legal certainty to allow prosecution and possibly conviction – and this is particularly true in South Africa where the Constitution requires that laws are clear and understandable to citizens. This observation has particular relevance in an international criminal law context, where the focus is obviously on individual criminal liability (and the concomitant foundations underlying this notion – not least of all the fundamental principle of legality - *nullum crimen, nulla poena sine lege)*. Thirdly, there has never been established an international court to prosecute individuals for piracy until recently *via* the Malabo Protocol which has assigned criminal jurisdiction to the African Court of Justice and Human Rights. The application of international criminal law nonetheless still rests with domestic courts in line with the principle of legality that both the ICC and the African Court subscribe to. Unfortunately, piracy does not form part of the international crimes upon which the scope of the International Criminal Court ("ICC") jurisdiction falls. The absence of an international organ responsible for prosecuting piracy undoubtedly

[169] Guilfoyle "Counter-Piracy Law Enforcement and Human Rights" (2010) 55 *Int'l Crim. L. Quart.* 142.

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contributed to the *lacuna* in international criminal law, in that no international tribunal has had the opportunity to interpret and develop the law of piracy. The issues that plague the UNCLOS piracy regime have been so dire that they inspired the formulation of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") to remedy some of the shortcomings. However, the SUA Convention is not a piracy regime, and it makes no reference whatsoever to piracy.

Having established that there are numerous issues with prosecuting piracy cases, particularly stemming from the definition of piracy amongst other things, the chapter to follow will focus on the definition of Piracy as provided for by international law and codified in the UNCLOS. The *primary objective* is to determine which internationally proscribed activity falls within the purview of the definition of Piracy, thereby precluding international crimes such as robbery on high seas, maritime terror and other maritime crimes analogous to piracy. The methodology here will be familiar criminal law analysis, informed by the need for clear provisions on the elements of a crime (as opposed to vague descriptions of phenomena which would not satisfy the strict standard of legality in criminal law). To achieve this end, the chapter will discuss the other maritime crimes that may be mistaken for Piracy, but only in so far as they relate to the definition of Piracy. The substantive content of the crime of Piracy will also be discussed. This will be done by extensively considering the elements of the crime of Piracy one at a time. The objective here is to set out a clear *numerus clausus* that must be satisfied so as to say that Piracy has been either committed or there was an attempt thereto. The prohibition in criminal law theory to create or identify criminal definitions by way of analogy will inform the approach here.

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As a matter of clarity and context, it must be noted that the title *hostes humani generis* was coined and used in historic times to describe the status of pirates in society as enemies of all and sailing as citizens of no countries. This label continues to follow modern day pirates and features in modern literature, sometimes being linked to the universal jurisdiction to which piracy is subject.[170] It is submitted that in modern times, the appropriate classification of the pirate is as a criminal, not as an enemy of all of mankind. Piracy is an international crime, and pirates much like perpetrators of international crimes are criminals who enjoy human rights and liberties afforded to all. The term *enemy* is a political term and well suited in the context of hostilities and warfare. Thus this research focuses on pirates as international criminals and therefore the analysis will be in the context of customary and contemporary international law developments. Moreover, the analysis will also extend to international criminal law from a South African perspective and the criminalisation of piracy in South African law taking into account the supremacy of the Constitution. Chapter III constitutes an analysis of the substantive elements of piracy which will form the foundation for chapters to follow.

[170]See J Berg, "You're Gonna Need a Bigger Boat: Somali Piracy and the Erosion of Customary Piracy Suppression" (2010) 44 *New Eng. L. Rev.* 343 at fn 3. See also C Tirbelli "The Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation" (2006) 18 *Sri Lanka J. Int'l L.* 149 162.

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CHAPTER III: SCOPE AND CONTENT OF THE MODERN CRIME OF PIRACY

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3 8 Concluding Remarks

3 1 Introduction

Having established and defined the evolutionary course of the phenomenon of piracy throughout history in the previous chapter, it follows that there must be a critical analysis of the crime as it is regulated in international criminal law (including under customary international law).

The legal definition of maritime piracy has been subject of controversy and intense disagreement throughout the history of maritime nations' desire to have a common framework to regulate and prosecute piracy. This does not come as a surprise of course, the very nature of the crime of piracy will as a matter of common-sense lead to varied and divergent views for the reason that different maritime states will have a different experience as regards maritime security – even in the same region. When one considers Africa for instance, piracy and maritime insecurity has destabilised both the Gulf of Aden at the Horn of Africa, and the Gulf of Guinea off the Coast of West Africa. However, the experience is different in that piracy in the Gulf of Aden is generally perpetrated by young men driven by personal profit from ransom payments. Whereas in the Gulf of Aden, piratical acts are reportedly executed by organised militia whose motivation is quasi-political. It therefore follows that when governments and policy makers in the two different sub-regions of the continent express a view on what constitutes a pirate and piracy, they may well be talking of

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two markedly different concepts owing to the different experiences that inform their views. The same can be said for piracy hotspots such as South-East Asia. Thus, one can say that because of that piracy is so hard to define because it ultimately depends on subjective experience.

Different states have defined it according to their own understanding in their respective national legislation, and this is reflective of the contention that has historically prevailed when members of the international community engaged in dialogue directed at formulating a common understanding and definition of piracy.[171] It is these very contentions that have yielded the less than effective framework that subsists today, both at national and international levels. Piracy is covered by a number of international instruments and in the case of South Africa it can arguably be prosecuted under two separate statutes, and much like in international law there is an instrument that defines piracy in accordance with the UNCLOS and then there is another instrument the provisions of which are so wide and vague that piracy falls within the ambit thereof. The latest instrument to be formulated in international law, which defines piracy, is the UNCLOS. This instrument enjoys the status of customary international law. Nevertheless, it is contended that UNCLOS contains an unsatisfactory framework in terms of guiding states in formulating an appropriate definition of piracy so as to successfully prosecute the modern pirate, and it is also found wanting in so far as it attempts to define piracy as it should be understood in international criminal law.

The *El Hiblu* incident which occurred recently in the territorial waters of Libya exposes the unintended consequences of the current international law regime governing piracy. It is reported that on 27th March 2019 a group of migrants were *en route* to Europe by sea when

[171] For instance, deliberations and discussions at the Montevideo Convention of 1889; Washington Treaty of 1922; The Harvard Draft in 1932; Geneva Convention 1958; and the UNCLOS of 1982.

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they were in distress and rescued by the *El Hiblu* off the Coast of Libya, the migrants allegedly forcibly took control of the *El Hiblu* which was returning them to a port in Libya and directed that it sails to Malta instead.[172] A member of cabinet of the Italian government is reported to have categorised the incident as piracy on the high seas by the migrants.[173] The Maltese government arrested three migrants for the incident on charges of terrorism. Humanitarian organisations and the NGO Community argued that the migrants acted in self-defence, overlooking the legal accuracy of the 'piracy' categorisation.[174] In considering the meaning, scope and content of the crime of piracy, reference is made in the chapter to the *El Hiblu* incident.

The purpose of this chapter is to critically analyse the provisions of the UNCLOS with the aim to give a comprehensive understanding as to why the international community is struggling to prosecute pirates under international criminal law.

The UNCLOS essentially provides that Piracy is *any criminal violence committed by passengers or crew of a private ship either on the high seas or at any place outside the jurisdiction of any state, against another ship, persons or property on board ship, for private ends*.[175] This definition casts the scope of the crime of piracy far and wide, however it raises more concerns than it does provide answers or solutions in as far as clearly defining piracy is

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[172] For a comprehensive background see V J. Schatz "The Alleged Seizure of the *El Hiblu 1* by Rescued Migrants:
Not A Case of Piracy Under the Law of the Sea" available at https://voelkerrechtsblog.org/the-alleged-seizure-of-the-el-hiblu-1-by-rescued-migrants/ (Accessed 01st April 2019).

[173] https://www.maltatoday.com.mt/comment/editorial/93988/piracy_is_as_piracy_does#.XKSdoKKxW00 (Accessed 01st April 2019).

[174] https://www.concordmonitor.com/Self-defense-or-piracy-Debate-after-migrants-hijack-tanker-24458254 .

[175] Art 101 United Nations Convention on the Law of the Seas of 1982. See also Art 14-22 of the Geneva Convention on the High Seas of 1958.

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concerned. It exposes the modern international criminal law regime as less effective in providing clarity as to what constitutes piracy and thus making it difficult to charge and prosecute perpetrators thereof.[176] This is the point of departure in trying to understand the problems associated with bringing pirates to justice. The current state of international law *vis-à-vis* piracy is that the UNCLOS leaves too much to invention in that it does not effectively provide a solid legal framework for states to work with when dealing with Piracy.[177] This observation has particular relevance in an international criminal law context, where the focus is on individual criminal liability. While the analysis here focuses on the elements of the crime of piracy as provided for by the UNCLOS, it will also seek to lend a foundation to such elements by discussing concomitant matters – not least of all the fundamental principle of legality - *nullum crimen, nulla poena sine lege*.

The point of departure is that customary international law provides a workable albeit incomplete normative context in which to establish individual criminal liability for piracy. As far as *customary international law* is concerned, the theoretical (and by now trite) position that piracy is one of the oldest crimes under international law (even an international crime *par excellence*) is remarkably not reflected in the empirical fact that states are – generally speaking – reluctant to follow through and treat piracy as a crime of universal jurisdiction.[178] This general reluctance frustrates efforts to combat piracy by the few willing states in that it makes it burdensome on a state desirous to prosecuting pirates to attain that goal, especially where such state does not have well defined anti-piracy laws and wishes to incorporate

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[176] Mensah "Piracy at Sea – A New Approach to an Old Menace" in Hestermeyer, Matz-Luck, Seibert-Fohr and Voneky (eds) *Law of the Sea in Dialogue* 161 161.

[177] Guilfoyle "Counter-Piracy Law Enforcement and Human Rights" 2010 (55) *ICLQ* 141 142.

[178]Gregory Stanton "Why the world needs an International Convention on Crimes Against Humanity" in Leila Nadya Sadat (ed) *Forging a Convention for Crimes Against Humanity* (2011) 353.

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international law by statutory or constitutional provision.[179] This is to say, it would be advantageous for willing states to incorporate a strong international criminal law regime, akin to, say, the grave breaches regime in the context of war crimes.[180] As a result, the trend seems to be that pirates captured are released without trial or punishment, which has in turn created a culture of impunity.[181] There are exceptions, like the efforts of a multinational fleet and taskforce aimed at eradicating the problem of Somali piracy along the east coast of Africa. Part of that strategy (which originally formed part of the so-called 'War on Terror' led by the United States) is indeed to capture and prosecute pirates.[182] It is submitted that this quasi-military or, military-cum-legal strategy, is neither coherent nor based on a comprehensive legal framework and certainly not a blueprint for South Africa.

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[179]This is especially relevant in dualist systems like South Africa – where international law norms should be transformed into domestic law in order to become applicable and enforceable in domestic courts – including domestic criminal courts. There is a contentious debate about the relevance and applicability (from an international criminal law perspective) of s 232 of the Constitution of South Africa (1996), which provides that customary international law, is law in the Republic. See Gerhard Erasmus & Gerhard Kemp "The Application of International Criminal Law Before Domestic Courts in the Light Of Recent Developments In International and Constitutional Law" 27 *South African Yearbook of International Law* (2002) 64-81 – for the argument that criminal courts in South Africa cannot directly rely on s 232 of the Constitution to exercise substantive jurisdiction over crimes under customary international law (mainly because of problems generated by the legality principle – also a key constitutional norm). For a contrary view see Ward Ferdinandusse *Direct Application of International Criminal Law in National Courts* (2006) 82.

[180]The normative strength of the grave breaches regime also serves as impetus for the progressive development and reach of international criminal law. See, for instance, the analysis by Sonja Boelaert-Suominem "Grave breaches, universal jurisdiction and internal armed conflict: Is customary law moving towards a uniform enforcement mechanism for all armed conflicts?" 5(1) *J. Confl. & Sec. L.* (2000) 63-103. The author examines international case law, prompted by *obiter dicta* in the *Tadić* appeals decision of the ICTY, in terms of which it was suggested that changes in the scope and reach of customary international law pertaining to grave breaches of international humanitarian law to also cover non-international armed conflicts may be detected.

[181] See Dutton "Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice" (2011) 34 *Fordham Int'l L.J.* 236 246 - 254

[182] J Kraska & B Wilson "The Pirates of the Gulf of Aden: The Coalition is the Strategy" (2009) 43 *Stan. J. Int'l L.* 241 244.

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There are also jurisdictional complexities that work against the successful prosecution of piracy. The international law principle as codified in the UNCLOS is that the high seas do not belong under the sovereign rule of any state.[183] As such, the high seas are open to all recognised states that form the international community. The International Maritime Organization (IMO) has made attempts to address the (enforcement) jurisdiction problem by passing resolution A. 1025 (26)[184] which suggests that states must take measures to codify their universal jurisdiction over piracy and also lay down a clear procedural framework that would support piracy prosecution.

While the debate about piracy as the subject of universal jurisdiction seems to be moot (at least insofar as the substantive notion of piracy as a crime against the whole of humankind[185] – akin to slavery – is concerned), the same is certainly not true with respect to *enforcement jurisdiction*. In brief, and first of all, the International Criminal Court (ICC) does not have jurisdiction to try cases of piracy *per se* (a creative prosecutor could, of course, with the right factual matrix and contextual elements at hand, argue that acts of piracy constitute *crimes against humanity* or even *war crimes*). Secondly, the vision by AU Member States which was contained in the Annex to the Statute of the African Court of Justice and Human and Peoples' Rights (the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights[186]) or, 'Malabo Protocol', has been realised. The Malabo Protocol empowers the African Court to try international crimes such as genocide, crimes against

[183] Art 89 of the UNCLOS.

[184] Available at http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1025(26).pdf. (Accessed 28th March 2019).

[185] Not to be confused with the legal-technical concept of 'crime against humanity.'

[186] Malabo Protocol, available at https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf.

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humanity, war crimes and aggression (the so-called 'core crimes' under international criminal law). This part of the proposal is controversial, because it has implications for African states' diplomatic, legal and institutional relationship with the ICC (which, of course, has jurisdiction over the four core crimes and many African states are states party to the Rome Statute of the International Criminal Court). Given the fact that the ICC (at present, at least and as pointed out above) does not have jurisdiction over all crimes of international concern (like piracy), piracy was included in the list of other international crimes within the criminal jurisdiction of the 'Criminal Chamber' of the African Court of Justice and Human Rights.[187] The international criminal law implications of this recent development are discussed at length later in the research.[188]

Against the above background, and given the debates and issues as briefly identified, the dissertation seeks to develop a coherent legal framework from a *South African international criminal law perspective*, but in the context of international and regional dynamics and legal considerations, for the effective combating of piracy as a crime of international concern.

3 2 Principle of Legality in International Criminal Law *vis-a-vis* Piracy.

The principle of legality in its narrow sense is expressed in the Latin maxim *nullum crimen, nullum poena sine lege* which stipulates that there can be no conviction and/or punishment without a law. It is one of the most fundamental principles of criminal justice in modern legal systems, meant to protect citizens from arbitrary prosecution and conviction by the state. The

[187] See Article 28F of the Malabo Protocol.

[188] For an overview see CB Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 5 *J. Int'l Crim. Just.* 1067; Gerhard Werle & Moritz Vormbaum (eds) *The African Criminal Court – A Commentary on the Malabo Protocol* (2017).

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importance of the principle of legality in domestic legal systems cannot be overstated as modern democratic criminal justice systems provide for it through their constitutions or by subscription to international legal instruments championing the principle. The immediate question and the that this part of the chapter seeks to answer is whether the principle of legality has the same or an equally important status in customary international criminal law, and in particular whether it has relevance in the prosecution of maritime piracy. This it seeks to do by assessing the jurisprudence of international criminal tribunals set up to try international crimes. It is only later on in the chapter when the elements of the crime is considered that the author will seek to weigh whether the current definition of piracy as provided for by UNCLOS passes muster. Principles of western democracy and international socio-political norms require that the interwoven nature of human rights law and (international) criminal law be upheld and maintained, as the former lends credence and legitimacy to the latter. For instance, in the instant case of piracy no court should endeavour to try accused persons if the crime with which they are charged offends the principle of legality.

The application and relevance of the principle of legality in international criminal law has been subject of debate, primarily because of the inconsistency of international tribunals in upholding the principle. The historically significant international trials at Nuremberg and Tokyo were particularly controversial in the manner in which they dealt with arguments founded upon the principle of legality.

It is trite in legal scholarship that regardless of whether a crime is prosecuted on the basis of national law of a state or under customary international law, the principle of legality features with dictates that elements of the crime must be clearly spelt out. The contentious question is

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whether this principle is as exacting in international law as in national law, as there are divergent schools of thought with some scholars argue that the standard is near absolute in international law,[189] some scholars argue that it in fact is not.[190] International criminal tribunals have favoured a less strict line of reasoning to the application of the principle of legality to international crimes.[191] In the *Prosecutor v Sam Hinga Norman,*[192] the Special Court for Sierra Leone relied on an ICTY case[193] and held that "in interpreting the principle *nullum crimen sine lege* it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on specific description of the offence in substantive criminal law, is of primary relevance."[194] This kind of teleological construction of the principle of legality by international criminal tribunals seems to be based on justice and policy considerations especially where conduct is *malum in se*. However, there is no written law with clearly defined elements to categorically criminalise that conduct. The jurisprudence of the SCSL in this regard is demonstrative of a tension between international criminal law and human rights law in that on the one hand substantive criminal law requires that a law criminalising conduct must exist (before the conduct in question occurs) and it must be clear in its provisions. The principle of legality actually encapsulates this requirement as its basic tenet *nullum crimen sine lege certa*. Human

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[189]J Lincoln "*Nullum Crimen Sine Lege* in International Criminal Tribunal Jurisprudence: The Problem of the Residual Category of Crime" (2010 – 2011) 7 Eyes on the ICC 137 138. See Also M. Cherif Bassiouni *Crimes Against Humanity in International Criminal Law* (1999) 113 – 114.

[190]G Werle & F Jessberger *Principles of International Criminal Law* 3 ed (2014) 39.

[191] In *The Prosecutor v. Andre Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe (Appeal Judgement)* ICTR 99-46-A at Para 127 the Appeals Chamber of the International Criminal Tribunal for Rwanda held that the principle of legality does not prevent a court from determining an issue through a process of interpretation and clarification of applicable law; nor does it prevent it the court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular provisions.

[192] SCSL 2004 14 AR72 (E).

[193]*The Prosecutor v Enver Hadžihasanović Amir Kubura*IT-01-47-T 15 March 2006

[194] Para 25.

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rights on the other hand requires a degree of reasonable flexibility; often dressed as dynamism and progressiveness, when the rights of victims to recourse and substantive justice are at stake.

In so far as the international crime of piracy is concerned there are provisions in the UNCLOS that provide for the elements of the international crime, however it must be borne in mind that these elements are constructions of the international community to reach one international customary law definition. Prior to the UNCLOS and its predecessor, there was not a single unanimously agreed to definition of piracy and the crime was only assigned its name based on location of occurrence rather than elements which differentiated it from other crimes.[195] The modern crime of piracy has these differentiating elements, however there remains the question as to whether those elements are sufficient to meet the standard of the principle of legality.

To determine whether the crime of piracy under international law passes muster, the elements of the crime (and possible gaps in the definition) are discussed below.

3 3 The International Legal Framework to Combat Piracy

UNCLOS provides for the codification of the customary crime of piracy in international law. At the conference that adopted the Geneva Convention of 1958 which preceded the UNCLOS, one of the more complex challenges faced by the delegates was agreement on a unanimously acceptable definition of piracy in the midst of a myriad of oft conflicting municipal legal traditions and experiences on the law of maritime piracy. This legal

[195] R. P. Kelley "UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy" (2011) *Minn L. Rev* 2285 2287. See also the old American case *Talbot v. Jansen* 3 U.S. (3 Dall.) 133, 160 (1795).

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instrument also provides the international customary law definition of piracy which forms the basis upon which this crime can be prosecuted in international *fora* and national courts with the requisite competence to apply international law. (The application of international law in South African courts is considered later in the research.)

The UNCLOS provides that piracy consists of any of the following acts:[196]

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

The foundational premise of the analysis is that criminal actions of an individual have to meet the UNCLOS requirements before a court of law can make a finding of guilt on a charge of piracy. The UNCLOS definition of piracy is made up different cumulative elements, each of which are considered and discussed in detail below.

[196] UNCLOS Article 101.

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3 3 1 Private Ends

One of the elements of the UNCLOS definition that differentiates piracy from other maritime crimes is the requirement that the illegal conduct by the perpetrator be committed for private ends.[197] The UNCLOS unfortunately leaves the meaning of "private ends" to interpretation and deduction from history. In the era of the United Nations (as opposed to the League of Nations era), it was the drafters of the UNCLOS predecessor, the Geneva Convention, who incorporated the private ends requirement into the piracy international criminal law framework in order to garner international consensus which favoured a shift from wanton enforcement by Britain in centuries past.[198] As will be seen below, the drafters of the Geneva Convention were not the first to consider the private ends element/ requirement. The private ends element was useful considering the history of pirates being hired by sovereign governments to carry out reprisal and plunder on ships sailing under the flag of an enemy state, there is however uncertainty as to relevance, scope and content of this requirement in modern day piracy and in the age of terrorism, activism, and recognition of liberation armed struggle.

Historically, the private ends requirement was tied to the notion that a person who perpetuates certain illegal acts associated with piracy on the seas without the sanction of a recognised government committed piracy.[199] The view precedes the existence of the UN

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[197]UNCLOS Art 101 (a).

[198] C Thedwall "Choosing the Right Yardarm: Establishing an International Court for Piracy" (2010) 41 *Geo. J. Int'l L.* 501 506

[199]See E D Dickinson "The Questionnaire on Piracy" (1926) 20 *The American Journal of International Law* 750 751 who criticizes the Committee of Experts who provided that "*According to international law, piracy consists*

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which ultimately codified the international law of piracy. The Committee of Experts for the Progressive Codification of International Law which was a League of Nations creature introduced the private ends requirement, and from the reading of its publication such as the Piracy Questionnaire,[200] the more obvious and perhaps intended interpretation is that the lack of government authority or sanction makes for private ends. The private ends requirement necessarily isolated the piratical acts from other acts on the high seas which were state sponsored since piratical acts could only be assigned to persons who sailed the sea of their own interest.[201] From an (international) criminal law perspective, this construction of the private ends requirement further serves to differentiate conduct that may well meet all the requirements of piracy during times of war. Since one of the tenets of international criminal law is the assignment of criminal responsibility to individuals, there has to be a clear distinction between international crimes *par excellence* and acts of war which may or not be illegal given the context within which they are carried out – further, there is the "war crimes" facility under which illegal reprisals at sea can be prosecuted. This broad interpretation has been applied by the Belgian Court of Cassation (in an appeal from the Court of Appeal at Antwerp) where it was held that where a private ship on the high seas commits acts of

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in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence against persons." (my emphasis).

[200]League of Nations Committee of Experts for the Progressive Codification of International Law, Questionnaire No. 6 adopted by the Committee at its Second Session, held in January 1926.

[201] For a similar view based on the historical practice of state sponsored piracy (as discussed in Chapter II of this research) see L Azubuike "International Law Regime Against Piracy" (2009) 15 *Ann. Surv. Int'l & Comp*. L. 43 53 – 53 – who discusses the private ends requirement and makes the submission that "[P]irates were not always frowned upon…States once employed pirates and used them against enemy States. Similarly, it is also anchored in the very nature of piracy, which is that pirates must not be acting for any recognized State." See also the Harvard Draft Convention and Commentary, 798.

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violence against another ship driven by political motives, those acts amount to piracy under international law.[202] The Court of Cassation stated:

> "The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective. On the basis of these considerations the Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning...of the [1958 Geneva] Convention [on the High Seas]. The ground of appeal is therefore unfounded in law."[203]

The Court makes the point that while illegal activity may have relevance or even be hailed as positive by a particular State or administration, such actions are for private ends if they are not carried out at the behest of – or otherwise sponsored by – that State. Thus, this is understood to mean that private ends may have a public aspect, but such aspects do not alter their orientation – namely that the actions are for personal ends. This is somewhat different from the view and narrow interpretation held by some modern authors whose view is that the private ends requirement means that illegal acts perpetrated based on conscience or political motive are not piratical.[204] This narrow interpretation appears to draw the line between piracy and other maritime illegal activities like terrorism, which are motivated by political ideology rather than plunder for personal gain.[205] While it is accurate that there is and should be a clear

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[202] *Castle John and Nederlandse Stichting Sirius v NV Marjlo and NV Parfin*, 77 ILR 537 (Court of Cassation; 19 Dec 1986). For a comment, see S P Menefee "The Case of the *Castle John*, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law" (1993) 24 *Cal. West. Int'l Law J.* 1-16.

[203] *Castle John* at 540.

[204] Z Keyuan "New Developments in the International Law of Piracy" (2009) 8 *Chinese J. Int'l Law* 323 325; F Pellegrino "Historical and Legal Aspects of Piracy and Armed Robbery against Shipping" (2012) 43 *J. Mar. L. & Com.* 429 436.

[205] Chen, J. "The Emerging Nexus between Piracy and Maritime Terrorism In Southeast Asia Waters: A Case Study on the Gerakan Aceh Merdeka (GAM)" In Lehr, P. (ed.), 2007. *Violence at Sea: Piracy in the Age of Global Terrorism.* Abingdon (Oxon), London & New York: Routledge, 139-154.

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demarcation between piracy and maritime terror at least from a principle of legality standpoint, the question is whether the private ends requirement is the foundational basis for the distinction. If from an interpretation point of view we accept that the opposite of 'private ends' is 'public ends', the question is whether it is sound to make the conclusion that terror and politically motivated conduct can be assigned a public ends status. The same question arises with regards to activism, for the reason that while activism is done for public good – it ultimately is an expression of a personally held political view. This interpretation could possibly stand if 'private ends' are construed to only mean personal gain as some authors seem to understand it.[206] However, a South African court would likely require robust persuasion to adopt this interpretation given that there is no real historical basis for such an interpretation under international law and the legal quagmire that obtains if this interpretation is favoured. In essence, an accused can raise the private ends requirement as a defence to a charge of piracy if for instance he submitted that he attacked a vessel because he did not agree with the foreign policy of the state whose flag the vessel sail under. As highlighted above, this requirement presents problems concerning legal certainty and the principle of legality. This is actually the same legal challenge that the Russian government faced when it charged 30 Greenpeace activists with piracy when they attacked an oil rig in protest of oil exploration activity by Russia. President Vladimir Putin, when referring to the activists, is quoted as saying: "it is absolutely evident that they are, of course, not pirates."[207] The piracy charges against the activists were dropped,[208] and for good reason. There is no historical account of piracy being used as a form of activism, and thus no basis for governments and courts to view it as such. There can, however, be a blurred line between activism and

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[206]E Barrios "Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia" (2005) 28 *B C Int'l & Comp. L. Rev.* 149 156. See also Kelley (2011) *Minn L. Rev* 2296.

[207]See http://www.bbc.com/news/world-europe-24645300 accessed 03 April 2018.

[208]*Ibid.*

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terrorism when activists employ the use of force as a strategy for protest. Thus the overlaps between piracy and terrorism seem to fuel this narrow interpretation of the private ends requirement.

In the *El Hiblu* incident the Maltese courts are yet to decide whether the terrorism charges against the migrants will succeed. From the limited information available in the media, it is submitted that the charges are unlikely to succeed, whereas if the charge would have been one of piracy under international law this element of the crime would *prima facie* have been satisfied. Further, the United Nations High Commission for Human Rights ("UNHCHR) has described the charges as exaggerated given the context within which the incident took place. A legal explanation as to the choice of charge by the Maltese government can be deduced by reference to the fact that the *El Hiblu* was not hijacked on the high seas but was allegedly hijacked in the territorial waters of Libya. Since piracy is a high seas crime, the Maltese government did not have the charge of piracy available to them. The high seas requirement is discussed below.

In the context of acts – short of "piracy" in the UNCLOS sense – but acts endangering maritime safety – see Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,[209] drafted in response to the *Achille Lauro* hijacking has now entered into force. This instrument is discussed more in Chapter V of this research.

3 3 2 High Seas

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[209]Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, March 10, 1988, entered into force March 1, 1992 (available at https://treaties.un.org/doc/Publication/UNTS/Volume%201678/v1678.pdf). South Africa acceded to the Convention on 8 July 2005. South Africa has yet to ratify the Convention.

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The UNCLOS piracy provisions stipulate that piratical conduct be committed on the high seas as defined in Article 3 of the UNCLOS.[210] This is the part of the ocean upon which no state may lay a claim as being part of its territory under international law. In sum, it belongs to all states that form part of the international community. This does not mean that it is a kind of "free-for-all", norm-free realm. Indeed, the international community is constantly trying to create normative frameworks that govern the high seas for the benefit of the whole of humanity,[211] this is particularly relevant when one considers that even though the seas are divided by boundaries and zones – they in fact are one continuous ecosystem that is not at all limited by the boundaries and territorial claim. The recent UN General Assembly discussions on a possible treaty for the preservation of marine biodiversity in the high seas is a good example.[212]

The UNCLOS provides that piratical conduct which occurs in the territorial waters of any State does not constitute piracy under international law. The result is that if a ship is attacked within territorial waters, we look to the State within whose territory the attack occurred to exercise jurisdiction over that attack, and the matter is dealt with under the laws of the State concerned. However, if an attack amounting to piracy is carried out beyond the territorial borders of any State (the high seas), according to the UNCLOS it is the arresting State that may exercise jurisdiction over the pirates and the seized vessel.[213] Important to note is that the provision is permissive rather than prescriptive, and this has had an effect on how contemporary piracy prosecutions are handled in practice. There has to be willingness and

[210] Art 3 provides that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

[211] For critical observations about the current international framework, see Michael J Struett, Mark T Nance & Diane Armstrong "Navigating the Maritime Piracy Regime Complex" 19 *Global Governance* (2013) 93-104.

[212] Agnes Ebo'O "Africa must invest in the new 'high seas' treaty" *ISS Today*, 20 Feb 2019, available at https://issafrica.org/iss-today/africa-must-invest-in-the-new-high-seas-treaty.

[213] Art 105 of the UNCLOS.

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ability on the part of the arresting state to prosecute maritime piracy – as the expenses and expertise required to successfully prosecute can be prohibitive. The consequence of the permissive provision is that some arresting States have either outsourced the prosecution of pirates or elected to adopt the so-called catch-and-release policy where pirates are let go with no consequences. Nonetheless, it remains that the modern piracy framework makes this distinction between territorial waters and the high seas an element of the crime. In legal scholarship, piracy as provided for in international law is referred to as piracy *jure gentium*,[214] while piratical acts that occurs in territorial waters are sometimes referred to as municipal piracy (particularly in US scholarship),[215] or as robbery at sea depending on how a State has chosen to classify piratical acts occurring within territorial waters. Piracy *jure gentium* as provided for by the UNCLOS has been recognised as a contravention of the *jus cogens* which all states must defend.[216] Further, the UNCLOS confirms the customary international law position that piracy is a crime of universal jurisdiction. The jurisdictional issues are discussed in detail later in the research.

[214] See generally D H N Johnson "Piracy in Modern International Law" (1956) 43 *Trans. Grotius Soc. 63;* E D Dickson "Is the Crime of Piracy Obsolete" (1925) 38 *Harv. L. Rev.* 334; V P Nanda "Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace? (2011) 39 *Denv. J. Int'l L. & Pol'y*177.

[215] L Bento "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" (2011) 29 *Berkeley J. Int'l L.* 399; S MacLaren "Entrepreneurship, Hardship, and Gamesmanship: Modern Piracy as a Dry Endeavor" (2013) 14 *Chi. J. Int'l L.*347; A Bane "Pirates Without Treasure: The Fourth Circuit Declares That Robbery is Not an Essential Element of General Piracy" (2013) 37 *Tul. Mar. L. J.* 615 617.

[216]*The Republic v Mohamed Ahmed Ise & Four (4) Others (2010)*(75 of 2010) [2011] SCSC 37. Available on https://www.unodc.org/cld/case-law-doc/piracycrimetype/syc/2011/the_republic_v_mohamed_ahmed_ise_and_four_4_others.html (Accessed 27 December 2017). The Seychellois court held as follows "[T]he crime of piracy Jure gentium is considered to be a contravention of *jus cogens* (compelling law), a conventional peremptory international norm that States must uphold."

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The first criticism of this distinction is that it is found wanting *vis-à-vis* modern piracy and modern maritime navigation. The manner in which piracy is carried out and the extent which it is reported has changed over time. A significant number of piratical incidents occur in territorial waters while a vessel is in transit, at anchor, or when at port.[217] For instance, in the *El Hiblu* incident this requirement would not be satisfied given the fact that it occurred on Libyan territorial waters. This scenario, according to the UNCLOS, is not a matter for international (criminal) law but one that must be criminalised by state law. English courts have sought to contextualise maritime piracy, particularly on the stringent interpretation that piracy for all intents and purposes occurs on the high seas. In*Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd*[218] the plaintiff's vessel *The Andreas Lemos* fell victim to piratical acts which occurred on territorial waters of Bangladesh, and thus instituted an insurance claim on the basis that the vessel was insured for piracy amongst other things. The defendant who was the insurer association sought to evade the claim by arguing that while the incident involved piratical acts, it was not piracy because piracy can only occur in the high seas.[219] The court held that in the context of an insurance policy there can be no distinction as to high seas or territorial water, if the vessel is at sea this is a maritime offence as the vessel is in a place where piracy can be committed.[220] This judgment must be referred to with a degree of caution for the reason that the rationale behind the judgment was not to alter or deviate from the international law concerning piracy but to

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[217] H Tuerk "The Resurgence of Piracy: A Phenomenon of Modern Times" (2009) 17 *U. Miami Int'l & Comp. L.* 1 13. See also T Fokas "The Barbary Coast Revisited: The Resurgence of International Maritime Piracy" (1997) 9 *U.S.F. Mar. L.J.* 427 443.

[218][1983] Q.B. 647.

[219]At 650 *Ibid*, counsel for the defendant makes the argument that "If piracy should be found to have been committed, every robber who commits his crime on a houseboat on the Thames would be guilty of piracy, and subject to prosecution for the crime in every country in the world."

[220] At 658 *Ibid*

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establish a different rule when interpreting commercial contracts.[221] It seems that in the realm of insurance and commercial law the focus is not so much on the definition of piracy but rather on piratical activity.

The hurdle caused by the high seas requirement manifests in the situation obtaining off the coast of Somalia. It is trite that pirate attacks have been rife in the said area, but working with the UNCLOS framework means anti-piracy activity can only be lawfully undertaken beyond the territorial waters of Somalia, and it is only piratical activity occurring in the high seas that can be prosecuted outside of Somalia. The United Nations Security Council, by resolution,[222] created a facility in terms of which state-owned vessels could enter the territorial waters of Somalia to conduct anti-piracy operations as if such operations were being conducted on the high seas.[223] Regardless of whether this resolution is being considered in isolation or in context, it exposes the UNCLOS high seas requirement as more of an impediment than a solution to territorial integrity and sovereignty. Worth noting is that this resolution by the Security Council was actually triggered by a request from the permanent representative of Somalia to the United Nations, for assistance in securing the waters off the coast of

[221] At 655 *Ibid* the court held that "A ship-owner whose property is taken by robbers is not much concerned whether that takes place in or outside territorial waters. Nor should I have thought that the precise location was of much concern to insurers, save to the extent that robbery is a good deal more likely on board a ship in a port or estuary, than it is 12 miles out or more."

[222] United Nations Security Council: Piracy and Armed Robbery at Sea Resolution 1816 (2008).

[223]Art 7 of stipulates that the Security Council decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

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

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Somalia.[224] This raises issue with whether the high seas and territorial water distinction has any substantive rationale (at least in so far as piracy is concerned). Or, is it thinly hinged on a superficial debate about sovereignty? Piratical acts in territorial waters and those occurring on the high seas are only differentiated by location, in terms of their effect. The argument can be made that the difference is negligible, if at all. This is especially pronounced in the context of maritime nations which are either unable (such as Somalia) to engage in anti-piracy operations and prosecution of pirates, or countries where there is no real political will to do so. The high seas requirement thus promotes *de facto* and *de jure* impunity rather than a legitimate protection of rights of an alleged pirate.

3 3 3 Two Ships Requirement

The two ships requirement is a self-explanatory element of piracy under UNCLOS. This element requires that for there to be piracy there must be two ships involved in the incident. There are authors who have argued that the UNCLOS can be interpreted to mean that there need not be two ships,[225] however such an interpretation is a stretch which deviates from the

[224]J G Dalton, J. A Roach, and J Daley "Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea - Resolutions 1816, 1846 & 1851" (2008) 48 *I.L.M.* 129 130. Needless to say, the resolution was heavily qualified. Of note is that it provided that the allowance to enter Somali territorial waters was a temporary measure. Further, that the UNCLOS remains the international piracy framework and so the resolution did not seek to establish customary international law.

[225]See for example G Smith "From Cutlass to Cat-o-Nine Tails: The Case for International Jurisdiction of Mutiny on the High Seas" (1989) 10 *Mich. J. Int'l L.* 277 295 who discusses Sir Hersch Lauterpacht's view that mutiny abroad a ship should constitute piracy. See also N Smith "Piratical Jurisdiction: The Plundering of Due Process in the Case of Lei Shi" (2009) 23 *Emory Int'l L. Rev.* 693 709-710 who in discussing the Geneva Convention submits that "Although this is against the evidence in the *travaux*, one could argue that this is still a plausible interpretation since Article 15(1)(b) omits a term like 'another' before the clause 'ship, aircraft, persons or property,' which could imply that Article 15(1)(b) encompasses actions against the same ship, aircraft, persons or property."

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travaux préparatoires of the erstwhile Geneva Convention[226] – the language of which was adopted without any alterations in the UNCLOS.[227] The *travaux préparatoires* basically gives cogent indication that the international community understood this requirement to mean that two (or more) vessels are requisite to fulfil the piracy definition under international law.[228] There is also an important argument raised by Dr. Lawrence Azubuike in support of the two ships requirement. He makes the argument that every vessel on the seas sails under a flag of a state the law of which applies on board that vessel, thus in the case of mutiny aboard a vessel the law of the flag state will apply because in any event the vessel is akin to a floating island of the flag state.[229] The gist of the argument is that where piratical acts are committed aboard a ship, these do not trigger the application of international criminal law as such because the law of the state under which that ship sails will find application – further that in the high seas international law serves to protect "outsiders" rather than a vessel's crew and passengers so another ship is necessarily required for purposes of piracy.[230] This construction holds true even in the context of contemporary maritime security incidents. As with the *El Hiblu* incident, even if it had occurred in the high seas, the fact there was not another vessel would have precluded piracy as a crime for consideration. From an interpretation point of view, it is submitted that no issue of legitimate concern arises.

There remains the question as to whether the two ship requirement finds relevance with modern piracy. This question presents a dilemma which touches on the principle of legality.

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[226] Geneva Convention on the High Seas 1958.

[227] Records of the 290th Meeting (1955) 1 *Y.B. Int'l L. Comm'n*. 40 U.N. Doc. A/CN.4/SER.A/1955.

[228] Summary of Replies from Governments and Conclusions of the Special Rapporteur *(1956)*2 *Y.B. Int'l L. Comm'n*18, U.N. Doc. A/CN.4/97/Add.1 to 3. Also note that no authority or rationale for the distinction was given by the International Law Commission.

[229] Azubuike (2009) 15 *Ann. Surv. Int'l & Comp. L.* 53.

[230] *Ibid.*

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The two ship requirement is useful in so far as it distinguishes piracy from other maritime crimes such terrorism and robbery at sea,[231] however one of the elements of any crime is that there has to be *mens rea* – the criminal intention to commit the crime with which an accused person is charged. The aforesaid dilemma arises when a passenger or crew member intends to commit piracy and/or turn the vessel into a pirate ship.[232] The two ship requirement excludes such a person's conduct from classification as piracy. The dilemma is demonstrated by the *Achille Lauro* incident where one of the issues was the hijacking of a vessel by ostensible passengers of the very same vessel.[233] The two ship requirement means that the conduct by the hijackers could not be classified as piracy at least not under international criminal law. The problem with this distinction is that it lends itself to the absurd interpretation that members of the crew and/or passengers of a vessel are not capable of formulating an intention (*mens rea*) to commit piracy as understood in international criminal law. They may commit piratical acts, but they can only be charged with ordinary crimes, or at least crimes other than piracy and the above described sense.

It is argued that the two ship requirement is neither practical nor of any demonstrable legal significance in the prosecution of piracy. While the principle of legality is not as stringently applied in international criminal law as in most municipal legal contexts, an accused may well still argue against being prosecuted under terror or robbery laws on the basis that the criminal intent to commit these analogous crimes cannot be established.

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[231]D Chang "Piracy Laws and the Effective Prosecution of Pirates" (2010) 33 *B. C. Int'l & Comp. L. Rev.* 273 282.

[232]This reasoning excludes mutiny by passengers or crew of a warship or government vessel. Cf. Art 102 of UNCLOS.

[233] For a comprehensive set of facts see G P McGinley "The Achille Lauro Affair – Implications for International Law" (1985) 52 *Tenn. L. Rev.* 691 691 – 693.

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3 4 Universal Jurisdiction *vis-à-vis* Piracy

There is general consensus amongst international law scholars and jurists that piracy, like slavery, is classically a crime to which all sovereign states can exercise universal jurisdiction.[234] From a classical point of view, universal jurisdiction for piracy is borne from the notion that pirates are *hostes humani generi,* they are enemies of mankind who sail under no legitimate flag.[235] The UNCLOS provides for a 'loose' codification of the principle of universal jurisdiction by providing that:

> *"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".*[236]

In simple terms, or at least in principle, the universality of jurisdiction means that every state may investigate and prosecute crimes accepted by the international community as universally

[234] M C Bassiouni "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" (2001) 42 *Va. J. Int'l L.* 81; See also M Boot "Pirates, Then and Now: How Piracy Was Defeated in the Past and Can Be Again" (2009) 88 *Foreign Aff.* 94 99.

[235] E D Dickinson (2009) *Harv. L. Rev.* 336; H Tuerk (2009) *U. Miami Int'l & Comp. L.* 15.

[236] Article 105 UNCLOS

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abhorrent. However, upon closer inspection it appears that universal jurisdiction as a concept is not an easy facility to explore practically – not in the least as to when it relates to piracy as provided for by the UNCLOS.

The first issue with universal jurisdiction was exposed in the dissenting judgment in the *Arrest Warrant Case (DRC v Belgium)*,[237] where Judge Van den Wyngaert in dissent noted that neither conventional nor customary international law provide a generally accepted definition of universal jurisdiction.[238] Therefore, there is not one model to which sovereign states can benchmark a claim to universal jurisdiction, save to make the argument that it is a facility recognised and sanctioned by customary international law without necessarily defining it – especially given the fact that many States such as Belgium have passed legislation providing for universal jurisdiction. There have been proposed definitions of universal jurisdiction, such as O' Keefe who proposes that universal jurisdiction is the assertion of (criminal) jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.[239]

The other issue with universal jurisdiction as it relates to piracy is that its application is limited to the high seas which are a body of ocean that belongs to all and none as far as states and territorial claims go.[240] The term "universal jurisdiction" is somewhat deceiving in that the universality of the jurisdiction pertains to the unanimous attitude or perception of the international community towards certain serious crimes. Thus the concept is not to be understood to mean that a state has competence to investigate, capture, and try pirates

[237] Judgment of 14th February 2002.

[238] At para 44.

[239] R O'Keefe "Universal Jurisdiction: Clarifying the Basic Concept" (2004) *J. Int'l Crim. Jus.*

[240] Article 105 of UNCLOS.

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wherever it may locate one. Literature discussing universal jurisdiction makes the case that universal jurisdiction is not a unitary concept, but is made up of different facets.[241] Some authors hold a purist view of jurisdiction and there is a suggestion that such a view does not take into account that universal jurisdiction refers both to a state's competence to prescribe and enforcement jurisdiction. Practically and in alignment with O'Keefe, this means that while all states have *prescriptive jurisdiction* against piracy – essentially meaning any state may pass a law that criminalises certain conduct and affords it jurisdiction over persons who commit that conduct notwithstanding the lack of a jurisdictional nexus to the conduct. The same is certainly not true for *enforcement jurisdiction*. States cannot for instance violate sovereignty of another state by entering its territory to arrest and enforce its law on an individual in that state. Explaining this quality of universal jurisdiction in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*,[242] the Constitutional Court held that investigations and the exercise of adjudicative jurisdiction confined to the territory of the investigating state are not at odds with the principles of universal jurisdiction.[243]

This distinction takes one back to the distinction between piracy *jure gentium* and piracy as criminalised by national laws of maritime states. Given the schematic regimes provided for by the UNCLOS, there arises a question as to whether enforcement jurisdiction can be exercised on the exclusive economic zone. The high seas regime provided for as Part VII of the UNCLOS demarcates the high seas as all parts of the sea that are not included in the

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[241]P M Wambua "The Jurisdictional Challenges to the Prosecution of Piracy Cases in Kenya: Mixed Fortunes for a Perfect Model in the Global War against Piracy" (2012) *WMU J Marit. Affairs* 95 100; J L Jesus "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects" (2003) 18 *Int'l J. Marine & Coastal L.* 362; M P Scharf "Universal Jurisdiction and the Crime of Aggression" (2012) *Harv. Int'l L.J.*357.

[242]2015 (1) SA 315 (CC).

[243] Universal jurisdiction from a South African perspective is discussed in greater detail in Chapter IV.

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exclusive economic zone and preceding waters.[244] Part V of the UNCLOS provides for the exclusive economic zone regime,[245] which is the portion of the ocean immediately succeeding territorial waters and can stretch out 200 nautical miles beyond the baseline of territorial waters.[246] That said, the UNCLOS also stipulates that other states enjoy rights (over the exclusive economic zone) identical to the rights and freedoms over the high seas which are afforded all states in Article 87 of the UNCLOS.[247] Further, the UNCLOS provides that the piracy provisions *inter alia* are applicable in the exclusive economic zone in so far as they are not incompatible with the exclusive economic zone regime.[248] Which essentially means that enforcement jurisdiction over piracy may be exercised on the exclusive economic zone of a state, subject to the proviso stipulated in Article (58) (3) that exercise of such jurisdiction shall not offend the rights, duties, laws, and regulations of the coastal state.[249]

The UNCLOS approach to jurisdiction in relation to exclusive economic zone and the high seas presents some inconsistencies, especially when read against early commentary on the negotiations that led to the successful adoption of the UNCLOS.[250] Sovereignty (over and

[244]Article 86 of UNCLOS.

[245]Article 55 provides that "the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

[246]Article 57 of UNCLOS.

[247]Article 58 of UNCLOS.

[248]Article 58 (2) of UNCLOS.

[249]Article 58 (3) which stipulates that "in exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part." See Also Article 105 which assigns enforcement jurisdiction to all states upon piratical acts occurring on the high seas.

[250]B H Oxman, E L Richardson, A M Aguilar, T Kronmiller, J Schneider and K Highet "Law of the Sea" *Am. Soc. Int'l Law* 77 (1983) 150 154 discussing the exclusive economic zone concept submit that "The question of

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above economic gain) underscores the exclusive rights afforded the coastal states' to exploit and protect natural marine resources in the exclusive economic zone. However it seems the application of international law on the exclusive economic zone is generally accepted notwithstanding that there is no express mention of the exclusive economic zones in the definition of piracy.[251] Some authors maintain that the jurisdictional set up *vis-à-vis* exclusive economic zones is problematic. Birnie holds as follows:

> "The situation is complicated because the piracy provisions are in Part VI of the UNCLOS relating to the high seas which state (in Article 86) that it applies "to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the international waters of an archipelagic state." Although Article 58 states that in the EEZ all states continue to enjoy the freedom of navigation and overflight and "other internationally lawful uses of the sea related to them, such as those associated with the operation of ships" and aircrafts, it also makes these rights subject to the relevant provisions of the Convention without making it clear which are the "relevant provisions" or which take priority. Article 86 adds that the article "does not entail any abridgement of the freedoms enjoyed by all States" in the EEZ under Article 58, which itself also adds that "Articles 88 to 115 . . .apply to the exclusive economic zone so far as they are not incompatible with this Part," but coastal states may consider that as the zone's purpose is to secure this exclusive right to its economic uses and as its legal status is equally left *sui generis* by the wording of the UNCLOS since it is not clearly stated to be part of the high seas, it is their responsibility to protect navigation from piratical assaults; the better view, however, would be that as the zone is by its terms not part of the

200 miles not only emanates as a symbol of asserting territorial rights and sovereignty, but also carries definite economic importance for these states as well."

[251]See generally *Centre for Oceans Law and Policy University of Virginia School of Law United Nations Convention on The Law of The Sea: A Commentary*. Which discusses the rejection by the United Nations Conference on the Law of the Sea to include the exclusive economic zone in the definition of piracy and further the inclusion of a provision stipulating that "a State encountering a pirate ship or aircraft in the exclusive economic zone of another State to notify the coastal State and cooperate in taking appropriate measures."

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> territorial sea the piracy articles apply in it. States taking the other line might also argue, however, that piracy is an unlawful use out with the residual rights of other states. The fact that attempts by the UNCLOS Drafting Committee to eliminate this confusion in favour of the better view were rebuffed bodes ill for future interpretation".[252]

The thematic regimes in the UNCLOS present some inconsistencies and vagueness in that the rights of the coastal state which are not to be violated as regards the exclusive economic zone are not obvious. For instance it remains unclear whether the use of lethal force in a bid to apprehend pirates in the exclusive economic zone does not militate against the coastal state's right to police the lawful use of the exclusive economic zone.

3 5 Analysis of Comparative Measures to Combat Piracy under the UNCLOS

In conducting the preceding analysis, the shortcomings of the UNCLOS were discussed in detail, exposing the legal implications of using the current international criminal law framework to prosecute piracy. The analysis was also underscored by considerations of the principle of legality in international criminal law and with particular reference to the UNCLOS provisions. Notwithstanding the shortcomings highlighted, there have been prosecutions of piracy – different tribunals around the globe have had opportunities to adjudicate and make determinations on piracy cases before them. Piracy prosecutions and judgments thereto have raised some noteworthy insights as to how individual states and regional blocs understand the phenomenon that is piracy, more especially against or with reference to the international criminal law framework relevant to piracy. A consideration of

[252] P W Birnie "Piracy Past, Present and Future" (1987) 11 *Mar. Pol'y* 163 172 – 173.

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recorded prosecutions and judgments in piracy cases will serve to expose the challenges encountered with piracy suppression internationally. Further, policy and approaches taken by states and regional maritime nations to address the piracy problem are worth studying against the UNCLOS which is the primary framework for international criminal prosecution. States such as the United Kingdom, the United States of America, Kenya, and Seychelles have operative piracy legislation and have tried pirates in their courts. Clusters of states have also recognized the supranational nature of the crime and thus have concluded international instruments for the suppression of piracy. One such initiative is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia ("ReCAAP"), the first regional inter-governmental multilateral agreement on piracy suppression. There are other international arrangements such as the European Union Naval Force Atalanta ("EU NAVFOR") launched in December 2008 within the framework of the European Common Security and Defence Policy.

It is apparent that naval states recognize that while the UNLCOS is available as a prosecution instrument, a comprehensive legislative framework to suppress piracy must cater for investigations and other enforcement activities to achieve the desired goal common to all naval states affected by piracy. Thus, this section of the chapter (with a comparative angle) will particularly focus on issues around the legality of apprehension of pirates, jurisdictional issues, investigations, evidentiary concerns, the obtaining costs of prosecution and the effects of the lack of an international or regional tribunal to prosecute piracy.

Once the legal hurdles have been identified, defined, and analysed, the chapter will consider how the international community's obligation or lack thereof, to prosecute influences the legal hurdles faced by states desirous of prosecuting pirates. The UNCLOS may provide for

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the responsibility of all states to join in the fight against Piracy,[253] however, there is nothing in the *travaux preparatoires*, the UNCLOS itself or customary international law that imposes a clear duty on sovereign states to prosecute piracy as an international crime. While references to South African law and policy considerations are made herein, a thorough discussion of the prosecution of piracy from a South African perspective is conducted in the following chapter.

Against the aforesaid, the practical hurdles to the prosecution of pirates are given some consideration.

3 5 1 Arresting Pirates on the High Seas

The UNCLOS provides for a framework regulating the arrest of pirates on the high seas. Under Article 105, which is the universal jurisdiction provision, it is stipulated that any State may seize a pirate ship and arrest the occupants thereof. Without deviating from the generality of Article 105, the UNCLOS provides for certain qualifications for the execution of a lawful arrest of pirates and thereby setting up legal hurdles that add on to the complexities of prosecuting a crime whose definition is equally mired in controversy. The qualifications of a lawful arrest are considered below

3 5 1 1 State Action

The UNCLOS provides that a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as

[253]See generally Art 100 and Art 105.

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being on government service and authorized to that effect.[254] The legal capacity to effect an arrest on suspected pirates is limited to recognized States only, thus making it unlawful for any other interested non-State actor to do so. This qualification exposes two impediments to the international drive to suppress piracy, the first being the fact that there is no international maritime force charged with the mandate and exclusive jurisdiction to police the high seas to enforce the UNCLOS provisions. The second impediment, inextricably linked to the first one, is that while the duty to seize and arrest suspected pirate ships and pirates rests with every State naval forces by and large do not have an automatic mandate to seize and carry out arrests in the sense that police officers are lawfully mandated. The coordination by different national ministries to facilitate the lawful apprehension of pirates at sea has been described as a legal chain of authorities which requires executive coordination that will invariably be a time intensive and complex process.[255] It is submitted that the wording of the UNCLOS provisions are to be construed to mean that only state sanctioned warships and military vessels may carry out an arrest on the high seas, however this is not to say the UNCLOS creates a rule in international law that assigns such a mandate to national militaries. It therefore follows that individual states would have to craft the necessary national framework which would include legislation, policy, and a defence strategy for the arrest of pirates and pirate ships on the high seas. That said, the UNCLOS does not compel States to formulate and pass national anti-piracy laws or domesticate the UNCLOS provisions. Such a treaty obligation would have contributed positively to the fight against piracy given that in some countries international law does not automatically become the law of the land notwithstanding being a signatory of any treaty. The relationship between international law and domestic law in South Africa is considered extensively in Chapter IV.

[254]UNCLOS Article 107.

[255]M D Fink & R J Galvin "Combating Pirates Off the Coast of Somalia: Current Legal Challenges" (2009) *Netherlands Int'l L. Rev.* 367 390.

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3 5 1 2 Adequate Grounds

The UNCLOS framework provides that where an arrest is made by a state warship without adequate grounds for such an arrest, the arresting state assumes liability to the state whose flag the arrested/victim ship sails under.[256] There is no guidance as to the meaning and content of 'adequate grounds' however it remains a qualification. For instance, when assessing whether there were adequate grounds it is unclear whether the test for adequacy is subjective or objective. Moreover, an objective test for adequate grounds determined at high seas is one that relies heavily on hindsight and the actual discovery that the arrested ship was in fact a pirate ship for purposes of the UNCLOS, while a subjective test is unlikely to be contemplated given the fact that the provision is understood to be a mechanism to curb abuse of State power and to incentivize States to monitor their military patrols and operations on the high seas.[257]

The 'adequate grounds' qualification must also be considered against the fact that there is no international law duty for States to fight or thwart piratical activities on the high seas. Which in turn means that when a State vessel engages in anti-piracy enforcement action it does so voluntarily and thus exposes itself to liability. Judge Jesus of the International Tribunal for the Law of the Sea notes that small and developing maritime nations may be wary of

[256]UNCLOS Article 106.

[257]J Kavanagh "The Law of Contemporary Sea Piracy" 1999 *Austl. Int'l L.J.* 127 144. See also E C Stiles "Reforming Current International Law to Combat Modern Sea Piracy" 2004 (27) *Suffolk Transnat'l L. Rev.* 299 318.

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undertaking anti-piracy action due to the consequences of engaging in anti-piracy efforts, more especially if there is a risk of incurring financial liability to the state whose flag the arrested ship sails under.[258]

3 5 1 3 High Seas

When examining the scope and content of the crime of piracy earlier in this chapter, the high seas requirement was considered, and a conclusion was drawn that piratical acts constitute piracy under international law only when they are committed on the high seas. The same high sea requirement qualifies a lawful arrest. The UNCLOS states that an arrest of suspected pirates must be effected on the high seas, thus making it a general rule that where an arrest is effected within parts of the ocean where a naval State exercises jurisdiction it is unlawful.[259]The practical considerations of maritime navigation and the manner in which piracy is carried out raise questions as to hot pursuit from high seas into territorial waters. Territorial waters cover an area up to 12 nautical miles from shore and it has been recorded that the *modus operandi* of pirates has been small rubber boats which are designed for speed and utilizing global positioning systems.[260] The UNCLOS upholds the international law precept of state sovereignty and respect for the territorial integrity of States. This creates a legal impediment to pursuing pirates beyond high seas because they can simply flee back into territorial water when pursued, and thus impunity continues to prevail.

[258]J L Jesus "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects"2003 (18) *Int'l J. Marine & Coastal L.* 363 373. For a view expressing that the threat of liability may be exaggerated see J Kavanagh1999 *Austl. Int'l L.J.* 144 where he makes the argument that with the rise of sailing under flags of convenience, liability to the flag State may be inappropriate.

[259]UNCLOS Article 105.

[260]L Bento 2011 (29) *Berkeley J. Int'l L.* 423. See also V P Nanda "Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?" 2011 (39) *Denv. J. Int'l L. & Pol'y* 177 179.

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3 5 2 Investigation Challenges

It is trite that the successful prosecution of a crime depends on a good investigation, and the court is persuaded by legal arguments supported by oral and physical evidence collected at investigation stage. Difficulties encountered during the investigation stage may even lead a prosecutor to decide not to pursue a case, more especially when the said challenges have an adverse effect on the matrix of evidence upon which the case stands. In the context of piracy, there are challenges which law enforcement authorities around the globe have faced, including developed States with world class investigative capabilities. From a South African perspective, the Constitution guarantees all accused a fair trial which includes the right to adduce and challenge evidence, and the inadmissibility of unconstitutionally obtained evidence.[261] Thus there exists a burden on investigators to adduce evidence of the accused person's commission of the crime with which he is charged. Investigation challenges, particularly those with an impact on the prosecution of pirates, are discussed in detail below.

3 5 2 1 Crime Scene

Article 105 of the UNCLOS provides *inter alia* that "…[t]he 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." This provision contemplates the prosecution of

[261]See s 35 (3) and (5) of the Constitution of the Republic of South Africa, 1996.

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the accused in the arresting state, however successful prosecution is not a foregone conclusion given that the scene of the crime may be halfway around the globe. A Somali pirate can be transported by air to appear before court, but a large oil tanker upon which the alleged homicide or rape has occurred presents challenges.

The other issue arising is the preservation of the crime scene and expertise required to do so. Military and naval personnel are not necessarily crime scene experts, yet during a piracy suppression operation they come into direct contact with the scene of the crime and thus evidence which may be crucial for prosecution purposes. This particular issue is universal in that advanced navies and those that are not so advanced face this identical challenge. Discussing the instant issue, Bahar notes that members of United States naval boarding teams involved antipiracy operations are not adequately trained in evidence handling and crime-scene preservation.[262] The preservation of maritime crime scenes thus remains a problem and hindrance to successful prosecution.

3 5 2 2 Witnesses

The recognition of the importance of witnesses in prosecuting piracy cases goes back centuries. In mid-16th century England the eyewitness account of two witnesses was considered sufficient to conclude that an act of piracy was indeed committed.[263] Eyewitness accounts are still relevant in prosecutions today. South African courts in particular assign

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[262]M Bahar *"Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*" 2007 (40) *Vand. J. Transnat'l L.* 1 58–59. See also M Laraia "Piracy is an International Problem that Needs a Multi Prong Solution" 2012 (9) *Regent J. Int'l L.*117. For a comprehensive discussion on the issue See H Fouche& J Meyer "Investigating Sea Piracy: Crime Scene Challenges" 2012 (11) *WMU J. Marit. Affairs* 33.

[263]L Bento 2011 (29) *Berkeley J. Int'l L.* 403.

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great weight to testimony given by an eyewitness. In the context of piracy, there are also practical challenges with witnesses – particularly securing their attendance at trial. Depending on the facts surrounding a particular piracy incident, witnesses could be the victim ship crew, holiday makers on a cruise ship, and/or military personnel. Professional sailors and crew may spend years at sea without a permanent mailing address to which summonses and other court documents can be sent.[264]Furthermore, there are logistical challenges such as facilitating the travel and accommodation of witness from foreign and oft far away countries.[265]The last issue that must be highlighted is the unwillingness of key witnesses to testify for fear of harm to themselves or their family members by piracy syndicates.[266]

This challenge is seen in prosecutions (and abandonment thereof) in national courts. It has been reported that a Yemeni court convicted piracy suspects and meted out a death sentence for the crime notwithstanding the fact that there were no witnesses in the trial.[267] Such an approach to piracy prosecution is, at least from a South African constitutional law perspective, unlawful and therefore undesirable. A prosecutor would be hard pressed to get a South African court to convict on allegation alone without the corroboration of key witnesses when there were in fact witnesses. That said, it is such difficulties that have seen a rise in the adoption of so-called ‘catch and release’ policies – such as is rife practice by navies sailing the Gulf of Aden.[268]

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[264] C Thedwall “Choosing the Right Yardarm: Establishing an International Court for Piracy” 2010 (41) *Geo. J. Int'l L.* 501 513 fn 74.

[265]M D Fink & R J Galvin 2009 *Netherlands Int'l L. Rev.* 391.

[266]P Mukundan “Piracy and Armed Robbery against Ships Today” 2003 (2) *WMU J. of Marit. Affairs* 167 178.

[267]A Petrig *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (2014) 348 & 443.

[268]E Kontorovich; S Art “An Empirical Examination of Universal Jurisdiction for Piracy” 2010 *Am. J. Int'l L.* 436 450.

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3 5 2 3 Detention and Incarceration

Capturing pirates on the high seas is only the beginning of a protracted process which leads to the ultimate prosecution. The detention of suspects prior to trial and the incarceration of convicted pirates are issues that have been cited as barriers to the prosecution of pirates, particularly the cost associated with detention and incarceration.[269] Once a suspect is apprehended, such suspect becomes a detainee and must be treated as such in accordance with international law and treaties governing the subject of detainees and prisoners.[270]

One of the major issues faced by navies and their governments arises when pirates are captured, and the capturing state is not desirous to prosecute. A state may find itself in a legal-*cum*-moral dilemma in that on the one hand the capturing state would not want to perpetuate a culture of impunity by either refraining from apprehending pirates or releasing them without any consequences. On the other hand, pirates (especially those of Somali nationality) are nationals of states with poor human rights records such that releasing suspects to security forces of their home country is never a viable option from an international law perspective.[271] In 2008 the *Absalon* – a Danish navy vessel – undertook a military operation which led to the apprehension of ten pirates off the coast of Somalia**.** The pirates were detained for six days, thereafter the Danish government decided to leave the pirates the

[269]See generally *The Economics of Piracy Pirate Ransoms & Livelihoods off the Coast of Somalia* Geopolicity Inc. (2011)

[270]The international law framework includes Article 9 of the International Covenant on Civil and Political Rights of 1976; Article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; and Article 9 of the Universal Declaration of Human Rights of 1948.

[271]See UN Convention against Torture of 1984 which stipulates: Article 3 (1) “No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

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pirates on a Somali beach – basically letting them off with no consequences.[272] The torture dilemma rings true for both detentions before trial and the deportation of convicted pirates after having served their sentences. The latter further raises another deterrent to prosecution in the form of asylum seeking, this is discussed later in this chapter. The aforesaid dilemma may also flow from national law and policy.[273] Advanced democracies such as the United States and much of the western world have national legal instruments and policies which prohibit torture of suspects. The U. S Court of Appeal in the Second Circuit laid out the American perspective as follows:[274]

> "Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence."

Although this was a civil case, the Judge made a relevant observation (for present purposes) in likening the status of pirates to that of whosoever would inflict torture – one might assume – even upon pirates. This attests to the seriousness with which torture is viewed internationally.[275]

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[272] H Strydom "Some National and Regional Responses to Maritime Piracy" 2011 *J. S. Afr. L.* 762 765.

[273] See Section 12 (1) (d) of the Constitution of South Africa.

[274] *Filartiga v Pena-Irala* 630 E2d 876 (2d Cir., No 79-6090, 30.6.1980), § 54.

[275] The prohibition of torture enjoys peremptory status under international law. See also Erika de Wet, "The prohibition of torture as an international norm of jus cogens and its implications for national and customary law" 15(1) *European Journal of International Law* (2004) 97-121.

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Detention also presents a constitutional challenge in that advanced democracies including South Africa generally adhere to strict timelines regarding the period between the apprehension of a suspect and being placed under arrest to first appearance before a court of law.[276]The European Court of Human Rights ("ECHR") had to determine in *Ali Samatar v. France,*[277]whether the rights of apprehended pirates were violated. *In casu*, the plaintiffs hijacked two vessels but were later apprehended by the French Navy. They were detained between 4 and 6 days prior to a court appearance in France in contravention of the French Constitution which stipulates that an accused must appear before a court within 48 hours of arrest. The ECHR held that the rights to freedom and security of the plaintiffs were violated and therefore the government of France had to pay compensation.

3 5 3 Asylum as a Deterrent

The peculiarities that arise from the ostensibly simple endeavour to prosecute piracy include the probability of a convict or suspect turning into an asylum seeker. This has led some legal commentators to conclude that the prosecution of pirates in EU courts would most likely have the effect of encouraging rather than deterring piracy because of a perceived window of opportunity to seek asylum and perhaps reside indefinitely in an EU state.[278]This fear of attracting undesirable asylum applications through in-country prosecutions is not exclusive to

[276]See Section 35 (1) (d) of the Constitution of South Africa.

[277]*See Affaire Ali Samatar et Autres c. France,* no 17110/10 and 17110/10 (ECtHR, 4 December 2014).

[278]E Karska "Piracy and International Criminal Law" 2013 (2) *Polish Rev. Int'l & Eur. L.* 41 60. See also Marie Woolf, *Pirates Can Claim UK Asylum,* TIMES (London), Apr. 13, 2008, http://www.timesonline.co.uk/tol/news/uk/article3736239.ecereporting that the British Royal Navy was given strict instructions to not detain Somali pirates for fear of asylum applications by detainees. L Bento (29) *Berkeley J. Int'l L.* 430.

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the EU, but is common to most developed countries where there has been an influx in immigrants and refugees.

The basis for asylum application is founded upon a principle of international human rights law, namely the principle of *non-refoulement.*[279] The basic tenet of this principle is that no person may be transferred or returned to a state in which such person is likely to be subjected to torture or inhumane treatment.[280] While this regime in international law pays due regard to the peremptory norm prohibiting torture, in the context of maritime enforcement and prosecution of piracy it is a consequence that some states take quite seriously. Some authors are of the view that the contemplated success rate of asylum applications is somewhat exaggerated, and that the risk of a fraction of successful applications must be borne by prosecuting states as a lesser evil than pirate impunity.[281] In practice it does seem that some states are genuinely apprehensive given the fact that some pirates do in fact make asylum applications. For instance, two Somali nationals who were on trial in 2009 for piratical acts against a Dutch vessel applied to remain as residents in the Netherlands.[282] And, in *Sufi & Elmi v United Kingdom*[283]two Somali nationals had been apprehended on the high seas and they were transferred to the United Kingdom for prosecution for piracy – a conviction was attained. Between the time of their apprehension and completion of their prison sentence they

[279]See Art 33 of the Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

[280] For comparative perspectives, see Christine van den Wyngaert, "Applying the European Convention on Human Rights to extradition: Opening Pandora's Box?" 39 *International and Comparative Law Quarterly* (1990) 757-779; Gerhard Kemp "mutual legal assistance in criminal matters and the risk of abuse of process: A human rights perspective" 123(4) *South African Law Journal* (2006) 730; Hennie Strydom (ed) *International Law* (2016) OUP, 294-295.

[281]See generally Y M Dutton "Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?"2011 (34) *Fordham Int'l L.J.* 236.

[282]Y M Dutton 2011 *Fordham Int'l L.J.* 240.

[283]*Sufi &Elmi v. United Kingdom,* App. No. 8319/07, Eur. Ct. H.R., at 72 (2011).

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made an application for asylum on the basis that they would face life threatening consequences if returned to Somalia. The European Court of Human Rights held that returning a Somali to Somalia, specifically Mogadishu, would violate Article 3 of the European Convention on Human Rights which militates against torture or to inhumane or degrading treatment or punishment.

The legal challenges highlighted above are demonstrative of the practical hurdles common to most naval nations regardless of economic prowess and level of piracy suppression expertise. Thus, the problems do not stem from the inadequacies of the UNCLOS regime exclusively, but other challenges and unintended consequences of prosecution make piracy an international crime the presents numerous complexities. There is no doubt that piracy remains a real concern for regional security and of course there is the need to secure shipping lanes which form the backbone of international trade. While no state has the ability or resources to unilaterally assume the burden of ensuring that prosecutions are pursued despite the existing problems, countries such as Kenya, Seychelles, the United States, and Mauritius have undertaken the monumental task – a feat worth study. Further than that, there has been recognition that it is not enough that each naval state must follow its own unique approach, but that a regional approach must supplement efforts by individual states to suppress and ensure that piracy is prosecuted.

3 6Regional and International Responses

As the piracy problem persisted in some of the busiest and commercially important shipping lanes in the oceans around the globe, it became clear that naval countries would have to react and adapt their anti-piracy efforts to meet the assault led by modern pirates and the obtaining

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challenges associated therewith. The very nature of piracy demands that there be regional and internationally backed approaches to eradicating piracy, more so in light of all the hurdles to effective anti-piracy strategies. Some regional states with common goals vis-à-vis piracy eradication are coordinating with some measure of success, but there are still some challenges which are worth study.

3 6 1 EU NAVFOR – Operation Atalanta

EU NAVFOR stands for the European Union Naval Force for Somalia. This is the first regional maritime operation of the EU which came about based on Decisions by the Council of the European Union in accordance with relevant United Nations Security Council Resolutions and International Law.[284] The EU NAVOR has the mandate to police a certain area of the ocean and patrol the Internationally Recommended Transit Corridor in the Gulf of Aden so as to deter, prevent, and repress acts of piracy and armed robbery at sea.[285] EU NAVFOR operates in an area of operations covering the Southern Red Sea, the Gulf of Aden and a large part of the Indian Ocean, including the Seychelles, Mauritius and Comoros.[286] The Area of Operations also includes the Somali coastal territory, as well as its territorial and internal waters. This represents an area of about 4,700,000 square nautical miles (approximately 8,700,000 square kilometres). The specific operation against piracy has been dubbed "operation Atalanta."

The EU NAVFOR is the European Union's response to the menacing threat posed by pirates off the coast of Somalia. Initially when the EU NAVFOR was set up on 8 December 2008,

[284] http://eunavfor.eu/mission/ (Accessed 22nd May 2018).
[285] http://eunavfor.eu/mission/ (Accessed 22nd May 2018).
[286] http://eunavfor.eu/mission/ (accessed 23rd May 2018).

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the European Council directed and authorized a twelve month period within which the EU NAVFOR was to lead operations directed at the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.[287] The legal framework governing the operations of the EU NAVFOR granted the forces authority to bring an end to piracy in the region by using necessary strategies including force against pirates.[288] Persons apprehended by EU NAVFOR forces as suspects can be sent to an EU Member State for prosecution, or transferred to Regional States or any other third States with which the EU has agreements and which wishes to exercise its jurisdiction over the suspected pirates.[289]

The EU NAVFOR has extended its mandate and taken advantage of UN Security Council Resolutions to escalate its anti-piracy measures off the coast of Somalia, these developments are discussed in context in the next chapter which deals with the UN approach to piracy. Worth noting is that operations of EU NAVFOR have gone so far as conducting aerial military assaults along the Somali shoreline destroying all manner of apparatus that facilitate piracy such as speedboats and fuel depots without actually targeting any suspected pirates.[290]

3 6 2 North Atlantic Treaty Organisation – Operation Ocean Shield

The North Atlantic Treaty Organisation ("NATO") is a multi-state alliance between states in Europe and North America, the basis of which is the maintenance of peach and security of

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[287] Council Decision 2008/918/CFSP of 8 December 2008.

[288]EU Naval Operations against Piracy (EU NAVFOR Somalia – Operation ATALANTA)',Fact Sheet, EU NAVFOR/11, September 2009, at www.consilium.europa.eu/showPage.aspx?id=1521&lang=EN.

[289]http://eunavfor.eu/mission/ (accessed 23rd May 2018).

[290]E Lieblich "Quasi-Hostile Acts: The Limits on Forcible Disruption Operations under International Law" 2014 (32) *B.U. Int'l L.J.* 355 357.

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the North Atlantic Region through diplomatic and coordinated military means.[291] NATO as a bloc and stakeholder in the safety of shipping lanes on the world's oceans also reacted to the threat of piracy at sea, and took on some short-term operations such as Operation Allied Provider and Operation Allied Protector in 2008 and 2009 respectively.[292] In August 2009, European and American vessels and aircraft – acting under the auspices of NATO – have conducted patrols on the waters off the Horn of Africa as part of NATO Operation Ocean Shield which succeeded the aforementioned NATO operations in 2008 and 2009.[293] The overall mission was, in sum, to prevent and stop piracy through direct actions against pirates, by providing naval escorts and deterrence, while increasing cooperation with other counter-piracy operations in the area in order to optimise efforts and tackle the evolving pirate trends and tactics.[294] The role of NATO much like the EU NAVFOR also extended to capacity building initiatives directed at regional and Somali authorities to deal with the crime of Piracy.[295] Ultimately, in 2016 Operation Ocean Shield was terminated. The operation was viewed by NATO and the international community as a successful drive which significantly contributed to the decrease in the number of piracy attacks in the Gulf of Aden.

3 6 3 ReCAAP – Asian Response

[291]For a brief history of NATO, see https://www.nato.int/cps/us/natohq/declassified_139339.htm.

[292]https://www.nato.int/cps/en/natohq/topics_48815.htm?selectedLocale=en(Accessed 12th May 2018).

[293]L R Blank "Rules of Engagement and Legal Frameworks for Multinational Counter-Piracy Operations" 2013 (46) *Case W. Res. J. Int'l L.* 397 397.

[294]https://www.nato.int/cps/en/natohq/topics_48815.htm?selectedLocale=en (Accessed 12th May 2018)

[295]A DeMaio "Upping the Stakes to Win the War against Somali Piracy: Justifications for a New Strategy Based on International Humanitarian Law" 2015 (22) *Geo. Mason L. Rev.* 387 412. See Also https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_topics/141202a-Factsheet-OceanShield-en.pdf (Accessed 17th May 2018).

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The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia ("ReCAAP") is a 2006 regional multilateral agreement between Asian states and is also the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery against ships in Asia.[296] Prior to this initiative, states such as Indonesia, Malaysia, Singapore, and Thailand were coordinating anti-piracy efforts with particular focus on aerial and maritime policing of the Strait of Malacca and intel sharing.[297] The initiative was spearheaded by the government of Japan by issuing the Tokyo Appeal and the Tokyo Action plan in 2000. While the initiative started as an Asian initiative, the United States, United Kingdom, and Scandinavian states are currently contracting parties to ReCAAP.[298]

ReCAAP somewhat differs from other regional responses to piracy in that it actually is a platform for facilitating communications and information exchange among participating governments to improve incident response by member countries, analyse and prove accurate statistics of the piracy and armed robbery incidents, and to lend context to the problem of piracy in Asia.[299] Unlike other regional responses, ReCAAP is not a military coalition response even though it does allow for joint military exercises between contracting states within the framework of ReCAAP. As regards anti-piracy intervention in the high seas Article 3 of ReCAAP requires that member states make every effort and adopt necessary measures to prevent and suppress piracy, arrest pirates, and seize vessels committing piracy or armed robbery against ships giving due regard to national laws and international law.

[296]http://www.recaap.org/about_ReCAAP-ISC (Accessed 09th June 2018).

[297]O Elagab "Somali Piracy and International Law: Some Aspects" 2010 (24) *Austl. & N.Z. Mar. L.J.* 59 70. See also Y Ishii "International Cooperation on the Repression of Piracy and Armed Robbery at Sea under the UNCLOS" 2014(7)*J. E. Asia & Int'l L.* 335 339.

[298]http://www.recaap.org/about_ReCAAP-ISC (Accessed 09th June 2018).

[299] "International Law Making" *Indonesian J. Int'l L.* 2016 450 456.

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After the conclusion of ReCAAP, the region saw a positive result in declining incidents of piracy in the Straits of Malacca. This demonstrated the effectiveness of a multilateral coordinated effort and it led the IMO to facilitate a similar arrangement with states in the Western Indian Ocean.[300] The United Nations Security Council also made a recommendation that coastal states in East Africa follow suit in relation to the piracy off the coast of Somalia – which then spurred into existence the Djibouti Code of Conduct.

3 6 4 Djibouti Code (Incorporating the Jeddah Amendment to the Djibouti Code of Conduct 2017)

The Djibouti Code of Conduct ("Djibouti Code") was adopted on January 2009 in Djibouti by representatives of numerous naval states with an interest in maintaining security in the Western Indian Ocean and the Gulf of Aden.[301] Signatory states to the Djibouti Code convened a high level meeting held in Jeddah, Saudi Arabia in January 2017 and adopted a revised Code of Conduct, which is known as the "Jeddah Amendment to the Djibouti Code of Conduct 2017."[302] The general spirit of the Djibouti Code is to promote information sharing, cooperation, and capacity building to counter piracy.[303] and has prompted the formation of two specific coordinating mechanisms, the Contact Group on Piracy off the Coast of Somalia("CGPCS")and the Shared Awareness and Deconfliction("SHADE")process.

[300] International Maritime Organisation, *Report of the Maritime Safety Committee on its Eighty Fifth Session.*

[301] The original signatories to the Djibouti Code were Comoros, Djibouti, Egypt, Eritrea, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Mauritius, Mozambique, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, United Arab Emirates, the United Republic of Tanzania and Yemen. See Also Article 2 (2) of the Djibouti Code.

[302] http://www.imo.org/en/OurWork/Security/PIU/Pages/DCoC.aspx

[303] Article 2 (1) of the Djibouti Code.

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The Djibouti Code provides for definitions which are not necessarily universal but are to be understood as they are provided for purposes of implementing it. The definition of piracy is taken from the UNCLOS *verbatim.* In an ostensible drive to deal with piratical acts occurring within territorial waters, the Code provides for "armed robbery against ships" which is defined as follows:

> "unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea"

This definition of armed robbery against ships reinforces the idea that piracy is exclusively a high seas crime. Essentially, the elements of armed robbery against ships constitute piratical activity but the definition makes a confusing exception by providing that "other than an act of piracy".[304] This exception is confusing in that violence, detention, and depravation are in fact acts of piracy even though they do not amount to piracy when they occur within territorial waters. It also gives the impression that piracy could occur in territorial waters, when this is not the international law position. This is further exacerbated by the use of descriptive language such as the prosecution of "perpetrators of all forms of piracy",[305] which gives the impression that in law there are various forms piracy – whereas it may be prudent to say that only piratical activity can vary.

In so far as the repression of piracy, the Djibouti Code provides for a few mechanisms worth considering. Firstly, it provides that any Member State may arrest and seize a pirate ship on

[304] Art 1 (2) of the Annex to the Code.

[305] See Art 3 (5) *Ibid*.

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the high seas – which is basically allowed in terms of the UNCLOS. Reverse hot pursuit is not allowed without the prior consent of the territorial state concerned. This was a missed opportunity given that one of the issues with piracy repression is the fact that once pirates enter territorial waters pursuit must be halted. The Djibouti Code was an opportunity for Members thereof to extend *inter se* consent and define the parameters and conditions which must be met before the 'limited' right to reverse pursuit is exercised. A comparable arrangement has been made by the Somali government and other naval states suppressing piracy under the auspices of the UN Security Council,[306] and thus it follows that such an agreement can be reached for *ad hoc* purposes such as maritime suppression activity on the seas.

The Djibouti Code also provides for the ability for an arresting or seizing Member State to (subject to its own laws) waive its right to exercise jurisdiction and "authorise" another State to enforce its own laws against the ship and/or detained piracy suspects.[307] The practicalities of making use of this provisions is not as simple as the stipulation. The exercise of jurisdiction must be lawful, and much will actually depend on the laws of the State which is being 'authorised' by the arresting State. While it is said that piracy is a crime subject to universal jurisdiction, adjudicative jurisdiction in some legal systems (such as South Africa) must be sanctioned by law in order to be exercised without some nexus to the State concerned.

3 6 5 Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa ("Yaoundé Code")

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[306] See Resolution 1816 which is discussed in greater detail in Chapter V.

[307] Art 5 (7) of the Annex to the Djibouti Code.

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The Yaoundé Code is a multilateral agreement between 25 States in Africa which was signed in 2013. The purpose of this agreement is to facilitate regional cooperation in matters of maritime security in West and Central Africa. The Yaoundé code is substantively identical to the Djibouti Code, and this is not surprising given that it was inspired by the success of the Djibouti Code and it was concluded under the auspices of the IMO.[308]

3 6 6 Critique of Regional Responses

International co-operation by regional states have been adversely affected by the fact that there is no supra-national commander with supreme authority over the naval forces, but each is answerable to individual national authorities as state level with different rules of engagement, as well as by incompatible communications.[309] To contextualize the afore-statement, Joint Command Lisbon (Portugal) exercises the overall responsibility over Operation Ocean Shield for instance, however day-to-day tactical control is exercised by the Allied Maritime Component Command, Headquarters Northwood, UK. When national vessels undertake activities as part of Ocean Shield or the Combined Task Force 151 encounter pirates, they consult and get guidance from national authorities as to how to deal with them; moreover, there are times when national guidance and authorisation may be in accordance with a request by the multinational force's Operational Commander.[310]

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[308] For more background and analysis, see K Ifesinachi & C Nwangwu 2015 (21) Research on Humanities and Social Sciences ISSN (paper) available at https://www.researchgate.net/publication/288965394_Implementation_of_the_Yaounde_Code_of_Conduct_and_Maritime_Insecurity_in_the_Gulf_of_Guinea. (Accessed 25th November 2019)

[309] H Tuerk 2009 (17) *U. Miami Int'l & Comp. L.* 33.

[310] S de Bont "Murky Waters: Prosecuting Pirates and Upholding Human Rights Law" 2011 *J. Int'l L. & Int'l Rel.* 104 126.

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A good measure of success has been realized by regional responses such as EU NAVFOR, evidenced by the dramatic decline in piracy incidents in the Gulf of Aden since the implementation of Operation Atalanta. However, these regional responses are *ad hoc* and temporary in nature. Piracy as an evidently evolving crime in manner of execution needs a permanent progressive solution which must endeavour to keep ahead of piracy. If the EU should decide that Piracy has been defeated and is no longer a priority security concern for the Regional Bloc, there remains a risk of a vacuum and opportunity for piracy to re-emerge and threaten the security of the ocean space policed by regional forces.

The other issue that rises in the context of regional responses is the legality and framework within which regional operations act *vis-à-vis* the UNCLOS. Concerns have been raised with the transfer of suspects to third countries once they have been captured by regional forces, in particular one author finds that this practice erodes a pertinent custom codified in the UNCLOS which dictates that a capturing state should be the one to prosecute suspects.[311] The drafters of the UNCLOS did consider the option of transfer and assignment or apportionment of jurisdiction, but the facility was rejected outright.[312]

Another observation is the singular approach that regional states have adopted. The responses to piracy are generally military interventionist in nature, whereas the available literature is rather silent on any efforts from a regional perspective in terms of developing a regional legislative framework for the prosecution of pirates. The EU NAVFOR and NATO for instance are military outfits whose operations are based on UN Resolutions and international

[311] See generallyJ Berg “You're Gonna Need a Bigger Boat: Somali Piracy and the Erosion of Customary Piracy Suppression” 2010(44)*New Eng. L. Rev.* 343

[312]*See Report of the International Law Commission to the General Assembly,* 11 U.N. GAOR Supp. (No. 9) 283, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 *Y.B. Int'l L. Comm'n* 283, U.N. Doc. A/CN.4/97

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law governing the use of force.[313] The lack of effort on the legislative front means that despite military intervention, if there are perceived difficulties in prosecution pirates are let go under the so-called 'catch-and-release' policy.[314] The prosecution of pirates apprehended by members of regional forces is done through transfer agreements which are discussed as part of the case studies below. There still is no regional body to prosecute piracy, and so prosecution at country level remains problematic from a legal and economic point of view.

Lastly, even the best of regional responses can be hindered by the typical hurdles that plague international agreements such as consensus and differences as to approach, content, and meaning in relation to agreements. For instance, the Djibouti Code is criticized for being nothing more than a matrix of aspirations by signatory countries as opposed to being seen as a deliberate decisive action plan.[315] Furthermore, the Djibouti Code does not provide for much where the prosecution of piracy is concerned aside from leaving this responsibility to Member States. This has not worked thus far, and there is not a solution tendered in the Code to encourage the national prosecution of piracy.

3 7 Individual State Responses to Piracy Prosecutions

[313] https://eunavfor.eu/mission/ (Accessed 29th March 2019)

[314] A Kiss "Problems of the Investigation and Prosecution in Case of Piracy at Sea" 2015 (49) *Zbornik Radova* 361 362. See also Press Release, EU NAVFOR, EU NAVFOR Releases Suspected Pirates After Prosecution Attempts Prove Unsuccessful (Apr. 21, 2011), http://www.eunavfor.eu/2011/04/eu-navfor-releases-suspected-pirates-after-prosecution-attempts-prove-unsuccessful.

[315] Douglas Guilfoyle "Combating Piracy: Executive Measures on the High Seas" 2010 (53) *Japanese Y.B. Int'l L.* 149 156. See Also H Strydom "Some National and Regional Responses to Maritime Piracy" 2011 *J. S. Afr. L.* 762 769.

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From the discussion above it is apparent that many naval states at least have the appetite for joint exercises and collective military pursuits in restoring and maintaining maritime security. This has, however, not replaced individual state efforts to prosecute pirates. A noticeable trend in so far as maritime security and piracy suppression are concerned is that enforcement and policing the high seas is generally done collectively, however prosecutions are still done at state level – not one of the regional responses make provision for a regional court to prosecute pirates, but this is still left at national level with some bespoke arrangements which are considered below. Moreover, international tribunals such as the International Criminal Court and the International Tribunal for the Law of the Sea do not have jurisdiction to try piracy cases notwithstanding that this is an international crime *par excellence*. This part of the dissertation considers the approach of different states, which have been at the forefront pioneering the prosecution of piracy as defined in the UNCLOS.

3 7 1 The United States – Case Study

Maritime piracy has been a security concern of the United States for a very long time. The United States approach at national level to piracy suppression and prosecution is influenced by its own outlook on security issues, especially with the drive to extinguish terror related criminal activity – even on the high seas. This is particularly motivated by the difficulty in drawing a distinction between piracy and maritime terror on the high seas – both complex phenomena with overlaps – no less when some commentators venture as far as stating that piracy is used as a mode of terrorism.[316] That said, it must be pointed out that there is no evidence to legitimately draw a nexus between known terrorist groups and Somali

[316]*Zbornik Radova* 362. See also M Gagain "Neglected Waters: Territorial Maritime Piracy and Developing States: Somalia, Nigeria, and Indonesia" 2010(16) *New Eng. J. Int'l & Comp. L.* 169 183.

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pirates,[317]however the same cannot be said for piracy occurring in the Malacca Strait in Southeast Asia. Even so, caution must be exercised before certain groups are referred to as terrorist organisations – South Africa will particularly be apprehensive to labelling self-professed struggle and liberation movements as terrorist groups.[318] There is a thin line between terrorism and legitimate activity by groupings involved in armed struggle for the liberation of a people.

The United States Constitution provides for Congressional power to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.[319] In criminalizing piracy, Congress in 1819 passed a law which provides that whoever, 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.[320]

The earliest reported case to deal with piracy under US law was the *United States v Smith*[321]where the US Supreme Court held that Common Law proscribes piracy not as an offence against the municipal law but as a transgression of the law of nations.[322]This interpretation is in line with the Constitutional tone which makes international law the authority of the definition and regulation of piracy. In *Smith*, the court also put forth an interpretation of piracy which would later be revisited in the context of contemporary piracy. It was held that there was a singular understanding of piracy by contemporary legal authors

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[317]L Butcher *Shipping: Piracy, Business and Transport Report*7.

[318]See A H Ansari, K H Win and A G Hamid "Combating Piracy Under the United Nations Convention on The Law of The Sea 1982" (2014) 56 *J. Ind. L. Inst.* 320 332.

[319]Article 1 Section 8 of the Constitution of the United States.

[320]18 United States Code § 1651. Piracy under law of nations.

[321]*United States v Smith* 18 U.S. 153 (1820).

[322]*Smith ibid* 161.

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on the law of nations, that piracy is a crime of a settled and determinate nature *viz* robbery or forcible depredations upon the sea, *animo furandi*.[323]In the prevailing customary international law, robbery at sea and piracy are two distinct crimes but this was not the view by the US judiciary two centuries ago. US courts lend considerable weight to legal writings as evidence and indication of the international law position of certain matters.[324]

Many decades later after *Smith*, and with the rise of piracy on the high seas, US courts started to see piracy cases and legal submissions which sought to challenge the *Smith* reasoning. This of course can be expected given the evolution of piracy as a concept and international (criminal) law over the decades. The definition of piracy was thus dealt with in the early 19th century in American courts, only for questions on the scope and content of piracy to arise again in the 21st Century. In the year 2010, by sheer coincidence, two factually similar cases of piracy were brought before the federal court for the Eastern District of Virginia. The cases were heard by two different judges who, when faced with similar facts and an identical legal question, came to completely contradictory decisions. These were *United States v Said*,[325] and *United States v Hasan*.[326]

The salient (and similar albeit totally unrelated) facts in both cases are that the accused persons were charged with committing the international crime of piracy. The accused persons

[323]*Smith* 187. Albeit it must be noted that the decision is criticized as being reliant on an erroneous interpretation of international law.

[324]*Filartiga v. Pena-Irala* 630 F.2d 876, (2d Cir. 1980) where it was held that the writings by jurists and legal commentators are resorted to by judicial tribunals, not for purposes of acquiring speculative views of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. See also *Smith* 160 – 161 where the court makes the point that the international law position on piracy is derived from writings of jurists and commentators.

[325]757 F.Supp.2d 554 (E.D.Va. 2010).

[326]747 F. Supp. 2d 599, 631 (E.D. Va. 2010).

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opened fire against United States Navy vessels on the high seas in the Gulf of Aden. The navy personnel on both occasions retaliated and managed to neutralize the attacks and take the suspects into custody. The accused were brought to the United States for prosecution for committing the crime of piracy as defined by the law of nations – in contravention of 18 U.S.C § 1651.

Said[327] was the first case to be heard by the federal court. The accused persons moved an application to dismiss the charge of piracy on the basis that they had neither boarded nor took control of the vessel or property thereon. The prosecution argued that the construction of piracy by the accused limits itself to common law boundaries of robbery at sea notwithstanding the fact that the evolution of international law has included numerous conduct which may amount to piracy.[328]In reaching its decision the court clarified that 'law of nations' means customary international law.[329] Further, and more interestingly the court makes much of the fact that there is no universally accepted definition of piracy – a basis upon which the courts speaks to the constitutional foundations of the principle of legality. The court held as follows:

> "Despite its reference to international law, piracy under the law of nations in § 1651, as with every other criminal statute in the United States criminal code, is subject to the constitutional rigors of due process. At a minimum, constitutional due process requires fair warning of the

[327]*Said* is available electronically on http://ia800302.us.archive.org/27/items/gov.uscourts.vaed.253001/gov.uscourts.vaed.253001.94.0.pdf. The facts of the case are discussed here as given in the case report.

[328]Cf the old English Case which unpacks the common law definition of Piracy –*Rexv Dawson* (1696) 13 St.Tr. 451where the court held "[n]ow piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty. If any man be assaulted within that jurisdiction and his ship or goods violently taken away without authority, this is robbery and piracy."

[329]To this point the court referenced *Flores v S. Peru Copper Corp.* 343 F.3d 140 154 (2d Circ 2003).

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> charged conduct… Accordingly, the principle of due process is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[330]

The court did consider the UNCLOS provisions, however it did so on the basis that it was a source of international law – as opposed to it being a codification of customary international law, which then led the court to hold that to follow the UNCLOS (amongst other 'sources') as authoritative was questionable. The charge of piracy against the accused was dismissed by the court.

Hasan followed shortly after *Said.* The arguments made by the accused in *Said* was also made by the accused in *Hasan*. Furthermore, an argument was presented to the effect that because criminal statutes must be interpreted according to their meaning at the time of enactment, the phrase "law of nations," as used in 18 U.S.C. § 1651, cannot evolve and, consequently, the authoritative (and exhaustive) definition of general piracy is provided by *Smith.* In reaching its judgment, the court held that both the language of 18 U.S.C. § 1651 and Supreme Court precedent indicate that the "law of nations" connotes an evolving body of law that by no means should be construed as static, and that the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus definition at the time of the alleged offense – not at the time of enactment of the law. The court in *Hasan* clarified that the evolution of the definition of piracy by the law of nations does not mean that courts create the law governing piracy anew, but it means courts must be cognizant and give due regard to customary international law at the time of the alleged offence. The court therefore concluded that the UNCLOS was in fact the codification of customary international law *vis-à-vis* piracy. While the United States has neither signed nor ratified the UNCLOS –

[330] *United States v Said* at Pg 4.

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and therefore cannot be applied in the United States as treaty law, this does not alter the immutable fact that the instrument is an exposition of customary international law. The accused were therefore tried for piracy.

Whereas the two cases came to different conclusions, and many a commentator find fault with *Said* and tend to agree with *Hasan*,[331] both cases nonetheless are quite important in exposing the flaws that flow from the current international criminal law framework governing piracy. It is submitted that the court's reasoning in *Said* – particularly on the constitutional imperative that is the principle of legality – brings forth valid points for consideration. As discussed earlier in this Chapter, the principle of legality has an important place even in international law to ensure that suspects before tribunals applying international law are not prosecuted on analogous and creative rules of law – and further that criminality of conduct must have been deemed so before the fact. The issues raised in the *Said* judgment raise questions as to the scope and content of the international crime of piracy, and the authorities cited therein do in fact lend insight to fluid understanding of piracy – notwithstanding the UNCLOS.

In the *Hasan* judgment the court made a compelling reasoning concerning the nature of customary international law. It is submitted that the maintenance of the UNCLOS as customary international law by the court is welcomed, however the inherent challenges of the UNCLOS were not given due consideration. An argument is made that the two judgments can be viewed as complementary, and that when read together they are illustrative of the thesis that the framework must be revisited.

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[331] See M Gardner "Piracy Prosecutions in National Courts" (2012) 10 J. Int'l Crim. Just. 797 808 & 813; J D Fry "Towards an international piracy tribunal: curing the legal limbo of captured pirates (2014) *Afr. J. Int'l and Comp. L.* 341.

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The accused in *Hasan* were sentenced to life imprisonment. The State appealed the *Said* decision at the Fourth Circuit Court of Appeals.[332] On appeal it was held that when Congress enacted 18 U.S.C. § 1651 and provided for piracy to be defined by the "law of nations," Congress contemplated that the definition of piracy would not be static but would always evolve with international law.[333] Further, the court held that that limiting the definition of piracy to robbery on the high seas would "render it incongruous with the modern law of nations and prevent the federal courts from exercising universal jurisdiction in piracy cases."[334] In addition to upholding the reasoning that informed the *Hasan* decision, the court reversed the dismissal of the piracy count in *Said* and sent that case back to the district court for further proceedings consistent with its holding that the crime of piracy within the meaning of 18 U.S.C. §1651 is not limited to robbery on the high seas.

3 7 2 Republic of Kenya – Case Study

Kenya has been at the forefront of piracy prosecutions in Africa. The Kenyan approach has also evolved over time, and it functions in partnership with foreign and regional military outfits. Kenya has concluded transfer agreements with regional blocs like the European Union and individual states like the United States.[335] In terms of these agreements, when a naval operation in the high seas results in the apprehension of suspects, the apprehending navy shall transfer the suspects to the Kenyan government where they will be tried in Kenya,

[332]*United States v. Said* 2012 WL 1868667 (4th Cir. May 23, 2012).

[333] Ibid at Para B 2.

[334] *Ibid.*

[335]A Odeke "An Examination of the Bases for Criminal Jurisdiction over Pirates under International Law"2014 (22) *Tul. J. Int'l & Comp. L.* 305 324.

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and where there is a conviction, prison terms are also served in Kenya.[336] The Kenya prosecutions have been justified on the basis of universal jurisdiction.[337]

The legality of Kenya's jurisdiction was considered in two cases by Kenyan courts.[338] *Ahmed* was the first ever piracy case to be tried in Kenya. The United States Navy had apprehended 10 pirates and handed them over to Kenya for prosecution. The accused raised some issues with the prosecution. Relevant for this chapter is the point of law that Kenyan courts had no jurisdiction to adjudicate the case. The argument was that Kenya's piracy law was codified in the Penal Code, but was not regulating piracy as under international law,[339] and further that Kenya had not domesticated the UNCLOS and thus that instrument could not find application. The prosecution argued that any act of piracy on the high seas is a crime against mankind beyond the exclusive purview of any state. On appeal,[340] the High Court upheld the Magistrate Court's decision citing that a Kenyan court was bound to apply international norms and instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations.

The issue arose again in the High Court of Kenya in *Hashi*. In this case, the accused persons argued that two key provisions of the Penal Code were contradictory with each other *viz*

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[336] However, Kenya and the Seychelles have concluded transfer agreements in terms of which convicted pirates will serve their sentences in Seychelles facilities. See L M Diaz & B H Dubner "Foreign Fishing Piracy vs. Somalia Piracy - Does Wrong Equal Wrong" 2010 (14) *Barry L. Rev.* 73 85.

[337] J W Harlow "Soldiers at Sea: The Legal and Policy Implications of Using Military Security Teams to Combat Piracy"2012 (21)*S. Cal. Interdisc. L.J.* 561 577.

[338] *Republic v Hassan Mohamud Ahmed and Nine Others*, (2006) Criminal Case No. 434 of 2006 (Chief Magis. Ct., Kenya) (hereinafter referred to as "*Ahmed*"), and *Ex parte Mohamud Mohamed Hashi & 8 Others* (2010) K.L.R. (H.C.K.) (hereinafter referred to as "*Hashi*").

[339] Penal Code, Chapter 63 of the Laws of Kenya – which was later repealed by Merchant Shipping Act 4 of 2009.Section 69 of the Penal Code stipulates that any person who in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of Piracy.

[340] *Hassan M. Ahmed v. Republic* (2009) K.L.R. (H.C.K.).

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Sections 5 and 69. Section 5 was not argued or raised in *Ahmed,* but it speaks to the issue of jurisdiction.[341] After considering the substantive content of both provisions, the Judge in *Hashi* held as follows:

> "[K]enyan Courts are not conferred with or given any jurisdiction to deal with any matters arising or which have taken place outside Kenya. The Kenyan Courts have no jurisdiction in criminal cases and in particular in the offences set out in the Penal Code where the alleged incident or offence took place outside the geographical area covered by the Kenya state or the Republic of Kenya. The Local Courts can only deal with offences or criminal incidents that take place within the territorial jurisdiction of Kenya."[342]

Ultimately, Section 69 of the Penal Code was repealed and replaced by the Merchant Shipping Act.[343] The legislation provides for the customary international law definition of piracy, aligning Kenya's framework with the prevailing international law.[344] Furthermore, the question of jurisdiction of Kenyan courts to hear cases of piracy committed on the high seas is also settled.[345] As part of Kenya's move towards thwarting international crimes, the Judicial Services Commission of Kenya proposed an International Crimes Division of the

[341]The jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters.

[342]*Hashi* (2010) K.L.R. (H.C.K.) at 17.

[343]Act 4 of 2009.

[344]Section 369 (1) provides for the UNCLOS definition of piracy.

[345]Section 430 of Merchant Shipping Act stipulates "Jurisdiction for offences (1) For the purpose of conferring jurisdiction, any offence under this Act shall be deemed to have been committed in any place in Kenya where the offender may be for the time being. (2) For the same purpose, any matter of complaint under this Act shall be deemed to have arisen in any place in Kenya where the person complained against may be for the time being. (3) The jurisdiction under subsections (1) and (2) shall be in addition to, and not in derogation of, any jurisdiction or power of the court under any other law."

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High Court which has since been set up[346] to have jurisdiction over international and transnational crimes including piracy.[347]

Kenya is arguably the region's foremost pioneer in piracy prosecutions. There may have been teething problems, however in all fairness even some of the oldest organized legal systems in the western world have had their share of teething problems.[348] The setting up of the International Crimes Division is indicative of Kenya's attitude not only towards piracy but also to the development of a comprehensive approach to international criminal law at state level. What may continue to plague prosecutions will be common to all jurisdictions, which adopt the UNCLOS *verbatim*, as is argued elsewhere in this dissertation.

Lastly, it is submitted that the prosecutions in Kenya can be criticized on the basis of the funding and resources received by the Kenyan government from foreign governments to conduct these prosecutions. Where a government apprehends a suspect and hands it over to another government and pays that receiving government to prosecute, that raises the question as to whether this is not in fact payment to convict.

3 8 Concluding Remarks

Piracy continues to be a menace that plagues important trade routes and undermines secure maritime navigation. The international legal framework designed to facilitate the prosecution

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[346]The division was set up primarily as a response to the post-election violence and crimes against humanity committed in 2008/2009. See also the report on capacity building initiatives aimed at the training of judges in international and transnational criminal law, available at http://www.wayamo.com/international-and-organised-crimes-division-iocd-kenyan-high-court/.

[347]See *Areal option for Justice? The International Crimes Division of the High Court of Kenya*- Report by Kenyans for Peace with Truth and Justice available at http://www.trustafrica.org/en/publications-trust/research-reports?download=389:the-international-crimes-division-of-the-high-court-of-kenya

[348]Example – the US with *Said* and *Hasan.*

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of pirates has been considered and found wanting. The UNCLOS lends itself to divergent interpretation primarily due to the definition of piracy which incorporates concepts such as private ends which are open to construction that defeats the purpose of the UNCLOS piracy provisions. Further, the UNCLOS does not take into account the practical execution of contemporary piracy by requiring that there be two ships. The commission of piratical acts absent a second ship means that the perpetrators are not liable to be charged with piracy, yet this undermines the international effort to eradicate piracy in all its forms. The very idea that criminals can board a ship unnoticed only to hijack it mid-voyage would mean that such criminals cannot be charged with piracy, surely is not in touch with contemporary methods of committing piracy. In response to the highlighted shortcomings the SUA Convention found relevance as an international law development, however because it was largely a reactive pursuit it also presents some challenges, and at times conflicts with the tone and policy direction of the UNCLOS. The legal and policy challenges that arise as a consequence of the SUA Convention either read with or against the UNCLOS exacerbate the problem and by no means should be used as a blueprint for South Africa or the region given the need for complementarity in the enforcement of international criminal law. The common thread that runs through all of the challenges with the UNCLOS is the failure to pass muster of the principle of legality which is a fundamental right afforded all accused persons and enshrined in a number of international human rights instruments. From a jurisdiction perspective, the UNCLOS piracy provisions have shortcomings which can undermine anti-piracy efforts and encourage a culture of impunity.

Against the previously mentioned, it must be noted notwithstanding the challenges there have been prosecutions of piracy (*jure gentium*) by countries such as Kenya and the Seychelles. The practicalities of bringing pirates to justice continue to hinder coherent and legal

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approaches to piracy. From the discussion in this chapter it appears that the maritime safety and security of the African region rests on *ad hoc* military arrangements which are a solution to one part of the problem, *viz* neutralising attack as they happen. There still remains a challenge as to the prosecution of pirates, because transfer agreements such as the ones concluded by Kenya and the EU are not sustainable and are tainted by the *quid pro quo* arrangements in terms of which a government receiving suspects also receives funding to prosecute those suspects. Problems stemming from the UNCLOS framework need to be addressed, for instance the question of piracy being exclusively a high seas crime must be considered particularly to determine if this is not a hurdle that can be resolved fairly quickly. As will be seen in Chapter V, Somalia opened up its territorial waters for piracy operations and there was no report of Somalia's sovereignty being undermined. Issues around arrest, witnesses, and crime scene integrity remain. The problems primarily stem from the burdensome nature of the logistic and financial arrangements associated with prosecutions, other national priorities such as healthcare, poverty eradication, and unemployment compete for resources and it may be difficult to justify expenditure for pirate prosecution. From a South African perspective, the issues around asylum applications may be a real problem which comes with prosecution of pirates. Thus there are still a number of challenges which are yet to be addressed.

South Africa is a key naval nation in the African Region and there has not been a piracy trial before the courts. The next chapter constitutes a prognosis in the event that there would be a pirate accused under the prevailing international law regime. As a regional power and pioneer in making necessary legislative reforms to align itself with international law and human rights development, South Africa's contribution to the piracy discourse is important. The

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chapter will also provide a contextual appraisal of the approach progressively adopted by the Courts to international criminal law.

CHAPTER IV

THE PROSECUTION OF THE CRIME OF PIRACY ON THE HIGH SEAS IN SOUTH AFRICAN COURTS – PROGNOSIS

4 1 Introduction

4 2 International Criminal Law Legislative Framework in South Africa

4 2 1 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

4 2 2 Implementation of the Geneva Conventions Act 8 of 2012

4 2 3 Prevention and Combating of torture of Persons Act 13 of 2013

4 2 4 Prevention and Combating of Trafficking in Persons Act 7 of 2013

4 2 5 Terrorism

4 3 International Criminal Law in South African Courts

4 3 1 Direct Application of Customary International Law – S v Basson and National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another

4 3 2 Universal Jurisdiction - National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another (Dugard and others as amici curiae); National Commissioner of the South African Police Service and another v Southern African Human Rights Litigation Centre and another (The Tides Centre as amicus curiae); Southern African Litigation Centre and another v National Director of Public Prosecutions and others; and S v Okah

4 3 3 Complementarity: obiter dicta in – Minister of Justice and Constitutional Development and others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae); and National Commissioner of the South African Police v

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4 1 Introduction

As a naval nation South Africa has an interest in ensuring that all the necessary legislative measures to suppress piracy are put in place and utilised efficiently. As alluded to in Chapter 3, piracy is an international crime *par excellence* and thus its prosecution as such cannot be analysed in isolation but must be informed by the general approach and application of international (criminal) law by courts in South Africa. There have been significant developments in international criminal law both in South Africa and in the international arena, and one could say that generally the former has been influenced by the latter.

The South African Constitution expressly stipulates the role of international law in relation to national law in South Africa.[349] Sections 231 and 232 comprise the provisions that lay constitutional foundation for the role of international law and judicial application thereof in South Africa. Section 231 provides for international agreements (and domestication thereof), which of course fall under the scope of international law. The provision basically stipulates that treaties that are ratified after following the necessary parliamentary procedures and

[349] The Constitution of the Republic of South Africa, 1996.

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implementation into domestic law in an Act of Parliament rank at par with domestic law as any Act of Parliament. Section 232 provides that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." This is a confirmation of the common law (monist) position which provides that courts must "ascertain and administer" the rules of customary international law as if it is part of South African law (no need to proof custom as would be the case with foreign law).[350]

The constitutional principle is qualified in that it allows for statutory and constitutional deviation, and therefore when South African courts are confronted with the question whether international law finds application there must be consideration of statutory and constitutional enactments which may have contrary provisions. In *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others*,[351] the Supreme Court of Appeal held that in terms of section 232 South Africa is "entitled to depart from customary international law by statute as stated in s 232 of the Constitution".[352] Professor Dugard also makes the same observation that greater legal weight is assigned to Statutes and the Constitution *vis-à-vis* customary international law, case law and common law, which are all subservient.[353]

While the consideration and application of international criminal law has featured in South African courts, thus far there has not been a prosecution of an individual for the core international crimes as generally criminalised under the instruments establishing international

[350]*South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 238; John Dugard "International Law and the South African Constitution" 1 *EJIL* (1997) 77-92, at 79.

[351][2016] ZASCA 17 (SCA).

[352]*Ibid* at Para 103.

[353]J Dugard *International Law: A South African Perspective* (2006) 56.

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criminal tribunals (war crimes, crimes against humanity, genocide and aggression),[354] or for other crimes under customary international law or treaty law (which would include crimes of international concern like slavery, torture, piracy and terrorism).[355] There has been a successful South African prosecution for extra-territorial terrorism.[356]

Issues such as universal jurisdiction for international crimes, the principle of legality in international criminal law, and the interplay between international criminal law and national law have been before the courts, and some important cases are discussed below to give context and insight as to the relevance of international criminal law in South Africa. Regionally, South Africa has been at the forefront of the development of international criminal law. It was the first African country to show commitment to ending impunity and championing the success of the International Criminal Court by not only being a founding member (as a member of the so-called "Like-Minded Group of Nations" at the Rome Diplomatic Conference), but further by domesticating the Rome Statute of the International Criminal Court[357], thus providing for the criminalisation of the core crimes under South African law. There has also been a progressive adoption and domestication of legal instruments for the prosecution of other international crimes in accordance with section 231 as discussed above. Over the last ten years, South Africa has realised developments such as the domestication of the Geneva Conventions of 1949 and the Additional Protocols of

[354]For a discussion of the elements of the core crimes, see Gerhard Kemp (ed) *Criminal Law in South Africa* 3ed (2018) 593-622.

[355]For a critical discussion of the categorization of crimes ("core" crimes, international crimes, crimes of international concern, and so forth) see Gerhard Kemp (ed) *Criminal Law in South Africa* 3ed (2018) 579-580. It should be pointed out that there is no consensus on the precise categorization. However, there seems to be consensus that genocide, war crimes, crimes against humanity and the crime of aggression form the "core crimes", while the designation of other crimes under international law (customary or treaty) is more contentious.

[356]*S v Okah*[2018] ZACC 3 (23 Feb 2018) (CC).

[357]Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

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1977,[358] the enactment of South Africa's obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) in the form of the Prevention of Torture Act,[359] and the enactment of South Africa's obligations under the UN Convention against Transnational Organized Crime (2000), in particular the Protocol on Human Trafficking, in the form of the Prevention and Combating of Trafficking in Persons Act, 2013.[360]

With the above overview in mind, we can now turn to the focus of this chapter, which is to unpack the development of international criminal law in South Africa and its application in national courts. A tentative prognosis of the current state of affairs will conclude the chapter.

4 2 International Criminal Law Legislative Framework in South Africa

Sections 231 and 232 of the Constitution give the foundational basis for the recognition and the applicability of international criminal law in South Africa. The legislature has made and passed laws domesticating international criminal law stemming primarily from international treaties to which South Africa is party. The statutes discussed hereunder also inform the general approach to international criminal law by the South African government, and of course serve as a point of departure in case law pertaining to the application of the statutes in question.

4 2 1 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

[358] Implementation of the Geneva Conventions Act 8 of 2012.

[359] Prevention and Combating of Torture of Persons Act 13 of 2013.

[360] Act 7 of 2013.

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The domestication of the Rome Statute of the International Criminal Court ("Rome Statute") through the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("ICC Act") provides for the duty and responsibility of the South African government to investigate, prosecute and impose penal sanctions on individuals found guilty of committing international crimes.[361] The ICC Act further provides for core international crimes as being genocide, crimes against humanity, and war crimes.[362] Against the background of section 232 of the Constitution (and case law borne from the interpretation of this provision), the ICC Act makes some significant international criminal law developments from a South African perspective. These include the customary international law rule of diplomatic immunity afforded heads of state or government, universal jurisdiction for international crimes, and the principle of complementarity.

While it is positive that the ICC Act was passed into law in South Africa, its application has not been without controversy. Professor Du Plessis prophetically wrote "The true test for the ICC Act will come when an international criminal makes his or her appearance on our territory. While the ICC Act commendably puts in place 'complementarity' structures and mechanisms whereby prosecutions of persons accused of international crimes can take place

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[361] ICC Act Heading provides that the Act "provide[s] for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute: to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; provide for cooperation by South Africa with the said Court; and to provide for matters connected therewith."

[362] See Section 3 (c) of the ICC Statute. Aggression, although recognised as an international crime in the Preamble to the ICC Act – and the ICC exercises jurisdiction over this crime, is not provided for as an international crime.

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within South Africa, the decision to institute a domestic prosecution lies with the government."[363] Indeed, in July 2015 an international crime suspect with two ICC warrants issued for his arrest in the person of President Omar Hassan Ahmad al-Bashir of Sudan attended an African Union summit hosted by the South African government.[364] South Africa as a Member State of the ICC which had domesticated the Rome Statute was expected to arrest and either institute criminal proceedings or surrender President Bashir to the ICC to face his charges.[365] In so far as the jurisdiction is concerned, the ICC Act in Section 4(3) gives South African criminal justice authorities competence to investigate, enforce, and prosecute serious international crimes committed extra-territorially if the accused is South African, or if the victim of an international crime is South African, or if the accused enters South African territory after the commission of the crime.

The reality of it all was that the suspected international criminal was "allowed" by the South African authorities to leave the Republic despite an interim order of the High Court directing government to not only detain the suspect but to secure his presence in South Africa pending the outcome of the ICC's application for his surrender to the Hague by South African authorities.[366]

It is submitted that President Bashir's presence in South Africa triggered the application of the provisions of the ICC Act, and the failure of the South African government to implement

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[363]M Du Plessis "Bringing the International Criminal Court Home - The Implementation of the Rome Statute of the International Criminal Court Act 2002" (2003) 16 *S. Afr. J. Crim. Just.* 1 17.

[364]https://www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html

[365] Article 86 of the Rome Statute places a general obligation on states parties to 'cooperate fully with the ICC in its investigation and prosecution of crimes within the jurisdiction of the Court. Chapter 4 of the ICC Act also provides the legislative framework for cooperation with the ICC.

[366]*Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17 (SCA). The SALC cases are discussed in detail below.

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the law had negative implications from both an international criminal law and a South African constitutional law perspective. Such impact is discussed below in context taking into account the consequential court cases that ensued and arguments made therein. The President Bashir matter is a classic example of the complexities that arise when the rule of law, geo-politics, and treaty obligations converge. In the South African context matters and tensions between the ICC and the ANC government such that South Africa made the decision to withdraw from the Rome Statute and cease being a Member State from the very institution it helped found, however there was a withdrawal of the Bill which was meant to repeal the ICC Act.[367]The South African government then introduced the International Crimes Bill in 2017[368]which also forms part of the effort to withdraw from the ICC. There has been little activity on the withdrawal effort by the South African government since the Bill was tabled in Parliament in 2017.On the 29th October 2019 the National Assembly revived discussions and proceedings on the Bill,[369] and it remains to be seen what the final decision will be as South Africa's ICC membership hangs in the balance. If passed into the law, the Bill will repeal the ICC Act *in toto*,[370] it would also take South Africa a couple of steps back in that it will provide for immunity for sitting heads of state.[371] This of course tallies with the political expedience which South Africa seeks in light of the Al Bashir incident which left the Government conflicted between diplomatic interests and international law obligations.

4 2 2 Implementation of the Geneva Conventions Act 8 of 2012

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[367] See Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill.

[368]International Crimes Bill B37-2017. Text available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B37-2017_International_Crimes.pdf. (Accessed 24th November 2019).

[369]Minutes of Proceedings of the National Assembly No 22 – 2019, First Session of the Sixth Parliament. Para 4 (7).

[370] See Schedule 2 of the International Crimes Bill.

[371] Section 3 *Ibid*.

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The Implementation of the Geneva Conventions Act 8 of 2012 ("Geneva Conventions Act") forms part of the international criminal law landscape in South Africa. It domesticates the provisions and grants South African courts jurisdiction over breaches of the Geneva Conventions of 1949 and Protocols of 1977.[372] The Geneva Conventions and Protocols are international instruments with a particular focus on proscribed conduct during times of war and armed conflict.

In relation to the domestication of the Geneva Conventions, Gevers observes as follows:

> "[C]reate[s] a war crimes regime for prosecuting 'breaches' of the Geneva Conventions in South African courts, notwithstanding the fact that the 'grave breaches' regime of the 1949 Conventions and its Protocols has already *in substance* been implemented through the ICC Act."[373]

In making the above statement the author relied on the fact that the grave breaches regime of the Geneva Conventions is the basis upon which the war crimes regime of the Rome Statute is framed. The Rome Statute explicitly references the Geneva Conventions and stipulates that the war crimes definition is linked to the said conventions.[374] This is not to suggest that the Geneva Conventions Act is superfluous, especially given the provisions relating to the

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[372] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, UNTS, vol. 75, 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, UNTS, vol. 75, 85; Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, UNTS, vol. 75, 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS, vol. 75, 287.

[373] C Gevers "International Criminal Law" in H Strydom(ed) *International Law* (2016) 401, 425.

[374] See Article 8 of the Rome Statute.

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jurisdiction of South African courts *vis-à-vis* international crimes as provided for in the Conventions. For purposes and scope of this research, the Geneva Conventions Act provides contextual insights as to the direction South Africa is taking coupled of course with the manner in which the courts apply the law. In this regard the Geneva Conventions Act provides that where a court is seized with a matter falling within its scope, the court must consider conventional and customary international law – and where appropriate apply it.[375] Thus it empowers courts to inform its decisions with reference to customary international law – giving the indication that South Africa is committed to continual subscription to international norms when dealing with international crimes.

The Geneva Conventions Act also makes a development in that it crystallises the *per se* breach of the Conventions as a crime. In the piracy discourse, this is important in the context of using piracy or piratical attacks as a method of war. Article 33 of Schedule 4[376] of the Geneva Conventions Act stipulates that "reprisals against protected persons[377] and their property are prohibited". This provision effectively criminalises the use of piracy as a method of warfare, given that the term "reprisals" featured in classical piracy to describe piratical acts visited upon civilian vessels from enemy States – hence the letter of marque and reprisal.

In terms of jurisdiction, the Geneva Conventions Act assigns universal adjudicative jurisdiction to South African courts.[378] Which means when a person suspected of breaching

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[375] Section 3 of the Geneva Conventions Act

[376] Geneva Convention Relative to The Protection of Civilian Persons in Time of War.

[377] Article 4 of Schedule 4 *Ibid* defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

[378] Section 7 (1) of the Geneva Conventions Act provides that "Any court in the Republic may try a person for any offence under this Act in thesame manner as if the offence had been committed in the area of jurisdiction of

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any of the Conventions anywhere in the world is present in South Africa, the courts can exercise jurisdiction over that person as if they had committed the breach in the area of that court's competence.

4 2 3 Prevention and Combating of Torture of Persons Act 13 of 2013

The Prevention and Combating of Torture of Persons Act ("Torture Act") domesticated South Africa's obligations as signatory and party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. Torture is a crime under customary law and its recognition as such has been recognised by international tribunals,[379] thus both the Convention and Act codify and lend insights to acts that constitute torture. Of significance to this research are some of the salient features that further the development of international law in South Africa. Firstly, the jurisdiction provisions of the Torture Act are materially similar to the provisions of the ICC Act and the Geneva Conventions Act in that they provide for universal jurisdiction of South African courts over persons who committed crimes in terms of the Act notwithstanding that the crime was not committed within South Africa's borders.[380] The Torture Act goes a step further to provide that a South African court has the competence to exercise its jurisdiction, even if the conduct of the accused does not amount to criminal activity at the place at which the conduct was carried out. For as long as it amounts to a contravention of the Torture Act, such person may be charged and undergo a criminal trial. The Act further criminalises torture, attempt thereof, and incitement to commit torture.[381] It further bars an accused from relying on diplomatic immunities and privileges,

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thatcourt, notwithstanding that the act or omission to which the charge relates wascommitted outside the Republic."

[379]In the case of *Prosecutor v Furundzija* ICTY IT-95-17/I-T the International Criminal Tribunal for the Former Yugoslaviaheld that torture is absolutely prohibited under customary international law. See Para 153.

[380] Section 7 of the Torture Act.

[381] Section 4 (1) of the Torture Act.

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and the defence of superior orders to a charge of torture under the Act.[382] The Torture Act specifically indicates that this position in South African law maintains notwithstanding any law to the contrary – including customary international law. In so far as sentencing is concerned, the aforesaid justifications cannot be used to mitigate sentencing, moreover no context of circumstance shall be accepted as a justification.[383] Discussing the elements and substantive content of the Torture Act is beyond the scope of this research.[384]

4 2 4 Prevention and Combating of Trafficking in Persons Act 7 of 2013

The Prevention and Combating of Trafficking in Persons Act ("Trafficking Act") domesticated the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime.[385] Human trafficking is a crime with both domestic and international dimensions in that it can be perpetuated within a country's borders or across borders, scenarios which are captured and covered in the Trafficking Act.[386] As a crime of international concern, the Trafficking Act provides the necessary enforcement mechanism including extra-territorial jurisdiction of South African courts over contraventions of the Act.[387]

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[382] Section 4 (3) *Ibid*.

[383] Section 4 (3) and (4) *Ibid*.

[384] For comprehensive discussions and analysis see J D Mujuzi "Prosecuting and Punishing Torture in South Africa as a Discrete Crime and as aCrime against Humanity"2015 (23)*Afr. J. Int'l & Comp. L.* 339. See also L Fernandez & L Muntingh "The Criminalization of Torture in South Africa" 2016 (60) *J. Afr. L.* 83.

[385]The heading of the Trafficking Act states that it "give[s] effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements."

[386] Section 4 of the Trafficking Act.

[387] Section 12 *Ibid*.

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4 2 5 Terrorism

The definitional overlaps between maritime terror and piratical activity have occasioned intermittent reference to terrorism throughout this research. In the South African context the warped relationship between piracy and terrorism is more pronounced and finds expression in the Protection of Constitutional Democracy against Terrorist and Related Activities Act[388] ("Anti-terrorism Act") and the Defence Act.[389] Thus further examination is warranted. The Anti-terrorism Act gives effect to South Africa's international obligations to counter international terrorism.[390] Section 2 of the Anti-terrorism Act provides that any person who engages in a terrorist activity is guilty of the offence of terrorism. In section 1 terrorist activity is defined elaborately both in terms of what constitutes terrorist activity and what does not – this definition has, much like piracy provisions of the UNCLOS and the Defence Act, been criticised as vague and flouts the principle of legality.[391] Relevant to this research is the approach of South African terrorism legislation to maritime security.

The breadth of the Anti-terrorism Act provides for numerous provisions under which the State could prosecute piratical acts depending on the factual matrix and context of a given crime. Under Part II of the Act is the creation of convention crimes including offences relating to hijacking a ship or endangering safety of maritime navigation.[392] It provides that

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[388] 33 of 2004.

[389] 42 of 2002.

[390]Organisation of African Unity Convention on the Prevention and Combating of TerrorismAdopted on 14 July 1999 and entered into force on 19 July 1999; ratified by South Africa on 7November 2002. See also Section 1 of the Anti-terrorism Act for "[International] instruments dealing with terrorist and related activities".

[391] See A Cachalia "Counter-Terrorism and International Cooperation against Terrorism - An Elusive Goal: A South African Perspective" (2010) 26 *S. Afr. J. on Hum. Rts*. 510

[392]See Section 10 of the Anti-terrorism Act. Convention offences are crimes created in fulfilment of the South Africa's international obligations in terms of 'instruments dealing with terrorist and related activities.' The

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any person who seizes or exercises control over a ship by force or threat thereof or any other form of intimidation is guilty of an offence relating to hijacking a ship or endangering the safety of maritime navigation.[393] The language used to describe the crime lends a very wide scope of application to the Anti-terrorism Act in that it covers a multitude of maritime offences.[394] Piratical acts include the seizure of a vessel, but the scope of the crime of piracy under international law is restricted by other elements of the crime such as the private ends and the two ships requirements. It is submitted that the Anti-terrorism Act effectively renders the crime of piracy obsolete, the practicalities of a prosecution are likely to favour use of the convention offences in section 10 of the Act rather than piracy provisions of the Defence Act which incorporates UNCLOS piracy provisions. Looking at section 10 (1) of the Anti-terrorism Act, another potential impediment which is of no consequence for prosecution under this Act is the high seas requirement. There is no distinction as to high seas and territorial waters, for as long as the crime occurred on the seas it is prosecutable under the Anti-terrorism Act. Thus, even if a vessel is seized in territorial waters as in the *El Hiblu* incident where the vessel was seized in the territorial waters of Libya.

The Anti-terrorism Act also provides as follows:

> "Any person who intentionally- (a) seizes or detains; and (b) threatens to kill, to injure or to continue to detain, any other person (hereinafter referred to as a hostage), in order to compel a third party, namely a State, an intergovernmental organisation, a natural or juridical person, or

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aforesaid instruments are listed in the Act itself as a number of Conventions and Protocols, noticeably the UNCLOS is not listed as an instrument dealing with terrorist and related activities. See Chapter I definitions and interpretation of the Act.

[393] Section 10 (1)

[394] Section 14 of the Anti-terrorism Act provides for prosecution of any person who threatens, attempts, conspires or induces another person to commit a crime under the Act.

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> a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage, is guilty of an offence of taking a hostage."[395]

This allows for the prosecution of piratical activity which features in contemporary piracy cases where perpetrators demand a ransom from shipowners as a condition for the release of crew and passengers aboard a seized vessel. According to the provision, a condition for the release of hostages can be directed to both private and state actors. The effect of this provision is that the ends (public or private) associated with maritime violence can be prosecuted separately as the crime of taking a hostage – unlike piracy where private ends and the illegal activity are cumulative elements of one crime. From a prosecution point of view this makes the Anti-terrorism Act the statute of choice *vis-à-vis* the Defence Act.

The history of South Africa, in particular apartheid and the armed struggle by liberation movements, undoubtedly had some influence on the tone of the Anti-terrorism Act. Essentially, it provides for a defence to charges under the Act if the terrorist and related acts were carried out in furtherance of an armed struggle against an oppressive regime – in line with international and humanitarian law.[396] This becomes relevant to the piracy discussion given the 'armed struggle' by militia and para-militia groups such as Movement for the Emancipation of the People of the Niger Delta, Liberation Tigers of Tamil Eelam, and Moro Islamic Liberation Front all of which have been linked to piracy, robbery at sea, and other maritime crimes in Southeast Asian waters, Niger Delta and the Gulf of Guinea.[397] The Anti-

[395]Section 7.

[396]Section 1 (4).

[397]S M Hasan, D Hassan "Current Arrangements to Combat Piracy in the Gulf of Guinea Region: An Evaluation" (2016) 47 *J. Mar. L. & Com.* 171 178; GShambaugh, A Huberts, A Zlotnick "KnowYour Enemy: The Changing Sophistication and Success ofMaritime Piracy" (2014) 15 *Seton Hall J. Dipl. & Int'l Rel.*9 31; A H Ansari, KH Win, A G Hamid "Combating Piracy Under The United Nations Convention On The Law Of The Sea 1982" (2014) 56 *J. Ind. L. Inst.* 320 332.

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terrorism Act at the very least provides for a window of opportunity to raise a defence where piratical activity is prosecuted under that Act. Such a regime is not available under the Defence Act or the UNCLOS.[398]

The scope of the private ends requirement in the UNCLOS and Defence Act piracy provisions also comes into question in this context. If an armed struggle liberation bandit hijacks a yacht on the high seas belonging to a dictator in furtherance of its campaign against the ruling regime – and a South African Navy ship arrests members of the bandit and they are charged with piracy. Can it be said that the actions were for private ends simply because they were not state sponsored? The very dimensions of an armed struggle renders the answer to that question quite complex because even if the argument that armed struggle activity cannot be said to be for private ends, the accused would have to prove that they are indeed members of a liberation movement – which could be very hard to do without either self-incrimination or exposing the covert operations which usually are characteristic of liberation movements.

At the international level, the inclusion of terrorism as a crime under the Rome Statute was considered by members of the international community however given the different experiences and divergent views, consensus on a universal definition proved a lofty ambition and so it was excluded.[399] After the Kampala Review Conference,[400] the New York Working Group on Amendments ("NYWGA") was organised to consider future amendments to the Rome Statute. One of the submissions made to the NYWGA by the Netherlands was the

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[398] The Constitutional Court in *S v Okah*had an opportunity to unpack the meaning and scope of the section 1 (4) provisions but declined to do so on the basis that evidence which could assist the court was insufficiently led at trial.

[399] See Resolution E of Annex I *Resolutions Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*.

[400] Held in Kampala, Uganda 31st May – 11th June 2010.

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inclusion of the crime of terrorism in the ICC statute as an international crime, and to avert the definitional problem it was submitted that terrorism be listed in Article 5 (1) as an international crime and including the following amendment:

> "The Court shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out conditions under which the Court shall exercise jurisdiction with respect to this crime."[401]

We are yet to see whether the crime of terrorism will eventually make it into the Rome Statute as did the international crime of aggression, but the very fact that there is dialogue pertaining to its inclusion coupled with the international community's pronounced stance against terror after 9/11 and the emergence of terrorist militia such as Boko Haram and ISIS – it may well be that ICC Member States will be forced to come up with a universally acceptable definition for inclusion in the Rome Statute. This development also spells progress for crimes such as piracy because the oft blurred lines between international crimes and transnational crimes is disappearing as the gravity of the heinous nature and menace to universal peace and security caused by terrorism, piracy, and human trafficking increases.

In 2011, the Appeals Chamber of the Special Tribunal for Lebanon delivered a key judgment *vis-à-vis* the crime of terrorism and what the objective and subjective elements of the crime are in international law.[402] The Office of the Prosecutor and the Defence Office both argued that at the time that the Court was asked to make a determination, there was no customary law definition of the crime of terrorism. The Tribunal disagreed on the basis that upon careful

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[401]Report on the Working Group on Amendments ICC-ASP/10/32

[402]*Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011, Case No. STL-11-01/I.

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scrutiny a definition has gradually emerged in customary international law. The Court held as follows:

> "A number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged. This customary rule requires the following three requirements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action or refrain from taking it; (iii) when that act involves a transactional element."[403]

The Special Tribunal for Lebanon's definition is expressed on the essential elements that constitute the crime of terrorism, however the Court's finding on the status of terrorism in customary international law has been criticised.[404] That said, and for purposes of this research, it must be acknowledged that the deductions of the Tribunal having considered a library of sources and material, is quite useful in exposing demonstrable essentials of terrorism which cannot – and should not – be attributed to piracy. Terrorism is meant to instil fear in a general population, and it is generally directed at an authority or government.[405] Piracy is different in that it is a crime perpetrated against private persons, and the intent is not to instil fear but to make illicit economic gain. So, piracy may be used as a means to terrorist

[403] *Ibid* at Para 85.

[404] K Ambos "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law" (2011) 24 *LJIL* 655.

[405] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* at Para 88. The Tribunal cites a number of international instruments and UN resolutions.

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ends – for instance by terror groups to raise funds to sustain terrorist activity, however that does not make piracy terrorism. These are two different crimes, as they would be if terrorists robbed a bank so as to fund their terrorist activities. It further demonstrates why from a doctrinal point of view the crime of terrorism must be differentiated from piracy.

Against the background of the discussion above, it is clear that there are overlaps between piracy and terrorism. However, the two crimes are not mutually substitutable under the prevailing South African framework in that while piratical acts can *prima facie* constitute terrorism,[406] acts of terror cannot constitute piracy – at least not from a prosecution standpoint. The jurisdictional provisions of the Anti-terrorism Act are similar to those of the other statutes as discussed above in that they give extra-territorial jurisdiction to South African courts. The approach of the courts towards the jurisdiction provisions of the Anti-terror Act are discussed in *S v Okah* below.

4 3 International Criminal Law in South African Courts

There is yet to be a prosecution of international crimes in South Africa under statutory and/or customary international law. Thus far, the courts have been faced with legal questions pertaining to the interpretation of legislation domesticating international crimes and the application of customary international criminal law. The manner in which the courts have approached the said legal questions is worth studying in light of recent international events which have triggered litigation and thereby revealed the overall South African perspective in relation to international criminal law. From the onset it must be highlighted that the analysis

[406] The Act's preamble states that"…terrorist and related activities, in whichever form, are intended to achieve political <u>and other aims</u> in a violent or otherwise unconstitutional manner, and thereby undermine democratic rights and values and the Constitution."

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here will focus on two broad themes, namely jurisdiction of South African courts over international crimes and South Africa's international law obligations.

4 3 1 Direct Application of Customary International Law – S v Basson[407]*and National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre & Another*.[408]

The application of treaty law and customary international law in South Africa in terms of sections 231 and 232 respectively have been discussed above as constitutional basis for the recognition of international law as a source of law. There is dissent amongst legal scholars as to the direct applicability of international law by national courts on the basis of section 232 of the Constitution. The above cited cases constitute different occasions on which the Constitutional Court progressively developed the jurisprudence with regards to the direct application of customary international law which has not been domesticated or codified by statute.

In Basson, the Constitutional Court considered South Africa's international law obligations to prosecute international crimes in its courts and the basis of such prosecutions. The court held as follows:

> "The recent establishment of the International Criminal Court represents the culmination of a centuries-old process of developing international humanitarian law. *It in no way deprives national courts of responsibility for trying cases involving breaches of such law which are properly brought before them in terms of national law*… For the purposes of this case it is not

[407] [2004] JOL 12543 (CC).

[408] 2015 (1) SACR 255 (CC).

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> necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute. We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act."[409]

While there was a missed opportunity here with the court declining to answer the question as to the direct applicability of customary international law, it did acknowledge that South Africa as a member of the international community has the duty to do so when international crimes are brought in terms of national law. Such duty is, according to the court, demonstrated by the fact that even though there is a permanent international tribunal that deals with international crimes, this does not erode the duty for national courts to exercise jurisdiction over international crimes. In a separate opinion Judge Sachs held:

> "The rules of humanitarian law constitute an important ingredient of customary international law… it should be emphasised that none of the above should be taken as suggesting that because war crimes might be involved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom."[410]

[409] See para 172 and further fn 147.

[410] Para 124 & Para 128.

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Judge Sachs' judgement does not explicitly deal with the direct application of international law but it does speak to the legal considerations that have a direct effect on the applicability of international criminal law by national courts. The judge marries the constitutional imperative of a fair trial and international community's interest in prosecuting international crimes, and he illustrates the common aim of both – which is the preservation of human dignity, equality, and freedom. The view of the court therefore is that basic constitutional rights must be respected, and undoubtedly the principle of legality will feature as a consideration. Thus, the question is whether a customary international crime formed part of South African law at the time of commission and related to that, whether the accused could have reasonably foreseen that his actions are in transgression of a law. As a matter of course there will be a need for justice for the victims of international crimes, particularly because of their grave and universally abhorrent nature. However, Judge Sachs drives the point that while international crimes are heinous, this does not mean that the rights of an accused are diminished. From this case one can deduce that South Africa as a constitutional democracy recognises international law as a sources of law, and even though at this point the court does not explicitly say that international law is directly applicable – the point is made that constitutional imperatives remain a primary consideration.

The same legal question would arise again in *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre* in the context of torture. The Constitutional Court held as follows:

> "Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm… In effect, torture is criminalised in South Africa under section 232 of the Constitution and the Torture Act whilst torture on the

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> scale of crimes against humanity is criminalised under section 232 of the Constitution, the Torture Act and the ICC Act."[411]

It is submitted that while the court seemingly espouses the view that customary international law is directly applicable, in the context of criminal law in South African courts competing constitutional principles must be considered.[412] The court is correct that the prohibition of torture *per se* by the international community is a peremptory norm, however, absent the domestication through the Torture Act there are constitutional issues that arise. The first being whether the international norm criminalises torture simply by prohibiting it. Secondly, even if it is criminalised, does the crime attract individual criminal responsibility. Thus, the statement by the court that torture "is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm" is not a simple matter of direct application but must be qualified. With the international crimes of piracy, the very uncertainty and varying views as to the scope, content, and meaning of the crime would raise issues if directly applied without a domesticating statute which will give clear elements with a clear meaning. Therefore the statement by the court is automatically qualified by the latter part of section 232, especially *vis-à-vis* conduct that is criminal in terms of customary international law.[413]The principle of legality in South African courts is discussed in detail below.

4 3 2 Universal Jurisdiction - National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another (Dugard and others as

[411]*National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre*para 37 and 39.

[412] Constitution of the Republic of South Africa – Section 35(3)(l).

[413] See Separate Opinion of Judge Sachs in *Basson.*

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***amici curiae);*[414]*National Commissioner of the South African Police Service and another v Southern African Human Rights Litigation Centre and another (The Tides Centre as amicus curiae);*[415]*Southern African Litigation Centre and another v National Director of Public Prosecutions and others;*[416] *and S v Okah.*[417]**

The concept of universal jurisdiction and its applicability in national courts has been considered and developed in recent cases which deal with the correct interpretation of legislation providing for international crimes. *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* was first heard in the North Gauteng High Court.[418] It was borne from the Southern African Human Rights Litigation Centre ("SALC") instituting legal proceedings against the National Prosecuting Authority and the South African Police service for failure to investigate allegations of crimes against humanity perpetrated by the government of Zimbabwe, in the territory of that country, and on its own citizens who were members of the Movement for Democratic Change political party. The SALC made submissions that any investigations and prosecutions of this matter must be carried out under the ICC Act because "South Africa was legally required to investigate war crimes, crimes against humanity and genocide, regardless of whether they were committed in South Africa or by South African nationals, those responsible could and should be held accountable under South African law designed for this very purpose."[419] This case was the first consideration of ICC Act provisions and thus set tone for the international criminal law

[414]2014 (12) BCLR 1428 (CC).

[415][2013] JOL 31161 (SCA).

[416]2012 (10) BCLR 1089 (GNP).

[417] 2018 (4) BCLR 456 (CC).

[418]*Southern African Litigation Centre and another v National Director of Public Prosecutions and others*2012 (10) BCLR 1089 (GNP).

[419] Ibid at para 1.9.

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landscape in South Africa. In so far as the question of universal jurisdiction as provided for by the ICC Act, the court held that:

> "In order to give effect to the principle of universal jurisdiction, and to confer jurisdiction on domestic Courts for international crimes, the ICC Act deems that all crimes contemplated by that Act, wherever they may occur, are committed in South Africa. Therefore, it was legally irrelevant that the victims were tortured in Zimbabwe, because the ICC Act requires that they are to be regarded as having been tortured in South Africa. The Constitution, and its protections, therefore must be considered as extending to victims of the alleged torture raised in the torture docket. Respondents' approach, according to this argument, would lead to the untenable situation that it would deny victims of international crimes standing in South African proceedings, and would shield decision-makers, like the respondents, from accountability when faced with making decision regarding prosecutions of international crimes that had occurred outside South Africa. This would make a mockery both of the universal jurisdiction principle endorsed by Parliament when enacting the ICC Act, as it would render the legislative provisions redundant, as well as the principle of accountable governance to which the Constitution commits South Africa."[420]

Referencing South Africa's international law obligations which are sanctioned by the ICC Act, the court held:

> "The Act, read in the context of its purpose and Rome Statute, seems to require a broad approach to traditional principles of standing. Section 3(d) read with section 2 requires the High Courts of South Africa to adjudicate cases brought by persons accused of a crime committed in the Republic, and even beyond its borders in certain circumstances. The

[420] *Ibid* at Para 13.

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relevant international imperative must not be lost sight of, and the constitutional imperative that obliges South Africa to comply with its relevant international obligations."[421]

The SALC fared well in their arguments and the court set aside the decision by the National Prosecution Authority and the South African Police Service in failing or refusing to investigate the alleged international crime. The Respondents appealed the decision to the Supreme Court of Appeal.

The Supreme Court of Appeal set the tone of its decision by identifying the central question and classifying the gist of it all under the umbrella of international criminal law – as if to signal the importance of it to South African jurisprudence and will serve as authority in resolving the question of universal jurisdiction for international crimes.[422] The court also summed up the different forms of jurisdiction as prescriptive, enforcement, and adjudicative jurisdiction.[423] This distinction is important because it cements the sound view that jurisdiction is not a concept that must be understood as an "all or nothing" facility, but rather that the different forms of jurisdiction while not mutually exclusive have different implications in law.[424] Further, the court expressed its construction that the rationale for universal jurisdiction is the universality in the abhorrent nature of certain crimes. It was held:

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[421] *Ibid* at para 13.4.

[422] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* [2013] JOL 31161 (SCA). See Para 5 where the court states "What business is it of the South African authorities when torture on a widespread scale is alleged to have been committed byZimbabweans against Zimbabweans in Zimbabwe? It is that question that is at the heart of this appeal."

[423] *Ibid* at Para 34.

[424] See R O'Keefe "Universal Jurisdiction – Clarifying the Basic Concept" 2004 (2) *J. Int'l Crim. Just.* 735 754 critique of the construction of universal jurisdiction by the ICJ in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ 14 February 2002.

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> "This increased consciousness of human rights and fighting impunity gave rise to an emerging and sometimes contested additional basis for prescriptive jurisdiction, namely the idea of universality which suggests that States are empowered to proscribe conduct that is recognised as 'threatening the good order not only of particular states but of the international community as a whole. They are crimes in whose suppression all states have an interest as they violate values that constitute the foundation of the world public order.' Accordingly, this basis for jurisdiction is not tied to the State's territory or some other traditional connecting factor but is rather grounded in the universal nature of the offence committed. At customary international law, such international crimes include piracy, war crimes, crimes against humanity, genocide and torture."[425]

The court then further made specific reference to contemporary international law as reflected in conventions. The observance here was that the customary principle of universality for certain serious crimes is also endorsed in modern treaties as evidenced by the Rome Statute which South Africa domesticated *via* the ICC Act.[426] After giving due consideration to the ICC provisions on jurisdiction that court held:

> "In the light of the progressive development of the idea of universality, prescriptive jurisdiction is no longer necessarily limited in the manner suggested on behalf of the Commissioner. Section 4(1) read with the definitions of "crimes" and "crimes against humanity" and part 2 of schedule 1 makes the alleged conduct complained of by the respondents, notwithstanding that it was allegedly committed extraterritorially, a crime in terms of our law."[427]

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[425] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre Ibid* atPara 39.

[426] *Ibid* at Para 40.

[427] *Ibid* at Para 51.

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Ultimately, the case went for further appeal to the Constitutional Court that mostly followed and agreed with the Supreme Court of Appeal's reasoning *vis-à-vis* universal jurisdiction. The court then held:

> "The Supreme Court of Appeal was, therefore, correct to rule that on the facts of this case the torture allegations must be investigated by the SAPS. Our country's international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity."[428]

Even though in the Constitutional Court the legal question was framed around the competence of the police service to investigate international crimes perpetuated extraterritorially, the principles pertaining to jurisdiction overall were given treatment. The court also clarified the limits of universal jurisdiction as follows:

> "South Africa may, through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction by investigating the allegations of torture as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an extradition request."[429]

Further the court held:

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[428] *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another* (Dugard and others as *amici curiae*)2014 (12) BCLR 1428 (CC)at Para 80.

[429] *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre* 2014 (12) BCLR 1428 (CC) at Para 49.

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> "[U]niversal jurisdiction to investigate international crimes is not absolute. It is subject to at least two limitations. The first limitation arises from the principle of subsidiarity… The second limiting principle is practicability."[430]

In *S v Okah* the Constitutional Court was confronted with the question as to whether in terms of the Anti-terrorism Act, South African courts have jurisdiction over terrorism activity which occurred outside of South African borders. Thus, the primary question in the case was whether the language of section 15 of the Act confers extraterritorial jurisdiction on the courts to try alleged offences over and above the financing of an offence is such alleged offences occurred outside South Africa. The court dealt with the textual make up of section 15 and grammatical meaning thereof, however of importance for purposes of this research is the holistic approach to interpreting the scope of the Act *vis-à-vis* international law. The court adopted an expansive permissive approach by looking beyond the letter of the law to the duty of South Africa as a member of the international community. The court held as follows:

> "The statute fulfils a number of international instruments. These establish that South Africa is under both a general duty to combat terrorism and a specific duty to bring to trial perpetrators of terrorism, wherever perpetrated, whom it does not extradite. The international instruments establishing these twin duties include conventions, protocols and UN Security Council resolutions."[431]

The court's philosophical approach to terrorism is that the universality of the anti-terror sentiment is such that jurisdiction of South African courts to try persons accused of terrorism wherever allegedly committed cannot be raised as an issue. This is to say if the Anti-terrorism

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[430] Ibid at para 61 – 64.

[431] At para 36.

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Act gives effect to South Africa's treaty obligations, then surely it cannot in its provisions also limit the jurisdiction and/or role of the Courts in seeing to it that those obligations are fulfilled. In giving expression to its view, the court relied heavily on contemporary international law which in its view created both a general and specific duties for the State as a whole to align itself with the international approach to terror by combating terrorism and prosecuting suspects thereof - and it relied section 233 of the Constitution as its legal basis.[432]

In light of the discussion of the cases above, the logical conclusion is that South African courts recognise that universal jurisdiction forms part of South African law through both customary international law and contemporary treaty-based legislation.

4 3 3 Complementarity: obiter dicta in – Minister of Justice and Constitutional Development and others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae);[433] and National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another (Dugard and others as amici curiae).

Complementarity is closely tied to jurisdiction of courts in an international criminal law context. The basic tenet of this concept is that Member States and not international tribunals

[432] The court at para 37 and 38 held that "The *general duty* to combat terrorism is broad. It commands a reading of the Act that enables South Africa to participate, as a member of the international community, in the fight against an international and transnational phenomenon. The conspicuous consequence of the contested interpretation is that it would pull the Act's teeth, rendering futile its expressed endeavour to give bite to thisduty. The *specific duty* to prosecute or extradite provides a yet stronger imperative to overturn that interpretation. Even if one were to assume that interpretation were reasonable, which a textual analysis shows it is not, s 233 of the Constitution requires this court to interpret the Act in line with international law. Here, there is a clear obligation that South Africa prosecute or extradite persons like Mr Okah. The interpretation in this judgment gives effect to that obligation, whereas the Supreme Court of Appeal's interpretation does not.

[433] 2016 (4) BCLR 487 (SCA).

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bear the primary responsibility to prosecute international crimes at national level.[434] Deviation from this deference is warranted only when the concerned Member State is either unable or unwilling to prosecute.[435] In the South African international criminal law framework, the principle of complementarity is endorsed and codified in the ICC Act.[436] In both *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre,* and *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre* the Constitutional Court and Supreme Court of Appeal both recognised the significance of the principle of complementarity in South African law, and international law in general. The following obiter dicta from the Constitutional Court decision encapsulates the South African judicial view on the principle of complementarity:

> "International criminal law and the ICC system in particular are premised on the principle of complementarity. States parties may take the lead in investigating and prosecuting international crimes. The ICC will only undertake investigations and prosecutions as a court of last resort where states parties are unwilling or unable to do so. The primary responsibility to investigate and prosecute international crimes remains with states parties."[437]

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[434]M ANewton "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*"* 2001 *Mil. L. Rev.*20.

[435]B Van Schaack "*Crimen Sine Lege*: Judicial Law Making at the Intersection of Law and Morals" 2008 (97) *Geo. L.J.* 199 fn260 expresses the view that "The principle of complementarity bars the ICC from asserting jurisdiction where a competent domestic court is prosecuting an individual, even if the conduct had been charged as a domestic rather than an international crime". Cf. *S v Basson supra* at Para 172where the Constitutional Court held that "The recent establishment of the International Criminal Court represents the culmination of a centuries old process of developing international humanitarian law. It in no way deprives national courts of responsibility for trying cases involving breaches of such law which are properly brought before them in terms of national law."

[436]See Preamble of the ICC Act. See also section 3(d) & (e).

[437]*National Commissioner of the South African Police v Southern African Human Rights Litigation Centre*at Para 30; and *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre* at Para 119.

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This view expressed by the Constitutional Court is particularly insightful because it also gives clarity as to the extent and scope of complementarity. This position is in line with the preamble to the ICC Act which expresses South Africa's commitment to seeking justice for international crimes having due regard to the principle of complementarity.[438] The Court's recognition of State parties as primary bearers of the responsibility to investigate and prosecute international crimes indicates that national police and courts are given powers necessary to investigate and adjudicate as would the ICC. This for instance means that issues such as diplomatic immunities which ordinarily would bar courts and enforcement government agencies from exercising jurisdiction over diplomatic figures, do not hold as a defence when international crimes are under investigation and before the national courts.

An issue may in the future arise will ensue from the brewing tripartite relationship that may materialise once the Criminal Chamber of the African Court of Justice and Human Rights ("ACJ") is operational. South Africa has not yet ratified the Malabo Protocol, but given the fact that the country has attempted to withdraw its membership from the ICC coupled with the current relationship between the AU and the ICC it is not a stretch to imagine that it will ratify the Protocol in the future. The Statute of the African Court of Justice and Human Rights provides for complementarity with national courts and courts of regional economic communities such as the Common Market for Eastern and Southern Africa ("COMESA")

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[438] The preamble of the ICC Act provides that "the Republic of South Africa is committed to-

- bringing persons who commit such atrocities to justice, either in a court of law of the Republic interms of its domestic laws where possible, pursuant to its international obligations to do so whenthe Republic became party to the Rome Statute of the International Criminal Court, or in the eventof the national prosecuting authority of the Republic declining or being unable to do so, in line withthe principle of complementarity as contemplated in the Statute, in the International Criminal Court,created by and functioning in terms of the said Statute."

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Court of Justice,[439] and goes beyond the complementarity provisions in the Rome Statute. The question remains whether the complementarity rule in the Malabo Protocol can be interpreted to encompass tribunal deference in general, and if the ICC or the ACJ would recognise the other's jurisdiction. One way to look at it is that the ACJ being a construct of the AU renders the ICC obsolete, and State parties to the ACJ enjoy complementarity with it to the exclusion of the ICC – which of course would see an *en masse* withdrawal or coordinated disregard between AU Member States of their international obligations *vis-à-vis* the Rome Statute.

The principle of complementarity is of course underscored by considerations that inform the integrity of the international criminal law framework as a whole, and thus the ICC has given clarity as to its views on how the relationship founded on complementarity between national courts and international tribunals should function. The ICC also stresses that primary duty to adjudicate international criminal law prosecution lies with the national courts. In *Prosecutor vKony*[440] the pre-trial chamber of the ICC held as follows:

> "Complementarity is the principle reconciling the states' *persisting duty* to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed."[441]

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[439] Article 46.

[440] *Prosecutor v Joseph Kony et al*, decision on the admissibility of the case under art 19(1) of the Statute, 10 Case No. ICC-02/04-01/05, 10 March 2009.

[441] *Ibid* at para 34.

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Thus, while the international court also has jurisdiction, there is a persisting duty on national courts to exercise primary jurisdiction – and complementarity is the catalyst that harmonises the two.

South African courts thus accept that complementarity is not just attached to prosecution and adjudication but also extends to investigations of alleged international crimes in contravention of the ICC Act and thus the Rome Statute.

4 4 National Prosecution of the Crime of Piracy

To date there has not been a piracy prosecution in South African national courts, however the theoretical framework to do so exists in the provisions of the Defence Act.[442] There is one recorded appearance of a fugitive suspected of piracy before a South African Magistrate's court for extradition proceedings in terms of which the suspect was detained in South Africa as part of an INTERPOL operation – and the Netherlands was requesting the extradition of the suspect, and such request was granted by the court.[443] These proceedings were procedural, and none of the substantive provisions of piracy either under international law or the Defence Act were subject of the proceedings. An opportunity was missed when pirates hijacked a South African yacht off the coast of Tanzania on its voyage to South Africa. The South African government refused to receive and prosecute the captured Somalians, and therefore

[442] 42 of 2002. See section 24.

[443] https://www.projectcargojournal.com/shipping/2019/01/30/pirate-boss-who-attacked-dutch-ship-faces-extradition/?gdpr=accept .

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they were sent to the Netherlands for trial.[444] This refusal may have been on grounds of jurisdiction as provided for in the Defence Act which is discussed below.

The provisions of the Defence Act are significantly similar to the piracy provisions of the UNCLOS; minor alterations pertain to the inclusion of a ship Master's conduct as potentially constituting piracy, and localising the crime by making reference to it being prosecutable in "the Republic".[445] The numerous challenges associated with the interpretation of the crime of piracy have been discussed in detail in the previous chapter, and they find application here as well, and yet the discussion deepens at the interface between piracy and the domestic framework.

The point of departure is reiterating the view that UNCLOS and thus the Defence Act are codification of customary international law position regarding piracy. However, going back to the days of the Harvard Draft Commentators and the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (discussed in Chapter II), it is clear that prior to the 1958 Geneva Convention and the succeeding UNCLOS there were conflicting legal views amongst Member States of the League of Nations as to the meaning of piracy according to the 'law of nations'.[446] Thus ultimately, the definition of piracy – while accepted as customary international law – is also a compromise between a range of divergent views as to what conduct amounts to piracy. Much of the criticism of the definition can be attributed to the fact that the ostensibly definite

[444]See Summary of the "*Choizil*" Case – *TheProsecutor v T21* Case No BY6940,Court of Appeal of The Hague, 22-004017-11

[445] Section 24(3).

[446]See League of Nations Committee of Experts for the Progressive Codification of International Law "Questionnaire No. 6: Piracy" 1926 (20) *Am. J. Int'l L.* 222

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provisions of the UNCLOS amount to a vague crime the contents of which, it is submitted, would hinder successful prosecution.

The Merchant Shipping (Maritime Security) Regulations of 2004[447] make provision for the regulation of activity that can be classified as piratical, however there is no express reference to piracy and there is no differentiation as to acts that occur on territorial waters and the high seas. The Regulations provide that their purpose is to safeguard against the unlawful interference with maritime transport.[448] Unlawful interference with maritime transport is defined *inter alia* as follows:[449]

> (1) Any of the following done without lawful authority is an unlawful interference with maritime transport
>
> …
>
> (b) taking control of a ship by force, or threat of force, or any other form of intimidation;
>
> …
>
> (d) causing damage to a ship that is being used for maritime transport that puts the safety of the ship, or any person or property on board or off the ship, at risk;
>
> (e) doing on board a ship that is being used for maritime transport anything that puts the safety of the ship, or any person or property on board or off the ship, at risk.

The sub-regulations describe activity which may be construed to amount to piracy, however they are couched in broad terms by making reference to maritime security in general. The weakness in the Regulations is that it appears to be very limited in scope of application, and it

[447] Made by the Minister of Transport under section 356 of the Merchant Shipping Act No. 57 of 1951.

[448] Regulation 2.

[449] Regulation 5.

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does not purport to be an instrument with criminal sanctions. For instance, nowhere in the Regulations is there a provision that unlawful interference with maritime navigation is an offence, rather it provides for an elaborate framework in terms of which enforcement orders can be issued to ensure compliance with the Regulations and to safeguard against the unlawful interference of maritime navigation.[450] There are criminal consequences for failure to comply with an enforcement order,[451] however the perpetuation of unlawful interference with maritime transport is not an offence. In terms of scope, the substantive content of the Regulations suggests that they are essentially a framework for legitimate sea vessel operators who in the course of legitimate seafaring may engage in conduct provided for in regulation 5. This however should not be construed to mean that legitimate seafarers cannot be pirates. Which segues into an interesting provision in the Regulations which provides thus:

> [U]nlawful interference with maritime transport does not include lawful advocacy, protest, dissent or industrial action that does not result in, or contribute to, an action of a kind mentioned in sub-regulation (1)(a) to (h).

This provision makes a very thin line between protest and advocacy activity at sea, and conduct that amounts to unlawful interference with maritime transport. It is unclear what yardstick would be used to determine if organisations such as Greenpeace would have crossed the Rubicon in their activism activity. Nonetheless, this lends insight as to South Africa's approach to maritime safety and security.

Whereas there has not been a prosecution pertaining to piratical activity in South Africa, reference has been made in passing by the courts recognising piracy as an international crime

[450] See Part 9 of the Regulations.

[451] Regulation 123.

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coupled with the theory that it attracts universal jurisdiction under customary international law.[452] This view by national courts is not restricted to South Africa. In *The Attorney General v. Adolf Eichmann,* the District Court of Jerusalem held:

> "Maritime nations have, since time immemorial, enforced the principle of universal jurisdiction in dealing with pirates, whose crime is known in English law as 'piracy *jure gentium*'."[453]

Thus, it is important to discuss as to what universal jurisdiction means from the perspective of a national court hearing a piracy trial. Against the discussion of the international criminal law landscape in South Africa, the provisions of the Defence Act relating to piracy are analysed.

4 4 1 Defence Act Jurisdiction Provisions

The South African legislative and judicial approach to jurisdiction as discussed above is aligned and centred on the international obligation of the State to meet international crimes

[452] In *S and another v Okah and a related matter* (Institute for Security Studies and another as amici curiae) 2018 (4) BCLR 456 (CC) at fn 68 the Constitutional Court held "[T]rue universal jurisdiction applied only to crimes under customary international law (piracy, slave-trading, war crimes, crimes against humanity and torture)". In *National Commissioner of the South African Police Service and another v Southern African Human Rights Litigation Centre and another* (The Tides Centre as amicus curiae)[2013] JOL 31161 (SCA) at Para 39 the Supreme Court of Appeal held "Accordingly, this basis for jurisdiction is not tied to the State's territory or some other traditional connecting factor, but is rather grounded in the universal nature of the offence committed. At customary international law, such international crimes include piracy, war crimes, crimes against humanity, genocide and torture."

[453] *The Attorney General v. Adolf Eichmann,* District Court of Jerusalem, Criminal Case No 40/61, § 13, available at: http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/Judgment (accessed: 25.08.2018).

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with the necessary framework for their eradication. Jurisdiction is central to that framework because without sound jurisdictional provisions, even the best drafted laws are deprived of enforcement power. South African courts have recognised that crimes such as piracy are under customary law subject to universal jurisdiction, however there must be a law to that effect in the statute domesticating an international crime – as a matter of constitutional obligation. The laws pertaining to terrorism, human trafficking, and war crimes have all explicitly provided for the competence of courts to exercise extraterritorial jurisdiction even when there is no traditional jurisdictional nexus between South Africa and the international crime suspect. Piracy as a classical international crime subject to universal jurisdiction is subject the same constitutional imperatives. The UNCLOS, from which section 24 of the Defence Act is borne, has a universal jurisdiction provision in Article 105 which provides as follows:

> "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."

The universality of the provision is in the fact that pirates and pirate ships are subject to arrest and trial by any State desirous to do so. The only proviso is that a pirate ship and pirates can only be arrested on the high seas. From a South African courts' perspective, this provision only serves as a confirmation of the customary law position, and so there has to be a statute that criminalises piracy and further provide for extra territorial jurisdiction. Unlike the ICC

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Act, Torture Act, and the Geneva Conventions Act, the Defence Act does not expressly provide for universal jurisdiction. It provides as follows:

> "Any person who commits an act of piracy is guilty of an offence, which may be tried in any court in the Republic designated by the Director of Public Prosecutions and, upon conviction, is liable to a fine or to imprisonment for any period, including life imprisonment."[454]

This provision criminalises piracy in South Africa, but in so far as the jurisdiction of the courts it may ostensibly be that universal jurisdiction is afforded the court, but it really is not. Piracy unlike other crimes is a crime that occurs outside the territory of any State anyway, jurisdiction is only established when an arrest and seizure is carried out. Even under the Defence Act the crime of piracy remains exclusively a high seas crime,[455] meaning if piratical activity took place in territorial waters of South Africa it would be prosecuted under different laws pertaining to theft, murder, rape, and so on. The Defence Act then makes provision for arrest based on articles 105 and 107 of the UNCLOS. It provides as follows:

> "An officer of the Defence Force may seize a ship or aircraft and the property on board, and arrest any person on board, in accordance with articles 105 and 107 of UNCLOS."[456]
>
> …
>
> "Any ship, aircraft or property seized, or any person arrested, in terms of this section, must as soon as possible be brought to the Republic or to any other authority determined by the

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[454] Section 24 (3).

[455] The Defence Act also incorporated the "a place outside the jurisdiction of any state..." provision from the UNCLOS.

[456] Section 25 (1).

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> Minister of Foreign Affairs, with the concurrence of the Ministers of Defence and of Justice, to be dealt with in accordance with applicable law."[457]

The provisions above authorise members of the South African military to make arrests on persons and ships suspected to be carrying out piratical activity, but they also make a clear stipulation that after such arrest, the suspects are to be brought to South Africa or any other authority determined by the relevant South African ministers to face the law. These provisions thus bring a very important dynamic into the question of a South African court's jurisdiction *vis-à-vis* piracy. In so far as investigation and apprehension of pirates is concerned, the South African military is sanctioned by law and customary international law to patrol the high seas and within the bounds of the law (including South African constitutional law) do whatever is necessary to effect an arrest on persons suspected of piracy. However, where there is nothing linking the accused to South Africa, it is submitted that South African courts do not have competence to adjudicate, nor does a South African prosecutor have the duty and/or obligation to bring such person to trial. If therefore a person accused of committing piratical Acts on a foreign vessel and as a fugitive made his way to South Africa, the courts would not be able to try such a person. Section 25 (3) of the Defence Act clearly stipulates that a piracy suspect must be brought to the Republic if arrested by the South African military personnel. This is to say South Africa has unqualified universal jurisdiction as regards enforcement jurisdiction, but adjudicative jurisdiction can be challenged by raising the point that South Africa was not the arresting state – and yet arrest is the qualifying jurisdictional link in terms of the Defence Act.

The UNCLOS itself buttresses this view. Article 105 provides that

[457] Section 25 (3).

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> "…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."

Thus, it is submitted that section 24 of the Defence Act allows for the South African military to effect arrests on the high seas regardless of the suspect person's and/or the victim ship's nationality, residence, and other jurisdictional nexus. However, for purposes of prosecution of persons for the crime of piracy in a South African court, it must be the South African *military* that effected the arrest on the High Seas.[458]

It must be highlighted that States such as Kenya and the United States have ventured into transfer agreements in terms of which pirates apprehended by the latter would be transferred to the former for trial and incarceration, and as discussed in Chapter III such arrangements have been controversial for a reason. South Africa cannot use them as a blueprint for establishing jurisdiction. South Africa is a State Party to the Djibouti Code which provides that:

> "The Participant which carried out the seizure pursuant to paragraph 4 may, subject to its national laws, and 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."[459]

[458] Section 199 of the Constitution stipulates: "Security Services must act, and must teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."

[459] Article 5 (7) of the Djibouti Code Incorporating the Jeddah Amendments.

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There is nothing in the Defence Act that allows the South African government to authorise another State to exercise its own laws upon apprehended pirates and a seized pirate ship, nor is there precedent where South Africa has given an authorisation to another state to exercise jurisdiction over an alleged perpetrator of an international crime. The situation contemplated in the provision is not an extradition request where one country makes a request for a fugitive to be returned so as to undergo a trial – this is a matter where suspects are effectively peddled to States as willing takers. It is puzzling why the Parties to the Djibouti Code did not rather direct that each State must enact national laws that vest their courts with universal jurisdiction. This would not have been controversial because there would not be a need for extra-judicial authorisations between States. Further, piracy is an international crime subject to universal jurisdiction without a doubt.[460] States have been known to jealously defend their right to primary jurisdiction – the legality and status of an agreement to authorise the exercise of jurisdiction is uncertain. If it is lawful to do so; there are quite a number of considerations that come into play at least from a South African perspective.

Firstly, piracy is not purely a legal issue it is also a security issue. Consequently, if the government is to authorise the exercise of jurisdiction by a third party State there has to be a designated authority to do so on behalf of South Africa. In the case of extraditions, it is the Minister of Justice who exercises authority.[461] For the matter at hand it is rather complicated because there are overlaps in scope and the Department concerned with foreign affairs and international cooperation, and the Department of Defence may all have an interest in the exercise of jurisdiction over piracy. Secondly, the South African government would have to consider whether the suspects would receive a fair trial in the receiving country, and if found

[460] See Opinion of Judge Guillame and separate opinion of Judges Buergenthal, Higgins, Kooijman in *Arrest Warrant Case* 2002 ICJ Reports.

[461] Section 11 (b) (iv) of the Extradition Act 67 of 1962.

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guilty whether they would receive humane punishment. This is in line with the constitutional imperative that every person has a right not to be subjected to punishment that is cruel, degrading, and inhumane, and the right to a fair trial.[462] In *Mohammed v President of the Republic of South Africa*[463] the Constitutional Court held thus:

> "For the South African government to cooperate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he had no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of the Constitution. It is inconsistent with the government's obligation to protect the life to life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment."[464]

The context while different, captures the view of the Constitutional Court towards sending fugitives to a country where they are likely to face a violation of their constitutional rights. Signatories to the Djibouti Code such as Somalia, Saudi Arabia, Yemen, Ethiopia, and the United Arab Emirates still impose capital punishment as a sentence to certain crimes.[465] Yemen recently convicted accused persons of piracy and imposed the death penalty as punishment.[466] Saudi Arabia also attracted international condemnation for the barbarism with which journalist Jamal Khashoggi met his death at the hands of Saudi government officials in a Saudi Embassy in Turkey.[467] This simply demonstrates that South Africa is not in the

[462] Section 12 (1) (e) and 35 (3) of Act 106 of 1996.

[463] (Society for the Abolition of the Death Penalty in South Africa intervening) 2001 (2) SACR 66 (CC).

[464] Mohamed v President of the Republic of South Africa at para 58.

[465] https://www.bbc.com/news/world-45835584 (accessed 12th November 2018).

[466] A Petrig *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* 2014 348 & 443.

[467] https://www.bbc.com/news/world-europe-45812399 (accessed 20th September 2019).

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company of governments with a clean bill of human rights protection. Thirdly, South Africa domesticated the UN Convention against Torture when it enacted the Torture Act discussed above. The Torture Act provides that no person shall be expelled to another State where there are substantial grounds that the person will be subjected to torture.[468] This is in line with the international law norm of non-refoulement. Thus, this would have to inform the decision by South Africa to authorise another State to exercise jurisdiction over persons arrested and property seized by South Africa.

Whether South Africa can be authorised by co-Signatories to the Djibouti Code to exercise jurisdiction over pirates and a pirate ship arrested by that Signatory will be informed primarily by whether South African law allows for the exercise of jurisdiction. With the current piracy jurisdiction regime in the Defence Act, it is submitted that South Africa cannot exercise jurisdiction. Jurisdiction in South Africa is a constitutional issue, and so it is inconceivable that a South African court would exercise jurisdiction solely on the basis that a foreign government waived its jurisdiction and authorised South Africa to visit its own laws upon the accused and the seized property. Unless there are lawful grounds for the exercise of jurisdiction, South African courts would not do so. The Djibouti Code in and of itself is a treaty from which some obligations for South Africa flow, however international instruments are subject to national law and the Constitution.[469]

4 4 2 Nullum Crimen Sine Lege – Legality

[468] Section 8 (1) of the Torture Act.

[469] J Dugard *International Law: A South African Perspective* (2006) 56.

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The issues that plague the piracy definition under the codified customary international law have been discussed and analysed in Chapter III and the principle of legality in international criminal tribunals has also been discussed. The Defence Act also adopted the international law definition of piracy with negligible changes, which means the issues that arise with the international law definition also find application in the Defence Act and therefore a further discussion would be a duplication of efforts. What remains is the consideration of these problems against the principle of legality which is part of South African law.

The principle of legality has featured in a number of cases in South Africa both prior to the Constitutional dispensation and after.[470] Section 35(3)(*l*) of the Constitution also provides for the legality principle in stipulating that a right to a fair trial is guaranteed all accused and this includes the right not to be convicted for conduct which was not criminalised at the time of commission. Of fundamental importance for purposes of this research is the tenet of the principle of legality that says crimes should not be vaguely defined.[471] This element of the principle of legality is not to be construed to mean that certainty is an absolute standard that must always be observed in defining the elements of a crime,[472] however an offence couched in terms that allow for multiple interpretations is vague and will not pass constitutional muster. In *S v Lavhengwa* the court held that the right to be informed of the charge with

[470] See *Naidoo v Pretoria Municipality* 1927 TPD 1013; *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC); *S v Von Molendorff and another* 1987 (1) SA 135 (T).

[471] See C R Snyman who describes the principle of legality as a legal concept made up of 5 important principles namely: (i) An accused may only be found guilty of a crime if the type of conduct performed by him or her is recognised by the law as a crime (*ius acceptum*); (ii) An accused may only be found guilty of a crime if the kind of act performed by him or her was already recognised as a crime at the time of its commission (*ius praevium*). (iii) A crime should not be vaguely formulated (*ius certum*); (iv) The definition of a crime should be narrowly interpreted (*ius strictum*); and (v) These abovementioned rules or principles relating to a crime apply *mutatis mutandis* to the imposition of a sentence (*nulla poena sine lege*).

[472] G Kemp *Individual Criminal Liability for the International Crime of Aggression* 2ed (2016) 220.

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sufficient detail means that the accused must know the necessary particulars of the charge he has to meet; and the charge itself must be clear and unambiguous.[473]

As regards the crime of piracy in a South African court, it is submitted that such a prosecution would be marred by the uncertainties that plague the definition, scope, and substantive content of the crime of piracy. Regrettably, customary international law would not shed light as an interpretive tool because the provisions in the Defence Act are substantially similar to those of the UNCLOS. Given the fact that the piracy provisions under the Defence Act are imported from the UNCLOS, the court would be remiss if it did not consider the writings of authors old and contemporary on the subject of piracy under international law – however it is very hard to decipher which is commentary and which is authoritative. For instance, there are authors who believe the private ends requirement does not include acts perpetrated for political reasons, while other authors believe that all ends that are not commissioned by the State are private. The UNCLOS and its *travaux préparatoires* would have to be employed as an interpretive tool as *per* section 233 of the Constitution, but then this begs the question as to whether those reflect custom as it is today in relation to contemporary piracy. The uncertainty in international law, in so far as the meaning of the elements of the crime of piracy are concerned, would undoubtedly form part of the defence of an accused. The problem takes a more interesting twist when one considers activist work such as Greenpeace and Sea Shepard Conservation Society which sometimes culminates into violent confrontation with other ships on the High Seas – are these activism actions piracy? Is maritime security compromised because of such activity? The private ends requirement in particular would be under scrutiny, and what this means in customary international law is unclear.

[473]1996 (2) SACR 482.

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4 5 Concluding Remarks

The South African international criminal law landscape has been shaped by interesting occurrences which are not purely legal but affected by geo-politics and Africa's relationship with the ICC and more developments are on the horizon with the emergence of the ACJ vested with the competence to try international crimes, including piracy. Complementarity will certainly be an issue that will be contested and the general relationship between the ICC and the ACJ will be worth monitoring. Much has been done by South Africa to progressively meet its obligations and discharge its international law duties and the domestication of international treaties and criminalisation of some breaches to international norms are testament of South Africa's leadership approach to ending impunity for the commission of international crimes. From an enforcement perspective there have been challenges and apparent abdication of duties and international obligations by South Africa, which was followed by an inchoate withdrawal from the Rome Statute. The interpretation by the Courts, of South Africa's international obligations and the application of international criminal law nationally has been progressive and illustrative of the judiciary's commitment to developing the law in line with international customary law. That said, much is yet to be done as the courts continue to face complex legal questions as to the interpretation and application of international criminal law statutes in South Africa.

As regards piracy, it is submitted that while the UNCLOS piracy provisions have been incorporated into the Defence Act it is unlikely that a prosecution would succeed on account of the principle of legality. The Defence Act does criminalise piracy committed on the high seas, however the definition and attendant elements of the crime of piracy under the current

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framework are vague as to allow for ambiguity in interpretation, and customary international law as codified by the UNCLOS does not provide answers. Further, while there is the view that piracy is a crime over which states can exercise universal jurisdiction, this is accurate only as regards prescriptive and enforcement jurisdiction. Adjudicative universal jurisdiction is qualified by the fact while pirates can be arrested by any State on the high seas, it is the court of that arresting State that may impose penalties. The Defence Act essentially provides for that too in relation to South Africa – but what is does not do is provide that where a perpetrator of piracy should be within the borders of South Africa, he may be arrested and tried for piracy notwithstanding that he was not arrested by a South African Navy ship on the high seas. The laws which provide for the criminalisation of international crimes in South Africa make it clear that perpetrators thereof can be subject to the jurisdiction of the courts regardless of there being no jurisdictional nexus between the perpetrator and South Africa. The Djibouti Code also has shortcomings and does not help South Africa's cause in exercising extraterritorial jurisdiction as regards piracy. There is the option that it could be domesticated, and perhaps the Courts would help with the question of "authorisation" to exercise jurisdiction. In so far as the definition of piracy, scope, content, and meaning of piracy – these are not explained or unpacked in the Djibouti Code. It only defines piracy as does the UNCLOS.

Given the international nature of the crime, it is pertinent to assess developments that have taken place at international level that have an impact or may provide guidance on the prosecution of piracy. International and regional initiatives have been discussed in Chapter III, the next Chapter focuses on international institutional development and how some of those institutions have developed and interpreted international criminal law. This of course has a bearing on how national courts can approach the crime of piracy given that the principle

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of complementarity assigns national courts the primary duty to prosecute international crimes, but they must do so in line with customary and contemporary international law. It is also important to analyse some of the UN Security Council resolutions pertaining to piracy and how they have shaped the approach to piracy and maritime security. The regionalisation of international criminal law through the adoption of the Malabo Protocol will also be examined as a general development in the international law framework and with regards to piracy which is now an international crime under the jurisdiction of the ACJ. This development was spurred by geopolitical considerations, but it will have an impact on the international criminal law framework.

CHAPTER V: DEVELOPING REGIONAL AND INTERNATIONAL LAW

5 1 Introduction

5 2 Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation and the 2005 Protocol

5 3 United Nations Security Council Resolutions on Piracy

5 4 Protocol on the Amendments to the Protocol of the African Court of Justice and Human Rights – Regionalisation of International Criminal Law

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5 1 Introduction

The very nature of piracy and its effect on regional security and international trade dictates that much like other international crimes, piracy can neither be localised to individual countries nor can it be assigned to a select few countries to confront on behalf of the international community. There has to be a genuine collective effort which, it is submitted, should be based on regional and international law that enjoins all the necessary stakeholders and provides for a sound framework to prosecute pirates. It must however be borne in mind that such progressive endeavours do not occur in a vacuum, there is already a regime complex *vis-à-vis* international criminal law in general obtaining both regionally and internationally. Much of the collective action to repress piracy regionally has generally comprised joint military interventions on the high seas. The efforts of multinational military fleet and taskforce are aimed at eradicating piracy off the coast of East Africa. Part of that

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strategy (which originally formed part of the so-called 'War on Terror' led by the United States) is indeed to capture and prosecute pirates, but it can be argued that much of the success realised was with arrest rather than prosecution. It is submitted that this strategy is neither coherent nor based on a comprehensive legal framework and certainly not a blueprint for South Africa and regional international criminal law. The aforesaid efforts are coupled with *ad hoc* agreements with states such as Kenya and the Seychelles to prosecute on the backbone of the principle of universality of jurisdiction over piracy. Of course, these arrangements (particularly sending pirates to third states for prosecution) flounder in the face of sound construction of jurisdiction, constitutionalism, and the principle of legality. As such the countries cited have had to make various adjustments to their laws to remedy some of the glaring legal flaws emanating from these arrangements.

While criticism of the *ad hoc* arrangements between arresting and prosecuting third states is valid, on the flipside of that is the risk of impunity because there is no international or regional tribunal that has tried piracy notwithstanding the existence of numerous regional courts and tribunals in and around Africa. Piracy is not solely a legal problem; it is also very much a security problem. That is why it has prompted a series of reactions from the Security Council as conduct that threatens regional peace, security, and stability.[474] The purpose of this chapter is to discuss the current development of an international/regional body that will have jurisdiction over piracy. The proposed draft protocol on the African Court of Justice and Human Rights will form the basis of the discussion. An analysis of the proposed jurisdiction of the court in question will be conducted. The possible role of the ICC will be considered briefly, as some avid piracy commentators have posited the view that perhaps the scope of

[474]See 5.3 *infra*.

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ICC crimes should be extended to cover piracy as well.[475] By any measure, this constitutes a very complex legal, diplomatic and political exercise – one that is not without risks for the evolving international criminal justice system. However the assumption is that such a regional or international approach is, in principle at least, desirable.

As is clear from the preceding chapters, it is safe to assert that the UNCLOS remains the prevailing legal framework at international law level for the prosecution of piracy. The United Nations General Assembly and the United Nations Security Council have recognised it as such without giving any sort of interpretive aid or guide as to the content, scope of application, and insight as to the meaning of the definition of the crime of piracy.[476] Consequently, there is no prescriptive approach and this has allowed for some developments of alternatives at international law level that deviate somewhat from customary international law.

5 2 Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation ("SUA Convention") and the 2005 Protocol

Driven by the International Maritime Organisation, the SUA convention of 1988 came into force in 1992, ten years after the UNCLOS was adopted. This is another instrument developed and implemented at international level to develop the international criminal law relating to maritime safety. It features heavily in literature pertaining to piracy, however as a

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[475] Y M Dutton "Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court" 2010 (11) *Chi. J. Int'l L.* 197.

[476] Report on the Work of the United Nations Open Ended Informal Consultative Process Established by the General Assembly in its Resolution 54/33 in Order to Facilitate the Annual Review by the Assembly of Developments in Ocean Affairs at its Second Meeting Held at United Nations Headquarters from 7 to 11 May 2001. A/56/121 at Para 62.

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point of departure there are certain points which must be highlighted so as to inform the relevance of the SUA Convention to contemporary piracy. Firstly, the SUA convention in its text does not make a single express reference to the concept of piracy, or at least reference to an expansion of the international criminal law piracy regime. It merely provides for a broad offence within which piracy or piratical acts may fall.[477] Secondly and related to the first point, the general theme of the SUA convention heavily channels terrorism.[478] From reading the text and paying particular attention to the references to terrorism, it is not far-fetched to construe the instrument as primarily a maritime terror suppression effort.

Some remedial approach to the shortcomings of the UNCLOS are presented by the SUA Convention, not by shedding clarity or lending insight but by providing for broad language that foregoes concepts such as the 'two ships', 'high seas', and 'private ends' requirements provided for in the UNCLOS. Moreover, the SUA Convention makes it a treaty obligation for states to criminalise the offences created in Article 3 of the Convention in their domestic laws, however it leaves penal consequences "which take into account the grave nature of those offences" at the discretion of individual states.[479] In so far as jurisdiction is concerned, the SUA Convention does not afford universal jurisdiction, but creates a *numerus clausus* of jurisdictional links which may be relied upon by a state to make the case that its national law has been contravened and thus must be enforced.[480]

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[477] SUA Convention Article 3 (1) (1) stipulates that "Any person commits an offence if that person unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation."

[478] Both the SUA Convention and the 2005 protocol in their preambles make explicit reference to the suppression and elimination of maritime terrorism and terrorist activities in whatever form they may manifest.

[479] SUA Convention Article 5.

[480] SUA Convention Article 6.

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The lack of clear distinctive characteristics between maritime terror and piracy has been described as unsound legal policy.[481] The author instant is inclined to agree with this view for the reason that while maritime terror and piracy may have some overlap in content and scope, it would be imprudent to paint the two international crimes with one broad brush – and the SUA Convention does this in the sense that it allows for a discretionary movement of the penal goalposts depending on how a prosecuting state views the gravity of an Article 3 contravention.[482] The very fact that accused persons would be neither terrorists under a state's national law nor pirates under domesticated UNCLOS provisions, but simply a criminal who unlawfully and intentionally seized or exercised control over a ship by force or threat thereof or any other form of intimidation – is in itself problematic. Given current geo-politics and policies passed by states such as the United States *vis-à-vis* terror – including the conceptualisation of the idea of radical Islamic terrorism, the enforcement of SUA Convention provisions could have unintended but dire consequences. Maritime states such as The United States and Israel would likely view an attack on ships sailing under their flags as more 'grave' if the attackers were Muslims from certain Middle Eastern states, than if they were nationals of other states.[483] After 9/11 in 2001 and the consequential United States led

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[481] H Tuerk (2009) *U. Miami Int'l & Comp. L.* 32.

[482] It is submitted that the term "gravity" allows for penal powers that are so wide as to be abused. Gravity denotes 'degrees' and that basically means an Article 3 contravention could attract a small fine as well as life imprisonment or capital punishment – depending on the degree of seriousness the prosecuting states deems the contravention. It is further submitted that this defeats the goal of international consensus on measures to eradicate maritime crimes.

[483] This fear is captured in the preamble of the SUA Convention, which provides: RECALLING resolution 40/61 of the General Assembly of the United Nations of 9 December 1985 which, inter alia, "urges all States unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security."

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fight against terror, many countries have passed national anti-terror laws.[484] The SUA convention, it is argued, opens the possibility to *de facto* try an accused as either a pirate or a terrorist depending on the subjective views of the prosecuting state. It is further submitted that the principle of legality may be raised against a prosecution of a crime formulated on the basis of the SUA Convention, given the uncertainty of the meaning and scope of Article 3 (1).

The SUA Convention, as highlighted above, does not allow universal jurisdiction over Article 3 contraventions. However, it does allow for a state to assert jurisdiction over unlawful acts which occurred in territorial waters of another state provided there is a nexus as detailed in Article 6.[485] This is a marked move from the UNCLOS which only applies on the high seas to the exclusion of territorial waters. Given that the SUA Convention does not expressly make reference to piracy, it perhaps would be difficult to justify universal jurisdiction to Article 3 contraventions. Whereas piracy is, in theory, an international crime *par excellence.*

Given the scope and content of the SUA Convention, it is submitted that the instrument is largely a teleological response to the shortcomings of the UNCLOS piracy provision rather than a framework to facilitate legally sound prosecution of piracy. Some scholars make the submission that the SUA Convention should not be construed to replace the UNCLOS but to complement it.[486] While it is true that it does not replace the UNCLOS, one is hard-pressed to conclude that there is a complementary relationship between the two instruments. It gives rise

[484]Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide since September 11*, 29 June 2012, ISBN: 1-56432-907-0, available at: http://www.refworld.org/docid/4ff6bd302.html [accessed 16 April 2018]

[485]SUA Convention Article 4.

[486]M Q Mejia, P K Mukherjee "The SUA Convention 2005: A Critical Evaluation of its Effectiveness in Suppressing Maritime Criminal Acts"*J Int'l Mar. L.* (2006) 170.

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to incoherence and legal uncertainty and thus does not contribute positively to the piracy framework. The fact that it has not been utilised by any of its signatories thus far is certainly testament to its perceived success potential.[487] South Africa is not a state party to the Convention, but it has adopted the maritime safety provisions thereof *verbatim*,[488] the implications thereof have been discussed in detail in Chapter IV of this research.

5 3 United Nations Security Council ("UNSC") Resolutions on Piracy

The UNSC's role as a stakeholder in the elimination of piracy is discussed in the first chapter of this research, but its prominence as a key international actor is rooted in its resolutions. The said resolutions are important in that they inform state action pertaining to security matters, the scope of which covers piracy – a modern day threat to regional stability and viability of strategic international shipping routes. The UNSC resolutions on piracy constitute a body of work that has occasioned some noteworthy developments at international level which can be described as the transforming if not bending of international law rules on confronting piracy. The UNSC is of course driven to present pragmatic solutions to pressing security problems, and the resolutions are indicative of the contextual approach by the UNSC – meaning the resolutions are (strictly speaking) a mechanism to resolve piracy in a given context as opposed to providing a generic approach. That said, some of the UNSC resolutions are adopted under the UNSC's Chapter VII powers, and the use of such powers is generally associated with the so-called 'by all necessary means' resolutions adopted in relation to

[487]See Y M Dutton "Maritime Piracy andthe Impunity Gap: Insufficient National Laws ora Lack of Political Will?" (2012) *Tul. L. Rev.* 1136 where she observes that Germany, the United States, Denmark, and other Western states have made decisions to release, rather than prosecute, captured pirates even though piracy is a universal jurisdiction crime and even though most states are parties to UNCLOS and the SUA Convention.
[488] Section 10 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act No. 33 of 2004.

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serious thwarting grave threats in armed conflict and times of war.[489] Thus, there arises the question as to the UNSC's view of maritime piracy and whether this means that anti-piracy activities by states are governed by international humanitarian law – or perhaps that piracy itself now should be viewed under the lens of international humanitarian law. This is a development that will be analysed in context.

The first of a series of UNSC resolutions focusing on piracy off the coast of Somalia was Resolution 1816.[490] The UNCLOS piracy provisions are identified by the UNSC as the existing framework governing piracy at international law, further that the UNCLOS is an expression of customary international law. In its language, the resolution uses the term 'piracy' in tandem with the phrase "robbery against vessels" and there seems to be a strong suggestion either that these are two distinct crimes which both fall under the purview of international law or that piracy and robbery at sea are intertwined such that one cannot be considered without the other.[491]Some authors are in fact of the view that the language used by the UNSC captures robbery at sea as a subset of piracy, and thus the interpretation that anti-piracy efforts must not be arrested by legal definitions of essentially largely indistinguishable

[489] See Article 42 *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. For a discussion see A M Vradenburgh "The Chapter VII Powers of theUnited Nations Charter: Do They Trump Human Rights Law" (1991) *Loy. L.A. Int'l & Comp. L.J*. 175.

[490] United Nations Security Council, *Security Council resolution 1816 (2008) [on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia]*, 2 June 2008, S/RES/1816 (2008) Adopted by the UNSC at its 5902nd meeting on 2nd June 2008.

[491] See Resolution 1816 preamble which inter alia provides "Gravely concernedby the threat that acts of *piracy and armed robbery* against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation." Also "Affirmingthat international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), sets out the legal framework applicable to *combating piracy and armed robbery*, as well as other ocean activities."

acts.[492]The use of such language by the UNSC blurs the line between a high sea and territorial waters crime in that robbery at sea is not necessarily a high seas crime whereas the international crime of piracy cannot occur on any body of water that forms part of the territory of any state. This expression by the UNSC is not novel, it has featured in literature discussing piracy under international law and has been discussed by national courts and actually validated as sound construction by a U.S court.[493] Nonetheless, robbery at sea is prosecuted by the state which exercises territorial, port-state, and/or coastal state jurisdiction because there exists a jurisdictional link to that state.[494] Customary international law separates piracy from other marine crimes such as maritime terror and robbery at sea, in fact there is no mention whatsoever of robbery in the UNCLOS provisions.

While piracy and robbery at sea are distinct legal concepts falling under the scope of different laws, the fact of the matter is that from a pragmatic viewpoint contemporary piracy does not comprise clear cut activity which at first glance can be categorised as piracy to the exclusion of all other maritime crimes – not in the least when piratical acts are compared to robbery against a vessel in territorial waters. The UNSC seems to concede this point by providing a working resolution to allow for anti-piracy initiatives that would not ordinarily be lawful action under international law, especially against customary international law rules on state sovereignty, jurisdiction, and of course the UNCLOS piracy provisions. This is countered with a reaffirmation by the UNSC of its respect for Somali statehood under international

[492]L Otto "Defining Maritime Piracy: The Problem with the Law" (2018) 31 *S. Afr'n J. Crim.* 134 136.

[493] See E Kontorovich "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" 2004 (45) *Harv. Int'l L.J.*183 who opines as follows "the crime of piracy consists of nothing more than robbery at sea" at 191. The Court in *United States v Said* discussed in Chapter III quotes Prof. Kontorovich as authority for the view that piracy and robbery at sea are identical.

[494] A Odeke "An Examination of the Bases for Criminal Jurisdiction over Pirates under International Law" 2014 (22) *Tul. J. Int'l & Comp. L.* 305.

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law.[495] Against the aforesaid, the UNSC resolution provides for a facility in terms of which naval states cooperating with the Somali Transitional Federal Government (which is recognised as the *de jure* government of Somalia) may lawfully enter into Somali territorial water to enforce laws governing both piracy and robbery at sea and employ all necessary means to fight piracy.[496] The UNSC imposed a 6 month timeline with an allowance to renew or extend the authorisation.[497] Taking care not to be misconstrued, the UNSC ensured to include an overarching caveat namely that the resolution is not an establishment of international law.[498]

Subsequent resolutions by the UNSC follow, generally without deviating from Resolution 1816 but developing in line with the substantive content thereof. Acting under Chapter VII powers, the UNSC in Resolution 1846 includes the SUA Convention as a framework for the creation of maritime offences, establishing jurisdiction, and prosecution transfer arrangements.[499] It therefore urges:

> "States parties to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the *successful prosecution of persons suspected of piracy* and armed robbery at sea off the coast of Somalia"

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[495] See Preamble providing "*Reaffirming* its respect for the sovereignty, territorial integrity, political independence and unity of Somalia."

[496] Paragraph 7of the Resolution provides that states may "(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery."

[497] See para 7 and 15 of the Resolution.

[498] See para 9 of the Resolution. This caveat features in subsequent resolutions as well.

[499] Para 15 of Resolution 1846 (2008) adopted by the Security Council at its 6026th meeting, on 2 December 2008.

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As discussed earlier in the chapter, the terms "piracy" and "pirate" do not appear at all in the SUA Convention, and yet the UNSC expressly links the prosecution of piracy with the Convention. It is unclear whether the UNSC is encouraging the use of the SUA Convention to remedy the shortcomings of the UNCLOS, or if it merely construes the SUA Convention as an instrument that can equally be used by State parties to prosecute persons suspected of piracy by creating crimes under the Convention which have definitional overlaps with piracy. In the preamble of Resolution 1851 the UNSC notes with concern the pirate catch-and-release practice by some naval states operating off the coast of Somalia, and in the same breath puts forward the SUA Convention as a legislative avenue to facilitate the prosecution of pirates. Once again the SUA Convention is associated with the prosecution of pirates, further casting doubt on the current piracy prosecution framework under customary international law.

Since the UNSC started adopting resolutions particularly focused on piracy off the coast of Somalia the encouragement of states to adopt national laws for the prosecution of piracy has been part of the drive to address the crime. In Resolution 1976,[500] the UNSC makes the undertaking to consider the establishment of an extraterritorial Somali piracy court.[501] From subsequent resolutions one can only deduce that upon consideration the UNSC abandoned this avenue in favour of specialised anti-piracy courts established in national jurisdictions, states such as Kenya, Mauritius, and Tanzania pioneered this initiative. The subject of an extraterritorial piracy court does not feature in any of the piracy resolutions adopted by the UNSC after Resolution 1976. The implementation of this policy of the UNSC was not

[500] Adopted by the Security Council at its 6512th meeting, on 11 April 2011.

[501] Para 26.

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without controversy, and drew criticism from legal commentators particularly on jurisdiction of national courts.[502]

It appears the UNSC – at least from a practical point of view – considers piratical actions to constitute armed robbery and *vice versa*. This lends credence to the view that the UNCLOS is outdated and thus does not suffice in regulating contemporary piracy, and perhaps more importantly that international law has to develop to provide for a progressive framework that effectively regulates the practical realities of modern day piracy.

5 4 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("Malabo Protocol") – Regionalisation of International Criminal Law

On 27th June 2014, the Assembly of Heads of State and Government of the African Union adopted the Malabo Protocol an instrument the purpose of which was to extend the jurisdictional scope of the African Court of Justice and Human rights.[503] Prior to the adoption of the Malabo Protocol, the Protocol on the Statute of the African Court of Justice and Human Rights had merged the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single Court known as the African Court of Justice and Human and Peoples' Rights ("ACJ").

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[502] See Chapter III of this research for an in-depth discussion.

[503] For an historical account of the process that led to the adoption of the Malabo Protocol see C B Murungu "Towards a Criminal Chamber in the African Court of Justice and Human Rights" 2011 *J. Int'l Crim. Just.* 1067.

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The Malabo Protocol establishes an International Criminal Law Section of the ACJ which is made up of a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.[504] The International Criminal Law Section is vested with competence to hear all cases relating to the crimes specified in the ACJ Statute.[505] There are fourteen international crimes specified in the Statute, comprising both core and non-core crimes. Specifically related to this research is the inclusion of piracy as a crime falling under the jurisdictional scope of the International Criminal Law Section of the ACJ.[506] The Malabo Protocol definition of piracy is substantively similar to the UNCLOS piracy definition, and thus offers no novel approach to modern piracy – it would seem that even under the regime of the Statute of the ACJ piracy remains a controversial crime which will be subject to development by the Court when there is a piracy case before it.

The move by the AU to set up an exclusively African international criminal law framework is a double-edged sword in that the benefits thereof differ in accordance with the vantage point of its beneficiaries. The historic conceptual genesis of an African international criminal court and the implementation thereof has not been without controversy, however on the balance there are some positives as well. Before discussing the intricate effects of having a regional criminal tribunal, a few general remarks must be made about the Malabo Protocol and the ACJ. The Malabo Protocol requires ratification of at least fifteen AU Member States before it can become operative.[507] The AU Assembly of Heads of State and Government made a recommendation for accelerated ratification of the Protocol.[508] As at May 2018 only 11 AU

[504]Statute of the African Court of Justice and Human and Peoples Rights, Article 16 (1) & (2).

[505]*Ibid* Article 17 (3).

[506] *Ibid* Article 28A (1) (5).

[507] Article 11 of the Statute.

[508] Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.547 (XXIV), para 15 and 17(b).

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Member States have signed the Protocol,[509] and only 5 have ratified it.[510] South Africa has done neither.

From a purely legal perspective, the Malabo Protocol is a welcome development in international criminal justice particularly considering the substantive content thereto. It is trite that the African continent has been associated with grave human rights abuses, civil strife, and impunity for commission of international crimes. The number of active armed international and non-international conflicts in Africa is not readily ascertainable, however it is trite that the region still faces challenges with rising hostilities, and it is the context of warfare that international crimes occur. Moreover, there are known perpetrators of international crimes that are yet to be prosecuted such as leaders and members of terrorist groups such as Boko Haram and the Lord's Resistance Army who have either claimed responsibility for devastating atrocities or are suspected of being responsible for gross human rights violations and international crimes in Africa. The Prosecutor's Office will certainly not be without work if the duties are executed in good faith. The tone of the Malabo Protocol seeks to address some of these issues, and the preamble thereto makes the following key observations:

> "The Member States of the African Union parties to the Constitutive Act of the African Union:
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> …
>
> FURTHER RECALLING their commitment to the <u>right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances,</u>

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[509] These are Benin, Chad, Comoros, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, Sierra Leone, Sao Tome & Principe, and Uganda.

[510] https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html

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> namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council;
>
> …
>
> FURTHER REITERATINGtheir respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments and acts of aggression;
>
> FURTHER REITERATINGtheir commitment to fighting impunity in conformity with the provisions of Article 4(o) of the Constitutive Act of the African Union."[511]

The emphasised assertions concerning the eradication of the culture of impunity within the broader context of African international justice constitute a positive development. The move towards a regional approach to international criminal law founded up concessions regarding historical regional shortcomings demonstrates, at least in principle, the AU's outlook in aligning the framework with other international legal instruments and institutions pursuing identical goals.[512] The said concessions can also be used to justify the expansive jurisdiction provided for by the Malabo Protocol amendments such as the competence to hold juristic persons accountable for international criminal law contraventions,[513] and competence to try crimes of an international character such as corruption and drug trafficking which do not necessarily fall within the category of 'core international crimes'.[514] It is thus laudable that there is a concerted regional effort to craft a comprehensive African approach to safety and security issues. The international community will be keeping an eye on the developments

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[511] Preamble of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

[512] Compare Rome Statute of the International Criminal Court.

[513] Article 46C.

[514] See Article 28A (8) and (11).

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around the ACJ, and the Court will have to feel the pressure of having to demonstrate that it is indeed a credible regional institution that will not be constrained by regional politics but driven by the ideals enshrined in the Statute's preamble. The Court's competence (or lack thereof) over Heads of State and senior state officials is worrying because it inadvertently allows for impunity which could be perpetual in the African context where some leaders have been known to commit gross human rights violations and international crimes to hold on to power indefinitely.[515] This is also not in line with the Rome Statute which and the Convention against Torture which do not allow for diplomatic immunities as a ground to avoid prosecution. South Africa has of course ratified and domesticated the said instruments and made this law, thus it would be interesting to see how it would navigate these divergent laws once it ratifies the Malabo Protocol.

The AU is of course a political organisation, and this is an important consideration when analysing the role of the AU sanctioned ACJ in African and international criminal justice frameworks. There is a widespread view amongst legal commentators that the Malabo Protocol is essentially a reactive move by the AU informed by the perception that the ICC and European courts are biased against Africans while impunity continues in the western world and other parts of the globe.[516] This stance by the AU calls into question the gravity of the impact the hostile relationship between African states and the ICC has on international criminal law on the one hand, and the relationship (if any) of the ICC and the ACJ going forward. The other concern is whether or not it will be possible for States to be party to both the Rome Statute and the ACJ Statute. The Rome Statute of the ICC incorporates the

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[515] Article 46A *bis*

[516]M V S Sirleaf "Regionalism, Regime Complexes, and the Crisis in International Criminal Justice" 2016 (54) *Colum. J. Transnat'l L.* 699; D Abebe "Does International Human Rights Law in African Courts Make a Difference?" 2016 (56) *Va. J. Int'l L.* 527; and T Murithi "Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan" 2015 (40) *Afr. Dev.*73.

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principle of complementarity and thus the relationship between national courts and the ICC is complementary in that the ICC will only hear trials within its purview when national courts are either unable or unwilling to prosecute.[517] Available literature on the mandate and activity of the ICC support the AU observation that although the court has international scope which allows it to investigate the commission of international crimes around the globe, its caseload and history is comprises only matters where the accused are of African origin.[518] Countries of the world, including western States, are always at war and there are frequent reports of possible international crimes being committed in contravention of the Rome Statute and a variety of Convention to which western democracies are party to.[519] The caseload of the ICC is therefore not reflective of the true picture of Western involvement in international crimes in comparison with their African counterparts. The ICC presents itself as a tribunal whose decisions and activity are governed solely by the law and pursuit of justice for victims of international crimes, however the *prima facie* selective prosecutions raise questions as to credibility and political pliancy. This lends some credence to the concerns by AU Member States. Political postures adopted by the AU and its predecessor – the Organisation of African Unity – towards the ICC is indicative of a shift induced by perceived biased in the international criminal justice framework, and it seems regional efforts to address gross human

[517] Article 1 of the Rome Statute provides: “An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.”

[518] See CS Igwe“The ICC's Favourite Customer:Africa and International Criminal Law”2008 (41) *Comp. & Int'l L.J. S. Afr.*294; L A Nkansah“International Criminal Court in the Trenches of Africa” 2014 *AJICJ* 8.

[519] For a general overview of international atrocities and the double standard in international criminal justice see https://www.ecchr.eu/en/topic/double-standards/.

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rights violations and implementing a permanent solution to impunity in Africa are desirable.[520]

Considering the now stale relationship between the AU and the ICC, coupled with the formation of the ACJ an argument is made that concerns of the negative impact of this arrangement on the development of international criminal law are progressively becoming irrelevant. The reasoning behind this argument is thus, the ICC's manner of approach to international criminal justice is in itself symptomatic of an imbalance in international relations which is biased against a particular region. The caseload of the ICC being exclusively African does not give a true reflection of global affairs, it in fact gives the impression that there is nowhere else on the planet where the Rome Statute provisions find application save for the continent of Africa – a sentiment reminiscent of 'unfortunate' western views about a dark Africa. Given the widely reported alleged atrocities by western militaries in conflict areas such Syria and Iraq, the question of international law being truly international arises. While much is made of the AU's (and Member States) decision to maintain a non-cooperative relationship with the ICC, it is important to bear in thought that African states played a crucial role in setting up the contemporary international criminal law framework and the ICC and bringing it to fruition. It is thus questionable whether any regional bloc or member thereof would subject itself to an international court which demonstrably is biased against members of that particular region, notwithstanding its stated international scope. Further, an argument is made that a regional criminal court is not necessarily a bad approach, not in the least for Africa. This not only takes care of the

[520]Grand Bay (Mauritius) Declaration and Plan of Action, adopted 16 Apr. 1999, O.A.U., Ministerial Conf. Hum. Rts. See also R J V Cole "Africa's Relationship with the International Criminal Court: More Political thanLegal" 14 *Melb. J. Int'l L.* 670 who gives an overview of the region's role in setting up the ICC leading up to the breakdown of the relationship between the ICC and the AU – with the latter directing Member States not to cooperate with former.

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"perceived bias" problem, but it also serves to illustrate the African commitment to observe international human rights norms and develop international criminal law. This is not to say that there is a brand of justice that only an African Court can mete out, however there is something to be said about fairness when one is judged by a peer approved court as opposed to being subjected to a court that has international scope but chooses to indict leaders of African origin.

In so far as piracy is concerned, the ACJ is the first regional/international tribunal with the jurisdiction to hear piracy cases. There have been suggestions at UN level, one of which included setting up a piracy court within the International Criminal Tribunal for Rwanda in Arusha Tanzania.[521] As cited earlier, the definition of piracy in the ACJ statute is substantively similar to the UNCLOS – only the use of a few terms differs but in terms of substance the provisions are virtually identical. This can be looked at from two opposite vantage points. Firstly, this can be seen as an opportunity for the ACJ (an international tribunal) to develop international jurisprudence which will inform future prosecutions of piracy under UNCLOS inspired provisions. As an international court it will have the power to not only interpret but to also develop the law and shed clarity where there are doubts. Thus far, there is no consensus as to the scope, content, and meaning of the crime of piracy – and as discussed in Chapter III there are conflicting national views on this issue. Secondly, this can conversely be looked at as a missed opportunity to develop international criminal law on piracy by a region within which piracy is rife and yet in close proximity with some of the most important international shipping lanes. Africa has enough experience with modern day piracy to have a fundamentally meaningful multilateral exchange on what constitutes piracy today, what may constitute piracy in the future given technological advances such as aerial

[521]UN Security Council, *Report of the Secretary- General on the Modalities for the Establishment of Specialized Somali Anti-piracy Courts*, S/2011/360.

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drones, and how international law can be developed to effectively prosecute piracy. Currently, the definition of piracy as provided in the UNCLOS and ACJ Statute is at best a reflection of archaic ideas that inform that definition. Nonetheless, the Malabo Protocol is a significant development for both piracy and international criminal law in general.

5 5 Emergence of Hybrid Criminal Courts

Contemporary evolution of international criminal law has also occasioned the emergence of the idea of hybrid criminal courts. The nature, mandate, and jurisdictional scope of such courts justify the descriptive title "hybrid". The idea behind special hybrid criminal courts is that there is established a national tribunal with jurisdiction to hear international crimes and whose make up comprises international jurists and judicial officers.[522] Thus it is hybrid in that it is not established under a regional or multilateral arrangement and yet it bears all the salient hallmarks of an international tribunal. As international criminal law has evolved since the days of Nuremberg and Tokyo tribunals, its evolution has not been without challenges – some of which are yet to be resolved. While the ICC is in principle a symbolic progression towards the legitimacy on international criminal justice, it too has been subject to much criticism for its failure and in particular how it has pursued a course which saw its caseload having African leaders as accused whereas international atrocities can be described as having a diverse pool of perpetrators. Hybrid courts represent an alternative to ICC proceedings without compromising justice for both the victims and the accused.

The Central African Republic is the latest state in the context of Africa to implement a hybrid court which will look into international crimes and atrocities carried out in that country from

[522]S Grover "Children's Participation in Holding International Peacekeepers Accountable for Sex Crimes" 2018 (38) *Child. Legal Rts. J.* 1 35 – 36.

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2003.[523] In August 2015 the Inter-governmental Authority on Development concluded the Agreement on the Resolution of the Conflict in the Republic of South Sudan. In Chapter V the said Agreement provides for the establishment of a hybrid court for South Sudan.[524] In the wider international context, the United Nations Human Rights Council has recommended the establishment of a hybrid court in Sri Lanka. The Council's report recommends that:

> "In these circumstances, OISL believes that for an accountability mechanism to succeed in Sri Lanka, it will require more than a domestic mechanism. Sri Lanka should draw on the lessons learnt and good practices of other countries that have succeeded with hybrid special courts, integrating international judges, prosecutors, lawyers and investigators, that will be essential to give confidence to all Sri Lankans, in particular the victims, in the independence and impartiality of the process, particularly given the politicisation and highly polarised environment in Sri Lanka."[525]

Hybrid courts present an alternative (or a complement) to traditional international tribunals the basis of which lies in multilateral agreements. However, they have been criticised as posing an existential threat to fully fledged international tribunals by undermining and avoiding their jurisdiction over international crimes.[526] Given the current regional tensions with the ICC, it may be argued that hybrid courts may well be the best available option to end impunity for offenders and render justice for victims of international crimes.

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[523] For a detailed discussion see P I Labuda "The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity" (2017) 15 J. Int'l Crim. Just. 175.

[524] Available at https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf (Accessed 04th April 2019).

[525] UN Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka (OISL)*, 16 September 2015, A/HRC/30/CRP.2 at Para 1246

[526] Laura A. Dickinson, The Promise of Hybrid Courts (2003) 97 *Am. J. Int'l L.* 295 296.

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As regards piracy, it is doubtful whether a specialised hybrid court would be suitable for purposes of prosecuting piracy. From available literature, hybrid courts are generally established in response to a state's internal atrocities amounting to international crimes and violations of human rights.[527] Thus it seems that the scope and focus of specialised hybrid courts are limited to crimes that occurred within the State for which such court is set up. There has been a recommendation at UN level that a specialised anti-piracy tribunal would be an appropriate response to the lack of piracy prosecution especially in Somalia where it is reported

that much of piracy in the Gulf of Aden can be traced back to.[528] Further there rises a question as to whether this is a desirable tone to set given that the world's oceans are expansive and piracy occurs in other parts of the world, and in fact can (at least in theory) be committed anywhere. It therefore follows that unlike international crimes such as genocide and crimes against humanity which have political undertones and are therefore likely to be localised, piracy is a regional problem the responsibility of which must be shared. In any event, the recommendation by the UN was never implemented. It is submitted that a permanent regionally sanctioned tribunal as envisaged in the Malabo Protocol is preferred.

5 6 Regional Policy on Piracy as an International Crime

[527] E Watchowski "The Hybrid Court of South Sudan: Progress towards Establishment and Sustainable Peace" (2017) 15 *Loy. U. Chi. Int'l L. Rev*. 117; H Hobbs "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy"(2016) 16*Chi. J. Int'l L.* 482; and B Van Schaack "The Building Blocks of Hybrid Justice" 44 *Denv. J. Int'l L. & Pol'y* 169.

[528] See U.N. Secretary General, Letter dated 24 January 2011 from the Secretary-Generaladdressed to the President of the Security Council (Somalia-Report of the Special Adviser to theSecretary-General on Legal Issues Related to Piracy off the Coast of Somalia), U.N. Doc. S/2011/30. For a critique of this approach see SL Hodgkinson "Establishmentof A Special Anti-Piracy Tribunal: Prospective and Reality - The Challenges Associated with Prosecuting Somali Pirates in A Special Anti-Piracy Tribunal"(2013) ILSA J. Int'l & Comp. L. 305.

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In 2002 the African Union established the Peace and Security Council within the Union ("AUSC").[529]Its mandate is stated as being "a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa."[530] Thus, this is an organ of the AU to which the region looks for direction as regards crisis situations requiring a collective response by Member States. One of the objectives of the AUSC is to engage in the promotion of stability and security in the African region.[531] This was a positive development when compared to the erstwhile Organisation of African Unity ("OAU") which subscribed to an absolutist approach to sovereignty and non-interference. Given the recent history of Africa as regards civil wars, terrorism, and other events which threatened the stability of the Region, the AUSC has been seized with a multiplicity of issues including dealing with the Lord's Resistance Army in East Africa, Boko Haram in West Africa, the Sudan Crisis, and many others. Piracy, which has seriously posed a menace to stability and security in Africa and adjacent oceans would be assumed a priority issue for the AU organ, however it has not been afforded adequate attention as a crime.There is hardly any communication or publication by the AUSC pertaining to either a clear strategy or policy on how the piracy problem in the region would be confronted.Piracy, it seems, suffers the disservice of being seen as a consequence of a bigger localised problem. The AUSC has made the following submission in relation to piracy:

> "While expressing appreciation for the efforts being exerted to address this problem, Council urges that the zeal and mobilization displayed by the international community in the fight against piracy and armed robbery at sea also apply to efforts required in order to bring to an

[529] This was done through the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002.

[530] Article 2*Ibid.*

[531] Article 3 (a) *Ibid*.

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> end the violence and suffering being witnessed on main land by Somalia. Council stresses that any lasting solution to the problem of piracy and armed robbery at sea off the coast of Somalia requires that the underlying problems within Somalia itself be effectively and swiftly addressed."[532]

Thus the view of the AUSC is not that piracy is a crime that must be met with a bespoke strategy, but it is of the view that underlying problems are responsible for the rise in piracy incidents and must therefore be resolved to eradicate piracy.[533] This approach is criticised for the reason that while it is accurate that root causes of criminal activity may be traced, that is not to say crime cannot be met with a strategy to suppress and eradicate. Piracy is a security issue the effects of which are felt well beyond the East African region. It therefore must be addressed as a threat as opposed to an unintended consequence of a bigger problem. The issues that plague Somalia have persisted for decades, and it is impossible to say how long it will take until Somalia has a unified stable national government. It is for this reason that the confrontation of piracy cannot be pegged onto the resolution of the situation in Somalia. Further, piracy is not solely an East African problem. West Africa is also dealing with a rise in piratical activity, and while the coastal States have their problems, they are stable relative to Somalia. Other regional security bodies such as the Arab Peace and Security Council have recognised the importance of addressing piracy as a security issue independent of the issues

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[532] African Union, Communique of the 163rd Meeting of the Peace and Security Council, PSC/MIN/Comm.4(CLXIII).

[533] See Also African Union, *Report of The Chairperson of the Commission on the Situation in Somalia*PSC/MIN/1(CCLXLV) 15th October 2010, Para 42 - where the Chairperson of the AUSC states that "In particular, the Commission stressed that piracy is a symptom of the broader challenges to peace and security in Somalia. Therefore, any effort to address piracy in isolation from its wider context would not produce the desired results."

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in Somalia.[534]The rise in piracy incidents off the West African coast has also suffered the disservice of a somewhat similar approach which basically makes the proposition that piracy in the Gulf of Guinea is largely 'petro-piracy.'[535] This view paints a picture of piracy in West African waters being primarily concerned with oil theft as a lucrative criminal enterprise, sometimes bordering on categorising oil as a *sine qua non* to piracy in the Gulf of Guinea.[536] Dr Otto after analysing the data on piracy occurrences in West Africa between 2009 and 2013, concluded that only 2% of the reported piracy incidents fell under the scope of petro-piracy.[537]It is therefore simplistic to adopt an approach whose premise is that piracy is a crime that can be resolved by addressing other issues, of course it may help to do so but piracy as a crime can be confronted with a dedicated strategy and a strong legal framework separate from issues which may be identified as root causes of piracy.

5 7 Role of the National and International Courts in Developing the Scope and Content of International Crimes

The gist of this research is determining the scope and content of the crime of piracy, and this of course is done with reference to commentary and literature on the subject of piracy and the

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[534] See United Nations Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1846 (2008),* 16th March 2009, Para 9 provides that "The League of Arab States held an extraordinary session of the Arab Peace and Security Council in Cairo on 4 November 2008, to examine the issue of piracy and armed robbery at sea off the coast of Somalia. The meeting issued a number of recommendations, condemned all instances of piracy and armed robbery at sea, called for closer cooperation with the Government of Somalia, and consultation, coordination and information exchange between Arab States and the relevant organizations and specialized agencies, including the Arab Sea Ports Federation, the International Maritime Organization, the United Nations and the African Union"

[535]L Otto "Maritime Security in the Gulf of Guinea: Establishing Law, Generating Order" (2016) *SAIIA Pol. Brief.*1 2.

[536]For a general overview of the links between piracy and oil in West Africa see M Murphy, "Petro-Piracy: Oil and Troubled Waters."(2013) 57 424-437.

[537]Otto (2016) *SAIIA Pol. Brief.*2.

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law of the sea. Much is made of the vagueness of the definition and the concomitant elements of the crime, and it thus raises the question as to how international criminal law has evolved as regards the ability of judges to develop international criminal law at the bench and the ability of States to legislate in deviation of the international law definitions of international crimes. This analysis becomes particularly relevant when considered against the developments pertaining to the Malabo Protocol and the introduction of the Criminal Chamber of the African Court. As stated, the Malabo Protocol committed to the UNCLOS piracy provisions notwithstanding the plethora of literature exposing the shortcomings of that definition. This raises the question whether definitions of international crimes as provided for in international instruments are so rigid as to not allow States (and regional bodies) to deviate therefrom.

There are a number of international conventions and treaties which provide for definitions and substantive meaning of international crimes, and when States ratify and domesticate international conventions, they can customise the laws to meet their unique and specific needs. In many States including South Africa, there are constitutional considerations and definitions of crimes must be tested against the principle of legality before they are made law. The national courts are then charged with the responsibility to interpret and apply the law. These considerations however pertain to the 'national side' of things, but they do have implications on the international aspect which in effect is the international community's interest that ultimately international crimes as defined in conventions and treaties must have a common meaning to all.

5 7 1 International Crime Interpretation and Development of International Criminal Law by National Courts

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This very issue was considered in the European Court of Human Rights ("ECHR") in the *Jorgic* case.[538] Mr Nicola Jorgic was charged with and convicted of Genocide in Germany. He appealed his conviction at the ECHR where he argued *inter alia* that his conviction was in breach of article 7 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[539] ("Convention") because the German courts adopted a wide interpretation of the crime of genocide in violation of Germany's own laws and public international law. Article 7 (1) of the Convention stipulates as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

The accused was charged under the German Criminal Code which provides as follows:

> "Whoever, acting with the intent to destroy, in whole or in part, a national, racial, religious or ethnical group as such, (1) kills members of the group, (2) causes serious bodily or mental harm to members of the group, (3) places the group in living conditions capable of bringing about their physical destruction in whole or in part, (4) imposes measures which are intended to prevent births within the group, (5) forcibly transfers children of the group into another group, shall be punished with life imprisonment"

The appellant argued that a mere attack on the living conditions or the basis of subsistence of a group did not meet the standard of the term "destroy" and therefore did not constitute

[538] *Jorgic v Germany*, no. 74613/01, ECHR 2007-II

[539] This Convention is now known as the European Convention on Human Rights.

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destruction of the group itself.[540] Further, he argued that the "ethnic cleansing" by Bosnian Serbs against Muslims in the Doboj region was done with the sole intent to expel that group from the region, but it was not done to destroy the very existence of Muslims. The appellant also made the argument that the German court had erred in its interpretation of the phrase "intent to destroy" in that it did so contrary to the interpretation of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), and diverging from established doctrine in international law which states that genocide is said to happen where extermination, murder, and deportation are means to physically and/or biologically destroy a narrowly defined group.[541] It for the aforesaid reasons that the appellant argued that he could not have foreseen that his actions would be construed by a court to satisfy the crime of genocide – essentially stating that the German courts' interpretation of genocide is so wide as to violate Article 7 of the Convention.

The ECHR primed its findings on the reasoning that even the best drafted legal provisions are subject to judicial interpretation and adaptation to meet contemporary circumstances.[542] In unpacking the meaning of Article 7 of the Convention, the ECHR held that the principle in the provision is that the law must be clear so that legal subjects know which actions will attract criminal liability. As regards the rationale of Article 7, the court held as follows:

> "Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, *provided that the*

[540] *Jorgic v Germany* Para 92.

[541] *Ibid* at Para 92.

[542] *Ibid* at Para 101.

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> *resultant development is consistent with the essence of the offence* and could reasonably be foreseen"[543]

The court considered the substantive elements of genocide and held as follows:

> "The national courts' interpretation of the crime of genocide could reasonably be regarded as *consistent with the essence of that offence* and could reasonably be foreseen by the applicant at the material time. These requirements being met, it was for the German courts to decide which interpretation of the crime of genocide under domestic law the wished to adopt. Accordingly, the applicant's conviction for genocide was not in breach of Article 7 (1) of the Convention"

The ECHR in *Jorgic* formulated a standard which guides as to the leeway that national courts have in interpreting the scope and content of international crimes. The court's tone suggests that definitions of international crimes are to be construed as principles rather than rules so as to allow national courts to approach interpretation that prioritises substance over form. What should be central to a court's interpretation, according to the ECHR, is that the essence of the crime should be aligned to whatever construction the court settles for. Therefore, it is not so much that a national court is allowed to deviate from international law, but rather that a court may when appropriate pursue an interpretation that develops the understanding of international crimes without compromising the essence of the actions that are criminalised. The ECHR also highlights the foreseeability element and attaches an objective test of reasonableness to it. From the language used by the courts, it seems that foreseeability pertains to criminal liability as opposed to foreseeing that certain acts will amount to a specific crime. Thus the accused must have the sense that his actions will attract criminal

[543] *Ibid* at Para 101.

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sanctions, or put differently that he should be aware that his actions are criminal and punishable by law.

Heeding the guidance of the ECHR and applying it to the UNCLOS in the South African context, it is submitted that the courts would have difficulties in attaining a conviction even with the latitude to develop the understanding of the international crime of piracy. The vagueness that plagues the UNCLOS piracy provisions render it difficult to determine the essence of the crime without disregarding some of its definitional elements. The high seas requirement is particularly problematic to the inquiry into the essence of the crime, because identical piratical conduct is judged differently depending on where it happened – unlike other international crimes which are concerned with the substance of the conduct and not so much where it took place.[544] A practical consideration linked to the high seas requirement is whether piratical activity occurring within territorial borders has the same effect as piracy which occurs only on the high seas. It clearly does as it compromises maritime security not only in the locale of the coastal State but beyond it. Without concise elements, it is difficult to establish the scope and content of the crime – and so a court would be hard pressed to carve out a defensible essence of the crime of piracy.

5 7 2 Law Development by International Tribunals

International tribunals form part of the framework upon which international criminal law and justice develops, and necessarily so. These institutions, be it permanent or *ad hoc* are created by statute which also lays down their mandate, have, through their decisions, an impact on

[544]*See Prosecutor v Tadic* Case No. IT-94-1-AR 72, Decision on the Defence Motion for Interlocutory Appeal onJurisdiction, 2 October 1995 at Para 94 where the court held that “"it does not matter whether the *'serious violation'* has occurred within the context of aninternational or an internal armed conflict". The emphasis is on the seriousness of the violation.

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field of international criminal law. The international criminal law regime complex is, like many other frameworks, not perfect and thus subject to critique from a variety of stakeholders including victims, accused, and commentators. With international tribunals at the centre of competing interests, the development of international criminal law in pursuit of justice must be understood in the context of the attendant pressures and constraints. In recent history there are two decisions of particular importance as regards the construction of international crimes which are also imperfectly defined, and perhaps impossible to define perfectly. These decisions are discussed with a view to gauge whether the latitude to develop the law can be a tool suited to resolving the issues that plague piracy. While it is trite that courts and international tribunals are adjudicative bodies and are thus not tasked with the mandate to make law, the parameters within which tribunals must venture in interpretation are not defined thus there is in reality a thin line between a court embarking on a course of progressive developing the law and judicial law making.

In *Prosecutor v Sam Hinga Norman*[545]the Appeals Chamber of the Special Court for Sierra Leone was seized with deciding whether the recruitment of children into armed forces was a war crime under customary international law at the time that the accused is alleged to have engaged in conduct amounting to child recruitment. The appellant further argued that even though the Geneva Conventions created an obligation on the part of States to refrain from recruiting children into armed forces, the international instruments did not criminalise such conduct. The prosecution argued that the crime of child recruitment was part of customary international law in 1996 when the accused engaged in recruitment of children in armed forces. Further, the prosecution relied on the *Tadic*[546]case to argue that individual criminal responsibility can exist notwithstanding lack of treaty provisions specifically referring to

[545] SCSL-2004-14-AR 72(E)).
[546]*Prosecutor v. Dusko Tadic*, 2 October 1995, Case No. IT-94-1-AR 72.

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criminal liability. The court having considered a variety of subject matter sources and the test for criminal liability for violations of customary international law as espoused in *Tadic*[547] it held as follows:

> "A norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty? Furthermore, it is not necessary for the individual criminal responsibility of the accused to be explicitly stated in a convention for the provisions of the convention to entail individual criminal responsibility under customary international law."[548]

This excerpt of course is borne from a deep context, but it does sum up the foundational thinking behind the Appeal Chamber's approach. This approach to the question of criminal liability was revolutionary in that conduct can be found to have been international customary law and criminal notwithstanding that there was inadequate authority as concerning the latter. Judge Robertson in his dissenting opinion raised some of the traditional issues that must be heeded before a norm is said to have crystallised into custom and before criminality can be attributed to such conduct. These include "factors such as Security Council resolutions stating that individuals will be held criminally responsible; to the existence of specific criminal laws and the decisions of criminal courts; to statements by warring parties accepting the

[547] *Ibid* at para 94. "The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3 [of the ICTY Statute]:
(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim[...);
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

[548] *Prosecutor v Sam Hinga Norman* at para 38.

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prohibition; to 'the behaviour of belligerent states and governments and insurgents', and to General Assembly and European Union statements assuming criminality; to legal interpretations published by the international committee of the Red Cross and so forth. Such a corpus of authority in relation to the crime of child enlistment was notably lacking in 1996."[549]

Judge Robertson summed up his findings thus:

> "So what had emerged, in customary international law, by the end of 1996 was an humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under fifteens or involving them in hostilities, whether arising from international or internal conflict. What had not, however, evolved was an offence cognizable by international criminal law which permitted the trial and punishment of individuals accused of enlisting (i.e. accepting for military service) volunteers under the age of fifteen. It may be that in some states this would have constituted an offence against national law, but this fact cannot be determinative of the existence of an international law crime: theft, for example, is unlawful in every state of the world, but does not for that reason exist as a crime in international law."[550]

When the majority decision is read against the dissenting judgement, the activism becomes clear. The very fact that the traditional factors indicative of international consensus as to the criminality of conduct was lacking and yet the court decided that these factors (or absence thereof) were immaterial as regards criminality is in itself activist. The court's approach amounted to a creation of an international crime and the manufacturing of a basis upon which to prosecute the accused. This case was followed by other decisions by international tribunals

[549] Dissenting Judgement of Justice Robertson at para 22.
[550] Ibid at para 33.

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which adopted a similar approach to interpretation of the scope, content, and meaning of international crimes.

In *Prosecutor v Ntaganda*[551] the accused appealed a decision of the ICC Pre-Trial Chamber where the one of the disputed matters was whether crimes committed by members of armed forces on members of such armed force fall within the scope of international humanitarian law or international criminal law and therefore the jurisdiction of the ICC the International Criminal Court. The Pre-Trial Chamber held that it had jurisdiction to hear the matter because members of the same armed force are not *per se* excluded as potential victims of war crimes as listed in the Rome Statute provisions or on the basis of international humanitarian law and international law.[552] Pertinent in the arguments made by the accused is the submission that the issues arising concern the *existence of a crime* in respect of an entire category of circumstances. On appeal, held as follows:

> "If customary or conventional international law stipulates, in respect of a given war crime, an additional element of that crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, *irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it*. This does not violate the principle of legality recognised in article 22 of the Statute, which protects accused persons against a broad interpretation of the elements of the crimes or their extension by analogy; therefore, it does not impede the identification of additional elements that need to be established before an accused person can be convicted."[553]

[551]ICC Appeals Chamber, June 2017, No. ICC-01/04-02/06 OA5.

[552]*Prosecutor v Ntaganda,* ICC Trial Chamber VI, 4 January 2017, ICC-01/04-02/06 at Para 54.

[553]Appeals Chamber, 15 June 2017, ICC-01/04-02/06 OA5 at Para 54.

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Even in the most conservative of descriptive language, the ICC's approach to the question as to relationship and range of influence between codified criminal definitions in its statutes and customary international law can at the very least be described as judicial activism. To say that the ICC ventured into the realm of law making would not be a preposterous observation as well. The court's reasoning deviated from "trite law" to formulate a new law that violence between members of an identical armed force constitutes an international crime, and it did so by reading an additional element to a crime which was designed to protect civilians as opposed to co-combatants. As regards international humanitarian law *vis-à-vis* co-combatants in an armed force, the Special Court for Sierra Leone held as follows:

> "It is trite law that an armed group cannot hold its own members as prisoners of war. The law of international armed conflict was never intended to criminalise acts of violence committed by one member against another, such conduct remaining first and foremost in the province of the criminal law of the State of the armed group concerned and human right law. In our view, a different approach would constitute an appropriate reconceptualisation of a fundamental principle of international humanitarian law. We are not prepared to embark on such an exercise."[554]

What the Special Court for Sierra Leone was not prepared to do did not inform the ICC's approach to interpretation of a legal question on an identical war crime. The activist approach of the ICC appears to be informed by moral considerations rather than positivist theory. The principle of international humanitarian law was in fact developed by the ICC's decision in *Prosecutor v Ntaganda* to incorporate the protection of members of an armed force against violence by members of the same armed group – and it does this by making it a war crime. The idea that members of an armed force qualify as 'protected persons' in an armed conflict

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[554] *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (the RUF accused) 2 March 2009 (Trial Judgment), Case No SCSL-04-15-T at para 1453.

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does in fact require a shift in thought as to the rationale of international humanitarian law and the scope thereof. The decision of the ICC went beyond establishing the existence of the crime in question but ventured into creating it.

Against the discussions above, this is the international criminal law jurisprudence that has developed from both a national court and an international tribunal perspective. International law is continually developed and there seems to be a judicial movement that employs the developing of law such that it borders on judicial law making.

5 8 Concluding Remarks

The problems associated with the prosecution of maritime pirates has long been an issue for individual states and regional blocs alike. Developments at international level illustrate the recognition by the international community of the shortcomings of the current framework, and perhaps also demonstrates a desire to cure such shortcomings. Unfortunately, efforts adopted thus far are either inadequate or still appeal to the piracy definition of old which is vague and thus open to varied manner of construction. For instance, the SUA Convention is not a piracy prosecution instrument, but it only covers activity best described as piratical in nature. The UNSC Resolutions fall short of a solution as well, and their undoing can be summed up into two theories. Firstly, UNSC Resolutions encourage UN Member (maritime) States to implement the current flawed framework to address maritime piracy. The main problem with this is that the uncertainty that plagues the UNCLOS trickles down to national courts and thus runs the risk of vitiating against the principle of legality and the rule of law in modern democracies. Perhaps the question which must be borne in mind is whether sound prosecution which passes constitutional muster can be expected from domesticating the UNCLOS provisions. The second Issue is that the United Nations Security Council

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resolutions focus primarily on military intervention and the stabilization of Somalia which is believed to be one of the root causes of piracy off the coast of Somalia and the Gulf of Aden. It is submitted that the militarization of the high seas is not a sustainable resolution to the piracy problem, it is very costly and therefore unsustainable. One might suggest that this is a solution that is temporarily viable only to maritime states with strong militaries and the financial power to sustain operations which involve policing and arresting Pirates on the high seas – however over time this may be burdensome to even the most militarily advanced states. The ACJ in principle provides an opportunity for the prosecution of piracy by an international tribunal. However, the ACJ Statute also uses the UNCLOS Piracy provisions so while it is a positive move to have an international tribunal, the legalities of prosecution of piracy remain. Having considered decisions of the ICC and other international tribunals, it may well be that the ACJ has the authority to develop the law pertaining to the international crime of piracy when it hears piracy cases. Similarly, and in consideration of the principle of complementarity, national courts also have leeway in developing international criminal law as was done by the German courts in *Jorgic*. These developments are a positive for the piracy course, but they do not negate the need to address the issues. In sum, regional and international developments in relation to piracy have generally remained faithful to the problematic UNCLOS provisions which in any event hold the status of customary international law. While attacks on international shipping lanes and on the high seas have since declined, it is important to note that ultimately those are the results of military campaigns run by individual states and clusters of states working in concert. There remains a vacuum in so far is the law is concerned.

The focus of the next chapter is on recommendations to resolving the challenges in the current legal framework governing piracy.

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CHAPTER VI: TOWARDS AN EFFECTIVE LEGAL FRAMEWORK TO PROSECUTE MARITIME PIRACY – CONCLUSION AND RECOMMENDATIONS

6 1 Introduction

6 2 Submissions as to the Definition of Piracy

6 2 1 Private Ends

6 2 2 Two Ships

6 2 3 High Seas

6 3 Submissions as to the Institutional Framework for Piracy Prosecution

6 4 Concluding Remarks

6 1 Introduction

The preceding chapters of this dissertation have constituted a commentary and critical analysis of the crime of contemporary piracy *vis-à-vis* the existing international and domestic legal and institutional framework. The aim has been to give comprehensive insight as to the

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issues that render piracy prosecutions controversial when juxtaposed against constitutional imperatives. Considering the content of the discussions preceding this chapter, the issues that obtain can be classified under two broad themes, namely a flawed piracy regime and the absence of a regional or international tribunal to prosecute piracy.

Piracy is of course an international crime *par excellence* and is subject to universal jurisdiction under customary international law which is codified in the UNCLOS piracy provisions. It continues to have a negative effect on the safety and security of regions wherein it occurs, which has led to some international responses essentially fashioned in military operations backed by the UNSC. This approach can best be described as a military-*cum*-political approach in that it does not form part of lasting legal framework but nonetheless constitutes a lawful use of military force crafted by the international community as a reactive measure to secure the oceans and affected regions. This strategy is reminiscent of the approach adopted by ancient Athenians who put together anti-piracy fleets and fortifications.[555] Shortcomings of military solutions to the piracy problem have already been discussed in previous chapters and will not be repeated here, but the point is made that such an approach is certainly not a blueprint for South Africa (or any other maritime state in the region) for there must be a sound legal approach accompanied by the necessary institutional setup which takes into account the need for complementarity. However, that is not to suggest that a military-cum-political approach is necessarily inimical to a legal approach – the approaches can sustain a synergetic existence.

While the study has exposed the weaknesses of the *status quo re* piracy, it must be conceded that some of these concerns were highlighted from the early to mid-1980s when the UNCLOS was ratified and replaced the 1958 regime, and yet there still is no solution because

[555]A Konstam *Piracy: The Complete History* (2008) 13.

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consensus is not an readily achievable feat. Since the 1980s to present there have been changes in the landscape of international criminal law, the crime of piracy itself has changed, and therefore the framework governing piracy cannot remain unchanged if it is to be an effective tool for the suppression of piracy. This chapter thus seeks to draw conclusions and make recommendations against the background of the discussion.

6 2 Submissions as to the Definition of Piracy

Against the discussions in previous chapters, it is concluded that the current definition of the crime of piracy on the high seas as provided for by the UNCLOS and domesticated in South Africa with a few changes by the Defence Act is vague as to content, meaning, and scope – therefore it offends international criminal law and constitutional imperatives such as the principle of legality. This definition was of course the result of an involved multilateral engagement by the international community, and as such it ought not to be simply discarded but viewed as a skeletal frame from which to develop a definition suited for contemporary piracy. In developing a definition, the caution by scholars in the Harvard Draft that "continual amendment should be obviated by foresight as far as possible"[556] must be heeded and observed as the point is neither to create a new crime altogether nor rigidly closely channel the current definition which will soon be outdated and thus require further amendment.

Piracy as a crime has in and of itself changed from the time the provisions of the UNCLOS were drafted to contemporary times. On the one hand sea travel, marine tourism, and world trade have evolved and intensified. On the other hand, technology such as geo positioning systems, speedboats, and automatic weaponry have influenced the manner in which piracy is

[556] "Harvard Research in International Law" (1932) 26 *Am. J. Int'l L.* 809.

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carried out. A much less considered dynamic in the fight against piracy is the impact the insurance and banking industries have had on the rising numbers of piracy incidents.

6 2 1 Private Ends

The first issue for discussion is the private ends requirement which is a vague concept the meaning and scope of which has been subject of creative conjecture at worst and deductive reasoning at best. Notwithstanding the uncertainty associated with this concept, it does have functional significance in that it at least gives us the general idea that private interests of perpetrators thereof inform that very nature of the crime. Given the nature of contemporary maritime piracy and the emergence of ocean borne activism, terrorism, and armed struggle activism it is difficult to say with legal certainty which motives would fall under the ambit of private or public ends, however that very distinction in a sense signals the need for a clearer definitive hallmark. It is submitted that given the overwhelming evidence that piracy is no longer associated with small-scale plunder but with the request of significant amounts of ransom as a condition of releasing the pirated vessel and crew to its owners, the amendment should entail abandoning the words “private ends” for “purpose of personal criminal economic gain”. This clearly makes piracy an economic or financial crime and thereby makes the private ends debate moot, and further aids in differentiating piracy from terrorism and other maritime security concerns. Where piratical activity is accompanied by demand for economic consideration to the exclusion of all else then one of the elements of the crime of piracy would have been satisfied. This would also address legal questions as to maritime activism by organisations such as Greenpeace, who it is submitted are not pirates – at least not in the sense that international law contemplates.

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There also is the question as to whether States still commission non-state actors to carry out piratical activity against enemy ships even during times of war. There is no record in modern academic literature or in the media of a piratical incident that was found to have been State sponsored, and while there has been commentary on the contemporary use of letters of marquee[557] no government has actually issued one in recent history. It is highly unlikely that in the foreseeable future international geo-politics are likely to see the return of the letter of marque or letter of reprisal. This projection is based on current and past developments around how the world views terrorism and state sponsored terrorism – this is more pronounced when considered against the background of the 9/11 terror attacks on the US World Trade Centre. Another factor to consider as regards state sponsored terrorism is the application of the UN Charter and in particular Article 2 (4) which stipulates as follows:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations"

From as early as 1970, the United Nations has linked this provision with the commission of state sponsored terrorism. The General Assembly made a declaration where it states that:

> "Every State has the duty to refrain from organising, instigating, assisting or participating in the acts of civil strife or *terroristacts* in another State or acquiescing in organized activities within its territory directed towards the commission of such

[557] T T Richard "Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy" (2010) 39 Pub. Cont. L. J. 411.

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> acts, when the acts referred to in the present paragraph involve a threat or use of force."[558]

The letter of marque considered in light of this Declaration can be construed as a State organising or instigating terrorist acts against another State. Article 2 (4) of the UN Charter was also relied upon by the UN Security Council when it dealt with the Libya over the Lockerbie incident which saw terrorists detonate a bomb on Pan Am Flight 103 where all on board perished. The Security Council's resolution the matter reiterated the General Assembly's position regarding state sponsored terrorism.[559] This position remains even when considered in the context of war and conflict. In decades past, the international community has through international instruments regulated methods in which States can engage in armed warfare. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("IV Geneva Convention")[560] provides that:

> "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited… Reprisals against protected persons and their property are prohibited"[561]

While letters of marque were, amongst other things, a tool in the arsenal of States in times of war they are now effectively outlawed as a method of war.[562] The IVth Geneva Convention

[558]Declaration on the Principles of international Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations – A/RES/2625 (XXV) 24 October 1970.
[559] See UNSC Resolution 748 (1992).
[560] 12 August 1949, 75 UNTS 287.
[561] Ibid Article 33.

[562] See *Prosecutor v Galic* IT-98-29-A (30 November) 2006 at Paras 86 - 90 where the International Criminal Tribunal for the Former Yugoslavia held that the prohibition of terror as enshrined in the IV Geneva Convention

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makes it unequivocal that reprisals against civilians and their property is prohibited as a method of warring with an enemy State.

In contemporary maritime piracy the private ends requirement is obsolete, and it is recommended that it be abandoned. It is a requirement that serves no purpose when considered against the discussion above. While naval States may have sanctioned private individuals to carry out piratical activity in medieval times, there is no report of this practice in modern international law – and given the current framework there will not be any. Further, even from an interpretation point of view the discussion as to whether this requirement covers piratical activity motivated by politically held views is now moot – given the international instruments and municipal laws on terrorism. It is submitted that even activism activity by organisations such as Greenpeace falls under the purview of terrorist activity notwithstanding that they are largely fashioned on noble pursuits. It is further submitted that Piracy as a crime should be limited to ship hijacking for the purposes of demanding a ransom for release – this would be a clear and definite requirement as opposed to private ends which is a vague and irrelevant concept.

6 2 2 Two Ships

The two ships requirement is also criticised as a handicap in the current framework in that mutinies are not covered, this lends the piracy framework to limited application which could result in either impunity or prosecution for crimes analogous to piracy, and potentially unintended consequences such as adaptation of *modus operandi* by pirates. For instance, if a

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is prohibited as a matter of customary international law. *Cf.* the Declaration of Paris discussed in Chapter II, however it must be noted that the abolition of Privateering, Letters of Marque and Reprisals *via* this declaration only applied inter se the Signatories.

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band of stowaways arose mid-voyage outside the territorial waters of any state and took the vessel by force and demanded a ransom the two ships requirement would not be met and thus they could not be tried as pirates notwithstanding that their criminal intention was to commit piracy. In the case of mutinies, the law of the vessel's flag State applies – but if a mutiny went beyond internal revolt and amounted to piracy surely that threat to maritime security becomes a concern to the international community.

A case in point is the *El Hiblu* hijacking (disregarding that it happened on territorial waters) where there was not another ship but persons who were already aboard the ship violently assumed control of it. The two-ship requirement in effect provides a defence to a piracy charge, and one would be hard pressed to articulate a logical rationale as to substantive difference of a stowaway or crew member from an accused who boarded the vessel from another vessel when in fact, they exercised identical *mens rea.* If indeed this defence succeeded pirates would be inclined to adapt their criminal activity so as to minimise exposure to harsh sanctions under the piracy regimes. While the Geneva Convention of 1958 *trauvaux preparatoires* are supportive of a two ships requirement,[563] it is submitted that a progressive piracy regime ought to be comprehensive. After the *Achille Lauro* incident and the 9/11 attacks on the World Trade Centre, it is not implausible that an elaborate scheme to board a vessel ostensibly as legitimate passengers only to illegally rise up and assume control of that vessel mid-voyage can be carried out successfully. The question becomes whether the perpetrators of the aforesaid crimes would have been classified as terrorists if they had demanded a ransom from the owners of the vessels they hijacked.

[563]Summary of Replies from Governments and Conclusions of the Special Rapporteur *(1956)* 2 *Y.B. Int'l L. Comm'n*18**,** U.N. Doc. A/CN.4/97/Add.1 to 3.

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Piracy must also not be viewed with an archaic eye which ignores the possibility that pirates are in fact criminals whose ways will evolve with the progression of time. Given the fast pace at which technology advances coupled with the fact that pirates are reported to use technology and electronic gadgetry, the two-ship requirement may soon become irrelevant and out of touch with modern methods of hijacking ocean borne vessels. Technologies such as unmanned aerial vehicles which make it possible to stage an attack remotely may well be used by pirates in the future, and when they are, the two ships requirement will once again be under scrutiny because an unmanned aerial vehicle cannot reasonably be said to be a ship or ocean vessel. Thus there has to be cognisance of the evolving weaponry and technological landscape.

6 2 3 High Seas

The high seas requirement is a distinguishing feature between piratical activity which occurs in territorial waters of a state and that which occurs on the high seas. The distinction is so pronounced that even in instruments such as the Jeddah Amendment to the Djibouti Code are This requirement is criticised as a superficial differentiation, the consequences of which precludes illegal activity in territorial waters from prosecution as piracy under international criminal law. However, the UNCLOS provides that only government vessels may effect arrest and seizure of pirates and pirate ships,[564] further the right of hot pursuit does not apply to instances where pursuit commences from the high seas onto territorial waters (colloquially known as reverse hot-pursuit).[565] Thus, while the UNCLOS piracy provisions make piracy a high seas crime, the exercise of investigative jurisdiction is also confined to the high seas.

[564]Article 102 read with Article 105.
[565] Article 111 of the UNCLOS.

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This has led to *adhoc* political solutions such as Security Council Resolution 1816 which was adequate for the reason that such an approach was necessary given that piratical activity on territorial waters threatened regional or international maritime peace and security – as is the case with territorial waters off the coast of Somalia. This approach is favoured over a purely legal approach because it can be customised to suit the particular context for which it is formulated, so for instance with Somalia the Resolution only allowed particular states to enter Somali waters for purposes of suppression of piracy and this allowance was time bound. This approach also allows coastal states to be part of the solution to security concerns within their territorial waters.[566]

That said, the high seas requirement is useful only on account of the protection of the territorial rights that coastal States ought to enjoy – even so, it is not the foundational provision for territorial protection as this is provided for in Article 111 of the UNCLOS. There is no solid indication that classical piracy made a distinction between high seas and territorial waters when dealing with piracy. The focus was on substance over form. Moreover, if as legal scholars we are to present doctrinal arguments that piracy is an international crime *par excellence*, then it should present as other international crimes do – that is to say whenever conduct occurs and it bears the hallmarks of piracy then it should be treated as such notwithstanding the geographic location where it happens. Piracy does not stop being a menace to maritime security when it occurs in the territorial waters of a coastal state, and the effects thereof are not trivialised by the fact that it occurred in territorial waters. When a vessel is hijacked and held for ransom in territorial waters the effects thereof have an impact on the marine economy as a whole – which is not restricted by territorial borders. Of importance to note is that the submission does not advocate for the coastal state surrendering

[566] For instance, Resolution 1816 required cooperation with the recognised Government of Somalia.

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its jurisdiction over territorial waters, but rather that coastal states should try piratical acts on territorial waters as an international crime – as they would try piracy occurring on the high seas. This will allow for a comprehensive approach to piracy by concentrating on the substantive essence of the crime. There is no notable reason that justifies the high seas requirement, not in the least if an argument is made that piracy is an international crime and its impact on global maritime security is pronounced. All of piracy is an attack on maritime security interests.

It is submitted that the high seas requirement militates against a comprehensive global approach and therefore should be abandoned so as to align the substantive scope and content of piracy with contemporary piracy. All of piracy should be prosecuted as an international crime by national and international tribunals.

6 3 Submissions as to Institutional Framework for Piracy Prosecution

The numerous challenges associated with piracy prosecution have been discussed at length, and though these challenges are as old as the UNCLOS piracy provisions there has not been an international tribunal with competence or mandate to hear piracy cases until recently – this had been left to national courts and as a result the law governing piracy has remained static even with the issues obtaining. The most recent and welcome development on this front is the Malabo Protocol which creates a regional criminal court for Africa with jurisdiction to hear a host of international crimes including piracy. The establishment of a regional criminal court has some far-reaching consequences for the international criminal law landscape, the most prominent being the relationship between the ICC, African states, and the regional court. However, in so far as piracy is concerned this is a positive step as it provides an opportunity to develop the law.

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This research has shown that the prosecution of piracy at national level has been a challenge for many states, it is thus submitted that a regional/international approach is favoured taking into account the need for complementarity. A regional tribunal would be able to address many of the hurdles that individual states face when confronted with the piracy prosecution problem such as securing the attendance of witnesses and lack of resources to sustain maritime prosecutions. Thus, when a Member State is unable or otherwise unwilling to prosecute, the regional court will ensure that impunity is not perpetuated. That said, from a regional security perspective it is important that the Peace and Security Council of the African Union plays a more prominent role in formulating policy and issuing directives which are geared at addressing piracy as an international crime as opposed to treating it as an unintended consequence of the fragility of one country in the region. As has been discussed, piracy is also occurring off the West African coast too under the watch of governments considered to be functional.

In so far as South African is concerned, there are two available avenues to remedy the shortcomings of the Defence Act. Firstly, it is submitted that the Defence Act piracy provisions must be repealed, and a new anti-piracy statute be enacted as has been done with other international crimes such terrorism, human trafficking, and torture. When one considers different South African legislation domesticating international crimes, and in particular jurisdiction provisions thereto, the common thread is that extraterritorial application of the law is expressly provided for – leaving no doubt that the proscribed conduct is subject to universal jurisdiction and thus a suspect who enters into the territory of South Africa can be detained and tried in South Africa notwithstanding the lack of a traditional nexus to establish jurisdiction. South African courts have in *obiter* recognised piracy as an international crime

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subject to universal jurisdiction. Thus, it is submitted that the piracy provisions in the Defence Act ought to be repealedin favour of a dedicated piracy statute which will be aligned with the prevailing international crimes framework in South Africa. Secondly (and alternatively), the Defence Act piracy provisions can be piracy provisions could be included in the International Crimes Bill as one of the crimes governed by the proposed statute. The former recommendation is favoured over the latter for the reason that the International Crimes Bill as an ICC withdrawal effort by South Africa has a negative impact on South Africa's approach to international criminal justice, and from a policy point of view it sets a bad precedent which undermines much of the regional leadership efforts that have defined South Africa as a regional leader and champion of international criminal law. Moreover, the International Crimes Bill much like the ICC Act is focused only on core international crimes, thus piracy is not suited to the general scheme and scope of the Bill.The general recommendation therefore is that a new legal framework is needed to make provision for the definition of piracy, universal jurisdiction, and the enforcement of the anti-piracy measures.

As regards the substantive meaning, scope, and content of the crime of piracy it is recommended that a new definition be adopted inthe new piracy law in South Africa. This definition will retain piracy's international crime status but make provision for clear and concise elements of the crime. A working definition tendered is as follows:

> Piracy means the direct or indirect unlawful assumption of control and seizure of a maritime vessel on all parts of the sea including territorial waters and the exclusive economic zone, with the intent toeither demand a form of financial consideration from the vessel owners as a condition precedent for the release of the vessel and its crew or to unlawfully retain the cargo of the vessel.

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It is submitted that this definition is progressive without compromising on the essential elements which have been the mainstay of piracy from classical ages to contemporary times transcending geographic location, culture, and race. Piracy is therefore a universal concept like other international crimes, and so with the proposed definition South African law would find relevance regardless where and by whom piratical acts were committed.

6 4 Concluding Remarks

The crime of piracy predates the recognition of international criminal law as a recognised body of enforceable law that could hold individuals accountable and assign criminal responsibility. However, even before the international community could convene to create international institutions to drive the international criminal justice program, piracy was already recognised by naval nations that piracy in the world's oceans created a common enemy. In the early ages they were referred to as enemies of all mankind, sailing under no flag, and not protected by the laws of any state. This was perhaps a befitting description of pirates as the concept of an international criminal would not have been developed at the time. So they were outlawed and in medieval England they were summarily executed if convicted. During time of war, pirates were commissioned by letter of marque and reprisal to attack and plunder ships sailing under the flag of enemy states. During times of peace, pirates would in any event attack and loot any vessel indiscriminately for personal gain. Then there was a time when piracy was thought to have disappeared and was not a matter of international concern, only for it to re-emerge and as global affairs started to be addressed under the umbrella of multilateral organisations such as the League of Nations and the United Nations after the League, piracy featured in the agenda and was included in two conventions, the last of which

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was the UNCLOS which crystallised customary international law. Today pirates are no longer considered enemies of mankind; they are criminals carrying on an enterprise that affects maritime security the same when it did in historical times. Given the prevalence of piracy attacks in West and East Africa, the menace to global marine travel and international trade invoked the attention of the world's superpowers, and the response was pragmatic – military resources were mobilised and there has been a drop in attacks particularly in the Gulf of Aden and off the coast of Somalia since the intervention of the EU and countries in North America and Scandinavia. While a military approach was effective, there has not been an effective legal approach to addressing piracy. A legal approach is necessary because it would underscore national approaches to prosecuting pirates. Furthermore, military intervention is very expensive and therefore unsustainable – it certainly does nothing to develop the law.

Much discussion has been had about international criminal law in general and piracy as a crime, and recommendations on how to approach the issues have been made. Piracy continues to pose a serious threat to the security of maritime navigation upon which international trade, travel, and tourism rely. Given its international dimension, it will continue to flourish if maritime nations address a common problem in silos. Moreover, from a regional perspective, the duty to eradicate piracy should not be outsourced to western militaries – but should be met with a cohesive regional legal and institutional framework. The adaptation of both the international law and South African domestic law framework governing piracy would be a step towards the realisation of a goal common to regional and international maritime nations. Currently the framework is inadequate to deal with the phenomenon of piracy.

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