ACADEMY BRIEFING No. 1

Counterpiracy under International Law

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Introduction

Academy Briefings are prepared by staff at the Geneva Academy of International Humanitarian Law and Human Rights (the Geneva Academy) to inform government officials, officials working for international organizations, non-governmental organizations, and legal practitioners about the international legal implications of important contemporary issues. This Briefing addresses the international legal implications of counterpiracy, looking at the legality of acts to counter piracy by both states and private maritime security contractors.

The Briefing covers the following specific issues:

- The nature, extent, and impact of modern piracy,
- The definitions of piracy and armed robbery at sea under international law,
- Key actions taken by the international community and individual shipowners to counter piracy,
- The lawful seizure of a pirate vessel under international law,
- Counterpiracy operations on land,
- Powers to arrest and detain suspected pirates,
- The duty to rescue at sea,
- The prosecution of suspected pirates (including the legal authority to prosecute, obstacles to prosecution, and the right to a fair trial), and
- The transfer of suspected pirates from one jurisdiction to another for prosecution (including transfer agreements and the principle of *non-refoulement*).

A set of conclusions and recommendations for future action complete the Briefing.

A. The phenomenon of modern piracy

Nature and extent of piracy

There has been piracy 'for as long as people and commodities have traversed the oceans'.[1] A belief that it had entered a period of terminal decline in the twentieth century[2] has been proved incorrect. Indeed, the recrudescence of piratical attacks has been rapid over the past ten years, in the Indian Ocean, especially off the coast of Somalia, but increasingly also in the Gulf of Guinea.[3] Worldwide, a total of 102 piracy attacks were reported to the International Chamber of Commerce's International Maritime Bureau (IMB) in the first quarter of 2012. As a result of these attacks, 11 vessels were hijacked, four seafarers died, and 212 crew members were taken hostage.[4]

The absence of a functioning government in Somalia[5] and its lack of commercial opportunities have combined with a long coastline along one of the busiest areas of ocean in the world to make the Gulf of Aden an epicentre of modern piracy.[6] Just over half (53%) of all reported piracy attacks in 2011 occurred off the Somali coast.[7] At the same time, though the number of Somalia-related incidents increased overall, from 219 in 2010 to 237 in 2011, the number of successful hijackings decreased from 49 to 28.[8]

The latest available figures, however, suggest a possible downward trend in piracy after years of steady increase. In the period 1 January through 12 July 2012, the IMB received reports of 69 hijacking incidents by Somali pirates, a reduction of 32 per cent compared with the same period in 2011.[9] With the aid of 'mother ships'—vessels used as operational bases to launch attacks that can stay at sea for months at a time—Somali pirates are travelling further afield and have reached as far south as the Mozambique Channel and as far east as the Maldives, an unprecedented operating range.[10]

Although Somali piracy was initially perceived to be a desperate and opportunistic response by impoverished Somali fishermen whose livelihood was threatened,[11] it has become a highly organized, sophisticated 'business'. During 2011, 31 ransoms valued at US$160 million were paid to Somali pirates, an average of approximately US$5 million.[12] Indeed, piracy off Somalia 'has increased so much that it is now considered a form of transnational organized crime, complete with established procedures, a successful business model and well-organized and well-funded backing'.[13] According to the UN Secretary-General:

1 'Introduction', in B. A. Elleman, A. Forbes, and D. Rosenberg (eds), *Piracy and Maritime Crime: Historical and Modern Case Studies*, Newport Papers, No. 35, (Newport, RI: Naval War College Press, 2011), p. 1.

2 See, for example, A. Cassese, *International Criminal Law*, Second Edition (Oxford: Oxford University Press, 2008), pp. 12, 28. See also E. D. Dickson, 'Is the crime of piracy obsolete?', 38 *Harvard Law Review*, 1924–5, p. 334.

3 See UN Security Council Resolution 2039 (2012). The Gulf of Guinea is a stretch of water defined by Cape Palmas in Liberia to the west and Cape Lopez in Gabon to the south. In between are a number of coastal countries, include Benin, Cameroon, Côte d'Ivoire, Equatorial Guinea, Ghana, Nigeria, Sao Tomé and Principe, and Togo. These ten countries are commonly called the 'Gulf' states. In recent years, the Gulf of Guinea has become an increasingly important supplier of fossil fuels. A. Nodland, 'Guns, Oil, and "Cake"', in B. A. Elleman, A. Forbes, and D. Rosenberg (eds), *Piracy and Maritime Crime: Historical and Modern Case Studies*, *op. cit.*, p. 192.

4 IMB, 'Piracy and Armed Robbery against Ships, Report of the Period 1 January–31 March 2012', April 2012, p. 22. It should be noted that the IMB includes reports of armed robbery at sea as well as piracy in its statistics. Armed robbery at sea covers piratical-type acts that are carried out in a state's territorial waters. For more detailed discussion of the difference between the two terms see, below, Section B.

5 Somalia's Transitional Federal Government (TFG) has effective control of very little of the country. See, for example, International Crisis Group, 'Somalia: The Transitional Government on Life Support', Africa Report No. 17021, February 2011. *Al-Shabaab* militants, who recently adhered to *al-Qaeda*, continue to hold large swathes of Somali territory. See 'Somalia's al-Shabaab join al-Qaeda', BBC, 10 February 2012.

6 About US$965 billion of cargo bound for Europe passes through the high-risk area off the coast of Somalia, according to Justine Greening, the UK Secretary of State for Transport. Cited by R. Sheridan and M. W. Bockmann in 'Ships Deter Pirate Stalkers by Signaling Armed Guards' Presence', *Bloomberg News*, 22 May 2012.

7 Based on figures taken from IMB, 'Piracy and Armed Robbery Against Ships, Report of the Period 1 January–31 December 2011', January 2012, p. 24.

8 *Ibid.*, p. 22.

9 See, e.g., "Special report: Pirates well-organised", Reuters, Nairobi, 13 August 2012. IMB, 'Piracy and Armed Robbery against Ships, Report of the Period 1 January–31 March 2012', April 2012, p. 22.

10 IMB, 'Hostage-taking at sea rises to record levels, says IMB', International Chamber of Commerce (ICC), 17 January 2011, and BBC, 'Somali Pirates seize ship off the Maldives', 26 March 2012.

11 See, for example, 'Report of the Special Adviser to the UN Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN doc. S/2011/30, 25 January 2011, §12; S. Coffen-Smout, 'Pirates, Warlords and Rogue Fishing Vessels in Somalia's Unruly Seas', Chebucto Community Net; M. N. Murphy, 'Piracy and the Exploitation of Sanctuary', Chapter 13 in J. H. Norwitz (ed.), *Armed Groups: Studies in National Security, Counterterrorism, and Counterinsurgency* (Newport, RI: Naval War College Press, 2008); and Gary E.Weir, 'Fish, Family and Profit', Chapter 13 in B. A. Elleman, A. Forbes, and D. Rosenberg (eds), *Piracy and Maritime Crime: Historical and Modern Case Studies*, *op. cit.*, especially pp. 210–2.

12 One Earth Future Foundation, *The Economic Cost of Somali Piracy 2011*, February 2012, p. 21.

13 UNODC, 'Awash with money – organized crime and its financial links to Somali piracy', Vienna, 25 May 2011.

> Naval Forces estimate that there are about 50 main pirate leaders, around 300 leaders of pirate attack groups, and around 2,500 'foot soldiers'. It is believed that financing is provided by around 10–20 individuals. In addition, there are a large number of armed individuals guarding captured ships, and numerous ransom negotiators.[14]

There is some, albeit limited, evidence of a possible link to armed non-state actors (ANSAs) in Somalia, especially *al-Shabaab*, designated a terrorist organization by the United States of America (USA) as well as other states.[15] In July 2011, it was reported by Reuters that ransoms paid to Somali pirates to free merchant vessels were ending up in the hands of *al-Shabaab*, laying shipping groups open to accusations of breaching international sanctions or even providing material support to terrorism.[16]

John Steed, the principal military adviser to the UN special envoy to Somalia and head of the envoy's counterpiracy unit, claims that links between armed pirate gangs and Somalia's *al Qaeda*-affiliated ANSAs are becoming firmer. According to the UN Office on Drugs and Crime, pirates are increasingly launching their cross-ocean raids from the *al-Shabaab*-controlled southern coastal city of Kismayu. Recruitment of pirates from the region was also on the rise.[17] Though most experts contest the existence of an ongoing operational relationship, in February 2011 *al-Shabaab* members seized several pirate gang leaders in Haradhere and forced them to accept a multi-million dollar deal under which the pirates would hand over 20% of future ransoms.[18]

Recognising the scale and debilitating effect of Somali piracy, the UN Security Council has used its powers under Chapter VII of the UN Charter to adopt several resolutions. These authorize foreign states to enter Somali territory, in co-operation with the Transitional Federal Government (TFG), for the purpose of conducting counterpiracy operations. In mid-May 2012, European Union (EU) naval forces conducted their first raid on pirate bases on the Somali mainland; they reported the destruction of several boats.[19]

Although the Somali coastline dominates statistics on modern-day piracy, attacks occurring elsewhere are by no means insignificant in number. For the first quarter of 2012, the IMB received formal reports of 10 attacks in Nigeria—the same number as for the whole of 2011[20]—and is aware of a further 34 incidents. Under-reporting of attacks from Nigeria is habitual and has been described by the IMB as a 'cause for concern'.[21] Further, for the first time an attack was reported by Benin, which was attributed also to Nigerian pirates. In the first quarter of 2012, attacks by Nigerian pirates resulted in the deaths of two crew members and another 42 were taken hostage. Although Nigerian pirates are reported to make far fewer attacks than Somali pirates, and typically hold vessels for days rather than months, Nigerian attacks have proved far more violent.[22]

Elsewhere in the world, piracy continues to be reported in Indonesia, where 18 attacks occurred in the first quarter of 2012 (up from five for the same period in 2011).[23] Although the anchorages off Chittagong remain vulnerable, the number of incidents reported by Bangladesh fell to 10 in 2011 (from 23 the previous year), due to operations by the Bangladesh Coast Guard. Attacks also declined

14 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts', UN doc, S/2011/360, 15 June 2011, Annex I, §3.

15 See, for example, 'Report of the Special Adviser to the UN Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN doc. S/2011/30, 25 January 2011, §24. See also K. Hyun-kyung, 'Do Somali pirates have links with al-Qaida?', *Korea Times*, 26 January 2011. In 2009, a senior Saudi Arabian *al-Qaida* operative called on Somali jihadists to launch attacks on 'crusader' forces in the Gulf of Aden. In an audiotape acquired by CBS News, Sa'id Ali Jabir Al Khathim Al Shjhri a.k.a. Abu Sufian al-Azdi said: 'To our steadfast brethren in Somalia, take caution and prepare yourselves. … Increase your strikes against the crusaders at sea and in Djibouti'. *Ibid*.

16 R. Lough, 'Piracy ransom cash ends up with Somali militants', *Reuters*, 7 July 2011. The UK Chamber of Shipping said it would continue to consider piracy a criminal activity, until proof emerged of financial ties between the pirates and ANSAs in Somalia. *Ibid*.

17 *Ibid*.

18 US President Barack Obama signed an Executive Order in April 2010 (US Executive Order 13536 of 12 April 2010) barring US citizens from financial dealings with pirates. In June 2012, it was reported that UK banks were far less willing to provide significant quantities of dollars for ransoms following the decision by British Prime Minister David Cameron to create a 14-nation task force in February to stop such payments. According to Cyrus Mody, Assistant Director of the International Maritime Bureau in London, however: 'The only way you release a crew is by payment. It's true that ransoms are the key fact that keep piracy going, but unless there's another option available, then pirates are going to take out their frustrations on the crew if they aren't paid.' M. W. Bockmann, 'Somali Pirates Battled in London as Banks Curb Dollar Supply', *Bloomberg Businessweek*, 22 June 2012.

19 'Somali piracy: EU forces in first mainland raid', BBC, 15 May 2012.

20 At least six Nigerian piracy incidents occurred at distances greater than 70 nautical miles from the coast, suggesting that fishing vessels are being used as mother ships to attack ships further away from the Nigerian coast. IMB, 'Piracy and Armed Robbery Against Ships, Report of the Period 1 January–31 March 2012', April 2012, p. 22.

21 IMB, 'Piracy and Armed Robbery against Ships, Report of the Period 1 January–31 December 2011', p. 24.

22 *Ibid*., p. 24; and IMB, 'Piracy and Armed Robbery Against Ships, Report of the Period 1 January–31 March 2012', April 2012, p. 22.

23 IMB, 'Piracy and Armed Robbery Against Ships, Report of the Period 1 January–31 March 2012', April 2012, p. 22.

Box 1. Examples of piracy attacks worldwide in the first quarter of 2012

Somalia

14 February 2012. Twelve pirates armed with guns in a 20-foot-long dhow attacked and boarded a fishing vessel around 35 nautical miles off Masirah Island, Oman. The pirates took hostage the eight crew members on board the fishing vessel, and stole their cash, personal belongings, two drums of diesel, and all food items before escaping.

2 March 2012. A Panamanian Chemical Tanker, MT Royal Grace, was attacked by armed pirates in a skiff around 211 nautical miles off Masirah Island, Oman. The pirates attacked, boarded, and hijacked the tanker, taking all 22 crew members hostage. They sailed the vessel to Somalia where the vessel and crew continue to be held.

26 March 2012. Armed pirates hijacked the Eglantine, a Bolivian bulk carrier around 200 nautical miles south-west of Minicoy Island, India. Pirates took the 23 crew members hostage and sailed the vessel towards Somalia. Later a warship freed the crew and vessel. However, two crew members were killed and one injured. Twelve pirates were detained by the authorities.

11 May 2012. Ten pirates armed with automatic weapons in two skiffs hijacked a Greek oil tanker in the Arabian Sea. The Greek tanker was carrying close to 1 million barrels of crude oil and 23 crew members. All contact with the tanker has been lost; it is believed that the pirates have taken the vessel into Somali waters.

Nigeria

13 February 2012. Eight armed pirates boarded a bulk carrier that was waiting for berthing instructions some 110 nautical miles south of Lagos. Pirates took the cook hostage and ordered him to take them to the master's cabin where they shot dead the master and removed the safe from his cabin. The pirates then attempted to enter the cabin of the chief engineer, who sustained fatal injuries when he fell while attempting to escape from a window. The pirates escaped on two waiting speedboats.

Singapore Straits

26 February 2012. An unlit speedboat approached a tug towing a barge 11 nautical miles from the Singapore Straits. Four pirates armed with guns and knives boarded the tug while two other pirates remained in the speedboat. The pirates ransacked the tug before making their escape with property and cash.

in the South China Sea, where 13 incidents were reported in 2011 (compared to 31 in 2010).[24]

The impact of modern piracy

Piracy has a significant impact on global trade. According to one authority, 90% of world trade is carried by sea and 40% of seaborne oil passes through the Indian Ocean.[25] Larger vessels and oil tankers offer potentially rich pickings and are especially vulnerable to piracy because they travel at low speed compared to other vessels.[26]

The One Earth Future Foundation conducted a study to quantify the cost of piracy as part of its 'Oceans Beyond Piracy' project, which concluded that piracy cost the global economy between US$6.6 billion and $6.9 billion in 2011. The shipping industry bore US$5 billion of this cost;[27] military operations to combat piracy cost a further US$1.27 billion, while a relatively meagre US$16.4 million was used to prosecute and imprison captured pirates. The rise in piracy has triggered a huge increase in the use of private maritime security companies (discussed later): up to US$1.16 billion was spent on private maritime security in 2011.[28]

24 *Ibid*.

25 Presentation by Peter Hinchliffe, Secretary-General, International Shipping Federation, to the Maritime Security Conference 2011, Kiel, Germany, 2–5 May 2011.

26 See, for example, D. Singh, 'Somali pirates' attack on India-bound Ethiopian ship foiled', *Neptune Maritime Security*, 25 July 2011.

27 One Earth Future Foundation, *The Economic Cost of Somali Piracy 2011*, February 2012, p. 21.

28 *Ibid*.

Aside from its financial consequences, piracy has taken a heavy human toll. In 2011 alone, 24 seafarers lost their lives at the hands of pirates and 1,118 seafarers were taken hostage, many of whom continue to be held.[29] Piracy has also had a debilitating effect on the ability to deliver food and other humanitarian aid to Somalia, which has in turn cost an unknown number of Somalis their lives.[30] Though this consideration may seem inappropriate, pirates also face obvious risks as a result of their unlawful actions. They may be killed or may drown while attacking or attempting to board a vessel. They may even be killed once they have been captured, in violation of applicable international law.[31] Those involved seem to consider that the potentially huge rewards of a successful hijacking outweigh these risks, however. As Roger Middleton notes with regard to Somali pirates:

> Many have noted the basic factors that have made Somalia such a prominent and, from the pirates' point of view, successful place of piratical activity. A long coastline alongside some of the busiest shipping lanes in the world provides plenty of targets, and offers places to wait with captured vessels during ransom negotiations. A population with few opportunities provides a steady supply of young men ready to take part in this risky activity: In a country where per capita GDP is estimated at around $600 per year, the $10,000 available to even the most junior pirates from a successful attack and ransom is hugely attractive, and far outweighs the risks of capture or drowning. Most importantly, the lack of a government able — or, in some places willing — to tackle the problem means pirates can operate safely and without fear of interruption.[32]

29 *Ibid*.

30 The UN Security Council has expressed concern at the threat piracy poses to the 'prompt, safe and effective delivery of humanitarian aid to Somalia'. UN Security Council Resolution 1846 (2008), Preamble.

31 One journalist reports that in the summer of 2010, Russian Special Forces stormed the *Moscow University* oil tanker, killing one of the 11 pirates holding the ship. The authorities claimed to have released the rest of the pirates, but then mysteriously reported that 'they could not reach the coast and, apparently, have all died'. Dmitry Medvedev, Russia's President, gave some indication of what that meant when he said the country would 'have to do what our forefathers did when they met the pirates until the international community comes up with a legal way of prosecuting them'. P. Swami, 'We're firing blanks in the war against piracy', *Daily Telegraph*, 12 April 2011.

32 R. Middleton, 'Trends in Piracy: A Global Problem with Somalia at the Core', Paper presented at Conference on Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracy, Dubai, 18–9 April 2011, p. 1.

B. The definitions of piracy and armed robbery at sea under international law

Historical definition of piracy

The term 'piracy' should be distinguished from 'privateering'. Privateering occurred when a private vessel was authorized by a state, during wartime, to attack and capture enemy vessels. Letters of marque, the written authorization provided by a government, distinguished a privateer from a pirate.[33] As a result, a privateer was not a pirate as long as his acts of violence were confined to enemy vessels, because such acts were authorised by the belligerent in whose service he was acting.[34] Privateering was abolished by the 1856 Paris Declaration Respecting Maritime Law because privateers, who were permitted to keep the spoils of their attacks, became greedy and abused the authorizations they received to attack vessels for personal gain.

Until the 1958 Geneva Convention on the High Seas (High Seas Convention) no authoritative definition of piracy existed in treaty law. The first formal attempt to provide one was made in the early 1930s when the codification project of the Harvard Researchers Committee sought to define the 'special jurisdiction' under which 'piracy' could be prosecuted.[35] The project produced the 1932 Harvard Draft Convention, the scope of which was determined by the 'international law of piracy' although it was considered 'expedient to modify in part the traditional jurisdiction because of modern conditions'.[36] The origins of the modern definition of piracy lie firmly in the Harvard Draft Convention, which strongly influenced the draft of the 1958 High Seas Convention and in turn the 1982 UN Convention on the Law of the Sea (LOS Convention), where the modern definition of piracy is found.

The modern definition of piracy

The definition in the LOS Convention[37] repeats, in almost identical language, the definition set out in Articles 14–22 of the High Seas Convention.[38] Almost all states are party to at least one of these two instruments, making this definition generally accepted. Based on Article 101 of the LOS

Box 2. The international legal definition of piracy*

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

* Article 101, LOS Convention.

33 On the terms 'privateering' and 'letters of marque' see, for example, B. A. Elleman, A. Forbes, and D. Rosenberg (eds), *Piracy and Maritime Crime: Historical and Modern Case Studies*, *op. cit.*, pp. 2–6.

34 L. Oppenheim, *International Law: A Treatise*, Third Edn (1920-21) Vol. I, §273.

35 J. Bingham *et al.,* 'Harvard Research in International Law: Draft Convention on Piracy', (1932) 26 *AJIL Supp.* 739, p. 786 (hereinafter, the Harvard Commentary).

36 *Harvard Commentary*, p. 786.

37 The LOS Convention entered into force on 16 November 1994 and has been ratified by 162 states as of 21 June 2012.

38 The High Seas Convention came into force on 30 September 1962. A total of 63 states had ratified the Convention as of 21 June 2012. For further discussion of the various definitions of piracy suggested before the adoption of the Geneva Convention, see the Harvard Commentary, pp. 769–80.

Convention, the modern law definition of piracy contains four elements:

1) the use of unlawful violence, detention or depredation;[39]
2) committed for private ends;
3) committed on the high seas; and
4) by the crew of a private vessel against another vessel, its crew, or cargo.

Therefore, to constitute piracy under international law, unlawful violence, detention, attack, or plunder must be committed by the crew or passengers of a private ship or aircraft against another ship or aircraft, including its crew or cargo, and the acts must be motivated by 'private ends'. The requisite act or acts must take place on the high seas or within a state's Exclusive Economic Zone.[40] 'Inciting' or 'intentionally facilitating' an act of piracy is also an offence.[41] A person who intentionally provides weapons or a boat to individuals knowing that these items will be used to carry out an act of piracy, for example, would be guilty of facilitating the offence.

Using 'unlawful violence'

Violence may typically be used by private citizens only for self-defence or the defence of others; other violence is unlawful by definition. For these purposes, it is irrelevant whether firearms are used or not.

'For private ends'

The term 'private ends' is not defined in the High Seas Convention or the LOS Convention. For this reason, the nature of the requirement that a piratical act must be committed for 'private ends' has been subject to debate. Some take the view that the intent of the act must be financial gain and that the term excludes acts that have a political or ideological motive.[42] If correct, this would bar the prosecution of politically motivated acts under counterpiracy laws.[43] Others take the view that the requirement serves to distinguish acts by private individuals from acts of a state or state agent.[44] We take the view that the latter interpretation is more persuasive: the absence of state authority determines whether or not acts can be classed as for private ends, not the actor's motivation.

The requirement that the acts be committed for 'private ends' first appeared in the Harvard Draft Convention which, as already stated, strongly influenced the High Seas and LOS Conventions. The Commentary that accompanies the Harvard Draft Convention cites numerous sources for definitions of piracy, dating back to the eighteenth century. The Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (1927) was one of the first to distinguish state-sanctioned acts from piracy. The Report stated: 'According to international law, piracy consists 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'.[45] Oppenheim, also writing in the 1920s, made a similar distinction.

> Private vessels only can commit piracy. A man-of-war or other public ship, so long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag State, which has to punish the commander, and to pay damages where required. But if a man-of-war or other public ship of a State revolts, and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence then committed are indeed piratical acts.[46]

39 'Depredation' means attack and plunder.

40 In other words, outside a state's internal waters and territorial sea. If attacks occur within territorial waters, they are often referred to as 'armed robbery at sea'.

41 Article 101(c), LOS Convention.

42 This is the understanding of the International Maritime Organization (IMO), for example. See 'Introduction: Southeast Asian Piracy: Research and Developments', in G. G. Ong-Webb (ed.), *Piracy, Maritime Terrorism and Securing the Malacca Straits*, Institute of Southeast Asian Studies, 2006, p. xiii.

43 However, such acts may be prosecuted under the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).

44 An advantage of this approach is that Somali pirates may not avoid prosecution by arguing that they are insurgents involved in a conflict with the Somali Transnational Federal Government and are attacking vessels for purely political reasons. See R. Geiß and A. Petrig, *Piracy and Armed Robbery at Sea, The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford: Oxford University Press, 2011), pp. 61–2; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), pp. 36–40; and M. Bahar, 'Attaining Optimal Deterrence at Sea' (2007), 40 *Vanderbilt Journal of Transnational Law*, pp. 1, 32. For further discussion of this point, see Annex B below, and see also Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea, op. cit.*, pp. 61–2.

45 League of Nations Document C.196.M.70 (1927) V, pp. 116–7 (our emphasis). As cited in *Harvard Commentary*, p. 775.

46 L. Oppenheim, *International Law: A Treatise*, Third Edn (1920-21), Vol. I, Sec. 273. As cited in Harvard Commentary, p. 777.

Brierly concurred with this view: '[A]n act cannot be piratical if it is done under the authority of a state, or even of an insurgent community whose belligerency has been recognised'.[47]

The Harvard Commentary cites Hall's International Law (Eighth Edition), which states that 'Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common: they are done under conditions which render it impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no state or organised political society, for by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject'.[48] Thus, as Guilfoyle has observed, the test of piracy lies not in the pirate's subjective motivation, but in the lack of public sanction for his acts.[49] The Commentary clarifies that:

> If the forces or employees of any state or government by mutiny or otherwise should seize a ship and use it to plunder on or over the high sea on their own account, this, of course, would be piracy and fall under common jurisdiction. The acts would be committed for private ends, not for public ends, and there would be no question of the immunity which pertains to state or government acts.[50]

Moreover, public acts are not defined by the motivation of the actors, but by whether they have state approval. It would be odd not to follow this reasoning. The LOS Convention is consistent with the reasoning of the Harvard Commentaries, making it clear that a public vessel becomes a private vessel, and thus capable of being involved in pirate activity, if its crew mutiny and take control of the ship.[51]

The Belgium Court of Appeal has also ruled that actions that are not state-approved fulfil the private ends requirement. Greenpeace argued before the Court that it had not committed an act of piracy when it attacked an allegedly polluting Dutch vessel because it was making a political protest. Rejecting Greenpeace's argument, the Court concluded that political motivation was no defence against a charge of piracy.[52]

'On the high seas'

As noted, under the definition of piracy, piratical acts must occur on the high seas or within a state's Exclusive Economic Zone (EEZ).[53] Attacks on ships within the territorial jurisdiction of a state, including its territorial waters,[54] are not considered piracy but are generally termed 'armed robbery at sea'.

The High Seas Convention defines the high seas 'as all parts of the sea that are not included in the territorial sea or in the internal waters of a State'.[55] State sovereignty over the seas is limited to the band of sea that is adjacent to a state's coastline (where it has one), known as the territorial waters. The high seas, defined strictly, are a space in respect of which no state can claim sovereignty.[56] A number of freedoms apply to the high seas, including freedom of navigation, overflight, the laying of cables and pipelines, fishing, and scientific research.[57] Vessels flying the flag of their state are entitled to claim non-interference by other states when travelling across

47 J. L. Brierly, *The Law of Nations*, First Edn (Oxford: Oxford University Press, 1928), p. 154.

48 Harvard Commentary, p. 771. For further discussion, see also pp. 799–804.

49 See, for example, D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), p. 36.

50 Harvard Commentary, p. 798.

51 Article 101(a) of the LOS Convention states that acts of piracy are committed from private vessels. Nonetheless, Article 102 of the Convention reads: 'The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft'.

52 *Castel John v. NV Mabeco* (1986), 77 *ILR*, 537.

53 Article 1, 1958 High Seas Convention; and Article 86, LOS Convention. The EEZ is an area of water that extends 200 nautical miles seaward of the territorial baseline of a coastal state. For the purposes of the definition of piracy under the LOS Convention, however, the EEZ is treated in the same way as the high seas. Article 58, LOS Convention.

54 The territorial waters (also known as the territorial sea) of a coastal state extend up to 12 nautical miles from the baseline. Each coastal state has the right to establish the breadth of its territorial waters so long as they do not extend beyond 12 nautical miles. Article 3, LOS Convention. Within its territorial waters, the coastal state exercises sovereignty, as an extension of territorial sovereignty. It enjoys sovereignty over the sea bed and subsoil, as well as the airspace over territorial waters. Article 2, LOS Convention; and Articles 1–2, 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Although the coastal state has sovereignty over its territorial waters, all other states have a right of innocent passage across them. Passage is considered innocent provided it does not prejudice the peace, good order, or security of the coastal state. The LOS Convention provides that criminal jurisdiction may not be exercised with regard to 'any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters'.

55 Article 1, High Seas Convention. Although the LOS Convention does not define the term, several of its provisions apply specifically to the 'high seas'. For the purposes of the definition of piracy under the LOS Convention, however, the EEZ is treated in the same way as the high seas. Article 58, LOS Convention.

56 Article 89, LOS Convention.

57 See the non-exhaustive list of freedoms contained in Article 87(1), LOS Convention; and Article 2, High Seas Convention.

the high seas. There are exceptions to this general rule of non-inference. One relates to piracy: all states have the right to investigate and if necessary seize vessels that are involved in acts of piracy.[58]

'Against another vessel or aircraft'

The definition of piracy under international law assumes that (at least) two vessels must be involved, one of which must launch an attack on the other. If a private ship or aircraft is hijacked by its own crew, this is not, strictly speaking, an act of piracy. The two-ship requirement was reportedly adopted to meet the 'insistence [that there be] some international factual element in the definition of piracy' in order to exclude offences that 'involve only ships and territory under the ordinary jurisdiction' of a single state.[59]

The 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention) closed the loophole in international law that the two vessel requirement had apparently created. The SUA Convention stipulates that it is an offence under international law for any person on board a ship unlawfully and intentionally to seize or exercise control over that ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; or to destroy or cause damage to a ship or its cargo which is likely to endanger the safe navigation of the ship. Unlike the crime of piracy, the SUA Convention applies anywhere at sea.

Customary law definition

Customary law is evidenced by a general practice[60] required by law (*opinio juris*),[61] and is applicable to all states, irrespective of adherence to relevant treaties. As stated within its preamble, the High Seas Convention is 'generally declaratory of established principles of international law' and is not a text that creates new laws or norms. Although a number of states declared upon ratification that its definition of piracy 'does not cover certain acts which under contemporary international law should be considered as acts of piracy and does not serve to ensure freedom of navigation on international sea routes', these concerns were not raised 20 years later when states adhered to the LOS Convention. In that Convention, no declarations were made by any states in respect of the articles dealing with piracy. Furthermore, according to the USA, which has not ratified the LOS Convention, the 2010 Digest of US Practice in International Law states that:

> [T]he actions and statements of the Executive Branch over more than six decades reflect the consistent US view that this definition [in Article 101 of the LOS Convention] is both reflective of customary international law and universally accepted by states.[62]

Furthermore, the definition of piracy in Article 101 has been copied both in regional treaties that address piracy[63] and UN Security Council resolutions.[64]

Armed robbery at sea

Armed robbery at sea is not defined under international law. The International Maritime Organization (IMO) Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery describes this crime as 'any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a state's internal waters, archipelagic waters and territorial sea'. The term includes inciting or intentionally facilitating such acts.[65]

What generally distinguishes armed robbery at sea from piracy is the geographical location of the act or acts. Whereas an act of piracy can only take place on the high seas (or within an EEZ), an act of armed robbery at sea can only take place in maritime zones that fall within a state's sovereignty – within a state's territorial sea, its archipelagic waters (all waters within the baseline), or its internal waters. With respect to armed robbery at sea, the state in whose waters the act took place is responsible for suppressing such acts.

58 Article 105, LOS Convention.

59 Stanley Morrison, writing in 1932, cited by Penny Campbell, 'A modern History of the International Definition of Piracy', in B. A. Elleman, A. Forbes, and D. Rosenberg (eds), *Piracy and Maritime Crime: Historical and Modern Case Studies*, *op. cit.*, p. 32.

60 Article 38, Statute of the International Court of Justice. *Asylum Case*, ICJ Reports (1950) p. 266. See also *Nicaragua v. United States*, *ICJ Reports* (1986), p. 98.

61 *Lotus Case, Permanent Court of International Justice*, Series A, No. 10 (1927), p. 18.

62 2010 Digest of US Practice in International Law, p. 11.

63 See, for example, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, 2005.

64 See, for example, UN Security Council Resolution 1851 (2008).

65 *2009 International Maritime Organization Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery*, Part 2.2.1.

C. Protecting shipping from pirate attacks

In 2011, a total of 30 states contributed military forces, equipment, and vessels to counterpiracy activities. On any given day, 10 to 16 military vessels are deployed in the Gulf of Aden and the Indian Ocean, patrolling an area ten times the size of Germany.[66] This military presence has been relatively successful in disrupting piracy attacks. However, its huge cost (estimated to be more than US$1.25 billion in 2011) and the ever-expanding range of pirate operations (as far east as the Maldives),[67] suggests that maintaining or improving on the *status quo* may impose an unsustainable drain on government resources.

In response to appeals by the UN Security Council (see Box 3), states and international organizations have adopted a range of measures to protect ships from piracy. The most prominent of these are discussed below.

Operation Ocean Shield

Operation Ocean Shield, NATO's contribution to international efforts to combat piracy off the Horn of Africa, began on 17 August 2009 after the mission received approval from the North Atlantic Council. Building on the experience gained during *Operation Allied Protector*, NATO's earlier counterpiracy mission, it adopted 'a more comprehensive approach' to counterpiracy efforts. It focuses on operations at sea but also assists regional states, at their request, to develop counterpiracy operations and capacity.[68] *Operation Ocean Shield* has carried out a number of rescue operations. Most recently, in May 2012, *TCG Giresun*, *Operation Ocean Shield*'s flag ship, intercepted a dhow with 14 suspected Somali pirates and seven Yemeni hostages on board.[69]

Operation Atalanta

On 8 December 2008, the EU Naval Force (EUNAVFOR) launched a counterpiracy operation titled *Operation Atalanta* off the coast of Somalia, in support of UN Security Council Resolutions 1814, 1816, 1838, and 1846. It aims to protect World Food Programme (WFP) humanitarian deliveries and to deter and disrupt pirate attacks on other vulnerable shipping.[70] The force's size fluctuates to take account of the monsoon seasons, which have a significant impact on the incidence of piracy, but typically it consists of five to ten surface combat vessels, one or two auxiliary ships, and two to four Maritime Patrol and Reconnaissance Aircraft. Including land-based staff, EUNAVFOR employs some 1,500 military personnel.[71]

The mission area of *Operation Atalanta* extends from the south of the Red Sea, across the Gulf of Aden, to the Western part of the Indian Ocean, including the Seychelles. This area of almost 4 million square kilometres is roughly 30 times the size of England.[72] According to the United Kingdom (UK):

> Operation Atalanta is achieving positive results in providing protection to WFP, African Union Mission in Somalia (AMISOM) reinforcements, and other vulnerable shipping. … It has delivered a significant reduction in the number of successful attacks in the Internationally Recognised Transit Corridor in the strategically critical Gulf of Aden through close cooperation with the international shipping industry.[73]

In 2012, the mandate of *Operation Atalanta* was extended to 2014, and its area of operations extended to include the coastal territory of Somalia, and Somalia's territorial and internal waters.[74] *Operation Atalanta*'s extended mandate is discussed further below.

66 One Earth Future Foundation, *The Economic Cost of Somali Piracy*, February 2012, p. 25.

67 BBC, 'Somali Pirates seize ship off the Maldives', 26 March 2012.

68 NATO, 'Operation Ocean Shield Current News', undated, during 2011.

69 NATO, 'NATOs Rapid Response Frees Hostages and Defeats Pirates', 12 May 2012.

70 UK Foreign and Commonwealth Office, 'The European response to piracy', last updated on 2 August 2012.

71 EUNAVOR Somalia, 'Mission', last accessed in May 2012.

72 *Ibid.*

73 UK Foreign and Commonwealth Office, 'The European response to piracy', last updated on 2 June 2011, *op. cit*.

74 The extension is currently valid to December 2014. Council of the European Union, 'Council extends EU counter-piracy operation Atalanta', press release, Brussels, 23 March 2012.

Box 3. Extracts from UN Security Council Resolution 1846 (2008)

Expressing again its determination to ensure the long-term security of World Food Programme (WFP) maritime deliveries to Somalia,

Determining that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region,

5. *Further calls upon* States and interested organizations, including the IMO, to provide technical assistance to Somalia and nearby coastal States upon their request to enhance the capacity of these States to ensure coastal and maritime security, including combating piracy and armed robbery at sea off the Somali and nearby coastlines;

6. *Welcomes* initiatives by Canada, Denmark, France, India, the Netherlands, the Russian Federation, Spain, the United Kingdom, the United States of America, and by regional and international organizations to counter piracy off the coast of Somalia pursuant to resolutions 1814 (2008), 1816 (2008) and 1838 (2008), the decision by the North Atlantic Treaty Organization (NATO) to counter piracy off the Somalia coast, including by escorting vessels of the WFP, and in particular the decision by the EU on 10 November 2008 to launch, for a period of 12 months from December 2008, a naval operation to protect WFP maritime convoys bringing humanitarian assistance to Somalia and other vulnerable ships, and to repress acts of piracy and armed robbery at sea off the coast of Somalia;

9. *Calls upon* States and regional organizations that have the capacity to do so, 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;

10. *Decides* that for a period of 12 months from the date of this resolution States and regional organizations 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 into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

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

Malacca Strait Patrols

The Malacca Strait Patrols are coordinated patrols of the Singapore and Malacca Straits undertaken by Indonesia, Malaysia, Singapore and Thailand to counter maritime piracy and terrorism. Established in 2004 by Indonesia, Malaysia, and Singapore, Thailand joined the initiative in 2008. 'Malacca Strait Patrols' is an umbrella name that comprises the Malacca Strait Sea Patrols, 'Eyes-in-the-Sky' air patrols, the Joint Coordinating Committee, the Intelligence Exchange Group, and a joint Standard Operating Procedure.[75]

Combined Task Force 151

Combined Task Force 151 is a US-led multinational task force composed of 25 states. It was established in January 2009 with a mission-based mandate to actively deter, disrupt, and suppress piracy, in order to protect global maritime security and secure freedom of navigation. *Combined Task Force 151* operates in the Gulf of Aden and off the eastern coast of Somalia and covers an area of approximately 1.1 million square miles.

75 MINDEF Singapore, Factsheet: Milestones of the Malacca Strait Patrols, 28 March 2008.

Other government operations

Some states are deploying military personnel on commercial vessels to act as armed guards against piracy. For example, France, Israel, and Spain all place military personnel, known as Vessel Protection Detachments (VPDs), on their flagged commercial vessels. This avoids the use of private maritime security contractors (discussed below) and is believed to be the approach preferred by most shipowners.[76] The UK has deployed VPDs on its flagged commercial vessels in the past but currently does not have personnel available to do so. It estimates that roughly 500 marines would be required to put VPDs consistently on UK ships travelling through high-risk areas.[77]

The Netherlands provides VPDs to certain vessels operating under its flag. The government reasoned that 'there will always be ships which, even if they implement all the Best Management Practices, run a real risk of falling prey to pirates. These ships are usually characterised by low freeboards, slow navigation speeds and limited manoeuvrability. The non-specific protection provided by the various counterpiracy operations may not always be sufficient, given the size of the operational area.'[78]

Italy also puts VPDs on its cargo vessels. In April 2012, Italian marines operating as a VPD on board an Italian oil tanker shot and killed two Indian fishermen after mistaking them for pirates. The incident occurred on the high seas and caused a major diplomatic row. Italy has argued that its marines fired lawfully in self-defence because the fishermen manoeuvred aggressively and ignored warning shots. India has argued that the marines used disproportionate force and should stand trial for manslaughter in India.[79] The marines were arrested in India and spent 105 days in Indian custody before being released on bail.[80]

Private Maritime Security Contractors

The huge area in which modern-day pirates operate means that military patrols will rarely be on hand to prevent attacks, creating a 'security gap'. As piracy has escalated, stretching state resources, an increasing number of shipowners and operators have invited private maritime security contractors (PMSCs) to help protect their ships and customers' cargoes.

PMSCs are employed to deter and if necessary ward off attacks against their clients' vessels. They will typically provide a range of services, including: risk assessments; practical advice on improving the security of vessels; anti-piracy training for crews; and armed or unarmed guards to escort vessels. It is estimated that at least one-quarter of the 42,450 vessels transiting the Gulf of Aden each year already employ PMSCs and the percentage is believed to be rising.[81] Such protection is not cheap; on average, a PMSC team (normally three persons) will cost US$50,000 per transit.[82]

Hiring PMSCs to protect commercial ships has certain advantages. The most prominent is the oft-repeated mantra that no vessel with armed guards on board has ever been successfully hijacked.[83] The presence of PMSC personnel also eases the burden on states of patrolling the riskiest areas. On the other hand, their widespread use may lead to an escalation of violence by pirates; there is also concern that PMSC personnel may use excessive force and that lack of regulation or oversight may cause failures of accountability.[84]

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76 Mark Brownrigg, Director-General, Chamber of Shipping, 22 June 2011, Oral evidence to the House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia: Tenth report of Session 2010–12*, HC 1318 2010-12, 5 January 2012, Q32.

77 Captain David Reindorp, 6 July 2011, Oral evidence to the House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia: Tenth report of Session 2010–12*, HC 1318 2010-12, 5 January 2012, Q261.

78 Advisory Council on International Affairs, Combating piracy at sea: a reassessment of public and private responsibilities, April 2011.

79 See, generally, D. Guilfoyle, 'Shooting fisherman mistaken for pirates: jurisprudence, immunity and State Responsibility', *European Journal of International Law (EJIL) Analysis,* 2 March 2012; and also M. Nalapat, 'The Italian Navy strikes again', *Sunday Guardian*, 21 May 2012.

80 Italian marines released on bail, *The Hindu*, 2 June 2012; see also 'Italian naval guards will have to undergo trial in India', *The Times of India*, 27 June 2012.

81 One Earth Future Foundation, *The Economic Cost of Somali Piracy 2011*, *op. cit.*, p. 17. The paper notes: '[T]his figure of 25% is an estimation of the entire year of 2011. From discussions with leading shipping industry representatives, we understand that the proportion of vessels employing armed guards increased rapidly throughout 2011, and by the end of the year this figure was closer to 50% of vessels.'

82 One Earth Future Foundation, *The Economic Cost of Somali Piracy 2011*, *op. cit.*, p. 17.

83 In a recent example, a US-flagged cargo ship was attacked by pirates in several skiffs. Though the PMSC team fired warning shots, the pirates continued to approach the cargo vessel and fired on it. The PMSC team returned fire and the pirates abandoned their attack. 'Maersk vessel attacked by pirates in the gulf of Oman', *Reuters*, 23 May 2012.

84 Recently leaked footage showed a PMSC appearing to use disproportionate force: see Bloomberg, Shooting to Kill Pirates Risks Blackwater Moment, 9 May 2012.

A growing number of states have endorsed the use of armed PMSCs on board commercial vessels to deter piracy attacks, including Germany, the UK,[85] and the USA.[86] The International Maritime Organization has implicitly endorsed the use of armed PSSPs by releasing two Interim Recommendations on their use,[87] one for flag states,[88] and the other for shipowners, ship operators, and shipmasters.[89] While not endorsing the use of private armed security, the IMO refers to the increasing use of private armed security personnel on ships to deter, and protect ships from, piratical attacks.[90]

The IMO states that placing armed guards on vessels to provide security should only be considered following a risk assessment. The guide for ship owners includes sections on: the selection of private security;[91] insurance cover;[92] command and control of private security on board a vessel;[93] management of firearms;[94] rules for the use of force;[95] and reporting.[96] The guidance emphasizes that a flag state's jurisdiction, and the laws and regulations imposed by a flag state on use of private security companies, all apply to a flag state's vessels; the laws of port and coastal states may also apply.

The guidance recommends that flag states should establish a policy on whether private security will be authorized and under what conditions.[97] When states assess this question, the IMO recommends that they should take into account the possibility that violence could increase if vessels carry weapons and armed personnel on board.[98]

Following a high-level debate in May 2012 on the subject of privately contracted armed security personnel, the IMO's Maritime Safety Committee agreed to develop new guidance for private maritime security companies. Its intention is to enrich existing advice, promote the formation of national policies, and harmonize international policy.[99] In addition, the American Society for Industrial Security (ASIS International) has been developing a standard entitled 'Quality Assurance and Security Management for Private Security Company's Operating in the Maritime Environment – Guidance'. This standard is intended to provide guidance for private security companies operating in the maritime environment, 'consistent with respect for human rights, contractual and legal obligations'.[100]

The shipping industry has, though, been concerned that crews might demand armed guards on all vessels, increasing costs in a competitive and economically troubled industry.[101] Recent

85 The UK has authorized the use of armed guards on UK flagged ships solely when:
- The ship is transiting the high seas in any part of the High Risk Area (bounded by Suez and the Straits of Hormuz to the North, 10°S and 78°E);
- The latest Best Management Practices for Protection against Somali-Based Piracy are fully respected but, on their own, are not deemed by the shipping company and the ship's master to provide sufficient protection against acts of piracy; and
- Use of armed guards is considered to reduce the risk to the lives and well-being of those on board.

UK Department for Transport, 'Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against Piracy in Exceptional Circumstances', London, November 2011.

86 Other states that allow the deployment of armed PMSCs on their ships include Cyprus, Denmark, Finland, Greece, Hong Kong (China), India, Italy, the Netherlands, Norway, Spain, and Switzerland.

87 'IMO approves further interim guidance on privately contracted armed security personnel', London, 16 September 2011.

88 *Interim Recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area (MSC.1/Circ.1406).*

89 *Interim Guidance to ship owners, ship operators, and shipmasters on the use of privately contracted armed security personnel (PCASP) on board ships in the High Risk Area (MSC.1/Circ.1405).*

90 Introduction, §1, MSC.1/Circ.1405; and Introduction, §1, MSC.1/Circ.1406. See, for example, 'United States Promotes the Use of Armed Anti-Piracy Contractors on Ships', 4 November 2011; 'Piracy Spurs Private Gulf of Aden Navy to Start Within Five Months', RBC Radio, 8 November 2011; and 'Armed guards to protect UK ships', BBC, 30 October 2011.

91 Section 2, MSC.1/Circ.1405.

92 Section 3, MSC.1/Circ.1405.

93 Section 3.3, MSC.1/Circ.1405.

94 Section 3.4, MSC.1/Circ.1405.

95 Section 3.5, MSC.1/Circ.1405.

96 Section 3.6, MSC.1/Circ.1405.

97 §5, MSC.1/Circ.1406.

98 §3, MSC.1/Circ.1406. In its analysis of a well-known engagement with suspected pirates that was filmed and uploaded to the internet (see Bloomberg, Shooting to Kill Pirates Risks Blackwater Moment, 9 May 2012), the President of Nexus Consulting Group argued that it 'is not coincidental' that pirates subsequently fired seven RPG rounds and more than 300 bullets at an oil tanker in the Arabian Sea. Nexus, Nexus Consulting Analysis on Use of Force Video, 9 May 2012, p. 29.

99 IMO, 'Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', MSC.1/Circ.1443, 25 May 2012.

100 ASIS International, 'Quality Assurance and Security Management for Private Security Companies Operating in the Maritime Environment - Guidance (201X)', undated, but accessed 11 July 2012.

101 Growing fuel costs and falling freight rates have left the shipping industry struggling. According to Sealntel Maritime Analysis, container shipping lines lost more than US$11.4 billion in 2011. See Shooting to Kill Pirates Risks Blackwater Moment, Bloomberg, 9 May 2012.

developments lend credence to this concern. In June 2012, two seafarers sued two companies, Heidmar and Marida Tankers, for failing to place armed guards on a ship that fell into pirate hands. Two assistant engineers from the *Marida Marguerite* filed their complaint in the USA, arguing that taking the ship through pirate-infested waters violated US Jones Act rules.[102] According to court documents, Bahri Chirag and Dangwal Sandeep claimed the vessel was unseaworthy because it lacked 'adequate security, including but not limited to, weapons and non-lethal methods of resisting intruders'. They suggested the vessel did not have an adequate security system, the crew did not have an adequate security plan, and the owners did not complete negotiations with the pirates in a timely manner. With their colleagues, Chirag and Sandeep were held for eight months.[103]

Use of force by PMSCs

Though most PMSCs are professional organizations that approach their work responsibly and employ highly qualified ex-military personnel, the rapid growth and profitability of the counterpiracy market has encouraged a boom in maritime PMSCs. Not all meet the professional standards set by the best.[104] This gives rise to particular concerns with respect to the use of force by PMSC personnel.

PMSC personnel—unless explicitly operating on behalf of a state—have the same rights and responsibilities as any other citizen. Their actions are primarily governed by applicable national law. According to circumstances, this may be the law of the vessel's flag state, the law of the nations in which the PMSC personnel have citizenship, or, in territorial waters, the law of the local state.[105] Potentially, therefore, several states may have jurisdiction over their actions. In general, the right of PMSC personnel to use force is typically restricted to lawful acts taken either in self-defence or to defend others. The understanding of this right varies from state to state. If PMSC personnel use force beyond what is deemed lawful (in the jurisdiction to which they are subject), they become liable to criminal prosecution.[106]

According to human rights law, states are obliged not only to *respect* human rights but also to *protect* rights from interference by others, including private companies.[107] Rights of particular importance include the rights to: life; freedom from torture and other cruel, inhuman or degrading treatment or punishment; freedom from arbitrary deprivation of liberty; and security. On these grounds, states should have in place legislative and administrative frameworks that regulate the actions of PMSCs and ensure they are properly accountable when they operate on flagged vessels.[108] Frameworks should determine, *inter alia*, whether and under what circumstances personnel may be armed; with what weapons they may be armed; and when and how weapons may lawfully be used. Although in most states a general framework exists, more

102 See Merchant Marine Act of 1920, Title 46 of the US Code; and especially Section 33 of the Jones Act, Recovery for Injury to or Death of Seaman (46 App. US Code 688 (2002)). Under the Jones Act an employee has a right to a 'safe place to work'. According to the US Maritime Law Center, the Act (among other things) governs the relationship between the employer and crew on US-flagged vessels. Prior to it, seamen had limited standing to claim compensation for injuries on board ship. The Jones Act extended the Federal Employers Liability Act to seamen. Under admiralty law, seamen benefit from a broader interpretation of 'negligence' and the employer has a higher duty of care. Under the Jones Act, employers are liable for 'any injury' arising in whole or in part from the negligence of any of their officers, agents, or employees, or from any defect or insufficiency of equipment attributable to their negligence. The employee must prove negligence. The act that is negligent is not required to be the sole proximate cause of an injury. Maritime Law Center, 'The Jones Act', undated.

103 'Arms suit hits Heidmar', *Tradewinds*, 21 June 2012.

104 See, for example, House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia: Tenth report of Session 2010–12*, HC 1318 2010-12, 5 January 2012, §39. INTERTANKO, for example, reported in May 2012 that companies had 'varying standards of service and operation'. John Boreman, 'IMO's MSC guidelines for private security companies', last updated on 25 June 2012.

105 For an interesting analysis of the applicable law on the use of force and footage of a US PMSC firing at a skiff, see Nexus, Nexus Consulting Analysis on Use of Force Video, 9 May 2012.

106 State immunity is relevant to PMSCs only in circumstances where they have been recruited by a state and are incorporated into or working on behalf of its military.

107 It is also argued that companies themselves have a duty to respect fundamental human rights, such as the right to life and the right to freedom from torture. Under the 2008 UN Framework for Business and Human Rights, developed by the UN Special Representative on Business and Human Rights and endorsed by the Human Rights Council in Resolution 8/7 of 18 June 2008 (§1), there is a corporate responsibility to respect human rights. See also 'Report of the independent international commission of inquiry on the Syrian Arab Republic', UN doc. A/HRC/19/69, 22 February 2012, §106.

108 The draft Convention on Private Military and Security Companies, if it were ever finalized and adopted, would strengthen this obligation, at least for States Parties to it. *Inter alia*, the draft Convention declares that respect for human rights is an *erga omnes* obligation; and draft Article 4 states that each state party 'bears responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the State'. It also requires that each state party 'ensure that the PMSCs it has contracted are trained in and respect international human rights and international humanitarian law'. 'Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination', UN doc. A/HRC/15/25, 5 July 2010, Annex.

specific regulation and guidance is urgently needed, especially with respect to the use of force and firearms.[109]

The US Coast Guard and the Department of Homeland Security jointly issued a Port Security Advisory in 2009 entitled 'Guidance on Self-defence and Defence of Others by U.S. Flagged Commercial Vessels Operating in High Risk Waters'.[110] The Guidance is provided to all personnel on board US-flagged vessels, including contracted security personnel, and sets out the current US rules for defence against piracy. Use of lethal force is permitted in self-defence or to defend others where there is reason to believe that there is imminent danger of death or great bodily harm.[111] Non-deadly use of force is permitted in self-defence or defence of others as well as in defence of the vessel and its cargo from theft or damage.[112] With regard to protection of property, force may only be used to defend the vessel and its cargo when authorized by the vessel's master.

The British Department for Transport released interim guidance in 2011. Further clarifying the use of force by PMSCs, it advised that:

> Lethal force can generally only be used in the context of self-defence or defence of others. The decision to use lethal force must lie with the person using force where they believe there to be a risk to human life. Neither the Master nor the security team leader can command a member of the security team against that person's own judgement to use lethal force or to not use lethal force.[113]

The guidance states that PMSC personnel must use the 'minimum force necessary' to prevent the illegal boarding of a vessel and protect the lives of those on board, and that procedures adopted should allow for a 'graduated response, each stage of which is considered to be reasonable and proportionate to the force being used by the attackers'.[114]

In May 2012, the IMO's Maritime Security Committee issued Interim Guidance for privately contracted armed security personnel (PCASP). It stated:

> PMSC should ensure that PCASP operating for them have a complete understanding of, and fully comply with, the applicable laws governing the use of force. In particular, it should ensure that PCASP understand that:
>
> (1) they should act according to these applicable laws in the knowledge that their role in regard to the above is exclusively for the protection of life of persons on board and the ship from armed pirate attacks;
> (2) all reasonable steps should be taken to avoid the use of force and, if force is used, that force should be used as part of a graduated response plan, in particular including the strict implementation of the latest version of BMP [Best Management Practices];
> (3) the use of force should not exceed what is strictly necessary and reasonable in the circumstances and that care should be taken to minimize damage and injury and to respect and preserve human life; and
> (4) PCASP should only use firearms against persons in self-defence or in defence of others.[115]

In March 2010, PMSC personnel killed a suspected pirate. This was the first such confirmed use of lethal force. On the morning of 23 March 2010, the Panama-flagged cargo vessel *MV Almezaan* was on route to Mogadishu with an unreported number of armed PMSC personnel on board. According

109 The International Maritime Organization has called for standards to be established: '[The] regime should not be made compulsory, but provide an international framework on which the flag state and the (shipping) companies may decide to employ arms on board'. 'Pirate guards need global guidelines: U.N. agency', *Reuters*, 17 May 2012. British Parliamentarians have also concluded that the parameters on the use of force by PMSCs need further clarification. See: House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia: Tenth report of Session 2010–12*, HC 1318 2010-12, 5 January 2012, §37. In March 2012, it was reported that PMSCs were storing their weapons on floating armouries in international waters, in order to cut the cost of supplying armed guards to ships on East Africa's 'pirate-infested waters' and circumvent laws limiting the import and export of weapons. Few, if any, governments have laws governing the practice. According to unnamed industry officials, some security companies 'have simply not informed governments of the flag their ship is flying'. K. Houreld, 'Piracy fighters use floating armories', *Associated Press*, Nairobi, 22 March 2012.

110 US Coast Guard and the Department of Homeland Security, 'Guidance on Self-Defense or Defense of Others by U.S. Flagged Commercial Vessels Operating In High Risk Waters', Port Security Advisory (3-09), 18 June 2009.

111 This reflects the US domestic law standard for the intentional lethal use of force by police, which sets a lower threshold than the *Basic Principles on the Use of Force or Firearms* (1990), a soft-law standard adopted in the context of the United Nations. It was established in *Tennessee v. Garner*, 471 US 1 (1985).

112 US Department of Homeland Security and US Coast Guard, *Guidance on Self-defence and Defence of Others by U.S Flagged Commercial Vessels Operating in Hugh Risk Waters*, Port Security Advisory 83-09, 18 June 2009.

113 Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, UK, November 2011, §5.6.

114 *Ibid.*, §§8.3, 8.5.

115 IMO, 'Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', MSC.1/Circ.1443, 25 May 2012, §5.15.

to EUNAVFOR's report of the incident, after three pirate skiffs approached the ship: '[A]rmed private vessel protection returned fire, successfully repelling the first attack, but the pirates continued to pursue. A second attack was repelled and the pirates fled the area.' Although no further details of the attack are given, it is accepted that, when the PMSC team fired a second time, one of the pirates was killed by 'small calibre gunshot wounds'.[116]

Soft law standards

In November 2010, the International Code of Conduct for Private Security Service Providers (ICoC) was opened for signature after an 18-month process of drafting.[117] The ICoC is a multi-stakeholder initiative convened by the Swiss government that aims to clarify international standards for private security companies operating in complex environments, and to improve their oversight and accountability.[118] As of 1 June 2012, more than 400 companies from 57 countries had signed the Code.[119] Signatory companies thereby make a commitment to support the rule of law, respect the human rights of all persons, and protect the interests of their clients.[120] With regard to the use of force, they undertake to require their personnel to take all reasonable steps to avoid the use of force and in no circumstances use more force than is strictly necessary and proportionate to the threat. The Code requires that PMSC personnel do not use firearms against any person except in self-defence, to defend others, or to prevent the perpetration of a particularly serious crime that involves grave threat to life.

Calls have been made for tighter regulation of PMSC conduct and more official guidance on their use of force. The UK Foreign Affairs Committee, for example, concluded that the circumstances under which PMSCs may use force to defend a vessel under attack need to be clarified further:

> Guidance over the use of potentially lethal force should not be left to private companies to agree upon. We recommend that the change of policy be accompanied by clear, detailed and unambiguous guidance on the legal use of force for private armed guards defending a vessel under attack. This guidance should be consistent with the rules that would govern the use of force by members of the UK armed forces in similar circumstances, and should include:
>
> - the circumstances in which private armed security guards faced with a clear threat of violence may respond with force, including lethal force, where proportionate and necessary, and
> - examples of a 'graduated response' to an attack, including confirmation that nothing in UK law or the CPS [Crown Prosecution Service] guidance requires a victim of pirate attack to await an aggressor's first blow before acting in self-defence.[121]

The Committee's chairman, Richard Ottaway, illustrated these concerns:

> There is a question to which everyone needs an answer, however. If a skiff is approaching a ship at high speed carrying pirates with rifles or rocket-propelled grenade launchers, can the armed guards on board the ship open fire?[122]

Towards guidelines on the use of force by PMSCs

Based on general principles of criminal law—despite certain differences between national legal systems—as well as applicable human rights law and good shipping industry practice, we would suggest the following guidelines on the use of force by vessel crews and PMSC personnel confronting a

116 EUNAVFOR, 'Pirate Dies in Attempted Hijacking – EU NAVFOR Detains Pirate Action Group', 24 March 2012.

117 See generally www.icoc-psp.org/. Members of the private security industry developed a draft of the ICoC in cooperation with the Swiss Department of Foreign Affairs, with facilitation by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the Geneva Academy. After a series of multi-stakeholder workshops, the ICoC was finalized at a conference in September 2010. Swiss Federal Department of Foreign Affairs (Directorate of Political Affairs, Political Affairs Division IV), Fact Sheet: International Code of Conduct for Private Security Service Providers (ICoC), November 2011.

118 See 'About the ICoC', undated. Arguably, the 2008 Montreux Document on Private Military and Security Companies is not directly applicable to counterpiracy because it applies to 'PMSCs operating in areas of armed conflict'. 'The Montreux document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict', Montreux, 17 September 2008, Part II, Introduction. The same introduction notes, however, that the good practices outlined may also provide useful guidance for states in their relationships with PMSCs operating outside areas of armed conflict.

119 A draft Charter for an independent governance and oversight mechanism (IGOM) for the ICoC was under consultation as of that date.

120 ICoC, §3.

121 House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia: Tenth report of Session 2010–12*, HC 1318 2010-12, 5 January 2012, §37.

122 House of Commons Debates, 9 February 2012, c525.

suspected piratical attack.[123] It is assumed that the weapons held by the PMSC personnel are lawful and that the personnel have received appropriate training in their use, and in respect for criminal law and human rights standards.

When a suspected pirate vessel (SPV) is spotted coming towards the ship, an auditory or visual signal should be given to the SPV to stop or change course away from the ship, using internationally recognized signals. Flares may be employed. An acoustic warning may also be given, for example using the Long Range Acoustic Device (LRAD). A ship's master should be fully informed of these actions, and wherever possible should be the person to authorize them.

Sounding the ship's alarms/whistle serves to inform the ship's crew that the ship is under attack from pirates and, importantly, demonstrates to any potential attacker that the ship is aware of the attack and is reacting to it. In addition to the emergency alarms and announcements for the benefit of the vessel's crew the ship's whistle/foghorn should be sounded continuously to demonstrate to any potential attacker that the ship is aware of the attack and is reacting to it.[124]

Should the SPV continue on a course towards the ship, attempts should be made to shake off the SPV, for example by increasing the ship's speed and directing a course away from the SPV. Should these attempts fail, a variety of actions may be taken, such as firing tracer rounds as warning shots across the bows of the oncoming SPV.[125] These should be aimed no closer than 50 metres and no further than 100 metres from the SPV when the SPV is at a distance of about one kilometre from the ship.[126] A distress signal and report of piratical attack should already have been made by now.

It is only after these actions fail that the ship may, as a last resort, use force against the SPV or its personnel. The primary function of the PMSC security team must be to prevent illegal boarding of the ship and to protect the lives of those on board, using the minimum force necessary to do so. By now, the crew should be safely locked into the ship's citadel. Wherever possible, 'less-lethal' weapons and tactics should first be employed, such as the use of acoustic weapons or dazzling lasers or, at closer range, water hoses.[127]

If these actions are unsuccessful, firing into the SPV's engine block or hull may be considered. It is suggested that this should be countenanced when an SPV is some 500 metres away from the ship[128] (and only if it is still on a course towards the ship).

If all the above efforts have failed to stop the SPV and its intent remains clearly hostile, the use of firearms may now be countenanced. Intentional lethal force may only be used in self-defence or defence of others on board the ship and where such force is strictly unavoidable in order to protect life. Offensive use of firearms or a rocket-propelled grenade (RPG) launcher within the weapon's operating range[129] by persons on the SPV, against the ship or its crew, may thus give rise to the right to use such lethal force. The decision to use firearms must rest with the person using force and must only be taken where he or she believes there is an imminent risk to human life. Only armed individuals with clearly hostile intent may be targeted. Firearms with optical enhancements (not only iron sights) should be used.[130]

As soon as, but only if, it is safe to do so, there is a legal duty to rescue any person, including suspected pirates, who may be at risk of drowning. There is also an obligation to report any deaths or serious injuries during an engagement with suspected pirates. Even if no one is killed or injured, a report of the engagement should be made as a matter of good practice; if the attack is repelled, this will allow other ships in the area to be apprised of the risk.[131]

123 This section also draws on a thoughtful piece by K. C. Doherty, the President of Nexus Consulting Group entitled 'Nexus Consulting Analysis on Use of Force Video', dated 9 May 2012 (Nexus Consulting Analysis).

124 *BMP 4: Best Management Practices for Protection against Somalia Based Piracy*, *Suggested Planning and Operational Practices for Ship Operators, and Masters of Ships Transiting the High Risk Area* (BMP 4), §8.7; see Nexus Consulting Analysis, p. 16. The piracy alarm must be distinctive in order to avoid confusion with other alarms, potentially leading to the crew mustering at the wrong location.

125 A warning shot 'means a signal to a vessel to stop. The term does not include shots fired as a signal that the use of deadly force is imminent, a technique that should not be employed.' US Coast Guard and the Department of Homeland Security, 'Guidance on Self-Defense or Defense of Others by U.S. Flagged Commercial Vessels Operating In High Risk Waters', Port Security Advisory (3-09), 18 June 2009, §2 (i), p. 2.

126 See *ibid.*, p. 12.

127 According to BMP 4: 'Improved water coverage may be achieved by using fire hoses in jet mode but by using baffle plates fixed a short distance in front of the nozzle. … Hot water, or using a diffuser nozzle to produce steam to deter pirates has also been found to be very effective in deterring attacks.'

128 *Ibid*., p. 13.

129 According to Doherty, an RPG has almost 100% accuracy from 300 metres and closer. Ibid., p. 18.

130 *Ibid.*, p. 27.

131 *Ibid.*, p. 30.

D. Seizing pirate vessels

The norm that permits states to assert their authority over a suspected pirate vessel is contained in both customary international law and international treaty law.

Historical authorization to seize a pirate vessel

When a state seeks to enforce law outside its territorial jurisdiction, as it is obliged to do when it seizes a pirate vessel:

> the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[132]

Pirates, however, are deemed *hostes humani generis* ('enemies of all humankind') because they endanger safe navigation and restrict the freedom of the high seas. On these grounds, some might say that international law authorizes all states to exercise jurisdiction, including outside their territory, and states may therefore seize a pirate vessel and arrest persons on board.[133] Guilfoyle, however, questions this logic. He argues that, because international law on piracy:

> only applies to events on the high seas, factually piratical acts committed in territorial waters are not, at international law, piracy and special common jurisdiction does not apply. A theory predicated on pirates as *hostes humani generis*, would surely not draw such arbitrary geographical distinctions. Being an 'enemy of all mankind' is thus not a substantive element or consequence of the offence, but purely a rhetorical phrase reflecting its seriousness.[134]

He offers an alternative reasoning to justify universal jurisdiction over acts of piracy: 'common interest', according to which states, 'through customary or conventional rule, have given comprehensive permission in advance to foreign states' assertion of law enforcement jurisdiction over their vessels, resulting in the *absence* of any flag state immunity from boarding'.[135]

The authors believe that today customary law probably reflects the law derived from the relevant treaties, especially the LOS Convention. Thus, states have agreed that each state will have jurisdiction over piracy committed on the high seas, while the same acts committed in territorial waters will not attract such universal jurisdiction.

International treaty authority to seize a pirate vessel

The LOS Convention,[136] which repeats Article 19 of the High Seas Convention, requires states parties to cooperate in suppressing piracy on the high seas and in any other place outside the jurisdiction of any state to the 'fullest possible extent'.[137] This authorization constitutes an exception to the general principle that a flagship is entitled to enjoy the 'freedom of the high seas',[138] by authorising any duly marked government vessel (but only a government vessel) to board and seize a pirate ship,[139] or any ship taken by piracy and under the control of pirates, and arrest persons on board.[140]

132 *Lotus case*, §45; A. Cassese, *International Criminal Law*, Second Edn (Oxford, Oxford University Press), p. 28.

133 'Any state may bring in pirates for trial by its own courts, on the ground that they are "hostes humani generis".' J. Brierly, *The Law of Nations* (Oxford: Oxford University Press, 1982), p. 154. See also: Harvard Draft Convention Commentary, pp. 764 and 768; and D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), p. 28.

134 D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, *op. cit.*, p. 29.

135 *Ibid*.

136 In resolutions on piracy and armed robbery at sea off the coast of Somalia, the UN Security Council has reiterated 'that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982' sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities. See, *inter alia*, UN Security Council Resolutions 2020 (2011), 1851 (2008), and 1846 (2008), as well as Resolution 2018 (2011).

137 Article 100, LOS Convention.

138 'The high seas are open to all States, whether coastal or land-locked.' Article 87, LOS Convention.

139 Under Article 103 of the LOS Convention, a pirate ship or aircraft is one that the persons who are in control of it intend to use for the purpose of committing acts referred to in Article 101, or have already used to commit such acts, for so long as the vessel or aircraft remains under the control of the persons in question

140 Articles 105 and 107, LOS Convention.

Box 4. Key provisions of the Law of the Sea Convention (1982)

Article 105. Seizure of a pirate ship or aircraft

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.

Article 106. Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

Article 107. Ships and aircraft which are entitled to seize on account of piracy

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 being on government service and authorized to that effect.

States must possess 'adequate grounds' for seizing a ship on suspicion of piracy. A state that does so without justification is liable for any loss or damage caused to the seized vessel.[141]

Hot Pursuit

The principle of 'hot pursuit' is relevant to the authority that states are granted under customary and treaty law to seize suspected pirate vessels and conduct operations against armed robbery at sea. The LOS Convention allows the authorities of a coastal state to pursue a foreign ship beyond its territorial waters and on the high seas where it has good reason to believe that the ship has violated its rules and regulations.[142] Only a vessel that is officially authorized to conduct government business, and is clearly marked to that effect, can undertake hot pursuit.[143] Such pursuits must commence when the foreign ship, or one of its boats, is still in territorial waters. In practice, the principle permits states that have made piracy and/or armed robbery at sea a criminal offence under national law to pursue a vessel suspected of such behaviour on to the high seas, thereby extending their jurisdictional reach. In consequence, a vessel that has infringed a coastal state's laws cannot escape prosecution by fleeing to the high seas. The right of hot pursuit ceases once the pursued vessel enters the territorial waters of its own or a third state.[144]

Lawful use of force

Any use of force by states on the high seas will only be lawful if it is in accordance with authority granted under the international law of the sea or is explicitly authorized under Chapter VII of the UN Charter, or is a lawful act of self-defence against an attack by pirates or is conducted for the defence of others.

Use of force in law enforcement under the international law of the sea

Although the LOS Convention does not expressly authorize the use of force, it is accepted that the authority to seize pirate vessels and arrest suspected pirates (under Article 105) must include a derived authority to use force when it is absolutely necessary, because otherwise such authority would

141 Article 106, LOS Convention.

142 Article 111 (1) of the LOS Convention states that 'the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State'. This might include, for example, fishing regulations, drug trafficking, or people smuggling. The High Seas Convention also codifies the right to hot pursuit, in Article 23.

143 Article 111(5), LOS Convention; and Article 23(4), High Seas Convention.

144 Article 111(3), LOS Convention; and Article 23(2), High Seas Convention.

Box 5. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)

Principle 9
Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme methods are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

be without effect.[145] The International Tribunal for the Law of the Sea has examined the amount of force that may lawfully be used by states when they conduct law enforcement operations under the law of the sea. In the *M/V Saiga* (No. 2) Case (*Saint Vincent and the Grenadines v. Guinea*), it stated:

> Although the [LOS] Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention,[146] requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.[147]

> These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered….[148]

The Tribunal appears to be reaffirming international law enforcement standards, notably those set out in the 1979 Code of Conduct for Law Enforcement Officials[149] (1979 Code of Conduct) and the 1990 Basic Principles on the Use of Force and

145 'Seizing a pirate ship under the power granted to all states by *UNCLOS* [the LOS Convention] implies the possibility of the use of force', T. Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', *European Journal of International Law*, Vol. 20(2), 2009, p. 412. See D. Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combats or Criminals?', *Melbourne Journal of International Law*, Vol. 11(1), 2010, p. 10.

146 According to Article 293(1): 'A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention'.

147 The *M/V "Saiga" (No. 2) Case* (*Saint Vincent and the Grenadines v. Guinea*), Judgment, 1 July 1999, §155. Although the International Tribunal for the Law of the Sea made this point with regard to a case where piracy was not the reason why force was used to seize and arrest the crew of a ship, its findings are considered to articulate customary international law on use of force on the high seas. The Permanent Court of Arbitration also 'accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary'. *Guyana*, Award of 17 September 2007, §445 (citing *S.S. "I'm Alone" (Canada/United States)*, Reports of International Arbitration Awards, Vol. 3, p. 1615).

148 The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, 1 July 1999, §156. The Tribunal further noted (§158): 'The Guinean officers also used excessive force on board the Saiga. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.'

149 According to Article 3: 'Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty'.

Box 6. French legislation governing the use of force at sea* (1995 as amended)

Article 1
The coercion measures foreseen under Article 7 of the Law of 15 July 1994** referred to above include, on the one hand, the firing of warning shots, and, on the other, the use of force which consists of live firing and aimed shots.

Article 2
Warning shots are authorized by the Maritime Prefect or the representative of the Government overseas as foreseen by the decree of 6 December 2005. These individuals shall immediately inform the relevant ministers of the authorities they give.

Warning shots comprise a single shot followed by three shots across the bow. This sequence is preceded by warnings to the ship to stop or reroute that are transmitted by any visual, radio, or acoustic means.

Article 3
In the event the Master fails to comply with the challenges, which may be followed by warning shots, the Maritime Prefect or representative of the Government overseas may order live firing to exert pressure on the Master [of the other vessel]. The use of force may lead to taking control of the other vessel.

A report is to be made immediately to the Prime Minister, the Minister responsible for the resources and staff used, and other relevant ministers.

Article 4
In the event that the warning shots and, if conducted, live firing, have had no effect, the Maritime Prefect or representative of the Government overseas may request the Prime Minister to authorise the opening of live firing against the vessel. This authorization is given after reasonable efforts have been made to obtain the views of the Minister for Foreign Affairs.

Live firing is preceded by renewed challenges. This is reported in the ship's logbook.

In no case may it be directed against individuals.

Explosive projectiles may not be used.

A report is made in the same manner as under Article 3.

Article 5
The provisions of this decree shall be without prejudice to the exercise of self-defence and do not prevent the exercise of specific competences of government officials given specific powers to use force.

* Decree No. 95-411 of 19 April 1995 governing recourse to coercion and the use of force at sea. Article 2 was modified by Decree No. 2005-1514 of 6 December 2005. Unofficial translation by the authors.

** Law No. 94-589 of 15 July 1994 governing the exercise by the state of its enforcement powers at sea.

Firearms by Law Enforcement Officials (1990 Basic Principles).[150] Both these soft-law instruments are designed to govern policing actions.[151]

The 1990 Basic Principles stipulate that law enforcement officials shall use non-violent means before resorting to the use of force. If it is absolutely necessary to use force, such force must

150 According to Principle 4: 'Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.' According to Principle 5: 'Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: … (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved'.

151 Thus, despite an argument that might be made to the contrary with respect to Somali pirates (see the discussion above with respect to alleged links to *al-Shabaab*), pirates are not fighters in a non-international armed conflict and therefore may only be targeted with lethal force in accordance with international human rights law and relevant national law. Warships deployed to counter piracy are on law enforcement, not armed conflict operations. See D. Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights' (2010), 59 *International and Comparative Law Quarterly*, p. 148. This is also the view of those who head counterpiracy operations. See, for example, the evidence given by Commander Clive Dow RN, NAVFOR's legal adviser, in Oral evidence given to the House of Lords European Committee, 'Combating Somali Piracy: the EU's Naval Operation Atalanta', 14 April 2010, §35.

be proportionate to the seriousness of the threat. As set out in Box 5 above, intentional use of lethal force is only permitted when strictly unavoidable to protect life.[152]

The 2005 Protocol to the SUA Convention lays down rules on use of force when attempting to seize a vessel for law enforcement purposes. Although directly applicable only to situations in which one state party to the Protocol boards a vessel flagged to another State Party, its standards are potentially of broader relevance. The Protocol states:

> [T]he use of force shall be avoided except when necessary to ensure the safety of its [government] officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.[153]

Use of force under Chapter VII of the UN Charter

As Somali piracy has evolved, the international community has adopted additional measures to complement and increase the provisions for targeting Somali piracy that are found in the LOS Convention.[154] Having concluded that piracy off the coast of Somalia constitutes 'a threat to international peace and security in the region',[155] the UN Security Council adopted several resolutions under Chapter VII of the UN Charter, notably Resolutions 1846 (2008) and 1851 (2008). Resolution 1846 stipulated that, for a period of 12 months from 8 December 2008, states and regional organizations might enter Somalia's territorial waters with the cooperation of Somalia's Transitional Federal Government (TFG), and use 'all necessary means' to fight piracy and armed robbery at sea, in accordance with relevant international law.[156] It is widely accepted that, when the Security Council speaks of 'all necessary means', it is authorising the use of force.[157]

Resolution 1846 (2008) goes further than the LOS Convention by authorising states and regional organizations to seize and dispose of 'boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery … or [where] there is reasonable ground for suspecting such use'.[158] Crucially, Resolution 1851 (2008) authorizes UN Member States, at the TFG's request and after notifying the UN Secretary-General, to strengthen the TFG's operational capacity to bring to justice those who are using Somali territory to plan, facilitate, or undertake acts of piracy and armed robbery at sea.[159] The Resolution stresses that any measures taken must be consistent with applicable international human rights law.[160] It is not certain whether the resolution permits military aircraft to enter Somali airspace without the prior consent of the TFG.[161]

With regard to EUNAVFOR's *Operation Atalanta*, the Council of the EU, in line with UN Security Council resolutions, has authorized its military to 'take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present'.[162]

152 Professor Goplan argues that 'targeted killings are a necessary, justified and legal response to high-seas piracy'. '[P]rosecution can only be a small part of the fight against piracy. The main weapon has to be ruthless force […] [U]ntil Somalia has a legal system capable of convicting pirates, killing them is the only option.' S. Gopalan, 'Put Pirates to the Sword', *Wall Street Journal*, 18 January 2010. Such use of force would clearly be unlawful.

153 Article 8*bis*, paragraph 9, of the 1988 SUA Convention, as amended by the 2005 SUA Protocol.

154 Until October 2011, the Security Council concerned itself only with piracy off the coast of Somalia. Following its emergence in the Gulf of Guinea, however, the Council adopted Resolution 2018 (2011) which expressed concern at the incidence of acts of piracy in the Gulf of Guinea and encouraged states in the region to develop domestic laws and regulations that would criminalize piracy and armed robbery, and a regional framework for countering piracy by sharing information and co-ordinating law enforcement operations.

155 See, for example, UN Security Council Resolution 1846 (2008), Preamble.

156 *Ibid.*, §10.

157 T. Treves, 'Piracy, Law of the Sea, and Use of Force', *op. cit*.

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

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

160 UN Security Council Resolution 1851 (2008), §7.

161 The USA, the main drafter of Resolution 1851 (2008)**,** initially proposed language that authorized operations in Somali air space. This language was withdrawn after other states objected, but the USA continues to maintain that Resolution 1851 (2008) authorizes operations in Somali air space. See M. Sterio, 'Fighting Piracy in Somalia (and Elsewhere): why more is needed', *Fordham International Law Journal*, Vol. 33 (2), 2009, p. 389.

162 EU Council Joint Action 2008/851, Article 2(d).

Use of force in self-defence

It is a general principle of law that reasonable force may be used in self-defence, to defend others, or to prevent a crime that poses a threat to human life.[163] Guilfoyle suggests this is the most common legal justification for killing or injuring suspected pirates.[164] As an example, in November 2008 the Indian Navy vessel *Tabar* spotted and intercepted a suspected pirate 'mother ship' while patrolling the Gulf of Aden. The *Tabar* communicated with the mother vessel and called on it to stop. In response, the pirate ship threatened to 'blow up the naval warship if it closed in on her' and proceeded to fire at the *Tabar*. The *Tabar* responded and sank the pirate vessel, killing 14 of its crew.[165] Speaking after the event, an Indian Navy spokesman said:

> We fired in self-defence and in response to firing upon our vessel. It was a pirate vessel in international waters and its stance was aggressive.[166]

The right to use force in self-defence is not unrestricted, of course, since the nature and degree of force used must not exceed what is reasonable and necessary in the circumstances.

163 The right to use force, and the amount of force that may be used in self-defence, varies from state to state.

164 D. Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combats or Criminals?', *op. cit.*, p. 10. Treves suggests: '[I]t is a fact that practice in the waters off Somalia seems to indicate that warships patrolling these waters resort to the use of weapons only in response to the use of weapons against them'. T. Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', *op. cit*.

165 As reported in 'India sinks Somali pirate ship', BBC, 19 November 2008.

166 As reported in 'Indian navy "sank Thai trawler"', BBC, 25 November 2008. The owner of the Thai fishing trawler, however, said the Indian navy had wrongly assumed it was a pirate 'mother ship'. Wicharn Sirichaiekawat said the Indian frigate had attacked the Ekawat Nava 5 while it was being hijacked by pirates. He said one of the crew had been found alive after six days in the Gulf of Aden, but that another 14 were missing.

E. Counterpiracy operations on land

The UN Security Council has explicitly authorized counterpiracy operations on Somali soil, provided that such actions are authorized by the Somali TFG. The authorization is contained in Security Council Resolution 1851, which states:

> For a period of twelve months from [19 December 2008] … States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.[167]

In March 2012, based on this authorization, the mandate of *Operation Atalanta* was extended to 2014 and its area of operation increased to include Somalia's coastal territory, as well as its territorial and internal waters.[168] Spain's Minister for Foreign Affairs, Jose Manuel Garcia-Margallo, stated that 'the EU plan is to allow attacks on land installations when ships are assaulted at sea'; he added that 'much care' would be taken to avoid civilian casualties.[169]

In May 2012, *Operation Atalanta* carried out its first attack on Somalia's coastal territory, near the port of Haradhere.[170] Helicopter gunships destroyed five speed boats that were identified as having been used for piracy.[171] No casualties were reported. Somalia's government stated that it had backed the strike and encouraged further attacks. Abdirahman Osman, TFG spokesman, said that the government and the European Union 'had agreed upon inland attacks on pirates, avoiding civilian casualties… We encourage frequent inland attacks – this is the only solution to piracy.' *Operation Atalanta's* Commander, Rear Admiral Duncan Potts, said the attack would 'further increase the pressure on, and disrupt, pirates' efforts to get out to sea to attack merchant shipping and dhows'.[172]

Somali pirates responded to the attack by threatening to kill hostages if they were attacked again. To date, pirates have been reluctant to kill their hostages, preferring to keep them for ransom. It is also feared that pirates may relocate. If they move their bases and storage facilities inland, among civilians, land-based counterpiracy operations will become a much less attractive option.[173]

167 Though the resolution speaks of humanitarian law, this should not be taken as evidence that the Security Council considers that an armed conflict exists between pirates and the states affected by piracy. Even though they are sometimes heavily armed, pirates operating off the coast of Somalia and in other areas are not conducting hostilities against their own or another government or other organized armed groups. They are motivated by the potential for gain, notably through ransoms, and to the extent they are organized it is for this purpose. In consequence, they are not organized armed groups that constitute a party to the non-international armed conflict that continues in parts of Somalia.

168 The extension is currently valid until December 2014. Council of the EU, 'Council extends EU counter-piracy operation Atalanta', press release, Brussels, 23 March 2012.

169 'Somalia pirates: EU approves attacks on land bases', BBC, 23 March 2012.

170 'Somali Pirates: EU Forces in first Mainland raid', BBC, 15 May 2012.

171 'EU Helicopters Strike Somali Pirate Base on Land', Reuters, 15 May 2012.

172 *Ibid*.

173 *Ibid*.

F. Arresting and detaining suspected pirates

The law of the sea, various Security Council Resolutions, and customary international law authorize any state to board a vessel suspected of participating in piracy, seize the vessel (where evidence of piracy is discovered), arrest persons on board, and try such persons before the courts of the state that made the arrests.[174] A state that boards a suspected pirate vessel is required, *inter alia*, to do all it can to avoid endangering the safety of those at sea, and ensure that all persons on board are treated in a manner that respects their dignity as human beings. It should comply with the applicable provisions of international law, including international human rights law.[175]

International legal authority

International law authorizes the detention and capture of pirates under the LOS Convention, the High Seas Convention, various UN Security Council resolutions, as well as customary international law. The LOS Convention authorizes any government vessel to board and seize a pirate ship (or any ship taken by piracy and under the control of pirates) and arrest persons on board.[176] The authority to arrest suspected pirates logically implies a derived authority to detain, because otherwise it would lack effect.[177]

Furthermore, Security Council resolutions, such as Resolution 1846 (2008), authorize states and regional organizations, in cooperation with the Transitional Federal Government of Somalia, to enter Somali waters and use 'all necessary means' to fight piracy and armed robbery, provided they act in accordance with international law.[178] The detention of pirates must be considered a 'necessary means', given the Council's repeatedly expressed concern that pirates are being 'released without facing justice'.[179]

International law applicable to arrest and detention of suspected pirates

Human rights implications

The capture and treatment of suspected pirates are governed by a complex body of laws, including customary international law, international treaty law, regional treaty law, national legislation, and various Security Council resolutions. This body of laws protects against abuses by those undertaking counterpiracy operations. Its role is especially important in Somalia, because Somalia's government is itself incapable of ensuring that human rights are respected.

Box 7. Seizure of a pirate ship or aircraft under the Law of the Sea Convention (1982)

Article 105
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.

174 Article 105 of the LOS Convention repeats Article 19 of the High Seas Convention; see also UN Security Council Resolution 1846 (2008), §10. The authorization was reaffirmed in Security Council Resolutions 1851 (2008), §6; 1897 (2009), §7; and 1950 (2010), §7. Of course the mere existence of authorization does not oblige states to use it. In this regard, see for example, D. Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights', 59 *International and Comparative Law Quarterly*, (2010), p. 144.

175 UN Security Council Resolution 1846 (2008), §10.

176 Articles 105 and 107, LOS Convention.

177 See D. Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights', *op. cit.*, p. 159.

178 Resolution 1846 (2008), § 10. This authorization was reaffirmed in Security Council Resolutions 1851 (2008), §6; 1897 (2009), §7; and 1950 (2010), §7.

179 Resolution 2015 (2011), Preamble. See also the preamble of Security Council Resolutions 1851 (2008) and 1897 (2009).

Because the Somali government is incapable of seeking redress on behalf of its citizens if their rights are violated, Somali citizens held by another state, or by a company or individuals, may be at higher risk of abuse or ill-treatment. Some reports have indeed suggested that some suspected pirates have not been treated in accordance with applicable norms. US forces have been accused of holding suspects naked, blindfolded, handcuffed, and without access to an interpreter for days.[180] Russian forces have been accused of setting adrift ten captured suspected pirates without means of navigation 300 nautical miles offshore; the suspects are considered to have died as a result.[181]

The extraterritorial application of human rights law when suspected pirates are apprehended and detained is therefore an important consideration. Unless relevant human rights norms have effective application in such situations, states will not be fully accountable and victims of consequent human rights violations may not obtain redress and reparation. The jurisdictional provisions of certain human rights treaties are at the centre of this issue. The International Covenant on Civil and Political Rights (ICCPR) sets out obligations that each State Party owes to individuals who are within that State Party's 'territory and subject to its jurisdiction'.[182] The human rights obligations contained in the European Convention on Human Rights (ECHR) are ones that States Parties similarly owe to individuals who fall within their 'jurisdiction'.[183] The question is: are those arrested and detained on the high seas within the jurisdiction of the arresting state?

With respect to the ICCPR, the UN Human Rights Committee[184] has affirmed that the obligation of each state to guarantee ICCPR rights to all persons within its territory and subject to its jurisdiction means that a state must guarantee those rights to anyone 'within its power or effective control', even if he or she is *not* situated within the territory of that state.[185] On this reasoning, a state party to the ICCPR which holds a suspected pirate in its power or effective control on the high seas is obliged to ensure that the suspect is treated in accordance with the ICCPR's provisions. In its General Comment 31, the Committee stated:

> This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent or a State Party assigned to an international peace-keeping or peace-enforcement action.[186]

The European Court of Human Rights has established that jurisdiction can occur via *personal* jurisdiction, in which case jurisdiction is established through the exercise of authority or control over a particular individual, similar to the ICCPR,[187] or *geographical* jurisdiction. In the second case jurisdiction is established as a result of military action (whether or not lawful) and is based on the exercise by military forces of effective control over an area outside its territory.[188] The two bases of jurisdiction are complementary and evidently may overlap.

180 *Attorneys: Accused Pirates Blindfolded, Handcuffed,* Associated Press, 19 July 2010.

181 S. Bont, 'Prosecuting Pirates and Upholding Human Rights Law: Taking Perspectives', *One Earth Future Foundation,* September 2010, p. 1; and 'Somali Pirates Captured and Released by Russian Navy Have Died', *The Telegraph*, 12 May 2010.

182 Article 2, ICCPR. US opposition to extraterritorial application of the ICCPR, which asserted that the twin criteria (see below) were cumulative not alternative, appears to have softened in recent times. According to the USA's latest report to the Human Rights Committee (Fourth Periodic Report of the USA to the UN Human Rights Committee, 30 December 2011, §505):

> The United States in its prior appearances before the Committee has articulated the position that article 2(1) would apply only to individuals who were both within the territory of a State Party and within that State Party's jurisdiction. … The United States is mindful that in General Comment 31 (2004) the Committee presented the view that "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." The United States is also aware of the jurisprudence of the International Court of Justice …, which has found the ICCPR 'applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,' as well as positions taken by other States Parties.

183 Article 1, ECHR.

184 The Human Rights Committee is a body of independent human rights experts who are mandated by the terms of the ICCPR to monitor its implementation by States Parties.

185 Human Rights Committee, General Comment 31, 2004. See, for example, *López Burgos v. Uruguay*, Comm. No. 52/1979. (29 July 1981) and *Lilian Celiberti de Celiberti v. Uruguay*, Comm. No. R.13/56 (17 July 1979).

186 UN Human Rights Committee, General Comment No. 31: The nature of the general legal obligation imposed on States Parties, 2004, §10.

187 The European Court of Human Rights (ECtHR) took this approach in the decisions on *Öcalan v. Turkey,* ECtHR, App. No. 6221/99 [2003], 125; and *Isaa and Others v. Turkey*, ECtHR, App. No. 31821/96 [2003].

188 See *Al-Skeini and Others v. United Kingdom,* ECtHR, App. No. 55721/07 [2011] ECHR 1093. See also *Bankovic and Others v. Belgium and 16 other contracting States*, ECtHR, App. No. 52207/99, [2001], §§66–7; *Ilascu and Others v. Moldova and Russia*, ECtHR, App. No. 48787/99, [2004], §314; and *Medvedyev and Others v. France*, ECtHR, App. No. 3339/03, [2010], §64.

The European Court of Human Rights considered the question of jurisdiction on the high seas in *Medvedyev and Others v France*.[189] The case concerned the interception by the French authorities, off Cape Verde, of a Cambodian vessel suspected of smuggling drugs. Those on board the Cambodian vessel were confined to their cabins by the French authorities for a period of 13 days. The Court held that the Convention extends to situations in which a state exercises full and exclusive control over persons outside its territory. In the *Medvedyev* case, it ruled that the French authorities were under the jurisdiction of the ECHR because they had full and exclusive control over those they had arrested and detained, using force.[190] Referring to Medvedyev in a later case, the Court stated that it

> does not consider that jurisdiction in the above cases [which included Medvedyev] arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of *physical power and control over the person in question*.[191]

Like the ICCPR, the ECHR requires a state party to the Convention to respect the human rights (as set out in the Convention) of a suspected pirate on the high seas over whom it has effective control.

Applicability of human rights

On the basis that states parties to the ICCPR and ECHR have a duty to protect the human rights of individuals with whom they interact on the high seas, which human rights are most relevant in such situations? It is clear that individuals who engage in piracy enjoy rights. The UN Security Council has also confirmed explicitly in several resolutions that human rights law is applicable during counterpiracy operations.[192]

The right to life

Respect for the right to life will be particularly important when efforts are made to defend ships against pirate attacks, seize pirate vessels, or capture suspected pirates. In each of these cases, the patrols of states and regional organizations are likely to use force. Nor is a suspect's right to life abrogated in any way when he is captured, released, or transferred; the right to life is a fundamental human right, and states are prohibited at all times from arbitrarily depriving any person of his or her life.[193]

As set out in the 1979 Code of Conduct for Law Enforcement Officials,[194] the most fundamental principle governing the use of force by the police (or those exercising police powers) is that force may be used 'only when strictly necessary' and 'to the extent required for the performance of duty'.[195] This provision neatly encapsulates the two core law enforcement principles of 'necessity' and 'proportionality'.[196] Based on these intertwined concepts of necessity and proportionality, it is further stipulated in the Code of Conduct that the use of firearms is considered 'an extreme measure. Every effort should be made to exclude the use of firearms, especially against children.'[197]

In its approach to regulating the use of lethal force in law enforcement, international human rights law generally reflects the standards laid down in the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Firearms

189 *Medvedyev and Others v. France*, ECtHR, App. No. 3394/03 29 [2010]. See also, *Rigopoulos v. Spain,* ECtHR, App. No. 37388/97 [1999]; and *Xhavara and Others v. Italy and Albania*, ECtHR, App. No. 39473/98 [2001].

190 *Medvedyev and Others v. France*, ECtHR, App. No. 3339/03 [2010], §67.

191 *Al-Skeini and Others v. United Kingdom*, ECtHR, App. No. 55721/07 [2011], §136 (our emphasis).

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

193 The right not to be arbitrarily deprived of life is affirmed in: Article 6, 1966 International Covenant on Civil and Political Rights (ICCPR); Article 4, 1969 American Convention on Human Rights (ACHR); Article 4, 1981 African Charter on Human and Peoples' Rights (ACHPR); Article 2, 1950 European Convention on Human Rights (ECHR); Article 5, 2004 Arab Charter on Human Rights (AbCHR). The right is a 'supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation', according to the Human Rights Committee. See 'General Comment No. 6: The Right to Life', 1982, §1.

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

195 Article 3, 1979 Code of Conduct.

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

197 Official Commentary on Article 3, 1979 Code of Conduct.

may be used 'in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.'[198] However, the imminent threat of serious injury is not sufficient justification for an intentional killing: it must be 'strictly unavoidable in order to protect life'. This is by no means an academic distinction. Firing into the legs of a suspect at a distance and firing into his head at point-blank range are actions that will in all likelihood not lead to the same outcome.[199] Thus, an important distinction is drawn between the use of firearms *per se* and the intentional use of lethal force. A threat *merely* to property is not sufficient to justify the use of firearms.[200]

The right to liberty

Once captured, a suspected pirate may be detained in order to take him to the state territory of the seizing vessel, or deliver him to another state (with that state's approval), for prosecution.[201]

The arbitrary deprivation of liberty is prohibited by several international human rights treaties.[202] Deprivation of liberty is not prohibited by international instruments but *arbitrary* detention is.[203] The grounds for depriving a person of his or her liberty must therefore be both established by law and in conformity with law.[204] As discussed above, Article 105 of the LOS Convention, Article 19 of the High Seas Convention, and various UN Security Council resolutions provide the legal authority to detain suspected pirates.[205]

Once detained, relevant international human rights treaties require that a suspected pirate must be brought 'promptly' before a judicial authority to rule on the legality of the detention.[206] Considering that pirates may be captured hundreds of nautical miles out to sea, this is a very real problem for states. As noted above, the European Court of Human Rights considered this issue in *Medvedyev v. France.*[207] In that case, suspected drug smugglers, captured off Cape Verde, were detained for 13 days during the voyage to Brest, a French port, due to the poor condition of the vessel captured and weather conditions. Given the special circumstances of the arrest, the Court ruled that the delay in bringing the suspects before a judicial authority could not have

198 Principle 9, 1990 Basic Principles.

199 Punch notes that the Netherlands police are trained to fire at the limbs, the explicit purpose being not to kill but to incapacitate in order to apprehend. He describes this as a 'shoot to live' approach. M. Punch, *Shoot to Kill*, *op. cit.*, p. 58.

200 As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions notes, 'protection of property cannot be invoked as a justification for the use of potentially lethal force unless it is somehow linked to the defence of life (e.g., protecting a hospital or acting in other cases where destruction could endanger lives, as is the case with nuclear plants, etc.)'. 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', *op. cit.*, 30 August 2011, §43.

201 Such agreements are common practice in current counterpiracy operations. For reference to an agreement under which more than 120 suspected pirates were delivered by foreign vessels to Kenya for prosecution, see UN Office on Drugs and Crime, *Counter-Piracy Programme, Support to the Trial Related Treatment of Piracy Suspects*, Issue 6 (June 2011). See also Foreign and Commonwealth Office, 'Prisoner transfer agreements'.

202 For example, Article 5, ECHR; Article 9, UDHR; Article 9, ICCPR; Article 6, ACHPR; Article 7, ACHR; and Article 14, AbCHR. Also of relevance is the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), though it should be noted that these principles are 'soft law' rather than legally binding rules. The European Court of Human Rights has explained that 'in order to determine whether someone has been "deprived of his liberty"… the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'. See *Medvedyev and Others v. France*, ECtHR, App. No. 3339/03 [2010], §73. The Court also noted that the difference between deprivation and restriction of liberty is 'merely one of degree or intensity, and not one of nature or substance'. See *Guzzardi v. Italy*, ECtHR, App. No. 7367/76 [1980]. Deprivation of liberty includes arrest and detention, as well as other forms of detention such as house arrest. See *Mandani v. Algeria,* HRC Comm. No. 1172/2003 [2007].

203 The Human Rights Committee has explained that 'arbitrariness' is not to be equated with 'against the law' but 'must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law…. [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.' See *Mukong v. Cameroon,* HRC Comm. No. 458/1991, [1994], §9.8.

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

205 The European Court (in *Medvedyev and Others v. France*, ECtHR, App. No. 3339/03 [2010]) laid down a two-stage test that must be satisfied before a detention at sea is compliant with Article 5(1) of the ECHR. First, a State's domestic law must clearly authorize detention, to ensure that the detention is lawful. A state party to the ECHR that wishes to detain suspected pirates must have legislative authority to do so. Second, there needs to be express textual authority in public international law that authorizes the boarding of vessels at sea and detaining persons on board and subsequently prosecuting them. Article 105 of the LOS Convention would satisfy the second limb of this test.

206 Article 9(4), ICCPR; Article 5(3), ECHR; Article 7(5), ACHR; and Article 14(5), AbCHR.

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

been avoided and that they had not been detained arbitrarily.[208]

However, it remains unclear under what circumstances the detention of suspected pirates who are captured at sea becomes arbitrary. In some cases, for example, detention has been prolonged by deliberations over whether to prosecute, and in which state. In 2009, five suspected pirates were held on board a Danish warship for over a month while Danish and Dutch authorities decided whether to transfer the suspects to Dutch custody.[209] They were eventually prosecuted in the Netherlands; the legality of their detention on board the Danish vessel was not challenged in court.[210] Alternatively, what if those detained are released because no state is willing to prosecute them? Ten suspects were held on board a US warship for six weeks, and were then released when no state was willing to receive the suspects for prosecution.[211]

Human rights law stipulates that detained persons must be informed of the reasons for their detention, in a language they understand, and in sufficient detail to enable them to request a judicial authority to review the legality of their detention.[212] Modern technology makes it possible in most cases to allow detained piracy suspects to communicate with a lawyer or judge by Skype or video link.

Right to freedom from torture

The absolute prohibition of torture and other forms of cruel, inhuman, or degrading treatment[213] is affirmed in various international and regional human rights instruments,[214] as well as in the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), which deals specifically with the issue. There is no universally agreed definition of torture, or of cruel, inhuman, or degrading treatment. However, CAT contains a definition of torture for the purposes of that Convention that clearly defines the prohibited behaviour:[215]

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind …[216]

CAT covers flag-bearing vessels of states parties. The UN Committee Against Torture has specifically applied the Convention in cases where a state party has exercised control over persons on board a vessel on the high seas.[217] CAT explicitly states that

208 *Ibid.*, §§131–3. In a similar case, a 16-day delay was also ruled to be compatible with a state party's obligations under the ECHR: see *Rigopoulos v. Spain,* ECtHR, App. No. 37388/97 [1999].

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

210 *LJN: BM8116, Rechtbank Rotterdam,* 10/600012-06, available in Dutch.

211 'Navy Releases Accused Somali Pirates Held on Warship for Six Weeks'*, Washington Post,* 28 May 2010. It can be argued that some naval patrols in the area focus on disrupting piracy rather than prosecuting pirates. The legality of capturing suspected pirates with the intention of subsequently releasing them ('catch and release') may be problematic under human rights law. One expert has suggested, for example, that detention in order to 'catch and release' rather than prosecute is not compatible with Article 5 of the ECHR. R. Middleton, 'Pirates and How to Deal With Them'*,* Africa Programme/International Law Briefing Note, AFP/IL BN 2009701, 22 April 2009, p. 5.

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

213 Meaning that the prohibition may not be limited or derogated from under any circumstances.

214 Articles 7 and 10, ICCPR; Article 3, ECHR; Article 5, ACHR; Article 5, ACHPR; and Article 3, AbCHR. In addition to these instruments, soft sources of law include: UN Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1975); UN Code of Conduct for Law Enforcement Officials (1979); UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhumane or Degrading Treatment Or Punishment (1982); and the UN Body of Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Istanbul Principles, 2000).

215 Article 1(2) of CAT states that this definition of torture is without prejudice to any international instrument or national legislation that contains or may contain provisions of wider application. Conduct that has been considered torture includes: electric shocks (see *Cakici v Turkey*, ECtHR, App. No 23657/94 [1999]); suffocation under water (see *Rodriguez v Uruguay*, HRC Comm. No. 322/1988, [1994], §§2.1 and 12.1); exposure to severe cold for extended periods (see Committee Against Torture, 'Report of Mexico produced by the Committee under Article 20 of the Convention and reply from the Government of Mexico', UN doc. CAT/C/75 (2003), §165); suspension by the wrists (see *Aksoy v Turkey*, ECtHR, App. No. 21987/93 [1996] § 64); severe beatings (see *Selmouni v France*, ECtHR, App. No. 25803/94 [1999] §101); and rape (see International Criminal Tribunal for Rwanda, *Prosecutor v Akayesu,* ICTR-96-4-T, (2 September 1998), §682).

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

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

each state party shall take measures to establish jurisdiction over acts of, complicity in, or attempts to commit, torture on board a ship registered to that state.[218] Furthermore, the Committee has stated that the Convention applies in 'all areas where the State exercises directly or indirectly, in whole or in part, *de jure* or *de facto* effective control' and that Article 2 refers to prohibited acts committed not only on board a ship registered to a state party but also to detention facilities and all other areas over which a state exercises factual or effective control.[219]

As well as being prohibited under human rights law, torture and other forms of cruel and inhumane treatment are prohibited by international humanitarian law in times of armed conflict.[220] The absolute prohibition on torture is a norm of customary international law, meaning that it is binding on all states, regardless of whether they are parties to the relevant treaties.[221]

National legislation

National standards on the treatment of arrested and detained suspects may be higher than those contained in international law. For example, under Article 104 of Germany's Basic Law, every detainee must be brought before a judge no later than the day after arrest. Following the *Medvedyev* judgment described above, France adopted new national legislation[222] under which state agents must inform the relevant state prosecutor of any detention on the high seas 'as soon as possible'.[223] A health check by a competent person must be conducted within 24 hours[224] and a medical examination within a further 10 days; a report on both exams is required, which must state whether the detainee is fit for continued detention; these reports must be transmitted to the state prosecutor 'as soon as possible'.[225] Within 48 hours of the initial detention, the judge for freedoms and detention, seized of the case by the state prosecutor, determines whether continued detention is lawful for an additional period of up to 120 hours. Detention can be further maintained following the same procedure.[226]

To summarize, international law authorizes the arrest and, by default, the detention of a suspected pirate. After arrest, or rescue, a detained suspect may have to be kept on board the arresting or rescuing vessel until it reaches a port.[227] During detention, suspects must be provided with adequate food and water. The national law of the flag ship will generally prohibit violence against detainees;[228] in addition, the right to life and the prohibition on torture and other forms of cruel, inhuman, or degrading treatment under international human rights law clearly outlaw violence against anyone detained on a ship.

From a legal perspective, there is some concern that private maritime security contractors (PMSCs) might be considered to have kidnapped suspected pirates they detain. Common sense, however, suggests that it should be lawful to detain suspected criminals until they can be handed over to the authorities, and that such detentions should be considered a form of citizen's arrest[229] or can be justified under the master's 'power to detain'.[230]

218 Article 5(1), CAT.

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

220 See Geneva Convention I, Articles 12 and 50; Geneva Convention II, Articles 12 and 51; and Common Article 3 to the four Geneva Conventions.

221 See, for example, HRC, General Comment No. 29, §3; CAT, General Comment No. 2, HRI/gen/1/rev.9 (Vol. I) 376, §1; *Chahal v. UK,* ECtHR, App. No. 22414/93 [1996]; and *Al-Adsani v. United Kingdom,* ECtHR, App. No. 35763/97 [2000], §61.

222 French Defence Code, Consolidated Version of 16 March 2011, Legislative Part, Part 1: General Principles of Defence, Book V: Acts of the State at Sea, Title II: Operations at Sea, Chapter: Exercise by the State of Law Enforcement at Sea, Section 3: Measures taken against persons on board ships.

223 *Ibid.*, Article L1521-12.

224 *Ibid.*, Article L1521-13.

225 *Ibid.*

226 *Ibid.*, Article L1521-14.

227 A military vessel may agree to meet a vessel at sea to take custody of detainees.

228 For example, the 1861 Offences Against the Person Act will be applicable to the conduct of those on board UK-flagged vessels.

229 For instance, under Section 24A of the 1984 Police and Criminal Evidence Act (applicable in England and Wales), a person may make a citizen's arrest of anyone who is in the act of committing an indictable offence or whom he has reasonable grounds for suspecting may be committing an indictable offence.

230 The right to make a citizen's arrest will vary from state to state. For instance, under Section 105 of the UK's 1995 Merchant Shipping Act, the master of any UK ship 'may cause any person on board the ship to be put under restraint if and for so long as it appears to him necessary or expedient in the interest of safety or for the preservation of good order or discipline on board the ship'.

G. Rescue at sea

International law imposes a general obligation on the master of a vessel to rescue any person (including a suspected pirate) who is in danger of being lost at sea. At the same time, the master holds ultimate responsibility for the safety of his vessel and its crew.[231] Accordingly, the duty to rescue those in danger is not absolute but qualified by the condition that providing assistance will not pose a serious danger to the vessel, or its crew and passengers.[232]

Applicable treaty law

The obligation of ship masters to rescue individuals in danger at sea stems from five international treaties:[233] the High Seas Convention, the LOS Convention, the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Maritime Search and Rescue, and the International Convention on Salvage. As stated in these treaties (see below), the obligation to rescue those in danger at sea applies equally to all, provided that carrying out rescue poses no danger. The obligation clearly extends to hostages held by pirates, and to pirates who pose no threat to a rescuing vessel.[234]

1982 LOS Convention

Article 98 of the LOS Convention (see Box 8) obliges every state party to require the masters of ships flying its flag to render assistance to *any* person found at sea in danger of being lost.[235] The obligation to assist applies to pirates as well as hostages.

This obligation is not absolute, but qualified by the condition that rendering assistance does not pose a serious danger to the ship or its crew and passengers.[236] If a pirate is in a sinking skiff but continues to shoot at the crew of a ship that attempts to rescue him, the ship is not obliged to rescue that individual. However, if the pirate begins

Box 8. Law of the Sea Convention (1982) and rescue at sea

Article 98. Duty to render assistance

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

231 See Chapter XI-2, Regulation 8(1), SOLAS: 'The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgment of the master, is necessary to maintain the safety and security of the ship'.

232 Article 98, LOS Convention. The obligation contained in this provision repeats Article 12 of the High Seas Convention. See also Article 10(1), International Convention on Salvage; and Chapter V, Regulation 33(1), SOLAS.

233 It should be noted that this section discusses only the pertinent obligations under international law. Individual states may have additional measures in their domestic legislation.

234 For example, in May 2011 pirates on board a skiff in the Somali Basin were rescued by USS Bainbridge after it rendered the skiff unseaworthy. NATO Allied Maritime Command Headquarters, 'Press Statement: NATO action frees hostages and defeats pirates', 18 May 2011.

235 The obligations contained in Article 98 of the LOS Convention repeat verbatim Article 12 of the High Seas Convention.

236 Article 98, LOS Convention.

to drown and falls unconscious, and therefore ceases to pose a danger, the master has a duty to rescue him.[237]

A ship flying the flag of a state party to the LOS Convention is required to 'proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may be reasonably expected'.[238] The reasonableness of the response to the distress call is to be assessed on an individual basis, taking account of the risk to the personnel or hostages involved.

1989 International Convention on Salvage

In similar terms to the LOS Convention, the International Convention on Salvage binds every shipmaster 'in so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to *any* person in danger of being lost at sea'.[239] States parties to the Convention are requested to adopt measures necessary to enforce this duty.[240] It should be noted that owners of a vessel are not liable if its master breaches this duty.[241]

1974 International Convention for the Safety of Life at Sea

SOLAS was originally drafted in 1914 in response to the Titanic disaster. Numerous revisions of the Convention have since been adopted, the most recent in 1974 (though amendments to the Convention were made in 2004).

Chapter V of SOLAS sets out the obligations of '*all* ships on voyages, except [warships… and] ships solely navigating the Great Lakes of North America and their connecting and tributary waters as far east as the lower exit of the St. Lambert Lock at Montreal in the Province of Quebec, Canada' with regard to rescue at sea.[242] The master of a ship at sea 'which is in a position to be able to provide assistance, on receiving a signal from *any* source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so'.[243] The obligation to provide assistance is not absolute, however. If the ship receiving the distress alert is 'unable' to render assistance or 'in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance', they are not obliged to do so. The master of the ship must enter in the logbook the reasons for not providing assistance.[244]

SOLAS obliges each state party to make the 'necessary arrangements' for distress communication and coordination in their area of responsibility, and for rescue of persons in distress at sea around its coast.[245] Such arrangements include the establishment of search and rescue facilities, having regard to the volume of seagoing traffic and the navigational dangers of the territorial waters of the state in question.

SOLAS was amended in May 2004.[246] A new clause states that masters of ships who have provided assistance to persons in distress at sea shall be released from their obligations 'with minimum further deviation from the ship's intended voyage'.[247] A further amendment obliges the masters of ships who have embarked persons in distress at sea to 'treat them with humanity, within the capabilities and limitations of the ship'.[248] This obligation would apply to rescued hostages as well as pirates. A third amendment states that 'the owner, the charterer, [or] the company operating the ship … shall not prevent or restrict the master of the ship from taking or executing any decision which, in the masters' professional judgement, is necessary for safety of life at sea'.[249]

237 Flag states may adopt legislation that extends the international law obligation. Canada, for example, has legislated to make it a criminal offence for a master not to render assistance to a distress call, unless this would pose a danger to the master's vessel. Article 131(1), read with Article 137(1) (a), Canada Shipping Act 2001.

238 Article 98(1) (b), LOS Convention.

239 Article 10(1), 1989 International Convention on Salvage.

240 Article 10(2), 1989 International Convention on Salvage.

241 Article 10(3), 1989 International Convention on Salvage.

242 Chapter V, Regulation 1, SOLAS.

243 Chapter V, Regulation 33(1), SOLAS.

244 Chapter V, Regulation 33(1), SOLAS.

245 Chapter V, Regulation 7(1), SOLAS.

246 IMO, Resolution MSC.153(78), Adoption of Amendments to the International Convention for the Safety of Life At Sea, 1974, 20 May 2004.

247 Chapter V, Regulation 33(4), SOLAS 1974, as amended in May 2004.

248 Chapter V, Regulation 33(6), SOLAS 1974, as amended in May 2004.

249 Chapter V, Regulation 34 (1), SOLAS, as amended in May 2004.

1979 International Convention on Search and Rescue

The International Convention on Search and Rescue (SAR Convention) was adopted in 1979 to establish an international search and rescue plan, to ensure that, wherever accidents occur at sea, the rescue of persons in distress will be co-ordinated by a search and rescue organization.

Rescue is defined in the Convention as 'an operation to retrieve persons in distress, provide for their initial medical treatment or other needs, and deliver them to a place of safety'.[250] Crucially, with regard to pirates, parties are obliged to ensure that assistance is provided 'to *any* person in distress at sea'. They are to assist '*regardless of the nationality or status of such a person or the circumstances in which the person is found*'.[251]

Box 9. A case example of rescue at sea*

In 2008, a Danish military vessel rescued seven pirates after receiving their distress call that they were sinking 90 nautical miles from Yemen. After their rescue, the pirates, who had been floating in the Gulf of Aden for a week, were handed over to the Yemeni Coastguard. Several anti-tank rockets as well as AK-47 assault rifles were seized during the rescue.

* Somali pirates rescued before drowning, *PressTV*, 5 December 2008.

250 Chapter 1, 1.3.2, SAR 1979.

251 Chapter 2, 2.1.10, SAR 1979. SAR was amended in 2004; see IMO, 'Resolution MSC.155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979', 20 May 2004 (authors' emphasis).

H. Prosecuting suspected pirates

Piracy is a crime that has been identified in international law and over which any state *may* exercise its national jurisdiction. The International Criminal Court has not, at least thus far, been given jurisdiction over piracy. However, the UN Security Council has regularly called upon states to make piracy, as defined in international law, a criminal offence under their domestic law.[252]

Piracy continues to pose a serious threat to international shipping partly because there has been a systematic failure to prosecute alleged pirates, even after they have been captured. Indeed, 'more than 90 per cent of the pirates apprehended by States patrolling the seas will be released without being prosecuted'.[253] The UN Security Council has noted with concern that pirates are 'released without facing justice, regardless of whether there is sufficient evidence to support prosecution'[254] and affirmed that 'the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community'.[255]

International legal authority to prosecute

There is no obligation to prosecute pirates under international law. Under the LOS and High Seas Conventions, a seizing state *may* transfer a suspect for prosecution to its courts, or by means of a transfer agreement to the courts of another state. At its 1973 Conference, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction rejected Malta's proposal to amend Article 100 of the LOS Convention to read '[a]ll States have the obligation to prevent and punish piracy and to fully cooperate in its repression'.[256]

Box 10. Seizure of pirate ships and detention of pirates under the Law of the Sea Convention (1982)

Article 105. Seizure of a pirate ship or aircraft

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.**

252 UN Security Council Resolution 1846 (2008), Preamble; and Resolution 1950 (2010), §13.

253 *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, January 2011, UN doc. S/2011/30, §14. In evidence to the US Senate Armed Services Committee, Ray Mabus, US Secretary of the Navy, stated: '[D]espite the international community's commitment, piracy has both continued to increase and move further offshore, a measure of pirate resiliency and the strong economic incentives that underpin it. Nine of ten pirates captured are ultimately freed as there is often insufficient evidence or political will to prosecute them, or to incarcerate them after conviction.' Cited in 'Piracy off the Horn of Africa', *Congressional Research Services,* 27 April 2011, p. 30. The estimate that 90% of those arrested for piracy are released is strongly contested by others.

254 UN Security Council Resolution 1897 (2009), Preamble.

255 UN Security Council Resolution 1918 (2010), §1.

256 M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. I (Center for Oceans Law and Policy, University of Virginia, 1985), p. 183.

Although states have no duty under international law to prosecute 'pirates' (as defined by the LOS convention), states parties to the 1988 SUA Convention are required to prosecute the perpetrators of offences contained in the Convention.[257] The SUA Convention makes it an offence for a person unlawfully and intentionally to:

- seize or exercise control over a ship by force, threat, or intimidation;[258]
- perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship;[259]
- destroy or cause damage to a ship or its cargo which is likely to endanger the safe navigation of that ship;[260]
- place a destructive device or substance aboard a ship;[261]
- destroy or seriously damage maritime navigational facilities or seriously interfere with their operation, if any such act is likely to endanger the safe navigation of a ship;[262]
- communicate information known to be false, thereby endangering the safe navigation of the ship;[263]
- attempt to commit any of the above offences;[264] and
- abet or act as an accomplice to any of the above offences.[265]

There is a clear overlap between piracy and the various offences contained in the SUA Convention. States that are party to it would be obliged to prosecute piratical acts that are offences under the Convention. Indeed, the Security Council has urged states to implement international agreements such as the SUA Convention in order to prosecute piracy effectively.[266]

Jurisdiction

States may establish jurisdiction over an act of piracy, and then prosecute its perpetrators, via several forms of jurisdiction.

Under the principle of **territorial jurisdiction**,[267] coastal states have jurisdiction over all criminal acts perpetrated in their territorial waters, as they would over criminal acts perpetrated on their soil.[268] Though the LOS Convention defines piracy to include only piratical acts perpetrated on the high seas or in the EEZ, nothing prevents a state from extending this definition through domestic legislation to cover piratical acts that occur in its territorial waters. (Such crimes are typically referred to as 'armed robbery at sea'.) Japan has done just that.[269] States that extend the definition of piracy in this way will acquire territorial jurisdiction to prosecute.

257 Article 4, SUA Convention.

258 Article 3(1) (a), SUA Convention.

259 Article 3(1) (b), SUA Convention.

260 Article 3(1) (c), SUA Convention.

261 Article 3(1) (d), SUA Convention.

262 Article 3(1) (e), SUA Convention.

263 Article 3(1) (f), SUA Convention.

264 Article 3(2) (a), SUA Convention.

265 Article 3(2) (b), SUA Convention.

266 UN Security Council Resolution 1846 (2008), §15; and Resolution 1851 (2008), Preamble.

267 'At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law jurisdiction over persons and things to the exclusion of the jurisdiction of other states.' Andrew Clapham, *Brierly's Law of Nations*, Seventh Edn (Oxford: Oxford University Press, August 2012), p. 168.

268 Territorial jurisdiction is the primary basis of jurisdiction since it directly implicates a state's sovereign authority. For further discussion of territorial jurisdiction, see, for example, A. Cassese, *International Criminal Law*, Second Edn (New York: Oxford University Press, 2008), p. 336.

269 Japan's domestic laws apply 'piratical acts' as defined in the LOSC to include such acts committed in its territorial waters (Article 2, 2009 Law on Punishment of and Measures Against Acts of Piracy). Likewise, the Kenyan Merchant Shipping Act Section 369(1) extends Kenya's definition of piracy to include acts committed in locations within Kenyan jurisdiction. The Crimes Act (1914) of Australia also extends the definition of piracy to cover acts committed in its territorial waters.

Since by definition the high seas are not in the territory of any state, all forms of jurisdiction exercised on the high seas are extraterritorial. The general rule on the high seas is that only flag states[270] have jurisdiction over criminal offences.[271] Piracy is thus an exception to that general rule. States may exercise extraterritorial jurisdiction over piracy through the law enforcement authorizations granted in the LOS and High Seas Conventions and various Security Council resolutions.

Alternatively, a state may seek to assert extraterritorial jurisdiction over criminal acts perpetrated outside its territory by applying the **active personality** principle of jurisdiction (also known as nationality jurisdiction). Under that principle, a state may prosecute one of its nationals for acts committed abroad. For example, Somali nationals who have committed acts of piracy might fall under the active personality jurisdiction of Somalia.[272] The offence prosecuted (in this case piracy) need not be a criminal offence in the territory within which it was perpetrated. It must be an offence under the domestic law of the offender's state of nationality.[273]

Finally, a state may exercise jurisdiction over an act of piracy by means of **universal jurisdiction.** The principle of universal jurisdiction permits each and every state to prosecute the perpetrators of particular offences, irrespective of whether a connection can be established between the act, its perpetrators, its victim, and the prosecuting state. This form of jurisdiction is based on the general principle that certain crimes are considered so heinous that every state should have the possibility to prosecute those who perpetrate them.[274] Piracy is said to be such a crime.[275] Through universal jurisdiction, every state can potentially claim jurisdiction to prosecute suspected pirates irrespective of any connection between the pirates, their victims or the vessel attacked, and the state in question.[276]

Typically, therefore, states may exercise jurisdiction over acts of piracy and prosecute the perpetrators.[277] Yet many do not, preferring to release suspected pirates they capture, having stripped them of their weapons and any other relevant equipment. Despite the impact piracy has on the global economy, it has been claimed (and contested) that 90% of pirates captured are released because no state is prepared

270 Each state is required to set out the conditions on which ships may be granted its nationality, registered, and given the right to fly its flag. Article 5, High Seas Convention; and Article 91, LOS Convention. According to the Permanent International Court of Justice in the *Lotus case* (1927):

> … by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.

271 Article 92, LOS Convention, provides that:

> Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.

As a result, the flag state of a pirate ship would normally have jurisdiction over those on board the vessel, allowing it to enforce its national laws and international norms. The usefulness of such jurisdiction with regard to piracy is questionable, however, because: a) it is unlikely that a pirate vessel will go through the process of registering itself to a state; and b) currently most of the vessels used for piracy are Somali, which rarely asserts its jurisdiction over alleged pirates.

272 Jack Lang, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN doc. S/2011/30, 25 January 2011, §48.

273 For further discussion of the active personality principle of jurisdiction, see A. Cassese, *International Criminal Law*, Second Edn (New York: Oxford University Press, 2008), p. 337.

274 As Judges Higgins, Kooijmans, and Buergenthal of the International Court of Justice have stated: '[I]t is equally necessary that universal jurisdiction be exercised only over crimes regarded as the most heinous by the international community. Piracy is the classical example.' *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, *ICJ Reports* [2002], Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, §§60–1.

275 A. Cassese, *International Criminal Law*, Second Edn, *op. cit.*, p. 338. It has been said that customary international law knows only of one true case of universal jurisdiction: piracy. President Guillaume, *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, Judgment, *ICJ Reports* [2002]. Customary international law generally applies to all states, whether or not they have ratified any relevant treaties. Compare with Guilfoyles' view that states, owing to a 'common interest', 'through customary or conventional rule, have given comprehensive permission in advance to foreign states' assertion of law enforcement jurisdiction over their vessels, D. Guilfoyle, *Shipping Interdiction and the Law of the Sea, op. cit.*, p. 29. Discussed on p. 23 above.

276 See *United States v. Shi*, 2008 WL 1821373; No. 06-10389 (9th Circuit, 24 April 2008). *Shi* is said to be the first time in nearly two hundred years that a US court has invoked the doctrine of universal jurisdiction. See, for example, E. Kontorovich, 'International Decision: United States v. Shi', *American Journal of International Law,* Vol. 103 (2009), p. 734.

277 Where several states make competing claims of jurisdiction, international law provides no rules for adjudicating between them. The issue must be resolved by diplomatic negotiation between the states concerned. See: D. Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights', 59 *International and Comparative Law Quarterly* (2010), p. 145; and R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), p. 37; African Union-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction (Report), Council of the EU (16 April 2009), Doc. 8672/1/09 REV.1, §14.

to prosecute them.[278] Between December 2008 and March 2011, for example, only 93 of the 770 alleged pirates that EU NAVFOR detained were subsequently prosecuted.[279] Why are pirates being released rather than prosecuted?[280]

Obstacles to prosecution

'Catch and release' persists for several reasons, notably: lack of national legislation, logistical challenges, lack of political will, and insufficient evidence. These are discussed in turn.

Lack of national legislation

As mentioned above, although the Security Council has repeatedly emphasized that states should criminalize piracy under their domestic law,[281] many states have not enacted national legislation to this effect. The UK, for example, has not brought a suspected pirate before its courts for prosecution in the last decade. In UK law:

> for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, [UNCLOS's piracy provisions] shall be treated as constituting part of the law of nations.[282]

Logistical challenges

Logistical challenges may inhibit a patrolling state from bringing a suspect to its own courts. Arresting vessels needs adequate holding facilities to detain suspects correctly, for instance. There are, however, other logistical challenges. Under Article 104 of the German Basic Law, every detainee must be brought before a judge no later than the day after arrest. Thus, a German naval vessel that captures a suspected pirate is required to release him unless it can ensure that the suspect will appear before a judge within this time period.

Lack of political will

A state may be deterred from transferring suspects to its jurisdiction by concern that they may seek asylum. This seems to be one reason why patrolling forces currently transfer most captured suspects to states in the region, using pre-arranged transfer agreements. Lack of 'public interest' may also reduce the political will to prosecute. Piracy prosecutions can be expensive. Suspects, victims, witnesses, and evidence must all be moved, often long distances, to the location of trial, and defendants must be provided with translation and legal aid. Where it is not evident that a prosecuting state has a clear interest in acting against the individuals concerned, the public may not support prosecution.

Lack of evidence

EU and NATO forces have estimated that some 700 suspected pirates captured by EU and NATO vessels off the coast of Somalia were released between January and June 2010.[283] Lack of evidence to support prosecution was cited as the main reason for these releases. This is perhaps unsurprising because the sea provides an ideal dumping ground for incriminating objects, such as weapons.

The practice by which a state or organization captures suspected pirates and transfers them to

278 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN doc. S/2011/30, 25 January 2011.

279 Cmdr. Paddy O'Kennedy of EUNAVFOR, reported in 'Pirates jailed in 17 nations as prosecutions rise', *Associated Press*, 15 March 2011.

280 In March 2011, five of the world's largest maritime organizations, complaining that '2,000 Somali pirates are hijacking the world's economy', launched an advertising campaign and a website (www.SaveOurSeafarers.com) demanding tougher action. The group includes the International Chamber of Shipping, which represents about 80% of the world's merchant ships, and INTERTANKO, whose members operate most of the world's tankers. In half-page advertisements in leading newspapers, including the *Wall Street Journal*, the group noted that 'even when caught red-handed, 80 per cent of pirates are released to attack again'. B. Debusmann, 'Why high-seas piracy is here to stay', *Reuters*, 4 March 2011.

281 UN Security Council Resolution 1897 (2009), Preamble. If some states have not criminalized piracy, many others have. In January 2011, the Special Adviser to the UN Secretary-General on legal issues related to piracy off the coast of Somalia reported that several states (specifically Belgium, France, Japan, the Maldives, Seychelles, Spain, and Tanzania) had begun adapting their criminal law to combat piracy. 'Report of the Special Adviser to the UN Secretary-General on legal issues related to piracy off the coast of Somalia', UN doc. S/2011/30, 25 January 2011, §47.

282 Merchant Shipping and Maritime Security Act 1997, Section 26.

283 Both Kenya and the Seychelles have refused to accept suspects on the grounds that insufficient evidence is available to prosecute. 'Report of the Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at seas off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results', UN Security Council, UN doc. S/2010/394, 26 July 2010, §§20–3.

another state for trial does not facilitate the sound collection, management, and analysis of evidence. To sustain prosecutions, the chain of evidence must be unbroken and uncontaminated and it is difficult to meet these conditions when a variety of counterpiracy forces are involved. Recognising this, the UNODC has developed a handover guidance manual with Kenya and the Seychelles which seeks to improve the quality of the evidence that counterpiracy patrols collect and transfer.[284]

Furthermore, as Cole has noted:

> [M]ost witnesses disperse around the world shortly after the apprehension of the pirates. Crew from ships that have been attacked will generally continue to their next port of call without delay, so there is no opportunity for police in the prosecuting state to take a statement further to the one taken by the naval personnel at the time of the attack, if one was taken at all. Naval personnel will be available during the handover to give statements to the police of the prosecuting state, but will then return to sea, so opportunities for taking further statements are few.[285]

In his January 2011 report, the Special Adviser to the UN Secretary-General on legal issues related to piracy off the coast of Somalia advised that, to facilitate the prosecution of pirates, 'the assembly of a case should begin with a set of evidence, such as the presence of equipment on board, a global positioning system, weapons, a large quantity of fuel, the composition of the crew, aerial observation of behaviour and the type of ship for the zone in question'. In particular: 'a database of fingerprints could be compiled. In at least two recent cases, concerning transfer to Belgium and the Netherlands respectively, fingerprinting made it possible to identify the perpetrators of previous attacks, who were attempting a repeat offence.'[286] To implement this recommendation, patrolling authorities and receiving states would need to cooperate, and large sums would be required for training and equipment.

The right to a fair trial

As discussed above, states or regional organizations that capture alleged pirates on the high seas commonly transfer them to another state in the region for prosecution. For this reason, it is highly relevant to ask whether states are under an obligation not to return a suspect to a state where his or her right to fair trial might be violated.

The right to a fair trial is affirmed in a number of human rights treaties.[287] Fair trial guarantees, in general, are not primarily concerned with the outcome of judicial proceedings, but the process by which outcomes are achieved.[288] There is no agreement on the core constituent elements of a fair criminal trial, but they may reasonably be expected to include:

- The presumption of innocence;
- The right to be heard by a competent, independent, and impartial court;
- The right not to be convicted of an offence that was not criminal when it was committed;
- The right to be tried and judged within a reasonable time;
- The right to legal counsel;
- The right to interpretation into a language the defendant can readily understand; and
- The right to an appeal against conviction.

States are clearly prohibited from returning suspects (*refoulement*) to states where there is a real risk they would face torture (see below). International law is more ambiguous regarding a state's obligation not to transfer suspects to states where their right to a fair trial may be violated. Referring to the fair trial obligation contained in Article 6 of the ECHR, the European Court of Human Rights has stated that 'the Court has not to date found that the expulsion or extradition of an individual … [would violate] Article 6 of the Convention, [although] it has on frequent occasions held that such a possibility

284 *Ibid.*, §26. In Resolution 1950 (2010), the Security Council affirmed 'the importance of continuing to enhance the collection, preservation and transmission to competent authorities of evidence of acts of piracy and robbery at sea off the coast of Somalia'. In his June 2011 report to the Council on the modalities for the establishment of specialised Somali anti-piracy courts, the UN Secretary-General stated the '[i]nitial problems associated with gathering of evidence by naval forces and its transfer to regional prosecuting States, in particular Kenya, and Seychelles, appear to have been overcome by guidance developed by those States with the assistance of UNODC. The States concerned report that it is no longer the case that the quality of evidence gathered by naval forces is an obstacle to successful piracy prosecutions.' UN doc. S/2011/30, §35.

285 A. Cole, 'Prosecuting Piracy: Challenges for the Police and the Courts', Briefing Paper in Conference on Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracy, Dubai, 18–19 April 2011, pp. 107–8.

286 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN doc. S/2011/30, 25 January 2011, §60.

287 See Article 14, ICCPR, and the following regional human rights treaty provisions: Articles 5, 6, and 7, ECHR (and Articles 2 to 4 of the 7th Protocol to the ECHR); Articles 3, 8, 9, and 10, ACHR; Article 13, AbCHR; Articles 3, 7, and 26, ACHPR.

288 S. Shah, *International Human Rights Law* (New York: Oxford University Press, 2010), p. 315.

cannot be excluded where the person being expelled has suffered or risks suffering a *flagrant denial* of a fair trial'.[289]

In *Othman (Abu Qatada) v. UK*, a case decided by the European Court of Human Rights in January 2012, the Court determined that a 'real risk' that evidence obtained by torture would be admitted in criminal proceedings was enough to constitute a 'flagrant denial of justice'.[290] On this test, if a state party to the European Convention transferred a suspected pirate to another state in which there is a *real risk* that the suspect would face a flagrant denial of justice, the transferring state would be in violation of its obligations under the Convention.[291]

Commenting on the transfer of suspected pirates to Kenya,[292] Guilfoyle has argued that piracy trials in Kenya would probably not violate Article 6 of the European Convention: '[D]espite the general backlog in Kenya's judicial system they commence promptly (in as little as six weeks), the pirates are represented by local lawyers (often with foreign language assistance), and translators have been paid for by capturing states. EU-provided assistance has included computers and money to bring more qualified lawyers to Mombasa and diplomatic observers are routinely present.'[293]

Prosecutions in national courts

As of June 2012, more than 20 states and other areas were either holding suspected pirates in custody awaiting prosecution, or had already prosecuted suspects. They include: Belgium, Comoros, France, Spain, Germany, India, Japan, Kenya, the Republic of Korea, Madagascar, Malaysia, the Maldives, the Netherlands, Oman, the Seychelles, Tanzania, the United Arab Emirates, the USA, and Yemen, as well as both Puntland and Somaliland.[294] Puntland had received 290 suspects and prosecuted 240, by far the largest number. Kenya was second, having received 143 suspects and prosecuted 50.

Three elements are common to the majority of piracy prosecutions. First, piratical acts are not committed by one person acting alone, and it is therefore unsurprising to find multiple defendants in most piracy prosecutions. The typical piracy case involves around 10 suspects.[295] Second, those charged with piracy normally defend themselves by claiming to be innocent fishermen. To date, this defence has not been particularly successful for those that have invoked it. Third, those prosecuted have typically been caught in the act, rather than suspected of piracy on the basis of suspicious behaviour. This correlates with the approach of *Operation Atalanta*, which only prosecutes individuals who have committed or attempted to commit an act of piracy, and does not prosecute individuals who are merely suspected of piracy, for example because of the equipment they carry. In evidence he gave to the House of Lords European Union Committee, Commander Dow (NAVFOR's legal adviser) explained that cases are selected to maximize the probability of conviction and rely heavily on witness evidence of observed acts of piracy.[296]

The Seychelles, which is party to a number of transfer agreements,[297] had prosecuted 63 pirates as of February 2012.[298] Its Supreme Court heard its first piracy case in 2009.[299] The case concerned 11 Somali nationals who were charged with a total of seven offences, five relating to terrorism and two to piracy.

On 5 December 2009, an aircraft on a surveillance mission over the Indian Ocean recorded images of a mother ship towing two skiffs, which had weapons and a total of 11 people on board. On the evening of

289 *Mamatkulov and Askarov v. Turkey,* ECtHR, App. No. 46827/99 [2005]; *Soering v. United Kingdom*, ECtHR, App. No. 14038/88 [1989], §113 (where a fugitive 'risks suffering a flagrant denial of a fair trial in the requesting country' this could 'exceptionally' engage Article 6). As cited by D. Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights', *op. cit.*, p. 166.

290 *Othman (Abu Qatada) v. UK*, App. No. 8139/09 [2012], §§281–2.

291 Guilfoyle, *ibid.*, points to the joint, partly dissenting opinions of Judges Bratza, Bonello, and Hedigan in *Mamatkulov and Askarov v. Turkey* ECtHR, App. No. 46827/99 [2005]. They concluded that a 'flagrant denial' would be one 'so fundamental as to amount to nullification, or destruction of the very essence, of the right guaranteed'.

292 In 2006, Kenya was the first state in the region to establish jurisdiction to prosecute suspected pirates. The Subordinate Court (court of first instance) of Mombasa declared that it was competent to prosecute suspected pirates on 26 October 2006. See 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN doc. S/2011/30, 25 January 2011, §50.

293 D. Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights', *op. cit.*, p. 167.

294 UNODC, *Counter-Piracy Programme, Issue Eight*, February 2012, p. 16.

295 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN doc. S/2011/30, 25 January 2011, §10.

296 Oral evidence given to the House of Lords European Committee, 'Combating Somali Piracy: the EU's Naval Operation Atalanta', 14 April 2010, §34; and Oral evidence, 14 January 2010, questions 113 and 148.

297 The Seychelles has transfer agreements with Denmark, the EU, the UK, and the USA. *Ibid*., Annex V, §5.

298 UNODC, *Counter-Piracy Programme, Issue Eight*, February 2012, p. 16.

299 *Republic v. Dahir and Others* (51 of 2009), [2010] SCSC 81 (26 July 2010).

6 December (after dark), the skiffs approached and attacked the *Topaz*, which fired back and eventually captured both skiffs and the mother vessel. Four Somali men were captured in each skiff. An AK-47 loaded with 26 bullets was recovered from the first skiff, and two loaded AK-47s and a rocket-propelled grenade were removed from the second. Other items, including ladders and hooks, believed to be on the second skiff, could not be recovered because the skiff sank soon after it was captured. Three Somali men were also captured on board the mother ship, which was towed to Port Victoria, Seychelles. A global positioning system, two mobile phones, and seventeen barrels containing food, fuel, and drinking water were seized from the mother ship. The mother ship, skiffs, and crew were all identified on the images recorded by surveillance aircraft on 5 and 6 December.

Following their capture, the 11 men were all formally arrested. They later protested that their constitutional rights (namely, to have the advice of a lawyer, to remain silent, and to be arrested in a language they understood) had not been explained to them during their arrest. When it considered this claim, the court ruled that no breach of the constitution had occurred because it was impractical to assign a lawyer to the accused at sea and the constitution contained the words 'as soon as … reasonably practicable'.[300] The defendants denied all the offences and claimed they were fishermen. During the trial they remained silent and did not call any witnesses. The prosecution called 16 witnesses and used the footage filmed by the surveillance aircraft as evidence of the defendants' involvement.

The 11 defendants were all acquitted of the five terrorism-related offences on the grounds that it could not reasonably be concluded that the acts in question (use of firearms and explosives against a Seychellois coastguard vessel) were intended to compel the Government of the Seychelles to refrain from acting or to act in a certain manner, as required by the definition of terrorism.[301] The court highlighted that a pirate is motivated by financial gain rather than an ideological goal. The court noted that the defendants were waiting to attack any ship within their reach and the *Topaz* was not specifically targeted. In his testimony, the captain of the *Topaz*, Major Simon Laurencin, stated that at night it is difficult to determine whether the *Topaz* is a warship or a passenger ship, and he believed the defendants would not have attacked had they known it was a warship.[302]

The court then turned to the two offences of piracy, stressing that piracy is concerned with illegal acts of violence committed for *private* ends as defined by section 65 of the Seychelles Penal Code.[303] The defence highlighted that no one was injured and that the *Topaz* had suffered no damage during the attack. The court found that injury and damage are not required for the offence of piracy to have occurred, because 'piracy is more of an offence to do with stealing property (vessel and cargo) for private ends ... than assaulting or causing injuries to the crew, which is incidental to the main criminal act'.[304] The court rejected the defendants' pre-trial statements that they were fishermen, because no hooks, nets, tackle, or any form of fishing equipment were found in the skiffs or mother vessel.[305]

The eight men captured in the two skiffs were all convicted of piracy. The three men captured on board the mother ship were convicted of aiding and abetting an act of piracy. The court clarified that 'aiding' meant any act that was intended to facilitate the commission of a crime which occurred prior to, or at the time of, the criminal act in question.[306] The court found that the three men were working with the men in skiffs towards a common goal, and concluded that the mother ship was an 'umbilical cord' to the skiffs, for without it these could not re-fuel, acquire food or weapons, or travel on the high seas to attack larger vessels such as the *Topaz*.[307]

The 11 defendants were all sentenced to 10 years' imprisonment to be served in the Seychelles. When determining sentence the court took into account that no one was injured; that the *Topaz* was not damaged during the attack; that the men were all first offenders and that some were minors when the offence took place; and that they would be incarcerated abroad, in a foreign country.

300 *Ibid.*, §14.
301 *Ibid.*, §19.
302 *Ibid.*, §42.
303 *Ibid.*, §37.
304 *Ibid.*, §53.
305 *Ibid.*, §54.
306 *Ibid.*, §63.
307 *Ibid.*, §68.

I. Transferring suspected pirates for prosecution

The LOS Convention, the High Seas Convention, and a number of Security Council Resolutions authorize states to determine the punishments imposed on those found guilty of piracy. However, this authority is not unlimited. International human rights law prohibits certain forms of punishment, including torture or other forms of cruel, inhuman, or degrading treatment or punishment. Such norms bind the state that seeks to prosecute but also prevent a state from transferring a suspect it has captured to another state where punishments that violate applicable human rights law might be imposed. As we saw above, the likelihood that suspects will receive a fair trial is also relevant when a state decides whether to transfer a suspect to another state for prosecution.

Transfer agreements

Transfer agreements occur between a state in the region that has criminalized piracy under its national legislation and is willing to prosecute suspected pirates, and states from outside the region or other organizations involved in counterpiracy operations. For example, the EU has a transfer agreement with Kenya under which Kenya agrees to 'accept, upon the request of the EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy and … will submit such persons and property to its competent authorities for the purpose of investigation and prosecution'.[308]

Transfer agreements typically contain provisions which ensure that transferred suspects will be treated in accordance with international human rights standards. Such assurances will *not* negate the obligations of a transferring state if they are merely words of assurance and lack adequate guarantees against mistreatment.[309] Assurances should include adequate judicial mechanisms for review and effective post-return monitoring arrangements.[310] Assurances from states that systematically violate the prohibition on torture would not be valid either.[311] Furthermore, assurances should only be accepted from states that do not systematically engage in prohibited behaviour, and even then after a complete examination of the merits of each case.[312]

In 2012, Mauritius and the UK entered into a Memorandum of Understanding stating that Mauritius would accept suspects transferred to it by UK military forces.[313] The Memorandum includes conditions of transfer under which no suspect transferred to Mauritius will face the death penalty. The Government of Mauritius announced that it had received the first transferred suspects in June 2012. Mauritius secured €3 million from the EU for the trial and detention of piracy suspects.[314]

As of February 2012, 143 suspected pirates were believed to be awaiting trial in Kenya, and a further 50 were serving sentences following prosecution. None had been captured by Kenya; all had been transferred to Kenya by patrolling forces.[315] In return for agreeing to accept transferred suspects, Kenya receives funding from various international bodies. For example, a new high-security court room was built in Mombasa, Kenya, in June 2010 with funding from the EU and the UNODC counterpiracy programme.

Since January 2010, the Seychelles has also been party to a number of transfer agreements and has received 151 suspects, of whom 63 had been prosecuted as of February 2012.[316] Because the Seychelles has few prison cells, agreements with the Seychelles Government now stipulate that convicted pirates will be transferred to Somalia to serve their sentences.

308 Article 2(a), EU-Kenya Transfer Agreement, as cited by R. Geiß and A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden, op. cit.*, p. 33. Several other states have entered into similar agreements with Kenya, including the UK (see Foreign and Commonwealth Office, 'Prisoner Transfer Agreements').

309 *Chahal v. UK,* ECtHR, App. No. 22414/93 [1996], §§104–5; and *Saadi v. Italy*, ECtHR, App. No. 37201/06, [2008], §§143–8.

310 CAT, General Comment 2, HRI/gen/1/rev.9 (Vol. I) 376, §19; *Saadi v. Italy*, ECtHR, App. No. 37201/06 [2008], §148; see also D. Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights', *op. cit.*, p. 162; and K. Jones, 'Deportations with Assurances: Addressing Key Criticisms', *57 International and Comparative Law Quarterly*, 2008, p. 187.

311 *Saadi v. Italy*, ECtHR, App. No. 37201/06 [2008], §148; *Soldatenko v. Ukraine,* ECtHR, App. No. 2440/07 [2008], §§71–4.

312 Committee against Torture, 'Conclusions and Recommendations: USA', UN doc. CAT/C/USA/CO/2, [2006], §21.

313 Mauritius set to try suspected pirates seized by the UK, *Reuters*, 2 June 2012.

314 *Ibid*.

315 UNODC, *Counter-Piracy Programme Issue Eight,* February 2012, p. 16.

316 *Ibid*.

Non-refoulement and the transfer of pirates

1951 Refugee Convention

The principle of *non-refoulement* was first developed in the context of refugee protection. The *Convention relating to the Status of Refugees* (1951, the Refugee Convention) states: '[N]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his right to life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[317]

As set out in the Refugee Convention, the *non-refoulement* obligation is dependent on the proviso of Article 1(f), which denies the protection of the convention to anyone who has committed a serious, non-political crime outside the country of refuge. Since piracy is a serious crime, it is unlikely that convicted pirates would be protected by the *non-refoulement* obligation under the Refugee Convention.[318]

However, the principle of *non-refoulement* is also found in other international and regional human rights instruments. Indeed, outside the Refugee Convention, the principle is articulated more expansively.[319] As Lauterpacht and Bethlehem state, the customary international law rule prohibiting *non-refoulement* would prohibit surrendering a person where 'substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment.'[320]

1984 UN Convention against Torture

CAT expressly states that: '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture…. 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.'[321]

The *non-refoulement* obligation contained in CAT is absolute and applies to every individual, even to those who are not refugees from persecution and even to those who have committed serious crimes. Therefore, the *non-refoulement* obligation contained in CAT does apply to pirates. The UN Committee Against Torture has explicitly stated that 'the *non-refoulement* guarantee [applies] to *all* detainees in its [a State Party's] custody', including those extra-territorially detained.[322]

1966 International Covenant on Civil and Political Rights

Article 7 of the ICCPR prohibits torture, or cruel, inhuman or degrading treatment. The interpretation of the Human Rights Committee is that it prohibits the *refoulement* of individuals who would face a real risk of being exposed to such harm.[323] According to the Human Rights Committee:

> If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that, as a result, there is a real risk that his or her *rights under the Covenant* will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.[324]

317 Article 33(1), Refugee Convention. The Refugee Convention applies only to an individual with convention refugee status, who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. See Article 1(a)(2).

318 Furthermore, commentators have claimed that Article 33 is unlikely to be of great relevance to Somali pirates because they would have little to fear from the local government in Puntland. See D. Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights', *op. cit.*, p. 153, citing A. Harding, 'Postcard from Somali pirate capital', *BBC News,* 16 June 2009.

319 See G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Edn (Oxford: Oxford University Press, 2007), Chapter 3.

320 Cited in A. Clapham, *Brierly's Law of Nations*, Seventh Edn (Oxford: Oxford University Press, 2012), p. 298, citing E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in E. Feller, V. Türk, and F. Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: CUP, 2003), pp. 87–177, §253, and see §114. For a full overview of refugee law, see G. Goodwin-Gill, *The Refugee in International Law*, Third edn (Oxford: Oxford University Press, 2007).

321 Article 3, CAT.

322 'Conclusions and Recommendations of the Committee Against Torture (United States of America) UN doc. CAT/C/USA/CO/2 (2006), §20.

323 Human Rights Committee, General Comment No. 20, *Article 7,* UN doc. HRI/GEN/1/Rev.6 (2003), at 151, §9. For states that have abolished the death penalty there is an obligation not to refoule (ITALICS) a person to another state where there is a real risk that person would be exposed to the death penalty, see Judge v. Canada (ITALICS), HRC Comm. No.829/1998 [2003].

324 *ARJ v. Australia,* HRC Comm. No. 692/1996 [1997] (authors' emphasis). For further discussion of the applicability of *non-refoulement* to ICCPR rights, see G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Edn, *op. cit.*, pp. 305–10.

1950 European Convention on Human Rights

The European Court of Human Rights has similarly concluded that the removal of individuals who would face a real risk of being exposed to torture and cruel, inhuman, or degrading treatment is precluded by the ECHR.[325] It has repeatedly highlighted that the prohibition on torture contained in Article 3 is absolute, regardless of an applicant's conduct, or the gravity of the offence.[326] The prohibition of *refoulement* under the ECHR undoubtedly applies to pirates.

A suspect seeking to rely on *non-refoulement* under the European Convention would nevertheless have to show that there are substantial grounds for believing that he or she would face a real risk of being subject to torture or cruel, inhuman, or degrading treatment or punishment if removed to the proposed destination. The *possibility* of harm is insufficient to meet this test,[327] though it is not necessary to prove that the ill-treatment will definitely occur. The likely treatment must attain a 'minimum level of severity', a relative assessment that 'depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and the method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age, and state of health of the victim.'[328] Even a small risk may be considered 'real' if the foreseeable consequences are very serious.[329]

With regard to the right to life (Article 2 of the European Convention), the prohibition on the death penalty contained in Optional Protocols 6 and 13 to the Convention has been interpreted to prohibit the *refoulement* of an individual to face execution. In a 2010 case, the European Court of Human Rights affirmed that:

> Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.[330]

325 *Soering v. United Kingdom,* ECtHR, App. No. 14038/88 [1989]; *Chahal v. United Kingdom,* ECtHR, App. No. 22414/93 [1996].

326 *Ibid.*; *Ahmed v. Austria*, ECtHR, App. No. 25964/94 [1996]; and *Ramzy v. The Netherlands*, ECtHR, App. No. 25424/05 [2005].

327 G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Edn, *op. cit.*, p. 313.

328 *Soering v. United Kingdom,* ECtHR, App. No. 14038/88 [1989], §100. See G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Edn, *op. cit.*, p. 314.

329 G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Edn, *op. cit.*, p. 314.

330 *Al-Saadoon and Mufdhi v. United Kingdom*, ECtHR, App. No. 61498/08 [2010], §§118, 120, 123.

Conclusions and recommendations

Existing international law, notably in the Law of the Sea Convention, is widely believed to be adequate to counter the international threat posed by piracy. It permits any duly marked government ships to board and seize pirate vessels and detain suspected pirates on the high seas and within a state's Exclusive Economic Zone. With respect to Somalia, the Security Council has granted concerned states additional powers to conduct counterpiracy operations on Somali territory, with the consent of the Somali Transitional Federal Government. What is lacking is the political will—and accordingly the funding—to prosecute and incarcerate pirates systematically while addressing the root causes of piracy: poverty, conflict, and lack of good governance.

Though 'catch and release' is less of a problem than it used to be, many suspected pirates are still released without any attempt to prosecute them. It is entirely possible to respect the human rights of those detained on suspicion of involvement in piracy, to give them a fair trial, and to incarcerate those who are convicted. It requires states to adopt national legislation that enables prosecution, and action to ensure that detained suspects receive sufficient clothing, food, and water, are treated humanely at all times, enjoy adequate toilet and washing facilities, and are granted access as soon as possible to a lawyer and a judicial authority with jurisdiction to order release or continued detention. Modern technology can provide access to justice before a ship docks at a friendly port.

There is an urgent need to clarify the lawful use of force by private maritime security contractors. While it is generally understood that they may use force only in self-defence or in defence of the personnel on board the vessel they are protecting, exactly when and in what circumstances they may open fire on another vessel on grounds of self-defence remains underdeveloped. It is not easy to distinguish between a fisherman and a pirate on the high seas. A wrongful or disproportionate use of firearms or explosive weapons puts individuals at risk of prosecution for homicide. Detailed guidance for the use of force on the high seas (including warning shots) by private maritime security contractors would be a valuable next step. It is hoped that this Briefing has provided an indication of how this could be elaborated.

Glossary of abbreviations and acronyms

ACHR	1969 American Convention on Human Rights
ACHPR	1981 African Charter on Human and Peoples' Rights
AMISOM	African Union Mission in Somalia
ANSA	Armed non-state actors
ASIS	American Society for Industrial Security (ASIS International)
1990 Basic Principles	1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
BMP	Best Management Practices
CAT	1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
1979 Code of Conduct	1979 Code of Conduct for Law Enforcement Officials
CPS	Crown Prosecution Service
Dwt	Deadweight tonnage
ECHR	1950 European Convention on Human Rights
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
EU	European Union
EUNAVFOR	EU Naval Force (Operation Atalanta)
High Seas Convention	1958 Geneva Convention on the High Seas
ICCPR	1966 International Covenant on Civil and Political Rights
ICoC	International Code of Conduct for Private Security Service Providers
IMB	International Maritime Bureau
IMO	International Maritime Organisation
LOS Convention	1982 UN Convention on the Law of the Sea
LRAD	Long Range Acoustic Device
MSC	Maritime Security Companies
NATO	North Atlantic Treaty Organization
PCASP	Privately contracted armed security personnel
PMSC	Private Maritime Security Contractor
PSSP	Private Security Service Provider
RPG	Rocket-propelled grenade
SAR	Search and Rescue
SOLAS	1974 International Convention for the Safety of Life at Sea
SPV	Suspected pirate vessel
SUA	1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
TFG	Transitional Federal Government (of Somalia)
UDHR	1948 Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
USA	United States of America
VPD	Vessel Protection Detachment
WFP	World Food Programme

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