THE UNIVERSITY OF HULL

JURISDICTION OVER MARITIME PIRACY IN INTERNATIONAL LAW

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by

Carmino Massarella

LL.B. (Hons.), B.Sc. (Hons.), LL.M.

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List of Abbreviations

ABNJ	Areas Beyond National Jurisdiction
AIDP	Association International de Droit Pénal
AJIL	American Journal of International Law
AJIL Sup.	American Journal of International Law Supplement
ASEAN	Association of South East Asian Nations
ATS	Alien Tort Statute
AU	African Union
BYIL	British Year Book of International Law
CTF151	Coalition Task Force 151
CUP	Cambridge University Press
ECHR	1955 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
EU	European Union
EUNAVFOR	European Union Naval Force
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
Harv. Int'l L. J.	Harvard International Law Journal
HSC	1958 Convention on the High Seas (High Seas Convention)
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICCPR	1966 International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IJMCL	International Journal of Marine and Coastal Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMB	International Maritime Bureau

IMO	International Maritime Organisation
ISC	Information Sharing Centre
IUU	Illegal, Unreported, and Unregulated (Fishing)
IRTC	Internationally Recommended Transit Corridor
JICJ	Journal of International Criminal Justice
LOSC	1982 United Nations Convention on the Law of the Sea (Law of the Sea Convention)
MOWCA	Maritime Organisation for West and Central Africa
NATO	North Atlantic Treaty Organisation
nm	Nautical Miles
ODIL	Oceans Development and International Law
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
PSI	Proliferation Security Initiative
RCADI	Recueil des Cours de l'Académie de Droit International
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
RFMO	Regional Fisheries Management Organisation
SHADE	Shared Awareness and De-confliction
STL	Special Tribunal for Lebanon
SUA	1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
SUA Protocol	2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
TFG	Transitional Federal Government (of Somalia)
UNCLOS	United Nations Conference on the Law of the Sea
UNGA	United Nations General Assembly
UNODC	United Nations Office for Drugs and Crime
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNTS	United Nations Treaty Series
VCLT	1969 Vienna Convention on the Law of Treaties
WMDs	Weapons of Mass Destruction
YBILC	Year Book of the International Law Commission

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Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1995) CETS No.156

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Jurisdictional Immunities of the State. (Germany v Italy: Greece intervening) ICJ Judgment of 3 February 2012

Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p.168.

North Sea Continental Shelf Cases. (Denmark v. Germany and Netherlands v. Germany) Judgment, 1969 ICJ Reports, 3.

Questions Relating to the Obligation to Prosecute or Extradite. (Belgium v. Senegal) ICJ Judgment of 20 July 2012

Corfu Channel Case (UK v. Albania), ICJ Reports 1949, 4

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide ICJ Advisory Opinion of 28 May 1951

ECtHR

Kononov v. Latvia ECHR 36376/04 (2010)

Rigopoulos v. Spain ECHR 37388/97 (1999)

Medvedyev and Others v. France ECHR 3394/03 (2010)

Al-Adsani v. United Kingdom ECHR 35763/97 (2001)

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Prosecutor v. Blaškić (judgment on the request of Croatia) AC 29 October 1997 (IT-95-14-T)

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Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945 – 1 October 1946. International Military Tribunal, Nuremberg (1947)

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In Re: Piracy Jure Gentium. (1934) A.C. 586

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The Le Louis (1817) 2 Dods. 2010, III-110.

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US

Bonnet's Trial (1718) 15 Howell's State Trial 1231.

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Contents

1 Introduction

This thesis is an examination of the international law of maritime piracy.[1] Its purpose is to explore the content and dimensions of the international law of piracy, and to seek a positive doctrine of the law as it currently stands. The thesis argues that maritime piracy in international law is primarily a question of jurisdiction. The thesis explains that jurisdiction in public international law has two distinct aspects, that of jurisdiction to prescribe, which is primarily a question of international criminal law (ICL), and that of jurisdiction to enforce, which at sea is governed by rules set out in the law of the sea. The thesis

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[1] I Bantekas and S Nash (2007) *International Criminal Law* London: Routledge-Cavendish, 94-100; JW Boulton (1983) *The Modern International Law of Piracy: Content and Contemporary Relevance* 7 International Relations 2493; I Brownlie *Principles of Public International Law* (2008) Oxford: OUP, 229-239; CJ Colombos (1967) *The International Law of the Sea* London: Longmans, Green and Co., 443-457; RR Churchill and RV Lowe (1999) *The Law of the Sea* Manchester: MUP, 209-211; DP O'Connell (I Shearer ed.) (1982) *The International Law of the Sea Volume II* Oxford: Clarendon, 966-983; BH Dubner *The Law of International Sea Piracy* (1978-1979) 11 NYU Journal of International Law and Politics 471; BH Dubner *The Law of International Sea Piracy* (1980) The Hague: Martinus Nijhoff; BH Dubner *Piracy in Contemporary National and International Law* (1990) 21 California Western International Law Journal 139; BA Elleman, A Forbes, and D Rosenberg. (eds) *Piracy and Maritime Crime* (2010) Newport, Rhode Island: Naval War College; R Geiss and A Petrig *Piracy and Armed Robbery at Sea* (2011) Oxford: OUP; GC Gidel *Le Droit International Public de la Mer. Le Temps de Paix. Tome 1: Introduction – La Haute Mer* (1932) Chateauroux: Mellottée, 303-348; B van Ginkel and FP van der Putten (eds) *The International Response to Somali Piracy.* (2010) Leiden: Martinus Nijhoff; D Guilfoyle *Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts* (2008) 57 ICLQ 690; D Guilfoyle *Shipping Interdiction and the Law of the Sea* (2009) Cambridge: CUP, 26-74; R Haywood and R Spivak *Maritime Piracy.* (2011) London: Routledge; DHN Johnson *Piracy in Modern International Law* (1957) 43 Transactions of the Grotius Society 63; J Kraska *Contemporary Maritime Piracy. International Law, Strategy, and Diplomacy at Sea* (2011) Santa Barbara: Praeger; HA Lauterpacht (ed) *Oppenheim's International Law Volume 1 – Peace* (1947) London: Longman, 557-567; P Lehr (ed) *Violence at Sea. Piracy in the Age of Global Terrorism* (2007) New York: Routledge; SP Menefee *Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity* (1998-1999) 5 ILSA J. Int'l. & Comp. L. 309; CH Norchi and G Proutière-Maulion (eds) *Piracy in Comparative Perspective: Problems, Strategies, Law* (2012) Paris: Pedone; JE Noyes *An Introduction to the International Law of Piracy* (1990-1991) 21 Cal. Int'l L. J. 105; VV Pella *La Répression de la Piraterie* (1926) 15 RCADI 145; AP Rubin *The Law of Piracy* (1988). Honolulu: University Press of the Pacific; M Shaw *International Law* (2008) Cambridge: CUP; I Shearer *Piracy.* in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (2012) Oxford: OUP; JWF Sundberg *Piracy: Air and Sea* (1971) 20 DePaul Law Review 337; P Stiel *Der Tatbestand der Piraterie nach geltendem Völkerrecht* (1905) Leipzig: Duncker and Humbolt; JHW Verzijl *International Law in Historical Perspective* (1971) Leiden: A.W. Sijthoff, 248-261; Harvard Research in International Law *Draft Convention on Piracy with Comments* Reproduced in (1932) 26 AJIL Sup. 739; SN Nandan and S Rosenne *United Nations Convention on the Law of the Sea 1982: A Commentary Volume III* (1995) The Hague: Martinus Nijhoff; DR Rothwell and T Stephens (2010) *The International Law of the Sea* Oxford: Hart, 162-3, 432-3

expounded here is that piracy was not historically conceptualised as an 'international crime' in the sense of one directly proscribed by international law, nor was piracy categorised as what we now know as universal jurisdiction. The thesis argues instead that the real significance of maritime piracy in international law is that it is a special basis of enforcement jurisdiction, an exception to the general rule of the exclusivity of flag State jurisdiction on the high seas. The thesis also suggests however, that this special basis of enforcement jurisdiction is less than adequate to address the contemporary problem of transnational maritime crime.

The thesis will contend that the current theories regarding the international law of piracy are contributing to the difficulties being experienced in bringing pirates to justice. Where prescriptive jurisdiction is concerned, the thesis will argue that the theory that piracy is directly proscribed by international law has created a situation where many State have inadequate or even non-existent municipal law criminalising piracy. Furthermore, the thesis will also contend that the theorisation of piracy as being subject to universal jurisdiction is also contributing to the failure of States to take responsibility for prosecuting pirates, and also runs the risk of encouraging excessive claims to jurisdiction. Consequently, the thesis will propose that piracy is more accurately characterised as a 'transnational crime', that is more logically prosecuted under the more normal bases of prescriptive jurisdiction, such as flag State jurisdiction, passive personality, and the protective principle.

At the same time, the thesis also examines the concept of piracy as a special basis of enforcement jurisdiction. It suggests that whilst the extraordinary authority to interdict and seize vessels at sea may have seemed adequate at the time of its codification, that authority may not be as effective today, since the law of the sea has developed away from a paradigm of control by maritime powers, and towards greater control in particular by coastal States in the form of expanded claims over coastal waters. Again the thesis proposes that the development of effective measures suppression of piracy and maritime crime might best be accomplished by a reassessment of the law of piracy, in particular by taking into account the way that measures have been implemented in relation to other areas of maritime law enforcement, including the control of

WMD proliferation, drugs smuggling, people trafficking, and fisheries regulation.

The thesis therefore challenges the received wisdom concerning the international law of piracy, and seeks to close a gap between the prevailing doctrine, and actual practice. The thesis argues that that misconceptions about the crime of piracy, and current developments in the law of the sea demand a re-conceptualisation of the law of piracy, away from unilateral enforcement of an international crime subject to universal jurisdiction, to a transnational crime, primarily subject to the protective principle of jurisdiction, and enforced through multilateral regional cooperation agreements, and agreements with flag States.

1.1. The Literature Reviewed

Assessing the extensive body of literature on the law of piracy can perhaps be best achieved by dividing it into three categories. The first is the historical literature and the literature analysing the history of piracy. This body of work continues to grow as historians unearth new aspects often through examination of historical legal documents. The second category is that of the work undertaken during the late 19th and early 20th century in an effort to codify the international law of piracy. The third, rapidly expanding body of literature encompasses the contemporary efforts to analyse the problem.

The literature relating to the history of piracy extends back to the ancient world.[2] Surveying this literature it becomes clear that the figure of the pirate is not as historically consistent as might be expected. The concept of piracy features prominently in the work of Cicero,[3] and later in the works of Gentili,[4] and Grotius.[5] Whilst the references made to these authors (often taken out of

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[2] See generally: HA Ormerod (1924) *Piracy in the Ancient World: An Essay in Mediterranean History* Liverpool: University Press; P de Souza *Piracy in the Graeco-Roman World* (1999) Cambridge: CUP

[3] MT Cicero (W Miller tr.) (1913) *De Officiis* London: Heinemann

[4] A Gentili *Hispanicae Advocationis Libri Duo.* (FF Abbott tr.) (1921). New York: OUP; A Gentili *De Iure Belli Libri Tres.* (JC Rolfe tr.) (1933). Oxford: Clarendon

[5] H Grotius *De Iure Belli Ac Pacis Libri Tres.* (FW Kelsey tr.) (1925). Oxford: Clarendon; H Grotius *De Iure Praedae Commentarius.* (GL Williams tr) (1950) Oxford: Clarendon

context) suggest that piracy was considered a serious crime, digging a little deeper reveals more practical concerns, in particular arguments concerning the extent of authority at sea, contested claims to colonial rule, and questions of title to property taken at sea. Perhaps most significantly, although random acts of maritime violence and plunder have remained a constant feature throughout history, the use of the term 'pirate' appears to be intimately connected with claims to colonial power and imperial control. In other words, it is a legal concept that exists in relation (or even opposition) to certain other specific claims to authority. In particular, it seems likely that the image of the pirate that we are familiar with was in fact the product of the British campaign to bring its own subjects to order once it had attained the position of colonial superpower, in a short period at the start of the 18th century, known as the 'Golden Age' of piracy.

The second chronological period was that of the start of the process of the codification of international law. It is during this period that it became clear that piracy was considered an issue not only of the law of the sea but also of the idea of international criminal responsibility, since many of the authors seeking a doctrinal basis for the development of that area of law used the concept of piracy as an example of the treatment of criminal offences by international law. Thus authors such as Pella and Lauterpacht proposed that the codification of the law of piracy should involve its development into an international crime.[6]

This 'tug-of-war' was identified by Gidel, writing in 1932, as being the main cause of the confusion surrounding the law of piracy. He observed that the international law of piracy had two different aspects and was being developed in two different directions. These two aspects were on the one hand the idea of piracy as a matter of "sea policing" (that is to say enforcement jurisdiction), and on the other a matter of international criminal responsibility. The law of piracy was therefore being developed at the same time by those lawyers who were intent on developing the (then nascent) concept of international criminal law (ICL), and by those approaching the problem from the perspective of the law of

[6] Discussed in detail in Chapters 7 and 8 below.

the sea.[7] Although the importance of the distinction has been acknowledged by authors including O'Connell and Guilfoyle,[8] this problem has not been investigated in any detail since Gidel first identified it, and its consequences have never been theorised. O'Connell noted that:

> The theory that the high seas are beyond the governmental power of States led for a long time to a confusion between the jurisdiction of States to enact laws governing the conduct of foreigners on the high seas and the jurisdiction to enforce these laws by actually executing them on the high seas.[9]

The necessity of distinguishing prescription from enforcement has also been the subject of discussion in the separate context of the decision of the ICJ in the *Arrest Warrant* case, which was criticised for its shortcomings in this respect by Cassese and O'Keefe.[10]

The contemporary literature on piracy is also extensive and continues to expand rapidly. Within this literature there are two discernible schools of thought. On the one hand there is what might be described as the prevailing view which claims that piracy is an 'international crime',[11] and also the original crime of universal jurisdiction.[12] The latter view has even attracted the approval of

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[7] Gidel *Droit International Public de la Mer* (n.1), 307-309. See also Johnson *Piracy in Modern International Law* (n.1), 69

[8] Guilfoyle *Shipping Interdiction* (n.1), 40

[9] O'Connell *International Law of the Sea Vol. II* (n.1), 800

[10] A Cassese (2002) *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case* 13 EJIL 853; R O'Keefe (2004) *Universal Jurisdiction: Clarifying the Basic Concept* 2 JICJ 735

[11] Colombos *The International Law of the Sea* (n.1), 444; ED Dickinson *Is the Crime of Piracy Obsolete?* (1924-1925) 38 Harvard Law Review 334, 355; Guilfoyle *Shipping Interdiction* (n.1), 27; O'Connell *The International Law of the Sea Vol. II* (n.1), 967

[12] Princeton Project on Universal Jurisdiction (S Macedo ed.) *The Princeton Principles on Universal Jurisdiction* (2001) Princeton, New Jersey: Princeton University, 29; Harvard Research in International Law (1935) *Jurisdiction with Respect to Crime Article 9 Universality–Piracy* 29 AJIL Sup. 563, 564; G Abi-Saab (2003) *The Proper Role of Universal Jurisdiction.* 1 JICJ 596, 599; MC Bassiouni *The History of Universal Jurisdiction* in S Macedo (ed.) (2004) *Universal Jurisdiction* Philadelphia: University of Pennsylvania Press, 47; O'Connell *The International Law of the Sea Vol. II* (n.1), 967; Geiss and Petrig *Piracy and Armed Robbery at Sea* (n.1), 143; KC Randall (1987-1988) *Universal Jurisdiction under International Law* 66 Texas Law Review 785, 788; Rothwell and Stephens *The International Law of the Sea* (n.1), 162; C Ryngaert (2008) *Jurisdiction in International Law* Oxford: OUP,

separate opinions in decisions by the PCIJ,[13] and the ICJ.[14] There are however a number of authors who have offered a contrary view. These authors observe, amongst other things, that piracy was not in fact historically considered to be a particularly serious crime, that it was not at all certain that States routinely prosecuted foreigners for piracy, and that at the time that the international law of piracy was being codified, individual criminal responsibility as a matter of international law was far from being generally accepted.[15] Both Cassese,[16] and Guilfoyle,[17] have also suggested that piracy does not fall into the same category as the 'core' international crimes to which universal jurisdiction applies.

Although there is a wealth of comment, including many articles, edited collections,[18] and obligatory references to piracy in textbooks, there are relatively few texts entirely devoted to an exposition of the law of piracy. Since the rise of Somali piracy there have however been many proposals for updating the law. Amongst the suggestions put forward by these authors is a dedicated international criminal tribunal set up by the UN Security Council to try pirates,[19] the setting up of regional tribunals,[20] or the use of the International

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108-109; MN Shaw (2008) *International Law*. Cambridge: CUP, 669; O Schachter (1991). *International Law in Theory and Practice* Dordrecht/Boston/Leiden: Martinus Nijhoff, 254

[13] *The Case of the SS Lotus* (France/Turkey) (1927). PCIJ, Series A, No.10, p.19, Dissenting Opinion of Judge Moore, 70

[14] *Case concerning the Arrest Warrant of 11 April 2000.* (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, p.3, Separate Opinion of President Guillaume p.35, 37; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal p.63, 79

[15] Harvard Research on Piracy, (n.1), 754-757; DHN Johnson (1957) *Piracy in Modern International Law* 43 Transactions of the Grotius Society 63, 69. Also see generally: G Schwartzenberger (1950) *The Problem of an International Criminal Law*. 3 Current Legal Problems 263

[16] A Cassese (2008) *International Criminal Law* Oxford: OUP, 4, 12

[17] Guilfoyle *Shipping Interdiction* (n.1), 27, 43

[18] Guilfoyle *Modern Piracy* (n.1); Lehr *Violence at Sea* (n.1); Norchi and Proutière-Maulion *Piracy in Comparative Perspective* (n.1) Beckman and Roach *Piracy and International Maritime Crimes in ASEAN* (n.1); van Ginkel and van der Putten *International Response to Somali Piracy* (n.1)

[19] J Harrelson (2009-2010) *Blackbeard Meets Blackwater: An Analysis of International Conventions that Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry.*25 American University International Law Review 284

[20] D Chang (2010). *Piracy Laws and the Effective Prosecution of Pirates.* 33 Boston College International and Comparative Law Review 273

Criminal Court for the same purpose,[21] authorising private security contractors to take action against suspected pirates,[22] including authorising them to act as 'bounty hunters',[23] modification of the 1982 Law of the Sea Convention,[24] regional treaties,[25] and appeals to resurrect supposed aspects of customary international law relating to piracy predating its codification.[26] The conceptualisation of piracy as an international crime to which it was claimed other later international crimes were assimilated is also further confused by a body of literature that imagines piracy to have been a particularly terrible crime justifying extreme and extraordinary measures in its repression, including labelling them as "the enemies of all", or even worse "rightless enemies".[27] Those who argue for such a theory of piracy are able to draw upon many references in the historical literature in which pirates were the subject of rhetorical condemnation, thus apparently supporting their arguments, but clouding the issue at the same time. Finally, there is a growing body of literature which criticises a perceived inadequacy in the international law of piracy, an example being Kontorovich's argument that international law has "developed in

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[21] JI Winn and KH Govern (2008). *Maritime Pirates, Sea Robbers and Terrorists: New Approaches to Emerging Threats.* 2 Homeland Security Review 131 at p.139; L Azubuike (2009). *International Law Regime against Piracy.* 15 Annual Survey of International and Comparative Law 43

[22] J Harrelson *Blackbeard Meets Blackwater* (n.22); EC Stiles (2003-2004) *Reforming Current International Law to Combat Modern Sea Piracy* 27 Suffolk Transnational Law Review 325; A Schwartz (2010) *Corsairs in the Crosshairs: A Strategic Plan to Eliminate Modern Day Piracy* 5 New York University Journal of Law and Liberty 500

[23] BA Bornick (2005) *Bounty Hunters and Pirates: Filling in the Gaps of the 1982 UN Convention on the Law of the Sea* 17 Florida Journal of International Law 259; JM Isanga. (2009-2010) *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes.* 59 American University Law Review 1267

[24] Harrelson *Blackbeard Meets Blackwater* (n.22); Stiles *Reforming Current International Law* (n.25)

[25] E Barrios (2005) *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia* 28 Boston College International and Comparative Law Review 149; N Dahlvang, N (2006) *Thieves, Robbers and Terrorists: Piracy in the 21st Century* 4 Regent Journal of International Law 17

[26] E Barrios (n.28); Berg, J. (2009-2010) *"You're Gonna Need a Bigger Boat": Somali Piracy and the Erosion of Customary Piracy Suppression* 44 New England Law Review 343

[27] See in particular: W Rech (2012) *Rightless Enemies: Schmitt and Lauterpacht on Political Piracy* 32 Oxford Journal of Legal Studies 235; D Heller-Roazen (2009) *The Enemy of All: Piracy and the Law of Nations* New York: Zone Books

such a way that it cannot respond effectively to an atavism like piracy",[28] a view echoed by Sterio, arguing that the resurgence of piracy has left international law in "crisis".[29]

The few texts that have been devoted to an analysis of the law of piracy have generally either echoed this sense of the law being inadequate, or have confined themselves to an exposition of the legal framework for counter-piracy activities. In the latter group, works by Geiss and Petrig,[30] and by Kraska,[31] have set out in some detail the various legal provisions impacting on piracy, ranging from human rights to enforcement mechanisms. Although Kraska does describe some of the historical context of piracy however, neither seeks to evaluate the theory behind the law of piracy. The only two texts of recent times that have analysed this aspect in detail are those of Dubner and Rubin. Having examined the codification process, Dubner argued that piracy was (in 1980) a "dead issue".[32] He further expressed the view that it was not the case that the law of piracy was static and well established. Speaking of the High Seas Convention definition of piracy he argued that:

> One problem area is the fact that over a period of time, states tend to perceive these conventions as "traditional" views and governing concepts. This belief is fallacious. The conventions are, at best, of a temporary nature in the long run. The 1958 conventional articles represent an understanding regarding problems that may have been relevant at the time the discussions took place. [...] Uniform prescriptions should be created but not with the attitude or view that

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[28] E Kontorovich *A Guantánamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists* (2010) 98 California Law Review 243, 275

[29] M Sterio (2011) *International Law in Crisis: Piracy off the Coast of Somalia* 44 Case Western Reserve Journal of International Law 291

[30] Geiss and Petrig *Piracy and Armed Robbery at Sea* (n.1)

[31] Kraska *Contemporary Maritime Piracy* (n.1)

[32] Dubner *The Law of International Sea Piracy* (n.1), 69; a view echoed by others including: AP Rubin *Revising the Law of "Piracy"* (1990-1991) 21 Cal. W. Int'l L. J. 129; CH Crockett *Toward a Revision of the International Law of Piracy* (1976-1977) 26 DePaul Law Review 78

> they can remain static without being examined, updated, and revised, as necessary.[33]

The most detailed historical analysis of the development of the law of piracy however, is that of Rubin who surveyed the development of the concept from ancient times to the present. His conclusions cast doubt on the prevailing view of the law of piracy. He argued that:

> It may be concluded that both in current practice and in current theory built upon ancient roots and the evolution of the international political and legal orders, there is no public international law defining "piracy;" that the only legal definitions of "piracy" exist in municipal law [...] that these examples of municipal law do not represent any universal "law of nations" [...] and that such other uses of the word "piracy" as exist in international communication reflect vernacular usages, pejoratives, and perhaps memories of Imperial Rome and Imperial Britain inconsistent with the current legal order and of doubtful legal effect even when used most emphatically in the heyday of both empires.[34]

In other words, the only detailed analysis of the law of piracy that has been undertaken casts doubt on the prevailing theory. It is interesting to observe that whilst these observations have been noted there has been little effort to investigate them. Thus a historical and revision note to the piracy provisions in the US Code observes:

> In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion.[35]

Nevertheless, despite the fact that Rubin and Dubner's analysis predates the current resurgence in piracy and maritime crime (Dubner's work dates from

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[33] Dubner *Law of International Sea Piracy* (n.1), 159-160

[34] Rubin *Law of Piracy* (n.1), 344

[35] US Code, Title 18, Ch. 81 (2006) (Historical and Revision Notes), 367

1980, Rubin's from 1988), and might be expected to demand reinvestigation, it has received almost no consideration in the contemporary literature.

The contribution this thesis seeks to make to the literature on piracy is therefore to re-evaluate the international law of piracy taking into account Rubin and Dubner's observations, and doing so using the framework that Gidel identified as being the cause of the confusion surrounding the law, specifically the fact that it engages both ICL and the law of the sea. The thesis argues that the law of piracy is above all a problem of jurisdiction, and consequently is divided between an assessment of piracy as prescriptive jurisdiction, and as enforcement jurisdiction. The thesis argues that not only is this a novel approach, and one that remains unexplored leaving a gap in the literature, but also that as Gidel observed, the failure to appreciate this distinction and theorise its consequences remains an obstruction to the development of effective legal mechanisms to tackle contemporary piracy and maritime crime.

1.2. Method

Turning to the issue of method, it must be observed that as the literature on the subject of piracy has expanded it has also come in for increasing criticism for its lack of depth and rigour. Authors have warned of a "stunted, repetitive, and superficial research programme that has come to plague" analysis of piracy, including in terms of research methodology.[36] This thesis is a doctrinal examination of the international law of jurisdiction over maritime piracy. This analysis is 'positivist' in the sense that it is concerned with describing the law as it *is* (the positive law) though it takes into account its historical development and the ways in which it is developing. This examination accordingly focuses on the formal sources of international law, which are traditionally considered to be enumerated in Article 38(1) of the Statute of the International Court of Justice (ICJ), namely treaties, custom, and general principles of law, together with judicial decisions and "the teachings of the most highly qualified publicists [...] as subsidiary means for the determination of rules of law".[37] There are consequently many different legal aspects of the problem of piracy that will not

[36] GG Ong-Webb *Piracy in Maritime Asia* in Lehr *Violence at Sea* (n.1), 37-38

[37] Statute of the International Court of Justice (1945) 15 UNCIO 355

be examined in any detail by the thesis. These include the private international law aspects of the problem, including title to property and shipping insurance; the role of piracy in civil jurisdiction over torts including the US Alien Tort Statute; human rights issues; or issues relating to the criminology of piracy.

The definition of piracy in international law is considered to be entirely contained within the 1982 Law of the Sea Convention (LOSC),[38] and its predecessor, the 1958 High Seas Convention (HSC).[39] As such, arguably the assessment of the law of piracy is therefore simply a question of treaty interpretation. According to the Article 31(1) Vienna Convention on the Law of Treaties (VCLT), a treaty provision is to be determined "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[40] Only the preparatory works of the treaty are considered to be subsidiary means of interpretation under Article 32.[41] Therefore strictly speaking, the relevance of documents predating the preparatory works is of limited value as a means of treaty interpretation.

Nevertheless, the thesis will argue that aside from the question of the strict interpretation of specific clauses within the treaty, it is possible, and indeed perhaps necessary, to look beyond these documents to understand the law of piracy, since the concept did not spring fully formed from the codification of the law of the sea. In fact there are three reasons why this might be the case. First, it is often stated that the treaty provisions on piracy are customary international law. It is however not always appreciated that there are two reasons for this. The first is that they are considered to be custom by virtue of the widespread ratification of the HSC. Perhaps more importantly in this context however is the fact that the HSC was said to be *declaratory of the law* at the time it was agreed. Thus the preamble states that the parties: "Desiring to codify the rules of

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[38] United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3 (The abbreviation 'LOSC' is used in preference to 'UNCLOS' which will instead be used to refer to the three UN Conferences on the Law of the Sea)

[39] Convention on the High Seas (1958) 450 UNTS 11

[40] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331

[41] A point recently noted in a blog post: D Guilfoyle EJIL:Talk! *Political Motivation and Piracy: What History Doesn't Teach us About Law* 17 June 2013 [www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law]

international law relating to the high seas [...] adopted the following provisions as generally declaratory of established principles of international law."[42] In other words the HSC was not considered to be *new* law, but merely reflective of the *existing* law. Article 31(3)(c) of the Vienna Convention also recognises that in treaty interpretation the "relevant rules of international law applicable in the relations between the parties" are to be taken into account.

Secondly, and entirely separately, it is clear from any examination of the law of piracy that judicial decisions, doctrinal writings, and even the policy statements of governments today repeatedly and consistently make reference to the historical development of the law of piracy (thus piracy is "the original international crime" and piracy "has always been subject to universal jurisdiction").[43] Thus even if the historical materials were irrelevant to the interpretation of the treaty definition, they continue to exert an influence on the contemporary development of the law, and it is necessary to assess whether piracy as a historical concept is in fact capable of sustaining these arguments. The thesis therefore examines the historical context and development of the law of piracy, the efforts towards its codification, and the doctrinal writings on the subject in its investigation of the contemporary law of piracy. Despite the fact that the thesis examines the concept of piracy in history however, the method adopted by the thesis is not one of critical studies, nor is it a multidisciplinary method (such as law and history).

1.3. Structure

As noted above, the thesis is structured around Gidel's observation that the international law of piracy has two separate dimensions, namely that of the law of the sea and of ICL. The distinction between jurisdiction to prescribe and jurisdiction to enforce does not split neatly between ICL and the law of the sea, but ICL is primarily concerned with the definition of crimes in international law and the prescriptive jurisdiction over them, whilst the allocation of enforcement competence at sea is a matter dealt with by the law of the sea.

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[42] Convention on the High Seas (1958) 450 UNTS 11 *Preamble*

[43] See Chapter 10 below.

The thesis is split into three sections. This introduction is followed by Chapter 2 which briefly examines the question of piracy as a problem of international law, starting with an introduction to the nature of contemporary piracy, the problem of defining piracy, and an overview of the development of international criminal law and the law of the sea, where it is argued that neither of these areas of law have remained static long enough for there to be a historically settled law of piracy. Part I of the thesis (comprising Chapters 3, 4, and 5) sets out the theory of jurisdiction in international law. Chapter 3 examines a number of issues including the meaning of jurisdiction, why it is necessary to distinguish between civil and criminal jurisdiction, the difference between prescription and enforcement, the restrictive nature of jurisdiction, and the question of immunities, in particular the operation of *functional* immunities. Chapters 4 and 5 then examine prescriptive and enforcement jurisdiction respectively, explaining the different criteria and bases applicable to each, together with their historical development. Chapter 4 explains that prescriptive jurisdiction is based on a linking point between the offence and the State prosecuting it. It examines the different ways in which States are able to prescribe rules applicable outside their territory, and explores in particular the under theorised nature of flag State jurisdiction, the apparently expanding (though still limited) concept of jurisdiction for the protection of community interests at sea, and advances an explanation and definition of the concept of universal jurisdiction. It is argued that far from being the paradigmatic crime of universal jurisdiction, prescriptive jurisdiction over piracy has historically been capable of being explained under almost all of the six different bases of jurisdiction. Chapter 5 explains how enforcement jurisdiction at sea is determined by the twin criteria of maritime zones and the activities that take place within them. The chapter surveys their theoretical background, the way in which they have come into being, and the way in which they are developing. Chapter 5 also explains that the concept of piracy, and enforcement jurisdiction at sea generally, is connected to the question of the juridical nature of the sea space and in particular whether the sea is subject to claims of sovereignty or not.

Part II (comprising Chapters 6, 7, and 8) then examines the historical context of the problem of piracy, the development of the legal concept, and the treatment

of the law of piracy during the codification of the law of the sea. Chapter 6 explains that the treatment of piracy in Roman law was primarily concerned with the problem of the acquisition of title to property, and the fact that pirates and robbers could not give good title to property, encapsulated in the term *pirata non mutat dominum*. The chapter goes on to explain that the history of piracy is dominated by the distinction between piracy and privateering. The laws of war at sea permit the seizure of enemy merchant vessels and vessels trading with the enemy under the law of prize. For long periods of history, armed conflict at sea was performed by private actors who were duly commissioned by States, known as *privateers*. To the extent that individuals seized vessels at sea *without* such authority, they were known as *pirates*. Since privateers and warships were engaged in lawful acts of war, they were entitled to functional immunities from foreign jurisdiction. They could not be tried for robbery or belligerent conduct generally, provided it was in conformity with the laws of war. Pirates on the other hand, as ordinary criminals, had no such immunity. They could be captured on the high seas and tried for robbery (piracy) by any interested State. The chapter also explains that during the 17th century European powers, particularly England, the Netherlands, and France, used privateers extensively in order to challenge the colonial power of Spain and Portugal. The chapter argues that it was only once this had been accomplished that the issue of piracy suppression came to the fore, and that what we today think of as historical piracy was in fact a very short period at the beginning of the 18th century known as the 'Golden Age' of piracy in which Britain sought to consolidate its colonial power by suppressing unauthorised maritime violence perpetrated by its own subjects. Chapter 7 then surveys the development of the law of piracy through its early conceptualisation as robbery and treason, and its interrelationship with issues such as the slave trade, civil war insurgency, and war crimes. Chapter 8 charts the treatment of piracy by the League of Nations, the Harvard Research, the ILC, and the UN Conferences on the Law of the Sea and argues that the codification effort did not attempt to codify an international crime, and that its preoccupation was in defining a basis of enforcement jurisdiction at sea.

Part III of the thesis then examines the consequences of the foregoing analysis for jurisdiction over contemporary piracy and maritime crime. Chapter 9 examines the notion of piracy as an 'international crime' arguing that the definition of piracy contained within the LOSC does not bear the characteristics of a criminal definition, nor does piracy conceptually fit within the criteria defining 'international crimes' in the sense of offences directly proscribed by international law. That chapter also observes that many of the problems being experienced with contemporary piracy prosecutions, in particular the lack of domestic legislation, are caused by wrongly categorising the crime of piracy. Chapter 10 then also examines the question of universal jurisdiction over piracy, and argues that piracy is normally only prosecuted by States with a clear connection to the offences, and that again, the theorisation of piracy as being subject to universal jurisdiction also causes practical problems. Chapter 11 considers whether some of the difficulties noted in the previous chapters are capable of being resolved by the use of the 1988 SUA Convention.[44] That chapter argues that SUA can be of assistance, but only to the extent to which the concepts of piracy and terrorism have common characteristics, and explains that the difference lies in the fact that piracy and terrorism target different interests. Finally, Chapter 12 considers the question of enforcement jurisdiction over piracy and maritime crime, and argues that the unilateral exercise of enforcement jurisdiction is today severely constrained by the extension of coastal State control, and argues that effective maritime policing mechanisms will require regional cooperation. The chapter observes that this is in fact what is happening in practice.

[44] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988) 1678 UNTS 201

2 Piracy and International Law

This chapter examines the way in which the problem of maritime piracy engages international law. The chapter surveys the nature of contemporary piracy and maritime crime, and notes that it is of its very nature a trans-boundary activity that demands multilateral cooperation to regulate, and that it also has distinctive characteristics in different regions of the world. The chapter then examines the definition of piracy and finally examines the development of the two areas of international law that regulate the problem of maritime piracy: international criminal law (ICL) and the law of the sea.

2.1 Contemporary Piracy

Before entering into discussion of the law of piracy, it is necessary to briefly survey the contemporary problem of piracy and maritime crime. As Dua and Menkhaus have observed, although 'piracy' is frequently treated as a homogenous concept, the reality is that attacks against shipping take different forms and are driven by different factors in different regions of the world, and that it is simply not possible to analyse the problem of piracy without understanding these factors.[1] They point out that traditional legal conceptualisations, such as the notion that pirates are outcasts beyond society, actually militate against a clear understanding of the nature of the problem, since they fail to recognise the importance of the context within which piracy and maritime crime takes place.

The IMB's reports list 42 different incident 'locations' grouped in regions including Southeast Asia, the Far East, the Indian Subcontinent, the Americas, and Africa, as well as the Mediterranean, the Arabian Sea and the Indian Ocean.[2] The thesis will however focus on three regions in particular because of their recent high incidence of maritime crime, specifically the problem of Somali piracy, Southeast Asia and the Straits of Malacca and Singapore, and the Gulf of

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[1] J Dua and K Menkhaus (2012) *The Context of Contemporary Piracy The Case of Somalia* 10 JCIJ 749

[2] ICC International Maritime Bureau *Piracy and Armed Robbery against Ships* Report for the Period 1 January – 30 June 2013, 5

Guinea in West Africa. Up until the sudden rise of Somali piracy, the global region with the greatest incidence of attacks against merchant vessels was Southeast Asia. Bateman observes that maritime crime in the region encompasses not only attacks against merchant shipping but also smuggling, kidnapping, and conflict over fishing rights.[3] Policing in the region is particularly complicated by the fact that regional States, and particularly Indonesia (being an archipelagic State) have coastal waters that are difficult to police. Regional States also have overstretched and under-resourced policing capacities, and are particularly sensitive to perceived threats of foreign interference which has limited the effectiveness of security cooperation, and of outside assistance.

The Straits of Malacca and Singapore are bordered by Malaysia and Singapore to the north and Indonesia to the south, and over 500 nautical miles long, the strait is the main shipping route from the South China Sea into the Indian Ocean with 50,000 ships passing through annually.[4] As a result, as well as being of great importance to the immediate coastal States, the Straits also connect China, Japan, and the Philippines on the one hand, with India, the Middle East, and Europe on the other. The northern end of the strait is 126 nautical miles wide, whilst at its narrowest it is only nine nautical miles wide, and is thus a 'choke point' a large part of which falls within the territorial waters of the three coastal States.[5] In 1992 69% of attacks against shipping reported by the IMB took place within the Straits, and whilst in the first six months of 2013 only four attacks took place there, Indonesia accounted for by far the majority with 48 attacks, more than 66% of the world's total.[6] The majority of attacks against shipping in the region involve 'hit and run' tactics against vessels whilst close to shore, and often whilst entering or leaving port or whilst at anchor, with robbers boarding vessels and stealing items of value before escaping. Other less frequent

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[3] S Bateman *Confronting Maritime Crime in Southeast Asian Waters* in BA Elleman, A Forbes, and D Rosenberg (eds) (2010) *Piracy and Maritime Crime* Newport, Rhode Island, Naval War College, 131-144

[4] RC Beckman, C Grundy-Warr, and VL Forbes (1994) *Acts of Piracy in the Malacca and Singapore Straits* Durham: International Boundaries Research Unit, University of Durham, 7

[5] *Ibid.*

[6] IMB *Report 1 January – 30 June 2013* (n.3), 6

but more serious incidents have involved the hijacking of vessels which are then stolen and sold on after the crew have been abandoned and after repainting of the vessel to change its identity.[7]

The sudden rise of pirate attacks launched against commercial shipping in the Gulf of Aden and wider Indian Ocean area in 2008 put an issue that had long been thought consigned to the history books back on the international agenda. Pirates were once again attacking shipping on the high seas. According to the International Maritime Bureau (IMB), piracy incidents "hit an all-time high" in the first three months of 2011, with Somali pirates alone accounting for 97 attacks, 16 hijackings, 299 seafarers taken hostage, three injured and seven killed.[8] Although 2012 and 2013 have seen a dramatic reduction in the number of attacks in the Indian Ocean, it may be too soon to declare the problem under control, and Somali pirates still hold four vessels and 68 hostages at the time of writing.[9]

The problem of piracy off the coast of Somalia appears to have had several precursors including opportunist attacks by smugglers operating across the Gulf of Aden between Yemen and Somalia, and of the hijacking of World Food Programme (WFP) ships delivering food aid to war torn Somalia.[10] Somali pirates soon graduated to hijacking larger vessels for ransom, and by 2008 a number of high profile hijackings including that of the MV *Sirius Star*. Laden with 2 million barrels of crude oil from Saudi Arabia, one quarter of that country's daily output, it was subsequently ransomed for US$3 million.[11] Vessels were initially attacked in the Gulf of Aden which at its narrowest is 21 miles

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[7] *Ibid*.

[8] ICC International Maritime Bureau *Piracy and Armed Robbery against Ships* Report for the Period 1 January–31 March 2011, 19

[9] IMB *Report 1 January – 30 June 2013* (n.3), 20

[10] The rise of Somali piracy has been documented by the Monitoring Group established by the UN Security Council to monitor the conflict in Somalia. For background to the problem see in particular: UN Security Council *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1853 (2008)* S/2010/91; *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)* S/2011/433, and; *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2002 (2011)* S/2012/544

[11] BBC News *Seized Tanker Anchors off Somalia* 19 November 2008 [http://news.bbc.co.uk/1/hi/world/africa/7735507.stm]

wide, where pirates boarded ships from small outboard powered skiffs. The vessels would then be hijacked and taken to the Somali coast and the crew held hostage until ransomed. By 2011 due to increased activity by naval forces, Somali pirates had developed a new technique involving the hijacking of fishing vessels and then sailing far out into the Indian Ocean before launching their attacks. Using such 'mother ships' pirates have been able to stay at sea for months prior to launching attacks more than 1,000 miles from the Somali coast.[12]

Attacks against merchant vessels in the West Africa region began to reach a serious level in 2011.[13] The Gulf of Guinea has ten coastal States including the island State of São Tomé and Príncipe. The main focus of attacks is however off the coasts of Ghana, Nigeria, and Benin. Although some attacks in the past may have been linked to the insurgency in the Niger Delta, which has involved the kidnapping of oil workers, the majority of attacks involve stealing from vessels either at anchor or near to the coast, although attacks have also taken place further out to sea.[14] In many cases the methods used are similar to those in Southeast Asia where robbers board vessels and steal valuables before escaping. More serious attacks recently have involved the hijacking of oil tankers which are then taken to isolated areas of the coast where their cargo is stolen, mirroring the land based practice of oil "bunkering", where oil is siphoned from pipelines and stolen.[15]

International efforts to address the problem of piracy and maritime crime have taken a number of different forms including the deployment of multinational naval task forces in the Gulf of Aden, the development of best management

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[12] IMB *Piracy and Armed Robbery* (n.9), 21

[13] C Kirongozi Ichalanga *Perspectives from Central and West Africa* in CH Norchi and G Proutière-Maulion (eds) (2012) *Piracy in Comparative Perspective: Problems, Strategies, Law* Paris: Pedone, 190-2

[14] *Ibid.*

[15] MN Murphy *Petro-Piracy: Predation and Counter-Predation in Nigerian Waters* in D Guilfoyle (ed) (2013) *Modern Piracy: Legal Challenges and Responses* Cheltenham: Edward Elgar, 70-4

practices,[16] the deployment of armed guards on board merchant vessels, high level consultative meetings,[17] the negotiation of regional cooperation mechanisms,[18] and the establishment of piracy prosecution centres in the East Africa region,[19] UN Security Council Chapter VII authority to intervene in Somalia to arrest pirates,[20] and a renewed effort to bring stability and the rule of law to that country. Thus it can be seen that piracy and maritime crime generally impacts upon many different States, and have consequently prompted initiatives by the international community at various levels. It is not only the case that acts of piracy and attacks against piracy are different in different regions, however. The terminology used is also very specific, and this too has an impact on an examination of the problem.

2.2 The Definition of Piracy

This thesis is an examination of the 'law of piracy' and it consequently a preliminary matter to set out a clear definition of the concept. It immediately becomes clear however that the issue of definition goes to the very heart of the problem of the law of piracy. It is often the case that discussions of piracy assume that it is a single well-defined concept. In reality, the term has multiple dimensions, and it is far from certain that it carries the same meaning in each and every context. There is little dissent from the view that the definition of piracy in public international law is that contained within Article 101 LOSC which was copied almost verbatim from Article 15 of the 1958 High Seas Convention (HSC),[21] and is considered to reflect customary international law. This definition will be analysed in detail below, but it is enough to note at this point that it encompasses only acts taking place on the high seas or outside the (territorial) jurisdiction of any State, and can only be conducted by one vessel

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[16] Such as the IMO's *Best Management Practice for Protection against Somalia Based Piracy* (BMP 4) (14 September 2011) MSC.1/Circ.1339

[17] The most important of which is the *Contact Group on Piracy off the Coast of Somalia*, which was established pursuant to UN Security Council Resolution 1851 (2008), and has membership of more than 60 states and international organisations. See: [www.thecgpcs.org]

[18] Discussed in Section 12.5 below.

[19] Discussed in Section 10.2 below.

[20] Discussed in Section 12.4 below.

[21] Convention on the High Seas (1958) 450 UNTS 11

against another. It is clear from the historical literature and from the work leading to codification however, that there has always been a distinction between piracy at international law and piracy at municipal law.[22] Nevertheless, it has become commonplace, even in the literature not specifically addressing international law, to insist that the treaty definition of piracy is the *only* definition of piracy. Since that definition of piracy is geographically limited, this conception obviously causes problems when it comes to incidents of maritime crime that take place in territorial waters, or other areas under the territorial jurisdiction of coastal States. This gap has been occupied by the use of a term introduced by the IMO of 'armed robbery at sea'. However, as will be explained below, the widespread use of this unfortunate term and the lack of the appreciation of the importance of municipal law relating to 'piracy' as a distinct issue is undoubtedly contributing to the problems being experienced with tackling maritime crime.[23]

It is also important to note that as well as there being different definitions of piracy under international and under municipal law, there are also different definitions depending on the *area* of law concerned, and therefore distinctions between piracy as a matter of public international law, and as a matter of private law. Thus for the purpose of marine insurance under the UK's Marine Insurance Act,[24] piracy is defined as "passengers who mutiny and rioters who attack the ship from the shore."[25] It is obvious therefore, that whilst the LOSC definition of piracy must be a starting point, the thesis will also examine both how it came into being, and how international law has developed in the half century since its agreement. As a result, the thesis will not rush to adopt given definitions of 'piracy' as being definitive, and will instead seek to explore how the term has developed in an effort to better understand what precisely the law of piracy is.

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[22] See Chapter 8 below.

[23] See Section 9.3 below.

[24] Marine Insurance Act 1906 8 Edw. 7 c.41

[25] This formula is also used in marine insurance regulations in other jurisdictions including Australia and Hong Kong. See P Sooksripaisarnkit *The Global Insurance Industry* in Norchi and Proutiere-Maulion *Piracy in Comparative Perspective* (n.1), 275; There is also extensive discussion of the private law aspects in Guilfoyle (ed.) *Modern Piracy* (n.1) This aspect of the problem is however largely beyond the scope this thesis.

2.3 The Dual Aspects of the International Law of Piracy

As noted in Chapter 1, the starting point of the thesis is the observation made by Gidel that the international law of piracy has two dimensions. It will be observed that the literature on the subject of piracy is by and large preoccupied with how those who commit criminal acts against merchant shipping can be tried and prosecuted, in other words, with the ICL aspects of the problem. The thesis will argue however that criminal accountability is not the primary concern of public international law. Arguably the main role of public international law is the regulation of the relationships between States, and seeks to ensure that States do not come into conflict with one another by effectively delimiting their spheres of competence, and to facilitate the peaceful resolution of inter-State disputes. Therefore, although some writers have argued that contemporary international law is unable to deal effectively with the resurgence in piracy, it will be argued that the effectiveness of international law must be assessed with this in mind.

Whilst the distinction between the international criminal law and law of the sea aspects of the problem might appear at first sight to be an issue of fragmentation,[26] it will be argued that in reality both of these areas of law are in fact underpinned by general international law, specifically the international law of jurisdiction and immunities. The thesis will also argue that, far from being historically settled and long established, examination of the development of both the law of the sea and international criminal law demonstrates that neither has remained static for a period of time long enough to support the idea that piracy has always been recognised as an international crime subject to universal jurisdiction, or even perhaps that the enforcement jurisdiction over it has retained the same theoretical justification.

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[26] See generally: ILC *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* YBILC 2006, vol II Part 2; M Koskenniemi and P Leino (2002) *Fragmentation of International Law? Postmodern Anxieties* 15 Leiden Journal of International Law 553

2.3.1 The Development of International Criminal Law

As noted in Chapter 1, there is a considerable body of scholarly opinion to the effect that piracy was the original international crime, and is the "paradigmatic" crime of universal jurisdiction.[27] There is however a disconnect between those theories and the reality of ICL, which as Cassese observed is in fact a very young discipline.[28]

It is true that prosecutions for violations of the 'laws and customs of war', and the establishment of *ad hoc* war crimes tribunals are recorded as early as 1474,[29] and that the idea of a permanent international criminal court was also suggested as early as 1870 by Gustave Moynier co-founder and president of what would become the International Committee of the Red Cross (ICRC).[30] Nevertheless, it was not until the end of the First World War that substantial steps were made towards the systematic prosecution of war crimes. At the end of the war a commission was established to investigate violations of the laws of war and the avenues for their prosecution. In its report published in 1919, it found the central powers responsible for the war, and recommended the establishment of a tribunal to prosecute violations of the laws of war.[31] The report did not meet with the approval of several States however, and even in countries that did support the prosecution of war crimes, such as Britain, there was considerable disagreement amongst lawyers and advisers.[32] In any event, although the treaty of Versailles provided for the prosecution of the Kaiser, the tribunal failed to materialise when the Netherlands granted him asylum and refused to hand him over for trial. Although some prosecutions were undertaken by Germany at

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[27] See Section 1.1 above.

[28] A Cassese (2008) *International Criminal Law* Oxford: OUP, 4

[29] G Schwarzenberger (1968) *International Law as Applied by International Courts and Tribunals*. Stevens: London, 462-6

[30] CK Hall (1998) *The First Proposal for a Permanent International Criminal Court* 322 International Review of the Red Cross

[31] See generally R Cryer et al. *An Introduction to International Criminal Law and Procedure* Cambridge: CUP, 109-10

[32] K Sellars (2012) *Delegitimizing Aggression: First Steps and False Starts after the First World War* 10 JICJ 7

Leipzig, these were heavily criticised for their leniency. It would not be until the end of World War Two that further progress would be made.

Prior to World War Two, international law was largely dominated by voluntarist legal theory, epitomised by the so-called *Lotus* principle, that limits to the sovereignty of States could not be presumed. As a consequence international law remained hostile to the concept of international crimes. Nevertheless during this period a number of eminent jurists began efforts to develop international law in the direction of the repression of crimes. Amongst these, Gidel singled out in particular Professor Vespasian Pella, then President of the International Association of Penal Law, who wrote in 1926 of "*le droit pénal de l'avenir*".[33] The early efforts at developing a system of international criminal law did not initially take the form of individual criminal responsibility for serious violations of international law however.[34] Those attempts instead took two principal forms. The first was the recognition of a category of municipal crimes that all States theoretically had an interest in cooperating to suppress. These crimes included amongst others, drug trafficking, human trafficking, counterfeiting, damaging undersea cables, and piracy. These were characterised as 'crimes of international concern', demanding 'universal repression'. The second was the idea of 'State crimes' which involved the criminal liability of the State itself,[35] a notion that persisted into the ILC's work on State responsibility, and was not finally laid to rest until the concept of State crimes was finally removed by Crawford as Rapporteur.[36] Although the concept of individual criminal responsibility for violations of international law was not a new idea, it was not until the war crimes tribunals following World War Two, that the concept of international crimes finally took shape.

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[33] VV Pella (1926) *La criminalité collective des États et le droit pénal de l'avenir* Bucharest: Imprimerie de l'État

[34] For a survey of the development of ICL generally see: United Nations *Historical Survey of the Question of International Criminal Jurisdiction.* Memorandum submitted by the Secretary-General. (1949) A/CN.4/7/Rev.1; and ILC *Report on the Question of International Criminal Jurisdiction* by Ricardo J. Alfaro, Special Rapporteur A/CN.4/15 YBILC 1950, vol. II, 1

[35] See generally: ES Rappaport (1932) *The Problem of the Inter-State Criminal Law* 18 Transactions of the Grotius Society 41; A Pellet (1999) *Can a State Commit a Crime? Definitely Yes!* 10 EJIL 425

[36] See: J Crawford (1998) *On Re-Reading the Draft Articles on State Responsibility* 92 American Society of International Law Proceedings 295, 296

2.3.2 Categorising Crimes in International Law

According to the ILC's report on the Obligation to Extradite or Prosecute, there are three different categories of crimes: crimes under international law, crimes under national law of international concern, and ordinary crimes under national law.[37] Cryer observes that although Schwarzenberger identified six different uses of the term 'international criminal law',[38] there are "only two that really deal with international criminalization" namely: core crimes and transnational crimes.[39] Of these, the interwar years saw a rapid development in the concept of what are now described as transnational crimes. The term 'transnational crime' has been proposed by Boister,[40] but the concept has much older origins, and the category is also described as 'crimes of international concern' and *delicta juris gentium* (often, though not entirely accurately, translated as 'offences against the law of nations').[41] In describing the concept of transnational crimes, Boister noted that they do not:

> [...] create individual penal responsibility under international law. [Transnational Criminal Law] is an indirect system of interstate obligations generating national penal laws. The suppression conventions impose obligations on state parties to enact and enforce certain municipal offences.[42]

Perhaps the first agreements relating to transnational crimes were those relating to the suppression of the slave trade.[43] These were followed by the 1925

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[37] ILC *Preliminary Report on the Obligation to Extradite or Prosecute (aut dedere aut judicare)* 7 June 2006 58th Session A/CN.4/571, 6 (para.20)

[38] G Schwartzenberger (1955) *The Problem of an International Criminal Law* 3 Current Legal Problems 263

[39] R Cryer *The Doctrinal Foundations of International Criminalization* in MC Bassiouni (ed.) (2008) *International Criminal Law – Volume I Sources, Subjects and Contents*. Leiden: Martinus Nijhoff, 107

[40] N Boister (2003) *Transnational Criminal Law?* 14 EJIL 953

[41] The notion of *Delictum* which survives in Civil Law jurisdictions in fact covers far more than criminal offences, and normally also includes civil wrongs. The phrase also does not necessarily convey the meaning that the wrongs are *violations* of the *jus gentium*, but rather that they are universally recognised as wrongs by different legal systems. The issue is discussed further in Section 7.1.3 below.

[42] Boister *Transnational Criminal Law* (n.37), 962

[43] International Agreement for the Suppression of the White Slave Traffic (1904) 1 LNTS 83

International Opium Convention.[44] The 1937 Convention for the Prevention and Punishment of Terrorism, was accompanied by a Convention for the Creation of an International Criminal Court to prosecute acts of terrorism, following a series of high profile political assassinations in Europe.[45] Those Conventions never entered into force however, and the Court was never established.[46] In the interwar period several independent initiatives began work on developing the concept of transnational crimes, in particular the International Association of Penal Law (*Association International de Droit Pénal* or AIDP) which had a number of illustrious members including Henri Donnedieu de Vabres (who would sit as the French judge at Nuremberg), Emil Stanisław Rappaport, and its president, Vespasian Pella.

The effort commenced in 1927 at the First Conference for the Unification of Penal Law in Warsaw, which aimed at identifying a list of crimes which could form the basis of an international code of crimes common to all States.[47] The AIDP discussed the issue at its Third Congress of International Penal Law in Palermo in 1933, when it took up the effort that had begun in Warsaw and posed the question: "For what offences is it proper to admit universal competency?", arguing that "in the contemporary codifications of penal law, there can be discerned a tendency towards a universal repression" of certain offences listed as:

> [...] piracy, slave-trade, trading in women and children, drug traffic, the circulation of and traffic in obscene publications, the breaking and deterioration of submarine cables and serious offences against the radio-electric communication, notably the transmission or circulation of false or deceitful distress signals or appeals, coinage offences, forgery of papers of value or of instruments of credit, acts of

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[44] International Opium Convention (1925) 81 LNTS 319

[45] See: B Saul (2006) *The Legal Response of the League of Nations to Terrorism* 4 JICJ 78, 79

[46] See generally: *Ibid.* and E Chadwick (2004) *A Tale of Two Courts: The 'Creation' Of A Jurisdiction?* 9 Journal of Conflict and Security Law 71

[47] ES Rappaport, VV Pella, and M Potulicki (1929) *Conférence Internationale d'Unification du Droit Pénal (Varsovie, 1–5 Novembre 1927): Actes de la Conférence* Paris: Recueil Sirey

> barbarism or vandalism capable of bringing about a common danger.[48]

Writing in 1955 urging the establishment of an international criminal court, Pella elaborated on the distinction between this class of offences, and 'core' crimes, noting that the latter group consists of:

> [...] acts or omissions internationally injurious, either because they contribute to the preparation or conduct of a prohibited war, or to the violation of the laws and customs of war, or to the creation of situations likely to endanger peace, or finally because they conduce to the pursuit of a national policy revolting to the sentiments of mankind. The second group comprehends offenses which generally do not prejudice international relations.[49]

In the case of the international crimes, Pella advocated the establishment of an international criminal court, and in the case of the transnational crimes:

> [...] progress ought to take the form of generalization of the instances in which national courts already have extraterritorial jurisdiction in the direction of universal competence.[50]

Thus, whereas the discussions in the AIDP had urged a 'universal repression' by means of States cooperating to ensure that the offences were proscribed by their municipal law, Pella was subsequently urging that all transnational crimes should be subject to "universal competence". He was not the only one to urge the development of the category. Raphael Lemkin also pressed his case for the assimilation of the concept of Genocide to that of transnational crimes, presenting his arguments to the AIDP amongst others in the interwar years. In his book *Axis Rule* written after World War Two but before the conclusion of the Genocide Convention he argued that the future Convention should require States to criminalise genocide in their criminal codes and to adopt the principle of "universal repression":

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[48] JL de la Cuesta (ed) *Resolutions of the Congresses of the International Association of Penal Law (1926 – 2004)* ReAIDP D-01, 19

[49] VV Pella (1950) *Towards an International Criminal Court* 44 AJIL 37, 54

[50] *Ibid.*

> […] in the same way as other offenders guilty of the so-called delicta juris gentium (such as, for example, white slavery and trade in children, piracy, trade in narcotics and in obscene publications, and counterfeiting money). Indeed, genocide should be added to the list of delicta juris gentium.[51]

The significance of these discussions is that 'offences against the law of nations' were in fact not international crimes but *transnational* crimes, and although Pella and the AIDP theorised that those crimes should be recognised as being subject to universal repression or competence, that did not necessarily mean that international law recognised them as being subject to universal jurisdiction. As will be noted in due course, the failure to draw a clear distinction between international crimes *per se* and the so-called crimes of international concern, or offences against the law of nations (transnational crimes) has caused considerable confusion in the development of criminal law addressing the problem of piracy.

The other category of crime in international law is that of international crimes, also called 'core' crimes. According to Cryer, international criminal law (ICL) is essentially concerned with these 'core' international crimes, which are defined as those:

> […] that have been tried before international criminal tribunals – i.e. aggression, crimes against humanity, genocide, and war crimes. […] the fundamental point to understand about these crimes is that the locus of the criminal prohibition is not the domestic, but the international legal order. In other words, States have decided that international law, in exceptional circumstances, ought to bypass the domestic legal order, and criminalise behaviour directly.[52]

The idea of the direct imposition of criminal responsibility was a product of the Nuremberg International Military Tribunal (IMT), and the crimes prosecuted by

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[51] R Lemkin (1944) *Axis Rule in Occupied Europe* Washington: Carnegie Endowment, 94

[52] Cryer *Doctrinal Foundations* (n.38), 108

the IMT were set out in the London Agreement which established it.[53] Those crimes were: crimes against peace, war crimes, and crimes against humanity.

Authors discussing the theory of international criminal law have identified four main characteristics of international crimes, that they are: (a) a violations of peremptory norms, (b) committed under some form of authority as part of "system criminality", (c) considered to be an offence against international peace and security and (d) are directly proscribed by international law which imposes individual criminal responsibility and is thus capable of prosecution by international tribunals.

The first is that core crimes are violations of peremptory norms (*jus cogens*).[54] A peremptory norm is one from which no derogation is permitted. An offence which States might derogate from or otherwise justify cannot attract international criminal jurisdiction since it could potentially be within a State's authority to sanction its performance. The second element is that core crimes are invariably crimes committed under colour of public authority and usually in some kind of official capacity. They typically arise out of an internationally wrongful act for which the State may also be internationally responsible, and the individual is not able to claim functional immunity (though he may still claim personal immunity if he is still serving as head of State, foreign minister, or diplomatic agent.) A defendant is also unable to claim a defence of Act of State, since this is excluded as a defence by the Article 7 of the London Charter of the IMT, and Article 4 of the Genocide Convention,[55] and are "outside the jurisdiction of a State to order and ratify and therefore involve personal responsibility."[56] As Cassese noted:

> [...] it is characteristic of [international crimes] that, when perpetrated by private individuals, they are somehow connected with a state policy or at any rate with 'system criminality'. [...]

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[53] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) (1951) 82 UNTS 279

[54] A Orakhelashvili (2006) *Peremptory Norms in International Law* Oxford, OUP, 288; A Pellet (1999) *Can a State Commit a Crime? Definitely, Yes!* 10 EJIL 425, 428

[55] Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277

[56] *Attorney-General of Israel v. Eichmann* (District Court of Jerusalem) 1968 36 ILR 5, 17

> international crimes are thus different from criminal offences committed for personal purposes [...] as in the case with ordinary criminal offences [...] or such other crimes that have a transnational dimension but pursue private goals such as piracy, slave trade [...].[57]

The third element is that core crimes are all considered to be crimes against international peace and security, thus giving rise to the jurisdiction over them, since their commission threatens the international order. Pella characterised them as "acts against the peace and security of mankind".[58] Fourth, 'core' international crimes are those that have been recognised as imposing direct criminal liability on individuals by international law. This is evidenced by those crimes having been adopted and prosecuted by international criminal tribunals (in particular by the Nuremberg IMT), and by the language e.g. of the Genocide Convention. core crimes are prosecuted by international tribunals.

As well as the three categories of crimes included in the Charter of the Nuremberg IMT (war crimes, crimes against humanity, and aggression), it is theoretically possible for other crimes to attain the status of an 'international crime'. The obvious example of this is the crime of Genocide, which was not prosecuted separately at Nuremberg, but was included in the concept of crimes against humanity. The establishment of Genocide as an international crime is based on the number of ratifications that the Genocide Convention has attracted, and its unanimous approval in the UN General Assembly, leading to the ICJ observing that:

> [...] the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.[59]

Although the Convention itself specified that jurisdiction over the crime was to be ascribed to the state on whose territory the crime took place or an

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[57] A Cassese (2008) *International Criminal Law*. Oxford: OUP, 54

[58] VV Pella *Towards an International Criminal Court* (n.42), 37

59 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide ICJ Advisory Opinion of 28 May 1951, p.23

international tribunal, the crime is now considered to attract universal jurisdiction.

A second offence that has potentially gained the status of an international crime is that of torture outside of an armed conflict. Torture is capable of amounting to both a crime against humanity (where it forms part of a "widespread or systematic practice" or attack against a population),[60] and a war crime. Torture is however also considered to be directly proscribed as a matter of customary international law. The ICTY in the case of *Furundžija* recognised the prohibition of torture as a peremptory norm, and stated that it is a crime punishable by any State under the principle of universal jurisdiction.[61] The wording of the Torture Convention precludes the applicability of functional immunities for acts of torture, and the House of Lords in the *Pinochet* cases held that the former Chilean president could be tried for his involvement in acts of torture during his time in office.[62]

2.3.3 The Development of the Law of the Sea

In contrast with international criminal law, the law of the sea is one of the oldest, if not one of the foundational fields of international law together with the law of armed conflict, since it was at sea that states first found the need to moderate and regulate their behaviour *inter se*. Here again however, it is difficult to see how the law of the sea has sustained a consistent law of piracy through the centuries, primarily because the law of the sea has not remained static for long periods of time. On the contrary, it will be argued that the law of the sea has been in a near constant state of flux as a result of the competing interests of States to control and use the ocean space. Amongst the issues that have framed this development is the tension between the freedom of the seas and the claims to sovereignty over areas of the sea space, conventionally

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[60] Cassese *International Criminal Law* (n.56), 149-50. The point remains controversial however, and other authors consider torture to remain a transnational crime, rather than an international one. See: R Cryer et al. (2010) *An Introduction to International Criminal Law and Procedure* Cambridge: CUP, 352

[61] *Prosecutor v. Furundžija* TC II 19 December 1998 (IT-95-17/1-T) Judgment p.60

[62] *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17 (24 March 1999)

characterised as the 'battle of the books' between Grotius (*Mare Liberum*),[63] and Selden (*Mare Clausum*).[64] In reality, this tension has less to do with competing doctrine and more to do with the conflict between the interests of maritime states in the freedom of navigation and the ability to deploy naval forces on the one hand, and the interests of coastal states in controlling the sea space around their coastlines on the other, both for their own security, and for the exploitation of natural resources. This tension is in fact not capable of resolution by one particular doctrine 'winning the argument', but has always been, and will continue to be, an underlying issue that impacts upon State policy and practice.

Furthermore, although it is common to refer to the notion of the 'freedom of the seas' as if it had always been accepted, the reality is that for long periods of history states in fact claimed exclusive sovereignty over large parts of the ocean space. In spite of the fact that Britain was one of the earliest advocates of the concept of the freedom of the seas, and ultimately its greatest beneficiary, it was also one of the last to abandon expansive claims to sovereignty over large areas of the sea. This tension, which was explained by McDougal and Burke in terms of a balancing of 'inclusive' and 'exclusive' interests,[65] does to a certain extent find a balance, since the majority of states have an interest in preserving both the principle of the freedom of navigation and of controlling the sea space adjacent to their coasts in the interests of security and the exploitation of living and non-living natural resources. However in the continuum between *mare clausum* and *mare liberum*, that balance does not have to be struck at a notional half-way point. The thesis will argue that the development of the law of the sea during the twentieth century has in fact been characterised by a steady shift away from the almost absolute freedom of the seas enjoyed by Britain for a brief period at the height of its empire, driven by a combination of decolonisation and the increasing demands for the preservation and

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[63] H Grotius (RVD Magoffin tr) (1916) *The Freedom of the Seas or the Right to Take Part in the East Indian Trade* Oxford: OUP

[64] J Selden (M Nedham tr.) (1652) *Of the Dominion or Ownership of the Sea: Two Books* London: William Du-Gard

[65] MS McDougal and WT Burke (1962) *The Public Order of the Oceans: A Contemporary International Law of the Sea* New Haven: Yale University Press, 1

exploitation of marine natural resources. At the same time as the number of coastal states has dramatically increased, so too have claims to control over ocean spaces, first with the extension of the territorial sea to 12 nautical miles, then the agreement of extensive rights over the continental shelf and a 200 nautical mile Exclusive Economic Zone (EEZ), and also in the agreement of a regime for the regulation of the deep sea bed.

The thesis will argue that these developments have impacted upon the law of piracy as much, if not more than, the development of international criminal law, because whereas the popular imagination still thinks of maritime security as the preserve of naval forces patrolling the oceans hunting pirates, the reality is that contemporary maritime crime is above all an issue involving the rights and responsibilities of coastal States. Perhaps the most surprising thing is the fact that historically speaking the ideal of naval law enforcement (as opposed to coastal state control) occupied a relatively brief period of colonial domination, within a historical narrative generally dominated by expansive claims by coastal states to control areas of the sea space. The thesis argues that the rising importance of the coastal states and their ability or failure to exercise control over the sea space adjacent to their coasts is the single most important issue in dealing with maritime crime, but one that is largely overlooked in the literature. Whilst the doctrine of the freedom of the seas created the a need for a law of piracy to allow individual States to police the high seas, the drift back towards greater control of the sea space by coastal States demands that the law of piracy be revisited. The thesis therefore argues that whilst the LOSC must be the starting point for a discussion of the law of piracy, State practice has moved on considerably and that lessons can be learnt from other mechanisms for the regulation of the ocean space.

Conclusions

In conclusion, this chapter has examined three different issues. Firstly, it has surveyed the problem of contemporary piracy and maritime crime, and observed that it has different characteristics in different regions of the world, but that it has one thing in common, namely the fact that it involves attacks in different maritime zones, and also in Southeast Asia and West Africa, in the

coastal waters of various States. Secondly, the chapter has observed that the problem of the legal definition of piracy goes to the very heart of the problem, since 'piracy' is capable of being defined in different ways at municipal and international law, as well as in different areas of law. Finally, the chapter has also briefly examined the historical development of ICL and the law of the sea, and noted that it is immediately apparent that the arguments that the international law of piracy is long established are difficult to sustain, because neither ICL nor the law of the sea have remained static for that period of time. It will be argued that as a result, piracy is not in fact an international crime, but a *transnational* one, that piracy was not historically subject to universal jurisdiction, and that the enforcement jurisdiction over piracy is not necessarily as well founded or effective as it might appear. These issues will be examined in greater detail below, but first the thesis will examine the international law of jurisdiction in greater detail.

PART I

THE THEORY OF JURISDICTION

3 Jurisdiction in International Law

This section of the thesis seeks to establish a framework for the analysis of jurisdiction over piracy. This chapter therefore addresses the theory of jurisdiction in international law.[1] The thesis will then examine the theory of prescriptive and enforcement jurisdiction in greater detail in Chapters 4 and 5 respectively. This chapter examines two main issues. The first is the theory of jurisdiction in international law which addresses four questions: the meaning and significance of jurisdiction; the difference between civil and criminal jurisdiction; the three forms of jurisdictional competence (prescriptive, adjudicative, and enforcement); and the question of whether jurisdiction is restrictive or permissive. The second part examines the law of immunities, and specifically the concept of individual functional immunity in international law.

3.1 The Meaning of Jurisdiction in International Law

The international law of jurisdiction stems from the principles of the sovereign equality of States and the principle of non-intervention in another State's internal affairs.[2] It has been observed that the word 'jurisdiction' has different meanings and needs to be carefully defined.[3] In reality, there are probably only

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[1] M Akehurst (1972-1973) *Jurisdiction in International Law* 46 BYIL 145; I Bantekas *Criminal Jurisdiction of States under International Law* in R Wolfrum (ed.) (2012) *The Max Planck Encyclopedia of Public International Law* Oxford: OUP; I Brownlie (2008) *Principles of Public International Law* Oxford: OUP, 297-318; R Jennings and A Watts (eds.) (1996) *Oppenheim's International Law* London and New York: Longmans, 456-498; V Lowe *Jurisdiction* in M Evans (ed.) (2006) *International Law* Oxford: OUP, 335-9; FA Mann (1964) *The Doctrine of Jurisdiction in International Law* 111 RCADI 1; FA Mann (1984) *The Doctrine of International Jurisdiction Revisited after 20 Years*. 186 RCADI 9; C Ryngaert (2008) *Jurisdiction in International Law* Oxford: OUP; M Shaw, M. (2008). *International Law* Cambridge: CUP, 645-696; O Schachter (1991) *International Law in Theory and Practice* Dordrecht/Leiden/Boston: Martinus Nijhoff, 250-273; DP O'Connell (1970) *International Law Volume II*. London: Stevens and Sons, 599-840; BH Oxman *Jurisdiction of States* in R Wolfrum (ed.) (2012) *The Max Planck Encyclopedia of Public International Law* Oxford: OUP; B Simma and A Th. Müller *Exercise and Limits of Jurisdiction* in J Crawford and M Koskenniemi (eds.) (2012) *The Cambridge Companion to International Law* Cambridge: CUP; Harvard Research in International Law. *Draft Convention on Jurisdiction with Respect to Crime* Reproduced in: (1935) 29 American Journal of International Law Supplement 435; The American Law Institute. *Restatement of the Law (Third). The Foreign Relations Law of the United States* Vol.1 (1987) St Paul. Minn.: American Law Institute Publishers

[2] Brownlie *Principles of Public International Law* (n.1), 289

[3] Akehurst *Jurisdiction* (n.1), 145; KC Randall *Universal Jurisdiction under International Law* (1987-1988) 66 Texas Law Review 785, 786

two meanings of the word. The first, jurisdiction as a noun ('a jurisdiction'), refers to a municipal legal system and the geographical area within which it applies. In some States, particularly federal States, it is normal for there to be several 'jurisdictions' within a single nation State.[4] It is in this sense that it is meaningful to speak of, for example, the jurisdiction of England and Wales. The second meaning of the word is in the sense of jurisdictional *competence*,[5] that is to say, the limits placed upon the right to prescribe or enforce rules, or of a court to adjudicate a particular matter.[6] Jurisdictional competence (hereafter referred to simply as 'jurisdiction') has three elements which happen to correspond to the separation of powers in the field of constitutional law. They are jurisdiction to prescribe (or legislative jurisdiction), adjudicative jurisdiction (also known as curial, or judicial jurisdiction), and jurisdiction to enforce (or executive jurisdiction).[7] Where States (or their organs) choose to prescribe rules, adjudicate a case, or carry out enforcement activities that have an international dimension, then they must do so in accordance with the international law of jurisdiction.

It should be noted that it has been suggested that there is another 'form' of jurisdiction in the shape of the threshold test for the application of certain human rights treaties,[8] in particular the European Convention on Human Rights (ECHR),[9] and the International Covenant on Civil and Political Rights (ICCPR).[10] It seems more likely however that this 'form' of jurisdiction is in

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[4] I Cameron (1994). *The Protective Principle of International Criminal Jurisdiction.* Aldershot: Dartmouth Publishing, 14

[5] Brownlie *Principles of Public International Law* (n.1), 299

[6] V Lowe *Jurisdiction* (n.1), 356; Jennings and Watts *Oppenheim's International Law* (n.1), 456

[7] H Fox (2008) *The Law of State Immunity* Oxford: OUP, 68; Brownlie *Principles of Public International Law* (n.1), 297

[8] *See generally:* R Wilde (2007) *Triggering State Obligations Extraterritoriality: The Spatial Test in Certain Human Rights Treaties* 40 Israel Law Review; M Milanović (2011) *Extraterritorial Application of Human Rights Treaties* Oxford: OUP; M Milanović (2008) *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties* 8 Human Rights Law Review 411

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS No.5

[10] International Covenant on Civil and Political Rights (1966) 999 UNTS 171

reality merely one, or perhaps both, of the other forms of jurisdiction already identified.[11]

Jurisdiction in international law is closely related to the concept of *immunities*. The rules of jurisdiction and the rules relating to immunities are two aspects of the same issue. The rules of jurisdiction are concerned with defining in what circumstances a State *may* exercise jurisdiction, and the law of immunities concerns the circumstances in which a State *may not* exercise jurisdiction. It is sometimes asserted that the rules of jurisdiction or indeed of immunities are self-contained regimes, or are primary rules of international law. However, it seems clear that the rules of jurisdiction and immunities are *secondary* or *procedural* (as opposed to substantive) rules of international law, in the sense that they are *general* customary international law underpinning the primary rules of international law that apply to its different fields and must be considered as separate from specific treaty obligations. As the ICJ observed in relation to State immunities in the *Jurisdictional Immunities* case when considering the relationship between peremptory norms and state immunity:

> The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State.[12]

These secondary rules determine the extent to which primary rules may be created, adjudicated, and enforced.[13]

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[11] Although Milanović argues that the term has an autonomous meaning in human rights treaties. Discussion of this point lies beyond the scope of the thesis.

[12] *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening) ICJ Judgement of 3 February 2012, p.38

[13] Although there is some disagreement about what exactly primary and secondary rules are in international law (in particular in relation to the methodology adopted by the ILC in preparing the draft articles on state responsibility), there is no need to discuss this in depth here. See generally A Gourgourinis (2011) *General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System* 22 EJIL 993; B Simma and D Pulkowski (2006*) Of Planets and the Universe: Self-Contained Regimes in International Law* 17 EJIL 483; Also see M Milanović (2006) *State Responsibility for Genocide* 17 EJIL 553; and H Thirlway *The Sources of International Law* in M Evans (ed) (2010) *International Law* Oxford: OUP*,* 95

3.2 Criminal and Civil Jurisdiction

Although many authors, including Mann[14] and Akehurst[15] have treated issues of criminal and civil jurisdiction in international law as part of the same problem, and some authors argue that there is no difference between the two,[16] there are in reality two separate (albeit related) crucial distinctions between criminal and civil jurisdiction in international law. The first is that jurisdiction of a regulatory nature (including criminal jurisdiction, and other forms of regulation including competition/anti-trust law and taxation) is a matter of public law, and involves regulatory conduct by the State itself exercising its sovereign authority.[17] Civil jurisdiction by contrast is generally a matter of private law, and relates to the settlement of disputes between private parties. Brownlie observed that public international law may come into play where an exercise of civil jurisdiction is "excessive and abusive" and *ultra vires*, but he goes on to argue that "[…] there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens".[18] In fact, although excessive claims to jurisdiction in civil cases may amount to unlawful conduct as a matter of international law (as illustrated by the facts of the *Jurisdictional Immunities* case) it may be more helpful to draw a distinction between civil jurisdiction on the one hand, and *regulatory* jurisdiction on the other. Regulatory jurisdiction encompasses both criminal law and other aspects of government regulation such as taxation and anti-trust/competition law.

The second point is that in criminal cases a State will not apply the criminal law of another State. Thus in the case of criminal law, prescriptive jurisdiction and adjudicative jurisdiction are inseparable, whilst in the case of civil matters the law involved in a dispute may be foreign law, and so prescription and

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[14] Mann *Doctrine of Jurisdiction* (n.1)

[15] Akehurst *Jurisdiction* (n.1)

[16] BB Jia (2012) *The Immunity of State Officials for International Crimes Revisited* 10 JICJ 1303, 1306

[17] The question of regulatory jurisdiction is complex and unsettled, and is treated differently as between the US and Europe (see generally: Ryngaert *Jurisdiction in International Law* (n.1), 16-21; KM Meesen (1984) *Antitrust Jurisdiction under Customary International Law* 78 AJIL 783)

[18] Brownlie *Principles of Public International Law* (n.1), 300

adjudication may not have any connection at all.[19] As a result, in the case of criminal matters with an international dimension, the question of prescriptive jurisdiction is the primary issue, since the right of a State to define criminal rules applicable beyond the uncontroversial categories of its territory and its own nationals is the subject of rules of public international law. Adjudicative jurisdiction, that is the question of whether a court might hear such a case, is entirely contingent on the State's right to exercise prescriptive jurisdiction, and therefore as a consequence it is "doubtful whether it is necessary to separate out" adjudicative jurisdiction.[20]

By contrast in a civil case with an international dimension the law applicable to the dispute is merely one of the questions that the court must address after first determining whether it is itself the appropriate forum to hear the case. In a civil case between private parties it is not the State that is prescribing the applicable rules, and the State itself would not necessarily be involved in the proceedings. The question of jurisdiction in civil cases is therefore purely one of *adjudicative* jurisdiction,[21] which is determined by the court itself by applying rules of private international law which are typically different from one State and another. Civil jurisdiction in Europe is for example covered by detailed treaty provisions including most recently Regulation EC 44/2001 which regulates civil jurisdiction and the recognition and enforcement of judgments. The question of determining the law that is applicable to a case with an international dimension then depends on the nature of the dispute, ranging from contract disputes, where typically the law to be applied is that with the closest connection with the contract, to disputes concerning immovable property, where the applicable law will almost always be the law of the jurisdiction where the property is situated.[22]

Drawing a distinction between civil and regulatory jurisdiction is important because discussions of jurisdiction in international law often attempt to address

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[19] Cameron *Protective Principle* (n.4), 6-7

[20] Cameron *Protective Principle* (n.4), 4 and Milanović *From Compromise to Principle* (n.8), 420

[21] Mann *Doctrine of Jurisdiction* (n.1), 82; Akehurst *Jurisdiction* (n.1), 179

[22] CMV Clarkson and Jonathan Hill (1997) *Jaffey on the Conflict of Laws* London: Butterworths, 2

issues arising out of both civil jurisdiction and criminal jurisdiction as if they were interchangeable. Recent discussion concerning the extent of the application of the Alien Tort Statute (ATS)[23] in the United States are a case in point. In tort cases the law to be applied to a dispute is normally the *lex loci delicti* and tort cases are normally heard where the incident took place. The Second Restatement of the Conflict of Laws states:

> [...] the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties.[24]

However US case law has developed "flexible" alternatives to this general rule, as evidenced in the cases of *Reich*[25] and *Babcock*.[26] The ATS has been the source of much discussion concerning universal jurisdiction, jurisdiction over piracy, and the nature of the relationship between civil and criminal jurisdiction in international law and has been described as "universal civil jurisdiction".[27] The ATS is said to have been enacted by the US Congress in 1789 in order to comply with its international obligations to provide redress for foreign claims against its nationals for acts committed in violation of the law of nations as set out by Blackstone in his Commentaries on the Laws of England. The ATS was apparently not actually used until the 20th century, but was applied in the case of *Filartiga v. Peña-Irala*,[28] where damages were successfully claimed from a former Chilean official who had taken part in torture in Chile against the claimants. Although much has been written about the ATS being "civil" universal jurisdiction somehow analogous with the public international law

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[23] 28 U.S.C. § 1350 (2006)

[24] The American Law Institute (1971) *Restatement of the Law (Second) Conflict of Laws Vol.I* St Paul, Minn.: American Law Institute Publishers Ch.7 page 414 §.145

[25] *Reich v. Purcell* 432 P 2d 727 (1967)

[26] *Babcock v. Jackson* 12 NY 2d 473 (1963) For discussion of this point see Clarkson and Hill *Jaffey on the Conflict of Laws* (n.21), 254-8

[27] DF Donovan and A Roberts (2006) *The Emerging Recognition of Universal Civil Jurisdiction* 100 AJIL 2006

[28] 630 F.2d 876 (2d Cir. 1980)

meaning of that term, the reality, repeatedly observed by the courts is somewhat different.

In the case of *Sosa* the court was required to decide specifically whether it had the jurisdiction to hear the case (as opposed to whether the United States was entitled to assert jurisdiction).[29] It was observed that the ATS provisions were "jurisdictional in the sense of addressing the powers of the courts to entertain certain cases concerned with a certain subject."[30] Ultimately, the US Supreme Court decided in the recent case of *Kiobel* that it did not have jurisdiction to hear cases without a substantial link to the United States.[31]

Another relevant aspect of civil jurisdiction is that relating to maritime or Admiralty law. In cases involving Admiralty proceedings, the subject matter of the dispute is property, and usually a ship or its cargo. In such cases the basis of adjudicative jurisdiction is said to be *in rem*, that is based on the presence of the vessel in port. *In rem* property proceedings in Admiralty cases do have implications for the discussion of piracy cases, and will be discussed in Chapter 7 below. Nevertheless, although cases of civil jurisdiction may raise questions of public international law, an analysis of jurisdiction over piracy in international law does not need to consider the vast majority of the issues that arise in private international law determinations of adjudicative jurisdiction in civil cases. The thesis will therefore refer to issues arising out of cases of the exercise of civil jurisdiction only sparingly for this reason. The thesis will also refer simply to prescriptive jurisdiction, by which it also includes adjudicative jurisdiction.

3.3 Jurisdiction to Prescribe and Jurisdiction to Enforce

The distinction between jurisdiction to prescribe and jurisdiction to enforce is important to the thesis because the two elements are determined by separate criteria. This distinction has however not always been clearly theorised, as

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[29] *Sosa v. Alvarez-Machain* 542 U.S. (2004)

[30] E Kontorovich (2004-2005) *Implementing Sosa v. Alvarez Machain: What Piracy Reveals about the Limits of the Alien Tort Statute* 80 Notre Dame L. Rev. 111, 112

[31] *Kiobel v Royal Dutch Petroleum Co.* 569 U.S. (2013)

evidenced by the various opinions in the *Arrest Warrant* decision by the ICJ,[32] which were criticised for precisely this reason.[33] It must be acknowledged immediately that prescription and enforcement are inevitably tied together, since one is of little use without the other: prescribing law that may not be enforced is of little utility, and it is not possible to enforce a law that has not been prescribed.[34] Nevertheless, the distinction is important because the two elements operate in substantially different ways. Thus in some jurisdictions it is possible for the prescriptive jurisdiction to be lawful, but the enforcement unlawful (as was the position in the *Eichmann* case) and one does not necessarily affect the other. In terms of definition, jurisdiction to prescribe is defined by the Third Restatement of US Foreign Relations Law as a State's ability:

> [...] to make its laws applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court.[35]

Jurisdiction to enforce is defined as the ability:

> [...] to enforce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.[36]

The distinction between prescriptive and enforcement jurisdiction was elaborated in the *Lotus* case where the Permanent Court of International Justice

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[32] *Case concerning the Arrest Warrant of 11 April 2000.* (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, p.3

[33] In particular the Separate Opinion of Higgins, Kooijmans and Buergenthal. See R O'Keefe (2004) *Universal Jurisdiction: Clarifying the Basic Concept* 2 JICJ 735 and A Cassese (2002) *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case* 13 EJIL 853

[34] The position is complex however. For example, Article 110(b) LOSC grants a right of visit (enforcement jurisdiction) over foreign flagged vessels on the high seas suspected of engaging in the slave trade, yet there is no concomitant right of prescriptive/adjudicative jurisdiction (the right to prosecute those engaged in the slave trade) where those same foreign flagged vessels are concerned.

[35] ALI *Restatement of the Law (Third)* (n.1), 232, s.401(a)

[36] *Ibid.* s.401(c)

(PCIJ) noted on the one hand that a state's authority to exercise enforcement jurisdiction was tightly circumscribed:

> […] the first and foremost restriction imposed 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.

At the same time however, the Court also expressed the view that:

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law […] Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules […].[37]

In other words, on a literal interpretation, enforcement jurisdiction is territorially bound, but prescriptive jurisdiction is subject to very few restrictions under international law. These two statements do however demand closer scrutiny. The first question is whether enforcement jurisdiction is purely territorial. This issue will be addressed in Chapter 5. The second question is whether prescriptive jurisdiction is as a matter of principle *permissive*, i.e. permits a state to exercise prescriptive jurisdiction as they see fit, provided there is no rule of international law that prohibits it from doing so (as the *Lotus* decision seems to indicate), or whether it is *restrictive,* merely that it requires a state wishing to avail itself of prescriptive jurisdiction over a given act or activity to show that there is a positive rule of international law permitting it to do so.

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37 *Case of the SS Lotus.* (France/Turkey). (1927). PCIJ, Series A, No.10, 4, pp. 18-19

3.4 Jurisdiction: Restrictive or Permissive?

Mann observed that, contrary to an often repeated misunderstanding of the judgment in *The Lotus* case, the role of the international law of jurisdiction is not to actually *allocate* competence between states, but simply to prevent states from making excessive claims to jurisdiction. Thus Milanović observes that the purpose of jurisdiction to prescribe is "to delimit the municipal legal orders of states, to tell states when they can extend their domestic law to regulate certain conduct." By doing so, he says "it defines when an exorbitant or excessive exercise of prescriptive jurisdiction constitutes a violation of the sovereignty of other states, an intrusion into their sphere of legitimate authority."[38]

As a result, the interpretation of the *Lotus* case as creating a presumption of jurisdiction being permissive has been criticised. Lowe refers to the idea that the PCIJ meant that a state may extend its jurisdiction as it chooses in the absence of a restrictive provision in international law as a "tiresome and oddly persistent fallacy".[39] He goes on to note that "it does not follow that a sovereign State is free to do what it wishes". He observes that claims by one State to prescribe rules with an effect in another State encroach on the rights of that State.[40] Instead as Reydams observes this interpretation would be at odds with other parts of the judgment which refer to international law placing "limits" on the exercise of jurisdiction.[41] Akehurst also notes that this approach is evidenced in the literature.[42]

Schachter observes that there is "no dissent from the general proposition that public international law sets limits on the authority of States to legislate, adjudicate and enforce its domestic law".[43] As a result, it is argued that whatever

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[38] M Milanović (2011) *Is the Rome Statute Binding on Individuals? (And Why We Should Care)* 9 JICJ 25, 47

[39] V Lowe *Jurisdiction* in MD Evans (ed.) (2006) *International Law*. Oxford: OUP, 340

[40] *Ibid*. 341-2

[41] L Reydams (2003) *Universal Jurisdiction: International and Municipal Legal Perspectives* Oxford: OUP, 15

[42] Akehurst *Jurisdiction* (n.1), 167

[43] O Schachter (1991) *International Law in Theory and Practice* Dordrecht/Boston/Leiden: Martinus Nijhoff, 252

the Court appeared to say in *The Lotus*, the reality is that jurisdiction remains by nature *restrictive*. Thus according to Ryngaert:

> [...] customary international law based on actual State practice turns Lotus upside down. Under the customary international law of jurisdiction, as historically developed, extraterritorial prescriptive jurisdiction is arguably prohibited in the absence of a permissive rule.[44]

This point has important implications when it comes to the analysis of the content of the different heads of prescriptive jurisdiction which will be addressed in the next chapter. In particular, it will be observed that universal jurisdiction is a form of prescriptive/adjudicative jurisdiction, that it must be defined narrowly, and that it extends only to 'international crimes'.

Before continuing with the examination of the theory of jurisdiction in international law, however, this chapter concludes by examining the theory behind one further issue which has an important influence on the analysis of the international law of piracy: that of individual functional immunities. This is because it will be argued that piracy is perhaps above all a set of circumstances in which functional immunities are lost. Most importantly in this context, it is important to clarify the difference between losing functional immunities by committing international crimes on the one hand, and by performing acts outside of their official capacity, or *for private ends*.

3.5 Immunity from Foreign Jurisdiction

As noted in the introduction, the question of jurisdiction is closely related to that of *immunities*. The principle of immunity in international law is based on the proposition that sovereigns are juridically equal and that the courts of one State are unable to sit in judgment on the acts of foreign sovereigns in the exercise of their sovereign authority, summed up in the maxim *par in parem non habet imperium*. Immunities attach both to the State, and to individuals who act on its behalf. State immunity is not absolute, and is increasingly subject to the so-called "restrictive approach" which holds that States only have

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[44] Ryngaert *Jurisdiction in International Law* (n.1), 27

immunity for so-called sovereign acts, or *acta jure imperii*. States therefore do not have absolute immunity for commercial activities. Nevertheless, the State and its property is subject to extensive immunity from both adjudication and execution of judgments, even in cases involving allegations of violations of peremptory norms, a principle repeatedly affirmed by the cases of *Al-Adsani v. Government of Kuwait,*[45] *Jones v. Saudi Arabia,*[46] and most recently by the ICJ in the *Jurisdictional Immunities* case.[47]

Immunities also attach to individuals who act as officials of the State. Individual immunities fall into two categories, namely functional immunities (or immunities *ratione materiae*), and personal immunities (or immunities *ratione personae*). As Cassese explains, personal immunities attach to individuals on the basis of the office that they hold. Heads of state, foreign ministers and diplomatic agents are always protected from foreign jurisdiction whilst in office. Personal immunity is said to be a *procedural* defence to civil or criminal proceedings, and amount to complete inviolability during the term of office. A claim to personal immunity is closely connected with State immunity, and shields the office holder even from prosecution for serious violations of international law. This form of immunity only subsists during that term of office and ceases thereafter.[48]

The second form of individual immunity is functional immunity: that state officials are immune from civil and criminal liability for acts they perform in their official capacity. Van Alebeek notes that the rules of functional immunity are autonomous from those of State immunity,[49] and they differ from those of personal immunity in that they function as a *substantive* defence. The act or omission complained of is attributable not to the individual, but to the State. Consequently, the individual does not incur responsibility at all. The leading

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45 *Al-Adsani v. United Kingdom* ECHR 35763/97 (2001)

46 *Jones v. Saudi Arabia* [2006] UKHL 26

47 *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening) ICJ Judgment of 3 February 2012

48 A Cassese (2008) *International Criminal Law* Oxford: OUP, 303-4

49 R van Alebeek (2008) *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* Oxford: OUP, 104

case on the issue of functional immunities was that of *McLeod,*[50] which arose from the same facts as the famous case of the *Caroline*. McLeod had been one of the officers in charge of the British operation that gave rise to the *Caroline* controversy. On a subsequent visit to the United States McLeod was arrested and charged for his part in the incident. In the correspondence between the US and British governments it was acknowledged that the acts for which McLeod was being held responsible had in fact been performed in the course of his duties and that he was entitled to functional immunity.[51] The concept of functional immunities was examined in the case of *Blaškić* which involved the question of whether State officials could be compelled to release documents to the ICTY. The Tribunal noted that State officials are:

> […] mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.[52]

Functional immunities can be lost in two ways. The first is if the act in question was a private act, as opposed to an official or public one. Clearly in a case where the individual does something entirely outside of his official capacity then he is not entitled to the protection of his office. As the Commentary to Article 7 of the ILC's Draft Articles on State Responsibility notes, acts of public officials are not attributable to the State if they are performed in a private capacity:

> The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the

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[50] *The People v. McLeod* 1 Hill (NY) 375 (1841)

[51] See generally: RY Jennings *The Caroline and McLeod Cases* (1938) 32 AJIL 82

[52] *Prosecutor v Blaškić* IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, (29 Oct 1997), para. 38

> conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.[53]

Consequently, where public officials perform activities entirely in their private capacity, and not their official capacity, they do not benefit from functional immunity. As the thesis will explain further in Chapter 7, the significance of this distinction in the context of piracy, is that it is fundamental to the definition of piracy that it is performed *for private ends*, that is to say that it does not attract functional immunity because it is committed without public authority. In other words, the significance of piracy is strictly speaking not that it gives rise to a special basis of jurisdiction, but that it relates to circumstances in which immunities are lost.

The second instance in which functional immunity may be lost is where the individual commits an international crime. In such cases there may be *concurrent* international responsibility, since the act may be attributable both to the State and the individual at the same time.[54] It will be argued that much of the confusion about the nature of the law of piracy is caused by the failure to correctly categorise the basis of liability. Piracy is a form of unlawful belligerency, and unlawful belligerents are subject to criminal liability (i.e. do not benefit from functional immunity) because they perform activities without public authority, not because they are *ipso facto* war criminals.

This confusion is evident in case law relating to WWII. In his opening speech at the Nuremberg trials Judge Jackson argued that the crime of aggression was punishable at international law on the same basis as "piracy and brigandage":

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[53] ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts* YBILC (2001) Vol. II (Part Two) A/56/49(Vol.I)/Corr.4

[54] M Spinedi, (2002) *State Responsibility v. Individual Responsibility for International Crimes: Tertium non Datur?* 13 EJIL 895 see also: A Nollkaemper, (2003) *Concurrence between Individual Responsibility and Criminal Responsibility in International Law* 52 ICLQ 615. A State would be responsible for reparations, the individual would be subject to international criminal responsibility.

> The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under international law, is old and well established. That is what illegal warfare is.[55]

This analysis is flawed however. It is argued here that piracy was not a forerunner of the crime of aggression, for two reasons. The first and most obvious is that the crime of aggression can only be committed by political and military leaders and other senior State officials.[56] Secondly, pirates and brigands are not punishable because their crimes are violations of international law. They are punishable because their criminal activity, to the extent that it is 'illegal warfare', is conducted without authority and for private ends, and as a consequence they are unable to rely on functional immunities.

It is important in this respect therefore, to draw a distinction between the fact of *being* an unlawful belligerent and committing crimes *as* an unlawful belligerent. The situation is illustrated by the case of *Ex Parte Quirin,* in which the US Supreme Court held that unlawful combatants were punishable *as such*, in other words that merely being an unlawful belligerent was a crime.[57] Dinstein argues that the court had confused the fact that as non-combatants the defendants were not entitled to immunity for their acts on the one hand, and the (improper) notion that their non-combatant status and taking part in hostilities was itself a violation of the laws of war on the other. Dinstein observes that war criminals are tried for violations of the laws of war, whilst unlawful combatants are subject to sanction for acts of violence or other activities for which they do not have authority.[58] Thus a soldier who shoots an enemy soldier in an armed conflict is, without more, merely doing his duty and is entitled to functional

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[55] *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945 – 1 October 1946.* International Military Tribunal, Nuremberg (1947)

[56] Cassese *International Criminal Law* (n.46), 159; R Cryer et al. *An Introduction to International Criminal Law and Procedure* Cambridge: CUP, 318

[57] *Ex Parte Quirin* 317 U.S. 1 (1942)

[58] Y Dinstein (2004) *The Conduct of Hostilities under the Law of International Armed Conflict* Cambridge: CUP, 30-1; MD Maxwell and SM Watts (2007) '*Unlawful Enemy Combatant': Status, Theory of Culpability, or Neither?* 5 JICJ 19

immunity. An unlawful belligerent who shoots an "enemy" soldier has no authority and therefore no immunity, and may be prosecuted for doing so.

Conclusions

This chapter has been concerned with addressing a number of preliminary issues relating to the international law concerning jurisdiction. First it has been observed that in international law, jurisdiction has a particular significance, namely protecting the sovereignty of States from the excessive claims of other States to be able to prescribe and apply their laws to given activities. This chapter therefore argues that the international law of jurisdiction is *restrictive* since jurisdiction limits the competence of States in order to preserve the sovereign prerogatives of other states. Second, the chapter argues that there is a difference between criminal and civil jurisdiction in international law because adjudicative jurisdiction in private international law and prescriptive jurisdiction in public international law are determined by different criteria. It has been observed that in criminal cases the question to be determined is whether the prosecuting State is entitled to exercise prescriptive jurisdiction, and whether it is entitled to exercise enforcement jurisdiction. Finally the chapter also notes the role played by immunities from jurisdiction in international law, and in particular the way in which functional immunities, and by extension individual criminal responsibility are affected by the proscription of certain activities a matter of international law.

The consequences of the observations made in this chapter are that, since jurisdiction is restrictive, it is necessary for a State claiming to exercise jurisdiction in any particular case, that the claim falls within one of the categories permitted by international law, and for those categories to be clearly defined and delimited. Thus, if piracy is to be conceptualised as being subject to universal jurisdiction, then it is necessary to show that piracy does in fact fall within the criteria delimiting that basis of jurisdiction. Secondly, it has been argued that the question of piracy jurisdiction, as with all cases of criminal jurisdiction, is one of prescription and of enforcement, and that attempts to draw analogies with civil jurisdiction are unhelpful. Finally, the chapter has also explained the distinction between loss of functional immunity by reason of

committing international crimes, and the inapplicability of such immunities by virtue of the fact that the criminal activity is performed without public authority. It will be argued that jurisdiction over piracy flows not from the fact that it is an international crime, but because piracy is by definition performed without authority, or *for private ends*.

4 Jurisdiction to Prescribe

As noted in the introduction, piracy is routinely described as the original or "paradigmatic" crime of universal jurisdiction. The literature often infers that since piracy takes place extraterritorially, it automatically falls under that head of jurisdiction. This chapter seeks to place the law of piracy in context by undertaking a survey of the different bases of prescriptive jurisdiction.[1] The purpose of this chapter is to illustrate how jurisdiction was capable of being claimed over piracy under most, if not all, of the six different bases of prescriptive jurisdiction, and that it is far from true to say that piracy is necessarily, or even obviously, prosecuted under universal jurisdiction.

4.1 The Basis of Prescriptive Jurisdiction

It is argued that prescriptive jurisdiction is, in contrast with enforcement jurisdiction, not in any real sense territorially constrained. Territory is merely one of several bases of prescriptive jurisdiction. States are able to define and punish crimes that take place outside their territory on the basis of the nationality of the offender, the flag State of a vessel, the nationality of the victim, the protection of the vital interests of the State, and universal jurisdiction. In fact as Ryngaert observes, the law relating to prescriptive

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[1] I Cameron (1994) *The Protective Principle of International Criminal Jurisdiction* Aldershot: Dartmouth; H Donnedieu de Vabres (1928) *Les Principes Modernes du Droit Pénal International* Paris: Recueil Sirey; V Lowe *Jurisdiction* in MD Evans (2006) *International Law* Oxford: OUP; M Shaw (2008) *International Law* Cambridge: CUP; FA Mann (1964) *The Doctrine of Jurisdiction in International Law* 111 RCADI 1; FA Mann (1984) *The Doctrine of International Jurisdiction Revisited after 20 Years* 186 RCADI 9; R O'Keefe (2004) *Universal Jurisdiction Clarifying the Basic Concept*. 2 JICJ 735; S Yee (2011) *Universal Jurisdiction: Concept, Logic, and Reality* 10 Chinese Journal of International Law 503; R Cryer et al. (2011) *An Introduction to International Criminal Law and Procedure* Cambridge: CUP, 43-84; C Kreß (2006) *Universal Jurisdiction over International Crimes and the Institut de Droit international* 4 JICJ 561; The American Law Institute (1987) *Restatement of the Law (Third) The Foreign Relations Law of the United States* Vol.1 St Paul. Minn.: American Law Institute Publishers; M Inazumi (2005) *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* Antwerp/Oxford: Intersentia; S Macedo (2004) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* Philadelphia: University of Pennsylvania Press; Council of the European Union *AU-EU Expert Report on Universal Jurisdiction* 8672/1/09 (16 April 2009); L Reydams (2003) *Universal Jurisdiction* Oxford: OUP; C Ryngaert (2008) *Jurisdiction in International Law*. Oxford: OUP; Harvard Research in International Law *Draft Convention on Jurisdiction with Respect to Crime* Reproduced in: (1935) 29 AJIL Sup. 435

jurisdiction in international law is entirely concerned with extraterritorial prescriptive jurisdiction, since the exercise of jurisdiction by a State with respect to matters taking place within its own territory does not actually raise questions of jurisdiction in international law (though it may raise questions relating to immunities). As a result it is not particularly meaningful to speak of 'extraterritorial jurisdiction' in the context of jurisdiction to prescribe in international law. This chapter will examine the extent to which a state may, as a matter of international law, prescribe and apply rules relating to criminal conduct, which for the sake of convenience will simply be referred to as *prescriptive jurisdiction*.[2] It will be recalled from the previous chapter that jurisdiction in international law is restrictive, and it is therefore necessary to be able to define the criteria for its exercise. In the case of jurisdiction to prescribe, the criteria are considered to be based on a connection or *link* between the prescribing state and the offence itself.[3] As Mann observed:

> [...] in order to be entitled to assume legislative jurisdiction there must exist a close connection in an international sense between the person, fact or event and the state imposing criminal liability in regard to them.[4]

It will be argued that an even more particular criteria is the *nature of the interests* upon which the criminal activity impacts. In any event, states are not normally able to assert the right to prescribe criminal sanctions for activities with which they do not have a connecting factor. The chapter will consider how the different bases of jurisdiction, and universal jurisdiction in particular, fit into this framework. Akehurst[5] and Cameron[6] also recognise the need for this

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[2] Since as noted at Section 3.3 above, where criminal jurisdiction is concerned it is unnecessary to separate prescriptive and adjudicative jurisdiction.

[3] See also V Lowe *Jurisdiction* (n.1), 342

[4] Mann *Doctrine of Jurisdiction* (n.1), 83

[5] M Akehurst (1972-1973) *Jurisdiction in International Law*. 46 BYIL 145, 182

[6] I Cameron *Protective Principle* (n.1), 5

linking point and it was also considered by the Court in the *Eichmann* case.[7] Lowe observes that:

> The best view is that it is necessary for there to be some clear connecting factor, of a kind whose use is approved by international law, between the legislating State and the conduct that it seeks to regulate. This notion is the need of a linking point, which has been adopted by some prominent jurists, accords closely with the actual practice of States.[8]

Donnedieu de Vabres describes this linking point as that of the *interests* impacted upon by the activities in question.[9]

Despite the fact that the Harvard Research project considered the subject of international criminal jurisdiction to be suitable for codification, and the fact that the ILC started work on the subject under the auspices of Special Rapporteurs Alfaro and Sandström in 1950,[10] the matter was subsequently dropped and since that time neither the ILC nor the ICJ have succeeded in setting out a clear understanding either of prescriptive jurisdiction generally, or of universal jurisdiction in particular. Furthermore, notwithstanding the fact that certain treaties have been recognised as laying the groundwork for the recognition of universal jurisdiction over certain offences, there are in fact no treaties specifically establishing universal jurisdiction.[11] Consequently the law relating to prescriptive jurisdiction remains entirely customary international law.

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[7] *Attorney-General of the Government of Israel v. Adolf Eichmann* (1961) 36 ILR 5

[8] Lowe *Jurisdiction* (n.1), 342

[9] See for example: H Donnedieu de Vabres (1928) *Les principes modernes du droit pénal international.* Paris: Recueil Sirey, 131

[10] IlC *Question of International Criminal Jurisdiction: Report by Ricardo J. Alfaro, Special Rapporteur* Doc. A/CN.4/15 (3 March 1950) YBILC 1950 Vol. II, 1; *Report by Emil Sandström, Special Rapporteur* Doc. A/CN.4/20 (30 March 1950) YBILC 1950 Vol. II, 18

[11] Cf. R O'Keefe (2004) *Universal Jurisdiction: Clarifying the Basic Concept* 2 JICJ 735, 755 arguing that the Genocide Convention and the Geneva Conventions codify universal jurisdiction.

4.2 Territory

The most widely recognised basis of prescriptive jurisdiction is that of a state over its own territory. Territorial jurisdiction is said to be *plenary*.[12] As well as criminal acts committed entirely within its territory a state may also prescribe rules concerning activities that are started within its territory and have their effect or are completed outside of the territory (called *subjective* territorial jurisdiction), and the opposite situation, namely where the activity is commenced abroad and completed with the territory (*objective* territorial jurisdiction). In such circumstances potentially both States are able to exercise prescriptive jurisdiction over the offence under territorial jurisdiction.

Lowe notes that subjective jurisdiction is generally unproblematic, but that a form of objective jurisdiction, the *effects doctrine* has proven much more so. This doctrine has been applied primarily by the United States in antitrust (competition law) prosecutions such as the *Alcoa* case.[13] The effects doctrine has generally been restricted to US antitrust cases however, and has met with strong protest particularly from European States. As well as its land territory, states are also able to prescribe rules under the principle of territorial jurisdiction to a varying extent outside their land territory in maritime spaces, in particular within internal waters and the territorial sea,[14] and to a certain extent within certain other maritime zones. As will be seen below, States have in the past asserted prescriptive jurisdiction under the territorial principle over conduct taking place on board or affecting their vessels at sea, and over extensive areas of the sea space over which they claimed sovereignty. Consequently, jurisdiction over 'piracy' to the extent that it historically took place within such a space, could be explained under the territorial principle.

4.3 Nationality

Although territory based jurisdiction is today considered to be the primary basis of prescriptive jurisdiction, Ryngaert points out that in civil law jurisdictions the

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[12] Lowe *Jurisdiction* (n.1), 342-3

[13] *US v. Aluminium Co of America,* 148 F.2d 416 (1945).

[14] The extent of prescriptive jurisdiction in the territorial sea is considered in detail in RR Churchill and AV Lowe (1999) *The Law of the Sea* Manchester: MUP, 92-5

right of a sovereign to prescribe law and apply it to his subjects was traditionally stronger than that over territory:

> In continental Europe, the territorial principle, while being the basic principle of jurisdiction, is not endowed with the almost sacrosanct status which it has in the common law countries. [...] The lesser importance of territoriality harks back to ancient times, when personality, and not territoriality, was the basic principle of jurisdiction.[15]

Ryngaert notes that Bartolus held that, subject to exceptions, a state's laws governed only its own citizens and not another state's subjects even if they were in its territory.[16] Although as part of the "Westphalian" reordering of international relations, and the consequent focus on territorial sovereignty, the role of jurisdiction based on nationality was reduced, Europeans outside of Europe normally did not submit to the jurisdiction of local courts, but instead to *consular jurisdiction* throughout the Renaissance and into the colonial period. Consular jurisdiction over European nationals was still in operation in China in the 19th century. Even today, civil law countries have a "nationality exception" to extradition and will not normally extradite one of their own nationals. Lowe states that the nationality principle of jurisdiction is used infrequently, and that "pre-eminence" has now been given to territorial jurisdiction.[17] Nevertheless nationality (sometimes also, perhaps unhelpfully, referred to as *active personality*) provides an undisputed example of extraterritorial jurisdiction to prescribe, since a State has a clear interest, and linking point, in addressing criminal violations by its own nationals. Again, historically there is evidence that piracy prosecutions were undertaken primarily by States against their own nationals, an uncontroversial basis of prescriptive jurisdiction.

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[15] Ryngaert *Jurisdiction* (n.1), 43

[16] Ryngaert *Jurisdiction* (n.1), 46

[17] Lowe *Jurisdiction* (n.1), 345.

4.4 'Flag State' Jurisdiction

A state may also prescribe rules applying to ships and aircraft that are registered with it and are therefore its "flag carrier". Like many aspects of jurisdiction at sea however, flag state jurisdiction is a recognised theory that nevertheless lacks a clear explanation. A particular source of confusion historically was the concept of ships at sea being assimilated to the territory of the flag state. It is necessary to examine this theory chiefly because of its historical influence, since it has few adherents today.[18]

4.4.1 Ships as 'Floating Territory'

A vessel at sea has from time to time been described as being "assimilated to the territory" of the state in question. Thus the Harvard Research noted:

> The propriety of this assimilation of ships to territory is almost universally recognized. The earlier discussions of ships on the high seas or in foreign waters developed the idea that a ship might be regarded, for the purpose of jurisdiction, as a kind of "floating island" of the flag State. […] While most modern jurists reject this analysis as founded upon an unsupportable fiction, the jurisdiction of the flag State over crimes committed on board is justified on grounds of convenience.[19]

According to O'Connell his position was evident in the writings of Bentham who referred to a ship as "an ambulatory province", and Hautefeuille who stated that a ship was a portion of the territory whose flag it flies.[20] According to this theory, acts of piracy committed against a State's ship might give rise to jurisdiction by that State on the basis that they were effectively committed inside its territorial jurisdiction (i.e. on board its ship). According to Bassiouni:

> From a jurisdictional perspective, Grotius […] posited the principle that ships on the high seas were an extension of the flag state's

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[18] DP O'Connell (I Shearer ed.) (1982) *The International Law of the Sea Vol. I* Oxford: Clarendon, 735

[19] Harvard Research *Draft Convention on Jurisdiction with Respect to Crime* (n.1), 509

[20] O'Connell *International Law of the Sea Vol. I* (n.18), 735

> territoriality. Thus, the flag state should be able to exercise its jurisdiction over non-national ships and persons for acts of piracy. It was not, therefore, an application of universal jurisdiction whereby any and all states could exercise their jurisdiction over any and all pirates. Instead it was the recognition of the universal application of the flag state's right to defend itself against pirates and eventually to pursue them as both a preventive and punitive measure.[21]

O'Connell notes that the theory of the territoriality of ships was however regarded with suspicion in England, for example not finding favour in the case of *R.v. Keyn*. That case concerned a collision between a British and a German vessel less than two miles from Dover causing a fatality aboard the British ship. The question the Court had to decide was whether the Admiralty jurisdiction extended to foreign ships within the territorial sea for negligent collision. The case involved a question of English law, but the majority of the judicial opinions in the case adopted the view that the criminal negligence on the part of the German captain could not have been said to have 'taken place' on the British vessel.[22]

Despite the rejection of the concept by the British courts, the PCIJ examining another case involving a collision at sea just over fifty years later took precisely the opposite view.[23] In that case, two ships had collided on the high seas, the fault of the collision being apparently that of the French vessel, the *Lotus*, and its first officer, one M. Demons, resulting in the sinking of the second vessel, the Turkish ship the *Boz Kourt* and resulting in loss of life. The *Lotus* having subsequently put into port in Turkey, Demons was arrested and charged with manslaughter for his part in the incident. France disputed Turkey's jurisdiction to prosecute Demons. As Lowe notes, since the enforcement action had taken

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[21] MC Bassiouni *The History of Universal Jurisdiction* in S Macedo (2004) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* Philadelphia: University of Pennsylvania Press, 47

[22] *R. v. Keyn* (1876). LR 2 Ex. D. 63. See generally *The Criminal Jurisdiction of the Admiralty of England: The Case of the Franconia* (1876-1877) 2 Law Mag. and Rev. Quart. Rev. Juris and Quart. Dig. All Cases 5th Ser. 145; O'Connell *International Law of the Sea Vol. I* (n.18), 739 et seq. and; WE Beckett (1927) *Criminal Jurisdiction over Foreigners: The Franconia and the Lotus* 8 BYIL 108

[23] *The Case of the SS Lotus* (France/Turkey) (1927) PCIJ, Series A, No.10

place on Turkish territory, the question was purely that of the extent of the Turkish jurisdiction to prescribe.[24] The decision of the PCIJ, together with the dissenting opinions illustrated the difficulty in determining the extent to which a flag State's jurisdiction might extend. The judgment itself appeared to base its decision on the doctrine of the territoriality of vessels:

> 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.[25]

In other words, the Court held that on the basis that a vessel that flies its flag is assimilated to a State's territory, actions that have their effect on board the vessel would fall within what is effectively objective territorial jurisdiction. This idea did not receive universal approval. In his separate opinion Lord Finlay disagreed with the notion of the territoriality of ships describing it as "a new and startling application of a metaphor" noting that:

> A ship is a moveable chattel, it is not a place; when on a voyage it shifts its place from day to day and from hour to hour, and when in dock it is a chattel which happens at the time to be in a particular place. The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all.[26]

Gidel also examined the idea of the *"fiction de territorialité du navire"*, noting that it had a long history, and had found favour with many authorities including

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[24] Lowe *Jurisdiction* (n.1), 340

[25] *Lotus Case* (n.24), 25

[26] *Ibid.* Dissenting Opinion of Judge Finlay, 52

Vattel, Hubner, Bluntschli, and Heffter.[27] He also noted that Pella had accepted the theory that a ship on the high seas was a floating part of the flag State's territory, and that an act of piracy against it was not in fact outside of the jurisdiction of any State, but effectively committed on the territory of the flag State.[28] Nevertheless Gidel observed that the British government in particular had always been a firm opponent of the theory, citing Lord Stowell as an example. Gidel observed that adherence to the fiction would have "absurd consequences". If a ship were to be considered the territory of flag State the laws of war at sea would not function since a belligerent State would have no right to seize neutral vessels, nor would it have any right of visit to verify a vessel's flag or to verify that it was not carrying contraband.[29] O'Connell noted that:

> This particular application of the distinction between the jurisdiction to prescribe and the jurisdiction to enforce met at the time with criticism because of the overtones of the 'floating island' theory as to the legal nature of ships, but the distinction itself is plausible and necessary to the conduct of international relations.[30]

One of those who had argued that piracy was a *sui generis* basis of prescriptive jurisdiction was Judge Moore.[31] Although he repeated this view in his dissenting opinion (in fact agreeing with the judgment),[32] that argument was undermined by the fact that the judgment itself asserted the right of flag States to claim jurisdiction over any offences taking place at sea affecting its vessels under the territorial principle. Clearly if States had such extensive prescriptive jurisdiction at sea it would seem to leave little room for evidence of another, 'special' basis of jurisdiction to deal with piracy.

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[27] GC Gidel *Le Droit International Public de la Mer. Le Temps de Paix. Tome 1: Introduction – La Haute Mer* (1932) Chateauroux: Mellottée, 239-240

[28] *Ibid.*

[29] *Ibid.* 248

[30] O'Connell *International Law of the Sea Vol. I* (n.18), 800

[31] JB Moore (1906) *A Digest of International Law Vol. II* Washington: Government Printing Office, 951-2

[32] *Lotus Case* (n.24) Dissenting Opinion of Judge Moore, 70

In the event, although the Court found in the *Lotus* case that Turkey was entitled to claim prescriptive jurisdiction over collisions at sea, States have since moved to agree precisely the opposite position first in the 1952 Brussels Convention,[33] and subsequently in Article 11 of the High Seas Convention and Article 97 the Law of the Sea Convention. Whilst the position in relation to collisions on the high seas is settled however, the position concerning jurisdiction over incidents between vessels other than collision remains under theorised.

4.4.2 The "Nationality" of Ships

Perhaps a better way of conceptualising the jurisdiction over vessels is to think of them as having a "nationality" or "personality". O'Connell argued that:

> A ship is a unique subject-matter of law. [...] In that sense a ship is said to have personality, but that is an unusual usage of the expression because, unlike persons in international law, a ship is not a legal actor independently of those who operate it., and if it is the bearer of legal rights and obligations that is only for procedural reasons.[34]

Dupuy and Vignes argue that a ship has a nationality, but that it does not have a legal personality of its own.[35] All states are entitled to grant nationality to vessels, and registration defines nationality, subject to the "genuine link" requirement.[36] The flag and markings are only prima facie evidence of its nationality.[37] A ship may only have one nationality. The flag state (strictly speaking the state of registration) is responsible for regulating its vessels, and (subject to the exceptions dealt with below) is exclusively competent to regulate it on the high seas.[38] As a matter of comity, coastal states also generally do not

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[33] Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation (1952) 572 UNTS 133

[34] O'Connell *International Law of the Sea Vol. I* (n.18), 747

[35] R Dupuy and D Vignes (eds) *A Handbook on the New Law of the Sea* (1991) Dordrecht: Martinus Nijhoff, 401

[36] United Nations Convention on the Law of the Sea (1982) 1833 UNTS 3 (LOSC) Article 91(1)

[37] See RG Rayfuse (2004) *Non-Flag State Enforcement in High Seas Fisheries* Leiden: Martinus Nijhoff, 23

[38] LOSC Article 92(1)

attempt to regulate the conduct aboard foreign vessels even in internal and territorial waters, where it does not have an impact on the coastal State itself (again a point discussed in greater detail below).[39] The one thing that is not clearly explained is the jurisdiction that the flag state has over activities perpetrated *against* its vessels, though it seems indisputable that it is entitled to do so, it is unlikely to be on the basis of objective territoriality, and may perhaps be more accurately compared to the protective principle. As will be noted in due course, a particular cause for concern, and a problem when it comes to the prosecution of pirates, is the failure of flag-State jurisdiction brought about by the phenomenon of flags of convenience or 'flagging out' whereby shipping operators register their vessels with States that do not impose substantial obligations on them, but are also not in a position to exercise jurisdiction over criminal acts perpetrated against them.

4.5 The Protective Principle

The protective principle is normally defined as prescriptive jurisdiction over offences which threaten the essential interests of the state. Cameron described it as: "permitting a state to grant extraterritorial effect to legislation criminalizing conduct damaging to national security or other central state interests".[40] The Harvard Research limited it to crimes "against the security, territorial integrity or political independence of a state" and split it into two separate categories, that of State security and counterfeiting.[41] The Third Restatement described the principle as: "certain conduct [...] against the security of the state or a limited class of other state interests". Cameron notes that the principle had its origins in the French Revolution, when the revolutionary government sought to criminalise acts directed against the State wherever and by whoever they might be committed. In particular, articles 5 and 6 of the French Code of Criminal Procedure of 1808 established "jurisdiction over foreigners who committed crimes against the security of the state or counterfeited the seal of the state or

[39] See Sections 5.3.1 and 5.3.2 below.

[40] Cameron *Protective Principle* (n.1), 36

[41] Harvard Research *Draft Convention on Jurisdiction with Respect to Crime* (n.1), 440 (Articles 7 and 8 of the draft convention respectively)

national currency."[42] Cameron notes that the protective principle was based on a Hegelian conception of the personality of the State itself, and on the *realist* school. It is for this reason that the protective principle is called the *Realprinzip* in German and *compétence réelle* in French.[43]

Donnedieu de Vabres noted that the idea of the ability of the State to criminalise conduct threatening it or its citizens is an age old tradition, but one that has had a variety of rationales.[44] He divided the interests protected into the protection of the State's institutions, its property, and its citizens (the passive personality principle). At the same time he also argued that *compétence réele* also covered "the defence of foreign interests" on the basis of the "solidarity of nations".[45] Pella also considered terrorism to be a crime against the personality of the State. It will be argued that the principle does in fact cover both offences against the security of the State itself, and also offences against the community interest. These will be examined in turn.

4.5.1 The Protection of the Interests of the State

The protective principle is traditionally conceived of narrowly as jurisdiction to protect the vital interests of the state, and the classic example of an accepted basis of jurisdiction to prescribe under the protective principle is measures to punish those counterfeiting the State's currency.[46] The protective principle is differentiated from the objective territorial principle (and the effects doctrine) because it can be engaged even where the proscribed activities have had no actual physical effect within the territory of the prescribing State.[47] It is also not capable of justification under the doctrine of self-defence, since the State is punishing activities that have already been commissioned, or even completed. Precisely which offences might fall within protective jurisdiction is not entirely certain. Many authors argue that considerable caution needs to be exercised in

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[42] Cameron *Protective Principle* (n.1), 36

[43] *Ibid.* 37

[44] Donnedieu de Vabres *Principes Modernes* (n.1), 87

[45] *Ibid.* 110

[46] AU-EU *Expert Report on Universal Jurisdiction* (n.1), 11 (para.12); Ryngaert *Jurisdiction* (n.1), 96

[47] *Ibid.*

this regard since it is potentially open to excessive claims. Lowe argues that "while the category is not closed, the potential for its expansion is limited" and that:

> [...] pressure to expand the use of this principle, and the danger of unshackling it from the protection of truly vital interests and of permitting its use for the convenient advancement of important interests, is clear.[48]

This view is also echoed by Brownlie.[49] Ryngaert also argues that "there is unmistakeably a danger that States might abuse the protective principle."[50] And that the protective principle is for the most part "invoked under not very dramatic circumstances, e.g. forgery or the counterfeiting of foreign currency, making false statements to consular officials abroad in order to obtain a visa, or drug smuggling."[51] In relation to drug smuggling, Ryngaert notes in particular the cases of *Keller*[52] and *Newball*. In the latter case the District Court held that:

> [...] for protective purposes, drug smuggling threatens the security and sovereignty of the United States by affecting its armed forces, contributing to widespread crime, and circumventing federal customs laws.[53]

4.5.2 The Protection of Community Interests

Donnedieu de Vabres argued that the protective principle extended to the defence of 'foreign interests' in two circumstances.[54] The first was the criminal protection of community interests common to all states. Within this category he included piracy, breaking undersea cables, and other transnational crimes. The second category was the repression of activities on a "representative" basis, on behalf of another state. In this case the prosecuting state would exercise

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[48] Lowe, *Jurisdiction* (n.1), 326

[49] I Brownlie (2008) *Principles of Public International Law* Oxford: OUP, 305

[50] Ryngaert *Jurisdiction* (n.1), 97

[51] *Ibid*. 99

[52] *United States v. Keller,* 451 F Supp 631 (DPR 1978)

[53] *United States v. Newball,* 524 F Supp 715, 716 (EDNY 1981)

[54] Donnedieu de Vabres *Principes Modernes* (n.1), 91 *et seq*.

criminal jurisdiction as the *judex deprehensionis* as an alternative to extradition.[55] He argued that in cases of this type, even if the crime is committed by a foreign national and even if it is carried out outside of its territory, a state may exercise jurisdiction because it is in fact defending its own interests at the same time.[56]

Apart from the interests of the State itself, it is argued here that in spite of the caution expressed in the literature concerning the excessive expansion of the protective principle, it has in fact developed considerably so as to protect certain community interests particularly at sea, chief amongst which is the prevention of ship based pollution. It is possible that this expansion is not an overextension of claims to jurisdiction, since they are perhaps also not very 'dramatic'. Another potential category which falls under the protective principle in the community interest is drugs smuggling, where it is often not clear where the drugs shipments are destined.

In the case of ship borne pollution on the high seas, jurisdiction normally rests with the flag State. Bang notes however that in many cases flag States have little or no interest in prosecuting infractions by vessels flying their flag.[57] This situation exists because flags of convenience are normally taken for precisely that reason. This form of jurisdiction does not depend on a direct interest on the part of the port State. As Rayfuse notes port state control is not extraterritorial enforcement jurisdiction, but does involve the port state applying rules to conduct that has taken place outside of its territorial jurisdiction.[58] In examining the concept of port State prescriptive jurisdiction, Molenaar evaluates in turn enforcement of CDEM standards, control of unregulated fishing on the high seas and illegal discharges/pollution on the high seas.[59] Bang

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[55] *Ibid.* 110

[56] *Ibid.* 111

[57] H Bang (2009) *Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea* 40 Journal of Maritime Law and Commerce 291, 291

[58] RG Rayfuse (2004) *Non-Flag State Enforcement in High Seas Fisheries* Leiden: Martinus Nijhoff, 69. Also see generally GC Kasoulides (1993) *Port State Control and Jurisdiction: Evolution of the Port State Regime* Dordrecht: Martinus Nijhoff

[59] EJ Molenaar (2007) *Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage* 38 ODIL 225

notes that Article 218 of the LOSC clearly envisages prescriptive jurisdiction by a coastal state over ships causing pollution in the EEZ or on the high seas.[60] This is not enforcement jurisdiction, since it is anticipated that the measures will be applied against vessels once they put into port. Prescriptive jurisdiction in such cases is directed against activities or omissions where the persons responsible are unlikely to be nationals, where the vessels fly foreign flags, and where the pollution itself need not have actually had an effect on the coastal/port State. In such cases the port State is acting in protection of a community interest, and can be explained only under the protective principle of prescriptive jurisdiction.

The other area in which the protective principle is deployed is in the case of drugs smuggling. In cases where drugs smugglers are captured trying to smuggle shipments into a given State then the objective territorial principle applies. In practice however, drugs shipments headed for Europe in particular are often subject to interdiction far out at sea, because the closer smugglers get the greater the danger they can get some of their shipments ashore. This is evidenced by cases that have come before the European Court of Human Rights (ECtHR) including *Medvedyev*[61] and *Rigopoulos*.[62] In both of those cases the drugs shipments were seized hundreds of miles out to sea bound for Europe. In the case of *Medvedyev* the facts recorded by the ECtHR were that the French authorities "suspected the ship of carrying large quantities of drugs, with the intention of transferring them to speedboats off the Canary Islands for subsequent delivery to the coasts of Europe".[63] It does not appear to have been suggested that the drugs shipments were specifically targeted at France (the State that performed the interdiction and subsequent prosecutions). In *Rigopoulos* the vessel involved in drugs smuggling was seized by Spanish naval forces some 3,000 nautical miles from the Canary Islands. Again it is only recorded that the vessel was bound for Europe, not any particular country.[64] Once again, in these circumstances prescriptive jurisdiction can only be

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[60] Bang *Port State Jurisdiction* (n.58), 296

[61] *Medvedyev and Others v. France* ECHR 3394/03 (2010)

[62] *Rigopoulos v. Spain* ECHR 37388/97 (1999)

[63] *Medvedyev* (n.62), 1 (para.9)

[64] *Rigopoulos*(n.63), 1

rationalised under the protective principle being exercised in the community interest. The significance of this analysis for the law of piracy is that, if prescriptive jurisdiction under the protective principle extends to a class of community interests, in particular at sea, then this is another (and perhaps the most compelling) basis on which States are able to claim prescriptive jurisdiction over piracy. As noted above, this was in fact the view of Donnedieu de Vabres, who was of the view that piracy, breaking undersea cables, and other offences against community interests at sea were subject to this head of jurisdiction.[65]

4.5.3 Passive Personality

A category of prescriptive jurisdiction which is closely related to the protective principle,[66] is that of *passive personality* or *protection of nationals* where a State seeks to assert jurisdiction over an offence on the basis that it was committed against one of its nationals, even though the act may have been committed by a foreign national, and outside its territory. Again, States have a clear interest in the protection of their own nationals. This basis of jurisdiction has however historically been the subject of considerable controversy, where it has been overextended. Both Mann[67] and Donnedieu de Vabres[68] believed passive personality to be an exorbitant basis of jurisdiction. As the latter observed, experience had shown that was capable of provoking conflict between States.[69] One example he cites is a French legislative proposal from 1852 which provided that a foreigner committing an offence against a French citizen outside France would, if he were to be found in France, be tried according to French law. This law was the subject of protest from the British Government.[70] The classic case of excessive claims to jurisdiction in this category was the Cutting case in 1886, which was the cause of dispute between the US and Mexico, after a

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[65] Donnedieu de Vabres *Principes Modernes* (n.1), 111-2

[66] Cameron *Protective Principle* (n.1), 76

[67] Mann *Doctrine of Jurisdiction* (n.1), 92

[68] Donnedieu de Vabres *Principes Modernes* (n.1) 107

[69] *Ibid.*

[70] Donnedieu de Vabres *Principes Modernes* (n.1), 107

US citizen was arrested on a visit to Mexico in connection with allegedly publishing material defamatory of a Mexican national in the US. [71]

The one area in which passive personality has proven relatively uncontroversial however, is where a state's nationals have been the subject of terrorist attack.[72] This has long been accepted, since the times of anarchist bombings and assassinations at the end of the 19th and beginning of the 20th century. Passive personality jurisdiction is also expressly permitted by a number of conventions dealing with terrorism and offences against diplomatic personnel. As Chapter 11 will explain in greater detail, the phenomenon of terrorism is such that it is possible that it has given rise to a particular form of prescriptive jurisdiction, and that in certain cases acts of piracy may fall under this basis of jurisdiction as well.

4.6 The Obligation to Extradite or Prosecute

An aspect of jurisdiction which is often the cause of some confusion is the obligation to extradite or prosecute. This is an obligation which arises out of certain treaties dealing with international and transnational crimes. It is not a basis of jurisdiction, but the fact that it is often confused with universal jurisdiction demands it be examined briefly here. The idea may trace its origins to a theory advanced by Grotius, who argued that states were under a duty to return fugitive wrongdoers to face trial on the basis that all states had a common interest in suppressing serious crimes. There are two separate forms of obligation. The first is an obligation to prosecute which is evident in relation to international crimes defined by treaty, including grave breaches of the Geneva Conventions of 1949, and the Genocide Convention.[73] The other form is the obligation to extradite or prosecute, also known as *aut dedere aut judicare*. Although Bassiouni has argued that the treaty provision originated earlier, the most familiar and widely copied version of the provision is found in Article 7 of

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[71] *Ibid.*

[72] R Higgins (1994*) Problems and Process: International Law and How We Use It* Oxford: Clarendon Press, 66

[73] Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277

the 1970 Hague Convention,[74] which has been copied and reused in successive conventions. The majority of these conventions are counter terrorism conventions, and it will in due course be argued that this has implications for the use of the mechanism.

These treaty regimes establish a mutual jurisdiction mechanism under which State parties establish jurisdiction over offences against the other States party to the convention. The concept was described by Judge Guillaume in the Arrest Warrant Case (speaking of the 1970 Hague Convention) as "a novel mechanism: compulsory, albeit subsidiary, universal jurisdiction".[75] Guilfoyle describes the provision in the SUA Convention as creating a "quasi-universal jurisdiction amongst state parties".[76] Cameron describes it as a "reciprocating states" regime.[77] O'Keefe argues that drawing a distinction between the obligation to extradite or prosecute and universal jurisdiction is "a trifle silly", but it seems clear that being under a treaty obligation to implement municipal legislation establishing jurisdiction is not strictly speaking the same thing as actually having jurisdictional competence as a matter of international law.[78] Perhaps the best explanation comes from the AU-EU Report, which noted that the obligation is:

> [...] conceptually distinct from universal jurisdiction. The establishment of jurisdiction, universal or otherwise, is a logically prior step: a state must first vest its courts with competence to try given criminal conduct. It is only once such competence has been established that the question whether to prosecute the relevant conduct, or to extradite persons suspected of it, arises.[79]

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[74] Convention for the Suppression of Unlawful Seizure of Aircraft (1970) 860 UNTS 105

[75] *Case concerning the Arrest Warrant of 11 April 2000.* (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, p.3, Separate Opinion of President Guillaume p.35, 38

[76] D Guilfoyle *The Legal Challenges in Fighting Piracy* in B Van Ginkel and F van der Putten (eds.) (2010). *The International Response to Somali Piracy.* Leiden and Boston: Martinus Nijhoff, 133

[77] Cameron *Protective Principle* (n.1), 80

[78] R O'Keefe *The Grave Breaches Regime and Universal Jurisdiction* (2009) 7 JICJ 811

[79] AU-EU *Expert Report* (n.1), 10

Nevertheless, the jurisdiction envisaged under these types of convention may well be further evidence of the existence of prescriptive jurisdiction under the protective principle over offences against the community interest, and transnational crimes in particular. The extradite or prosecute provision will be analysed in greater detail in Chapter 9 below in relation to the SUA Convention.

4.7 Universal Jurisdiction

The final basis of prescriptive jurisdiction is universal jurisdiction, which in spite of the fact that it has been the subject of a considerable body of literature remains resolutely ill-defined. It could have been expected to have received some clarification by the ICJ in the *Arrest Warrant* case, but instead the Court avoided discussing the issue directly as much as possible. Judge ad hoc Van den Wyngaert actually argued that there was "no generally accepted definition" of universal jurisdiction at all.[80] One of the causes of uncertainty about the law relating to universal jurisdiction is that a large part of the literature on the subject is clearly normative in nature. As Bassiouni observed:

> [...] it is necessary to separate, on the one hand, the expectations of international criminal justice advocates for universal jurisdiction to be expanded as a way of preventing impunity and enhancing accountability and, on the other hand, the status of international law. Quite frequently, the proponents of expanded universal jurisdiction seek to rely on customary international law, as well as on specific treaties dealing with certain historic crimes, such as piracy, slavery and slave-related practices, and war crimes. Frequently, however, that reliance is either misplaced or misrepresented.[81]

Perhaps the most repeated definition of universal jurisdiction is that put forward by O'Keefe who argues that:

> It would seem sufficiently well agreed that universal jurisdiction amounts to the assertion of jurisdiction to prescribe in the absence of

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[80] *Arrest Warrant* case, paras 44-46

[81] M Cherif Bassiouni *The History of Universal Jurisdiction and its Place in International Law* in S Macedo (ed.) (2004). *Universal Jurisdiction* Philadelphia: University of Pennsylvania Press, 39

> any other accepted jurisdictional nexus at the time of the relevant conduct.[82]

He argues that universal jurisdiction "is probably more usefully defined in opposition to what it is not", a position that he notes is also adopted by de la Pradelle[83] and is also adopted by Ascensio,[84] Reydams[85] and Crawford.[86] This approach has also been adopted by the *Institut de Droit International*,[87] and by the AU-EU Report which states that:

> Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction.[88]

However, it will immediately be obvious that there is a problem with defining a basis of prescriptive jurisdiction negatively. It was observed in the previous chapter that the law relating to prescriptive jurisdiction is *restrictive*, in the sense that States may only exercise prescriptive jurisdiction where the offence falls within one of the specific categories defined by international law. It follows therefore that these categories *must be positively defined*. It is clearly not sufficient to define a basis of jurisdiction simply as "a basis different to all the others". It is therefore necessary to look more closely for a theoretical justification for the exercise of universal jurisdiction. It is argued here that universal jurisdiction is based not on the linking point required of other bases of jurisdiction, but on the basis of the nature of the offences it relates to. This

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[82]R O'Keefe (2004) *Universal Jurisdiction: Clarifying the Basic Concept* 2 JICJ 735, 745

[83] G de la Pradelle 'La compétence universelle' in H Ascensio, E Decaux, and A Pellet (eds.) (2000) *Droit International Pénal* (Paris: Pédone cited in O'Keefe *(Ibid.)*

[84] H Ascensio (2003). *Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals.* 1 JCIJ 690, 699

[85] Reydams *Universal Jurisdiction* (n.1), 5

[86] J Crawford (ed) (2012) *Brownlie's Principles of Public International Law.* Oxford: OUP, 467

[87] Institute of International Law, *Seventeenth Commission: Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes.* Resolution of 26 August 2005 (Kraków Session)
[http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf]

[88] AU-EU *Expert Report* (n.1), 7

approach is taken by the 3rd Restatement which defines universal jurisdiction in the following terms:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.[89]

According to the Princeton Principles universal jurisdiction is "criminal jurisdiction based solely on the nature of the crime".[90] In fact in the case of universal jurisdiction to prescribe, it is not the state itself that is prescribing, but that the criminal offence is created by international law, and further that those offences are recognised as being against the fundamental binding principle of the post war legal order, namely international peace and security.

4.7.1 The Development of the Concept of Universal Jurisdiction

It is often assumed that universal jurisdiction is firmly established. Writing in 1928 however, Donnedieu de Vabres described universal jurisdiction as a novel theory.[91] Universal jurisdiction he said "has its modest origins in a text in the code of Justinian" under the title *ubi de criminibus agi oportet*.[92] This was followed by the Italian doctrine of the Middle Ages, specifically the towns of Lombardy, where certain categories of vagrant criminals were considered to pose a threat to the societies at large if they went unpunished. This was added to by Grotius who theorised the existence of a *"societas generis humani",* and that crimes against the natural law demanded punishment by whoever had custody

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[89] The American Law Institute (1987) *Restatement of the Law (Third) The Foreign Relations Law of the United States Vol. I*, 254 (§ 403)

[90] S Macedo (ed.) (2001) *The Princeton Principles on Universal Jurisdiction* Princeton University: Princeton, 28; Ryngaert *Jurisdiction* (n.1), 101

[91] H Donnedieu de Vabres (2011) *The System of Universal Jurisdiction: Historical Origins and Contemporary Forms* 9 JICJ 905, 929

[92] *Code of Justinian* Book III Title XV which states that a criminal should be tried either where the crime was committed, or where the criminal is found.

of the perpetrator.[93] Interestingly, whereas many European States have long recognised something akin to universal jurisdiction, Reydams notes that English law has always been sceptical of extraterritorial prescriptive jurisdiction generally, based on its insistence on the right to jury trial.[94] Thus Akehurst noted that:

> [...] in many continental countries the universality principle is as ancient as the territoriality principle in England. It existed in medieval Italy, sixteenth-century Brittany, seventeenth- and eighteenth-century France until 1782, and seventeenth- and eighteenth century Germany. It was supported by Grotius, Vattel, Paul Voet, Huberl and Bynkershoek, not to mention lesser-known writers in sixteenth and seventeenth-century Belgium. [...] On the other hand the English-speaking countries are not alone in regarding such jurisdiction as contrary to international law. France is of the same opinion [...][95]

Donnedieu de Vabres theorised that universal jurisdiction and extradition were essentially the negation of the right to asylum.[96] He put forward three theories justifying universal jurisdiction: jurisdiction based on the place of arrest (*forum deprehensionis*), jurisdiction based on the principle of "human solidarity", and jurisdiction based on the protection of community interests. Cameron noted that:

> [...] certain authorities in the past chose to lump together the protective and universality principles, because both extended jurisdiction on the sole basis of the nature of the crime, or rather the nature of the interests which the crime attacked.[97]

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[93] H Grotius (FW Kelsey tr.) (1925) *De Jure Belli Ac Pacis Libri Tres: Vol. II The Translation*, Oxford: Clarendon Press, 504

[94] Reydams *Universal Jurisdiction* (n.1), 57

[95] Akehurst *Jurisdiction* (n.5), 164-5

[96] Donnedieu de Vabres *Principes Modernes* (n.1), 137-8

[97] Cameron *Protective Principle* (n.1), 79

The distinction between contemporary universal jurisdiction and the protective principle however, is that whereas under the protective principle the state is still able to show that it has an interest in prosecuting the particular conduct, in the case of universal jurisdiction, the interest is of another level of abstraction, namely that it impacts upon international peace and security. Offences against peace and security have of course been consistently defined as international crimes.[98] They are also a relatively recent development.

The reality is that the contemporary law of universal jurisdiction is in reality much younger than is often thought. It is argued here that in fact the concept owes its existence almost entirely to a single case that took place between 1961 and 1962; the prosecution of Adolf Eichmann by Israel.[99] In that case the District Court of Jerusalem was required to explain the basis on which it could exercise jurisdiction. Eichmann was a foreign national accused of what were essentially war crimes, crimes against humanity, and genocide during the Second World War against individuals of multiple nationalities, and in different European States.[100] The main problem facing the District Court was that whilst Israel's moral right to try Eichmann was unimpeachable, technically (since the State of Israel did not even exist at the time Eichmann was committing his crimes), Israel could not frame its claim to prescriptive jurisdiction within any of the normal categories.[101]

The District Court nevertheless argued that Israel was entitled to claim prescriptive/adjudicative jurisdiction over Eichmann both under the protective principle, and under the universality principle stating that the criminal offences with which Eichmann was being charged

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[98] ILC *Draft Code of Offences against the Peace and Security of Mankind* (1954) YBILC, 1954, vol. II; ILC *Draft Code of Crimes against the Peace and Security of Mankind* (1996) YBILC, 1996, vol. II (Part Two)

[99] *Attorney General of the Government of Israel v. Adolf Eichmann* District Court of Jerusalem (1961) 36 ILR 5

[100] The indictment against Eichmann ran to 15 counts, the first 8 of which related to crimes against the Jewish populations of different European States. Counts 9 to 12 involved crimes against other (non-Jewish) civilian populations in Europe. *Ibid.* 8-10

[101] The District Court argued that there was a linking point between the State of Israel and the 'Jewish people', but chose not to rely on that argument alone. *Ibid.* 11

> […] conformed to the principles of international law defining the criminal jurisdiction of States: the crimes were both universal in character and specifically intended to exterminate the Jewish people, so that Israel might assume jurisdiction under both the universality and the passive personality and protective principles.[102]

In making its argument for universal jurisdiction, the Court had recourse to an extensive and eclectic mixture of citations from doctrinal and judicial sources, including the *Digest,* Grotius, Donnedieu de Vabres, Hyde, and Wheaton.[103] The Court argued that crimes against the law of nations (*delicta juris gentium*) were punishable by any State:

> These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (delicta juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.[104]

The Court made extensive use of references to piracy, including Vattel's comment that pirates could be punished by the first into whose hands they fell, Blackstone's comments regarding piracy as an "offence against the law of nations" and Viscount Sankey in the case of *In Re Piracy Jure Gentium* where he stated (obiter) that:

> […] a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but hostis humani generis and as such is justiciable by any state anywhere.[105]

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[102] *Ibid.* 10

[103] *Ibid.*

[104] *Ibid.* 26

[105] *In Re: Piracy Jure Gentium*. (1934) A.C. 586

The District Court did not base its assertion of universal jurisdiction on piracy alone, however. It also made reference to the Control Council Law No. 10,[106] the Statute of the Nuremberg IMT[107] and its case law, and the Genocide Convention,[108] including the ICJ's *Reservations to the Genocide Convention* Advisory Opinion.[109]

4.7.2 The Theory of Universal Jurisdiction

The theory of universal jurisdiction has been complicated by the use of different terminology, often found necessary in order to distinguish it from other concepts such as the obligation to extradite or prosecute. Such terms such as "universal jurisdiction plus",[110] "pure universal jurisdiction" and "universal jurisdiction in absentia".[111] In reality these terms bring no clarity to the definition: there is only one kind of universal jurisdiction, the only question is what its rationale is, and under what circumstances it may be exercised. It is argued here that fundamental to answering this question is the coming into existence of the concept of international crimes in the aftermath of the Second World War, and in particular stemming from the Charter of the Nuremberg IMT.

The most compelling theory concerning the basis of universal jurisdiction is that it is exercisable over offences that are directly proscribed by international law, and that are of a peremptory status. As Dinstein has observed, in the case of the prosecution of international crimes, the prosecuting State is not in fact the

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[106] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946)

[107] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) (1945) 82 UNTS 279

[108] Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277

[109] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion,* ICJ Reports 1951, p.15

[110] AM Slaughter *Defining the Limits: Universal Jurisdiction in National Courts* in Macedo (ed.) *Universal Jurisdiction*(n.1), 173

[111] *Case concerning the Arrest Warrant of 11 April 2000.* (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, p.3, Separate Opinion of President Guillaume, 40

originator of the criminal definition,[112] (though as Kress observes it is normally necessary for the State to have also created the necessary offences as a matter of municipal law).[113] Therefore as Bassiouni has observed:

> Universal jurisdiction applies when the proscription does not originate with the enforcing state and the conduct does not occur within the territory of that State. When universal jurisdiction can be asserted there is no need for a link or nexus between the enforcing power, be it national or international, and the conduct in question or the perpetrator or victim's nationality. Universal jurisdiction is, as already noted, based solely on the nature of the crime.[114]

Secondly therefore, in the case of these international crimes, it is arguable that they are of such a serious threat to international peace and security, and therefore the security of all States, that that alone is enough to satisfy the demand for a 'linking point'. Finally, it can also be argued that universal jurisdiction flows from the idea that the specific offences are peremptory norms, and are thus not only capable of being sanctioned by a foreign State, but are also not susceptible to pleas for individual functional immunities. Thus as Lord Millet argued in the *Pinochet* case:

> In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly they must be so serious and on such as scale that they can justly be regarded as an attack on the international legal order. Isolated

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[112] Y Dinstein *The Universality Principle and War Crimes* in MN Schmitt and LC Green (eds.) (1998) *The Law of Armed Conflict Into the Next Millenium (International Law Studies Vol.71)*. Newport, Rhode Island: Naval War College, 30

[113] C Kreβ (2004) *Universal Jurisdiction over International Crimes and the Institut de Droit International* 4 JICJ 561, 564

[114] M Cherif Bassiouni *The History of Universal Jurisdiction and its Place in International Law* in S Macedo (ed) *Universal Jurisdiction* (n.1), 42-3

> offences, even if committed by public officials, would not satisfy these criteria.[115]

Orakhelashvili has also argued that crimes of universal jurisdiction are "distinguished by its foundation in *jus cogens*":

> Crimes that offend the community interest are outlawed under jus cogens, and the international community as a whole has a legal interest in their prosecution. These are genocide, torture, war crimes, and crimes against humanity. As Goodwin-Gill suggests, the notion of international crimes 'is indeed distinguished by its foundation in a rule of jus cogens, and in the importance and universality of its basic moral content'. [...] Jus cogens criminalization therefore impacts on principles allocating jurisdiction through providing for universal jurisdiction. Traditional jurisdiction patterns – territorial, personal, or protective – imply a link between the crime and the forum State and hence its individual interest to prosecute the crime. Universal jurisdiction is exercised without any link of a State to a crime and enables States to prosecute jus cogens crimes in the community interest.[116]

In conclusion, it seems clear that universal jurisdiction in contemporary international law is closely connected to the concept of international crimes, and the fact that they pose a threat to international peace and security. It further seems clear that, if piracy is not an international crime, and does not threaten international peace and security, then it is not a crime attracting universal jurisdiction.

Conclusions

This chapter has examined the international law relating to prescriptive jurisdiction. In so doing it has recalled that jurisdiction is by necessity restrictive, and it has argued that the applicability of a given basis of

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[115] *R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] 2 All ER 97

[116] A Orakhelashvili (2006) *Peremptory Norms in International Law* Oxford, OUP, 288

prescriptive jurisdiction is determined by the concept of a 'linking point' or the interests that are impacted upon. The chapter has examined each of the bases of prescriptive jurisdiction in turn, and noted that all have been capable of sustaining the exercise of jurisdiction over piracy, with the possible exception of universal jurisdiction. In particular the chapter has explained that piracy and maritime crime was capable of falling under expansive claims regarding territory and jurisdiction over vessels at sea, and was also capable of being rationalised under a State's jurisdiction over its own nationals.

The chapter has also examined the concepts of the protective principle of jurisdiction, and universal jurisdiction. It has been observed that, although the protective principle is often theorised as being limited to a narrow class of State interests such as counterfeiting its currency, there is in fact considerable evidence in State practice that the protective principle applies to offences against the community interest, particularly at sea in the shape of prosecutions for pollution and for drugs smuggling. This lends weight to Donnedieu de Vabres' assertion that the protective principle in fact extends to all crimes of international concern (transnational crimes) by virtue of the fact that they impact upon the interests of all States, even though the prosecuting State may not have been affected by that particular offence.

Finally, the chapter has examined the theory of universal jurisdiction, and noted that the explanation that universal jurisdiction is simply a basis of jurisdiction that does not fall within any of the other categories of prescriptive jurisdiction is inadequate. The chapter has observed that, although the theory has a long history, the contemporary concept of universal jurisdiction can probably only be traced as far back as the *Eichmann* case. The chapter has observed that, in spite of the Court referring to the crime of piracy as justification for the assertion of universal jurisdiction, the better view is that universal jurisdiction applies to international crimes, and that it is justified on the ground that those offences are crimes are so serious as to be harmful to international peace and security.

Having established the bases on which states are able to exercise prescriptive jurisdiction, the next chapter turns to an analysis of the basis on which states are able to claim jurisdiction to perform acts of enforcement.

5 Jurisdiction to Enforce

The purpose of this chapter is to set out a positive theory of enforcement jurisdiction with specific reference to the law of the sea.[1] This chapter explains that enforcement jurisdiction is based on different criteria to prescriptive jurisdiction, specifically that it is based on different maritime zones and the different activities within those zones. This chapter also explains that the allocation of enforcement jurisdiction at sea is not underpinned by a consistent theory. Instead it has grown organically over time under demands from States for control of resources. It is argued that this allocation is also not static, and is developing in a number of different ways, both within the framework of the LOSC, and also separately in relation to other specific activities. The consequences for the law relating to piracy and maritime crime are that the idea that the law remains static and well established is once again undermined by the reality that the law of the sea is itself dynamic and that the allocation of jurisdiction has changed dramatically as it has developed and been codified.

This chapter examines the theory of jurisdiction at sea, before examining the influences on the codification of the law of the sea. The chapter then surveys the way in which the sea space is split into different maritime zones under the LOSC, and the way in which different activities are regulated in those zones. Finally the chapter examines the different bases of high seas law enforcement, both contained within the LOSC, and those mechanisms that have been

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[1] RR Churchill and AV Lowe (1999) *The Law of the Sea* Manchester: MUP; DR Rothwell and T Stevens (2010) *The International Law of the Sea* Oxford: Hart; DP O'Connell (I Shearer ed.) (1982) *The International Law of the Sea Volume I* Oxford: Clarendon; DP O'Connell (I Shearer ed.) (1984) *The International Law of the Sea Volume II* Oxford: Clarendon; D Guilfoyle (2009) *Shipping Interdiction and the Law of the Sea* Cambridge: CUP; E Papastavridis (2013) *The Interception of Vessels on the High Seas* Oxford: Hart; RG Rayfuse (2004) *Non-Flag State Enforcement in High Seas Fisheries* Leiden: Martinus Nijhoff; M Gavouneli (2007) *Functional Jurisdiction in the Law of the Sea* Leiden: Martinus Nijhoff; I Shearer (1986) *Problems of Jurisdiction and Law Enforcement against Delinquent Vessels* 35 ICLQ 320; B Kwiatkowska (1991) *Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice* 22 ODIL 153; MS McDougal and WT Burke (1962) *The Public Order of the Oceans: A Contemporary International Law of the Sea* New Haven: Yale University Press; R Barnes (2009) *Property Rights and Natural Resources* Oxford: Hart; D Freestone, R Barnes and D Ong (2006) *The Law of the Sea: Progress and Prospects* Oxford: OUP; PB Potter (1924) *The Freedom of the Seas in History, Law and Politics* New York: Longmans, Green and Co; AP Rubin (1988) *The Law of Piracy* Honolulu: University Press of the Pacific

subsequently developed outside of the Convention. The chapter therefore also observes that when it comes to methods of high seas enforcement, the law of the sea has developed dramatically since the law of piracy was codified. This has principally been through the development of mechanisms to deal with specific issues on a bilateral or multilateral basis outside of the LOSC.

5.1 The Theory of Enforcement Jurisdiction at Sea

The theory of extraterritorial enforcement jurisdiction is not always clearly explained. It is certainly true that, as the *Lotus* judgment stated, in the absence of a permissive rule to the contrary, one State could not "exercise its power in any form in the territory of another".[2] However, the Court went on to say that: "In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule".[3] This was echoed by Judge ad hoc Van Den Wyngaert in the *Arrest Warrant* case.[4] This latter view; that a state's enforcement jurisdiction is "strictly territorial" would pose particular problems for law enforcement at sea. As Guilfoyle notes, in fact the position is a little more complex.[5] Jurisdictional competence at sea is regulated by the law of the sea, primarily the LOSC, which allocates rights and competences between States. As Lowe observes, enforcement jurisdiction at sea is based upon two factors: on the one hand the division of the sea space into maritime zones, and on the other, the different activities that take place within those zones.

> It is a commonplace observation that the 1982 UN Convention on the Law of the Sea establishes a framework for the Law of the Sea that is based upon two different concepts. One is a zonal analysis, which takes the juridical zones into which the seas are divided and stipulates the basic rules applicable to each of them in turn. The other is a topical analysis, taking some of the main activities on the seas,

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[2] *Case of the SS Lotus* (France/Turkey) (1927) PCIJ, Series A, No.10, p.4, 18-9

[3] *Ibid*.

[4] *Case concerning the Arrest Warrant of 11 April 2000*. (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, p.3 Dissenting Opinion of Judge ad hoc Van Den Wyngaert, para. 49

[5] Guilfoyle *Shipping Interdiction* (n.1), 9

such as fishing, marine research and pollution, and again setting out the basic rules for each.[6]

In addition, a State also exercises jurisdiction over its own vessels. The law of the sea is therefore to a significant extent a balance between the jurisdiction of coastal States and the jurisdiction of flag States.

In spite of the fact that the law of the sea is one of the oldest areas of international law, there is no overarching coherent theory as to the legal nature of the ocean space, or to the rights of States to regulate it. This section examines three aspects of the attempts to theorise the legal nature of the ocean, and the rights over it. These are the controversy between the freedom of the seas (*mare liberum*) versus the claim to sovereignty over ocean spaces (*mare clausum*), the theory of jurisdiction and authority at sea, and the juridical nature of the high seas.

5.1.1 Mare Liberum vs. Mare Clausum

Perhaps the most fundamental discussion of the theory of the law of the sea is the theoretical dispute between the freedom of the seas and the right to claim sovereignty over ocean spaces, which is often characterised in terms of the 17th century "battle of the books" between Grotius' *Mare Liberum* and Selden's *Mare Clausum*. In reality the controversy has much deeper roots, both in terms of theory, and in terms of the political context in which the dispute took place. Claims to the sovereignty of the seas stretched back into antiquity. Potter notes that the ancients "were inclined to assume that it was quite possible to create and maintain a dominion over the sea comparable to that on land".[7] Antiochus IV, Epiphanes, King of Syria in 176 is quoted as saying "are not the both the sea and the land mine?"[8] and the people of Tyre were said to have "brought the sea under their dominion for a long time, not only the neighbouring sea, but wherever their fleets went".[9]

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[6] V Lowe *Foreword* in Gavouneli *Functional Jurisdiction* (n.1), ix

[7] Potter *Freedom of the Seas* (n.1), 11-2

[8] *Ibid.* 12

[9] *Ibid.*

Theoretically the approach of Roman law was entirely the opposite. Potter observes that under Roman law "the sea is said to be subject only to what is called the jus gentium and open thereby to free or public use."[10] The Institutes and Digest of Justinian state that:

> By the law of nature, then, the following things are common to all men: the air, flowing water, the sea, and, consequently, the shores of the sea.[11]

The Emperor Antoninus is quoted as saying: "I am indeed lord of the world, but the law is lord of the sea."[12] Roman practice however was another matter. The Carthaginians, pre-Roman Italian tribes and the Romans themselves all claimed dominion over the seas.[13] Potter notes that the rules in the Institutes and the Digest refer merely to free use by the Romans, not by everyone.[14] Many of the claims to sovereignty over ocean spaces were driven by the need for maritime security: "[…] as in the case of Athens, much of the Roman claim to maritime dominion rested upon her activities against the pirates."[15]

During the Middle Ages, excessive claims of sovereignty to parts of the seas ranged from the Venetian Republic's claim to be able to tax commerce in the Adriatic, Denmark's claim to the Baltic, and the English claim to the "British Seas".[16]

These claims reached their most excessive with the assertions of Spain and Portugal to exclusive control over areas of the sea at the turn of the 16th century. These claims would soon come under pressure however. Potter argues that during the Renaissance, a "powerful theory of maritime freedom" was being

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[10] *Ibid.* 25

[11] TC Sanders (tr.) (1865) *The Institutes of Justinian* London: Longmans, Green & Co., 167-8 (Lib. II Tit. I)

[12] Potter *Freedom of the Seas* (n.1), 27

[13] *Ibid.*

[14] *Ibid.* 32

[15] *Ibid.* 33

[16] *Ibid.* 36-9

built up, based on Roman law concepts.[17] Dominion of the sea was criticised by Vasquez who relied on the *Digest*, and Donellus who elaborated a theory of "public" or "common" property.[18] This was taken up by the policies of the English Queen Elizabeth I, and given its most famous doctrinal treatment by Grotius. These claims were however not merely philosophical, as the next chapter will examine, they were made in pursuance of expansionist colonial policy.

The *mare liberum/mare clausum* tension was conceptualised by McDougal and Burke in terms of use of the ocean space that was "inclusive" (defined as "a claim to use or authority over an area or over specified activities" that other States may share with the claimant State) or "exclusive" (defined as a claim that other States cannot share with the claimant State).[19] They argued that:

> The historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention general community interest.[20]

However, it is argued that this 'balance' is not so easily explained, and that the law of the sea is in fact not only highly dynamic and currently in a state of change, but also that the way in which these competing interests have in the past been balanced has had profound implications for the way in which activities at sea have been controlled, and even conceptualised. O'Connell notes at the very beginning of his work on the law of the sea that:

> The history of the law of the sea has been dominated by a central and persistent theme: the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas. The tension between these has waxed and waned through

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[17] *Ibid.* 51

[18] *Ibid.* 51-2

[19] McDougall and Burke *Public Order* (n.1), 1

[20] *Ibid.*

> the centuries, and has reflected the political, strategic, and economic circumstances of each particular age.[21]

Later in his work he elaborates further:

> The concept of the freedom of the seas is neither absolute nor static: it embodies the balance of jurisdictional functions among States which at any time best serve the community of nations, and its content is subject to constant modification as that community adjusts itself to the solution of new problems.[22]

The thesis argues that in fact the dispute between the freedom of the seas and control over areas of the sea space was not a process of a community arranging its affairs in the most equitable fashion, but a fundamental part of the struggle between different European States to maintain or expand their colonial possessions. The preoccupation in the 17th century was with breaking the monopoly of the most powerful States over foreign trade, and thus the emphasis was on the freedom of navigation.[23] At the time, Grotius expressed the view that marine natural resources (principally fisheries) were inexhaustible, and as the thesis will argue, maritime security also took a back seat. Today the preoccupation that drove the development of the freedom of the high seas has waned, and whilst the freedom of navigation is still vital to the both the global economy and to the strategic interests of naval powers, the preservation and exploitation of increasingly scarce and precious natural resources and the increasingly complex nature of maritime security are arguably now of much greater concern to the international community.

5.1.2 Imperium, Dominium and Iurisdictio

Whilst States claimed exclusive rights over areas of the sea space, the theory of control and authority was straightforward, because the coastal State claimed plenary competence to enforce its laws within those spaces. As the concept came increasingly under attack from the theory of the

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[21] O'Connell *Law of the Sea Vol. I* (n.1), 1

[22] O'Connell *Law of the Sea Vol. II* (n.1), 796-7

[23] Barnes *Property Rights* (n.1), 166

freedom of the seas however, this issue became more problematic. As O'Connell noted:

> Running also through the seventeenth century debate was the persistent question of the intrinsic relationship between the new concept of sovereignty and the philosophical notion of effective power which took legal form in the Roman Law doctrine of occupatio. The question was whether the power to rule (jurisdictio) flowed from proprietorship of the maritime terrain, or was independent of it. It was a critical question then, and it remains a critical one today, for the jurists have been unsuccessful in their search for a touchstone of the exercise of governmental authority outside the boundaries of national territory. Power tends to be destabilized and incongruous when manifested extraterritorially, because it cannot be plenary, as it is intraterritorially, yet no rubric is available to determine its nature and extent.[24]

The question that would need to be answered was the relationship between the concept on the one hand of *imperium,* or the power to rule, and *dominium,* or ownership, on the other. If a sovereign claimed ownership over the sea space, then authority to rule that space followed. If the doctrine of the freedom of the seas demanded that States could no longer make extensive claims to *dominium* however, what was the basis of legal authority at sea? Certainly as far as coastal waters were concerned, *imperium* and *dominium* were considered to be coterminous,[25] but on the high seas, where *dominium* could not be claimed, *imperium* could still extend, in particular over the sovereign's subjects and vessels.[26] This assertion of *imperium* was at times characterised extremely widely as Sir Leoline Jenkins insisted in a direction to an Admiralty court sometime between 1669 and 1674:

> Every Englishman knows, that his Majesty hath an undoubted Empire and Sovereignty in the Seas that environ his Kingdoms [...]

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[24] O'Connell *International Law of the Sea Vol. I* (n.1), 14-5

[25] *Ibid.* 15

[26] *Ibid.* 17

> But besides these four seas, [...] his Majesty hath a Concern and Authority (in Right of his Imperial Crown) to preserve the publick Peace, and to maintain the Freedom and Security of Navigation all the World over [...] if the Peace of GOD and King be violated upon any of his Subjects, or upon his Allies or their Subjects, and the Offender be afterwards brought or laid hold on in any of this Majesty's Ports, or such Breach of the Peace is to be enquired of, and tryed [...] in such Country, Liberty or Place, as his Majesty shall please to direct. [...] so odious are the Crimes of Piracy, Bloodshed, Robbery, and other Violences upon the Sea, that Justice observes and reaches the Malefactors, even in the Remotest Corners of the World [...] This Power and Jurisdiction which his Majesty hath at Sea in those remoter Parts of the World, is but in concurrence with all other Soveraign Princes that have Ships and Subjects at Sea.[27]

O'Connell says of this passage that its meaning is that "the Admiral had personal jurisdiction over British ships anywhere in the world, but not over foreign ships, whereas the Crown had territorial rights in the British Seas."[28] That being the case, what jurisdiction does a sovereign have over foreign ships at sea? Outside of a claim to *dominium*, and without a claim to *imperium* one might argue none at all. This did not prevent arguments being made in support of claims by States to interfere with foreign shipping however. Amongst these was Gentili, at the time an advocate before the English Court of Admiralty for the Spanish Crown. It has been observed that identifying principles in some of Gentili's writings is difficult since he was perfectly prepared to argue both for and against a particular proposition in different cases as the demands of his client's brief demanded. When it came to the question of foreign interference with ships at sea, he was particularly constrained by the fact that the contemporary government policy of Elizabethan England was to reject the concept of the sovereignty over the sea space advanced by Spain and Portugal, and thus allow English vessels to navigate in (and prey upon) the waters claimed

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[27] W Wynne (1724) *The Life of Sir Leoline Jenkins* London: J Downing etc., I, xc Cited in O'Connell *Law of the Sea Vol I* (n.1), 18 and; Rubin *Law of Piracy* (n.1), 88

[28] O'Connell *Law of the Sea Vol. I* (n.1), 18

by those two States. This policy however limited English claims to control at sea. Van der Molen explains that Gentili:

> [...] tried to bridge this over by making a distinction between "dominium" [...] and "iurisdictio". Now, according to him, there can be no dominium over the high sea, but there can be iurisdictio.[29]

Van der Molen presents as an example a case where Gentili argued that the English Crown had jurisdiction to seize a Spanish and a Dutch vessel at sea.

> Gentili recognizes the freedom of the seas in the sense that does not admit dominium either private or public over the high seas. It is true, that a sovereign [State] can exercise jurisdiction over the high seas, in order to punish wrong and to check privateering, but his authority does not extend beyond this. [...] Gentili tried to find a solution for the discrepancy, which already existed in Roman times between theory and practice, and which in his own time was still more accentuated, because on all sides national sea-dominion was proclaimed. In this way he also reconciled the practical politics of Elizabeth, which were aimed at the strengthening of England's maritime position, and her famous assertions concerning the freedom of the seas towards Spaniards and Danes. [30]

According to Van der Molen, Gentili:

> [...] made his escape by way of a distinction between dominion and jurisdiction. Under the latter heading he departs very far from the freedom which he predicates under the former. [...] His conclusions may be summed up as follows: The sea is common for all to use it, the property of no one individual or nation, but merely under the protection of the prince. Under the law of nations national jurisdiction for protective purposes is recognized wherever and in so far as it is necessary. No one who sails the sea may escape from just

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[29] GHJ van der Molen (1968) *Alberico Gentili and the Development of International Law* Leiden: A.W. Sijthoff, 164-5

[30] *Ibid*.166-7 The case appears in A Gentili (FF Abbott tr.) (1921) *Hispanicae Advocationis Libri Duo*: *Vol II The Translation* New York: OUP, 35.*et seq*.

> government. Yet they war justly on a prince who denies them the innocent use of nature's gift. Needless to say, Gentilis was a voice crying in a wilderness of confusion and contention.[31]

If enforcement jurisdiction existed beyond the immediate territorial jurisdiction of the coastal State however, what was the theoretical basis for jurisdiction on the high seas, which were theoretically open to all? The questions posed by the debate between *mare liberum* and *mare clausum* and the question of the basis of authority at sea in the absence of *dominium* leave the unanswered question of the juridical nature of the high seas, an issue that has probably never been adequately theorised.

5.1.3 The Juridical Nature of the High Seas.

The problem of the juridical nature of the high seas was one identified by Grotius himself. As O'Connell notes:

> Grotius wrote that in the legal phraseology of the law of nations the sea is called indifferently res nullius, res communis, or res publica. These three expressions have been used ever since by publicists, not as synonyms but rather as antonyms. Each of them has incurred criticism, but as to the exact implications of each of them there has been continuous confusion. That the implications differ would seem obvious; but they are implications of emphasis rather than of detail, and so they remain essentially elusive.[32]

O'Connell suggests that the concept of *res nullius* (belonging to no-one) is the only one that "correctly explains the historical evolution of the Freedom of the Seas." He acknowledges that the theory is however subject to ambiguity,[33] and it was strongly criticised by Gidel because it conveyed the sense that the seas were not subject to the law at all.[34] The theory of *res communis* (being communal property) was equally criticised by Gidel because it suggested that the seas were

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[31] Potter *Freedom of the Seas* (n.1), 53-4

[32] O'Connell *Law of the Sea Vol. II* (n.1), 792.

[33] *Ibid.* 793

[34] Gidel *Droit de la Mer Tome I* (n.1), 216

subject to a fixed system of rules imposed by the international community. He observed that this did not in fact reflect the reality that there was no such enforcement mechanism, and that the freedom of the seas manifested itself in the opposability of the inviolability of vessels *vis-à-vis* other States.[35] Another theory put forward by McDougal and Burke is that of the "reasonable use" of the seas.[36] This theory is based on the maintenance of a "continually evolving balance between different common interests". This theory is also criticised by O'Connell who observes that the proposed evaluation of "reasonableness" is bound to be subjective, and that it is "difficult to see how the distinction between 'inclusive' and 'exclusive' interests work out in practice".[37]

Having rejected both the concepts of *res nullius*, and *res communis*, Gidel argued for a separate theory of what he called the *juridicité* of the high seas, or the idea that the sea was subject to a system of rules. He noted that although the high seas were not the subject of the laws of any State, this did not mean that they were a "space outside the law". He argued that these rules were most in evidence in the case of piracy. He argued that the rules against piracy attest to the existence of this notion of the rule of law at sea, but also argued that this concept was necessary for the exercise of rights at sea generally. Mirroring the concept of *imperium* and *dominium*, Gidel made the observation that is at the heart of this thesis, the distinction between prescription and enforcement, or as he put it, the distinction between *validité* and *efficacité*. The point is that the sea is not a lawless space, since those at sea remain subject to the laws of their own States, including the laws of the State of which they are nationals and the flag State of their vessels. What States are constrained from doing is enforcing their laws against foreign nationals and foreign flagged vessels at sea. Gidel's analysis is endorsed by Papastavridis,[38] who also argues that the freedom of the high seas was never an absolute concept, and was always qualified by claims for jurisdiction for the maintenance of international peace and security, the

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[35] *Ibid.* 223

[36] McDougal and Burke *Public Order* (n.1), 37-8

[37] O'Connell *Law of the Sea Vol. II* (n.1), 795

[38] E Papastavridis (2011) *The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited* 24 Leiden Journal of International Law 45, 52

protection of the freedoms of the high seas themselves, and the maintenance of the *ordre public*.[39] O'Connell for his part argues that Gidel's examination "sheds no additional light on the crucial question of the scope of the exercise of power on the high seas". In his final analysis of the issue, O'Connell argues that:

> The problem of determining the limits to individual State action on the high seas is not, in fact, likely to be resolved by legal characterization, because that poses the wrong question. The question is not the legal nature of the area, but the regime actually brought about by the practice of States.[40]

Thus, that regime, as O'Connell acknowledged, is not in fact susceptible of an overarching theorisation because it is constantly shifting. It is argued that this constant reshaping of the balance between *mare liberum* and *mare clausum* is evident in the codification of the law of the sea.

5.2 The Development of the Law of the Sea

Where the codification is concerned, it will be argued that the law has developed in three interrelated ways during the 20th century. The first is particularly evident in the development of the 1982 LOSC which ascribes substantial rights of regulation to coastal States, and in the case of the deep sea bed, to the international community. This has made substantial inroads into the theoretical concept of the freedom of the high seas, and has also dramatically reduced the area of the ocean designated as high seas. The second is the recognition that the regulation of the ocean space poses challenges that can in many cases only be addressed by multilateral cooperation. This is true in particular with relation to issues such as environmental protection and the conservation of natural resources. The third is the more recent development of mechanisms for the interdiction of vessels on the high seas driven by the need to manage fisheries, to combat drug smuggling and illegal migration, and to prevent the proliferation of weapons of mass destruction. These issues have significant implications for the law of piracy because it will be argued that the process of decolonisation,

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[39] *Ibid.* 68-9

[40] O'Connell *Law of the Sea Vol. II* (n.1), 796

together with the increased claims by coastal States mean that piracy enforcement can no longer rely on unilateral enforcement action by naval powers, and will also need to adapt by adopting more multilateral and consensual enforcement mechanisms.

The law of the sea was the subject of sustained effort towards codification which eventually resulted in the 1982 LOSC. The achievement of that Convention was not the product of a single effort, but of a long process of negotiation which dealt with different aspects, initially at least, piece by piece. The efforts at codification began in 1924 under the League of Nations, which prepared a list of subjects "ripe for codification" amongst which were territorial waters, the exploitation of marine resources, the legal status of state owned merchant vessels, and piracy.[41] Of these only the issue of territorial waters was eventually taken up by the preparatory commission for the 1930 Hague Conference. In the event that Conference did not reach agreement on a treaty instrument, though it did produce draft articles on the territorial sea under the auspices of the rapporteur, J.P.A. François. The codification efforts were taken up again after the Second World War by the United Nations, and it fell to the newly formed International Law Commission (ILC) to continue working on the issue at the request of the General Assembly. The ILC, with François once again as rapporteur, adopted draft articles on the law of the sea at its eighth session in 1956,[42] which formed the basis of the first United Nations Conference on the Law of the Sea in 1958 (UNCLOS I).

The development of the law was heavily influenced by the process of decolonisation which saw a rapid increase in the number of coastal States, and greater pressure for the equitable allocation of natural resources. Churchill and Lowe note that UNCLOS I was attended by eighty-six states, almost double the number as had attended the 1930 Hague Conference.[43] The conference succeeded in adopting four different conventions, on the Territorial Sea and the

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[41] *Second Session of the Committee of Experts for the Progressive Codification of International Law* League of Nations, Geneva, January 29th 1925, reproduced in: (1926) 20 Special Numbers AJIL Special Supplement 17, 19

[42] ILC *Articles concerning the Law of the Sea* Doc. A/3159 YBILC 1956 vol. II, 253

[43] Churchill and Lowe (n.1), 15

Contiguous Zone, the High Seas, the Continental Shelf, and on the Fishing and Conservation of the Living Resources of the High Seas. The question of the breadth of the territorial sea once again remained unresolved however, and this was the subject of a second conference on the law of the sea (UNCLOS II) which narrowly failed to agree a formula of a six mile territorial sea and a further six mile fisheries zone.

The third UN Conference on the Law of the Sea (UNCLOS III) would convene in 1973, and had its origins in the discussions concerning a special regime for the deep sea bed. Treves observes that UNCLOS III was brought about by two interconnected factors. The first was the work undertaken in the UN General Assembly concerning the mineral resources of the deep sea bed beyond national jurisdiction. The second was the fact that as a result of decolonisation the number of States had dramatically increased again, and that many of the new States had different priorities in the law of the sea that the former colonial powers.[44]

The first component developed after the discovery that the deep sea bed was a potential source of valuable mineral resources, specifically manganese nodules.[45] Developing States argued that the sea bed, or 'the Area' as it was to be known, should be subject to controlled exploitation rather than allowing it to be mined by whoever had the means to do so, which would have seen it used solely for the benefit of developed States. In 1967 in a speech to the UN General Assembly, Arvid Pardo, the Maltese ambassador to the UN had argued that the sea bed should be considered the "common heritage of mankind". At the same time, Treves notes that the number of States had doubled again in the 10 years leading up to that speech, and their "priorities in the uses of the seas were different than those of the maritime powers that had dominated the scene in Geneva. Exploitation of the living and non-living resources was seen as more important than, or as important as, navigation of merchant and military

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[44] T Treves (2008) United Nations Convention on the Law of the Sea United Nations Audiovisual Library of International Law [legal.un.org/avl/pdf/ha/uncls/uncls_e.pdf], 1

[45] Churchill and Lowe *The Law of the Sea* (n.1), 223

fleets."[46] UNCLOS III first met in 1973 and finally reached agreement on the Law of the Sea Convention in 1982. Churchill and Lowe observe that amongst the 150 States attending, groupings emerged, perhaps most notably the "Group of 77" developing States who brought their own concerns and interests.[47]

A number of points can be made about the final Convention. The first is that the Convention dealt with an array of different issues, and has been described as a "constitution for the oceans".[48] As such the Convention is considered to be a 'package deal' in the sense that it involved a 'give and take' between different interests.[49] At the same time, as will be noted in the following sections, the Convention also dramatically changed the organisation of the maritime space, driven by the demand by coastal States to secure natural resources. Finally, although some parts of the Convention such as the provisions on the deep sea bed are very detailed, in other areas the Convention is less so, and is capable of further development by other agreements.[50] As noted above, the LOSC allocated jurisdiction based on the division of the ocean space into different zones, and on the activities that take place within them.

5.3 Enforcement Jurisdiction under the LOSC

As noted above, enforcement jurisdiction at sea involves a balance between the rights of the flag State and the rights of the coastal State. Enforcement jurisdiction is based on the division of the sea space into maritime zones, and a coastal State is entitled to regulate certain activities in certain zones to a decreasing extent the further they are from the coast, so that on the high seas coastal States have little or no control over foreign vessels, which instead submit to the exclusive jurisdiction of the flag State (subject to exceptions). Within the

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[46] *Ibid.*

[47] *Ibid.* 17

[48] Remarks by Tommy B Koh, President of Singapore, President of the Third UN Conference on the Law of the Sea. [www.un.org/depts/los/convention_agreements/texts/koh_english.pdf]

[49] AE Boyle (1997) *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction* 46 ICLQ 37, 38

[50] Boyle observes that whilst the LOSC is not strictly speaking a 'framework agreement' its evolution is possible and is "in that sense no less a dynamic or living instrument than so-called framework agreements". AE Boyle (2005) *Further Development of the Law of the Sea Convention: Mechanisms for Change.* 54 ICLQ 563, 584

LOSC *spatial jurisdiction* is relatively settled, but *topical jurisdiction* may be said to be still developing in a number of different ways.[51] As a result of these factors, O'Connell notes that whilst the LOSC provisions are "explicit up to a point", they are "in many respects, not infused with a coherent theory of jurisdiction which would add to their precision. The result is a danger of the phenomenon familiar to international lawyers of 'creeping jurisdiction'."[52] This section is not intended to be a detailed analysis of the law of the sea, but an overview is necessary to frame the discussion of the law of piracy that will follow.

5.3.1 Internal and Archipelagic Waters

The division of the ocean space into zones is based on the establishment of *baselines* which according to Articles 3 and 5 LOSC are the low-water line along the coast. Under Article 7 straight baselines may be drawn where the coastline is deeply indented or fringed by islands. The waters landward of the baselines are *internal waters* including river estuaries, bays, and ports, and are 'assimilated' to the State's land territory (subject to limited exceptions), and are subject to the coastal State's territorial jurisdiction.[53] As vessels travel to and from shore, they become subject to varying degrees of regulation. Nevertheless, it is generally recognised that subject to rules to the contrary, coastal states do not generally interfere in the internal affairs of ships, even in ports and internal waters. As Churchill and Lowe explain:

> By entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State. [...] But since ships are more or less self-contained units [...] coastal States commonly enforce their laws only in cases where their interests are engaged. Matters relating solely to the 'internal economy' of the ship tend in practice to be let to the authorities of the flag State.[54]

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[51] Churchill and Lowe *Law of the Sea* (n.1), 18

[52] O'Connell *Law of the Sea Vol. II* (n.1), 733

[53] Churchill and Lowe *Law of the Sea* (n.1), 60

[54] *Ibid.* 65-6

In other words, as a matter of comity, States do not generally interfere with foreign flagged ships, even in internal waters, unless the activities of the vessel impact upon the coastal State's interests. At UNCLOS III several States (Fiji, Indonesia, Mauritius, and the Philippines) argued for the right to draw baselines around mid-ocean archipelagos. This was because those States, being made up of groups of islands, wished to assert control over economic and security matters inside the archipelagos.[55] In spite of resistance from maritime States, Part IV of the LOSC allows Archipelagic States to draw straight baselines around the archipelago.[56] This right is however subject to a right of innocent passage.

5.3.2 The Territorial Sea and International Straits

It has long been accepted that a coastal State is entitled to exercise control over the waters immediately adjacent to its coast, and even Grotius admitted as much. Precisely what rights the coastal State had, and the distance to which it could exercise them was however not entirely clear. Bynkershoek argued in 1702 that the coastal State had complete sovereignty in the territorial sea, but the practice of many European States was that control was not exclusive and did not permit the complete exclusion of foreign vessels.[57] Churchill and Lowe observe that de la Pradelle writing in 1898 described the coastal State control over the territorial sea as being only a "bundle of servitudes".[58] O'Connell notes that there were three different theories concerning the rights over the territorial sea: the property theory, the police theory, and the competence theory.[59] The breadth of the territorial sea too was subject to differing claims. The actual claims of States once again varied widely, although by the 19th century several of the major powers recognised a three mile limit to the territorial sea. As noted above, the different conferences on the law of the sea all failed to reach

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[55] *Ibid.* 120

[56] Defined by Article 46

[57] Churchill and Lowe *Law of the Sea* (n.1), 72

[58] AG de la Pradelle (1898) *Le droit de L'Etat sur la mer territorial* 5 RGDIP 264 cited in Churchill and Lowe *The Law of the Sea* (n.1) ,72

[59] O'Connell *Law of the Sea Vol I* (n.1), 60 *et seq.*

agreement on the limit of the territorial sea,[60] although the proposal for a six mile territorial sea and a further six mile fisheries limit failed by only one vote at UNCLOS II. In the event agreement was finally achieved at UNCLOS II on a twelve mile territorial sea, and the rules establishing it are set out in Part II of the LOSC.

Within the territorial sea ships of all states "enjoy the right of innocent passage" under Article 17 LOSC. Article 18 defines passage as the "continuous and expeditious" traversing of the territorial sea, or to and from internal waters. Article 19 defines passage as being innocent so long as it is not "prejudicial to the peace, good order or security of the coastal State", and provides a non-exclusive list of activities that would be considered prejudicial, including "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State".[61] There are separate provisions concerning the right of the coastal State to exercise criminal jurisdiction in the territorial sea. Under Article 27, the coastal state *should not* exercise criminal jurisdiction to investigate a crime or arrest anyone aboard a ship exercising innocent passage, unless the consequences of the offences extend to the coastal state. Article 27 is nevertheless said to be *hortatory* only.[62]

Another aspect of rights in the territorial sea relates to the question of international straits. Historically the position concerning passage through straits depended on their status either as high seas or territorial sea, and the rights of passage were either freedom of navigation in the former and the right of innocent passage in the latter.[63] Maritime States however claimed that the right to passage in international straits could not be prevented by coastal States even where they fell within the territorial sea. The issue came before the ICJ in 1949 in the *Corfu Channel* case in which it was held that this was in fact the

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[60] The 1958 Convention on the Territorial Sea and Contiguous Zone did not define the breadth of the territorial sea.

[61] LOSC Article 19(2)(a)

[62] For detailed discussion of the debate over the extent of coastal State enforcement jurisdiction in the territorial sea see: Churchill and Lowe *Law of the Sea* (n.1) 95-100

[63] *Ibid.* 102

case.[64] The use of straits for international navigation, including those that fall within the territorial sea, is regulated by Part III of the LOSC. Article 38 provides for the right of "transit passage". In exercising transit passage vessels are required to proceed without delay through the strait, to refrain from any threat or use of force against the coastal States, and to comply with generally accepted international regulations for safety at sea.[65] George observes the rights of coastal States appear to be in tension, since Article 42(1) grants them the right to adopt laws and regulations relating to the safety of navigation, fishing, and customs, fiscal and sanitary laws, yet at the same time are prohibited from "denying, hampering, or impairing the right of transit passage" under Article 42(2).[66]

As well as the territorial sea, coastal States have historically exercised control over vessels further away from shore in a number of different ways, including the use of the doctrines of constructive presence and hot pursuit, and the recognition of the contiguous zone.

The oldest concept is a customary right of the coastal State to seize vessels that do not enter the territorial sea, but nevertheless commits offences (such as smuggling) using its boats, under the doctrine of *constructive presence*.[67] The second is provided by article 33 LOSC which entitles a coastal State to claim a 'contiguous zone' up to 24 nm from the baselines (in other words a further 12 nm from the edge of the territorial sea). Within this zone the coastal state is permitted to "exercise control" necessary to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territorial sea" or to punish such infringements that have been committed within the territorial sea. A coastal State is also entitled to engage in "hot pursuit" of vessels that have committed offences before navigating to the high

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[64] *Corfu Channel Case* (UK v. Albania), ICJ Reports 1949, p.4

[65] Article 39 LOSC

[66] M George *The Regulation of Maritime Traffic in Straits Used for International Navigation* in AG Oude Elferink and DR Rothwell (eds) (2004) *Oceans Management in the 21st Century: Institutional Frameworks and Responses* Leiden: Martinus Nijhoff, 24; See also discussion in Rothwell and Stephens *International Law of the Sea* (n.1), 244-6; and Churchill and Lowe *Law of the Sea* (n.1), 109

[67] Churchill and Lowe *Law of the Sea* (n.1) 132-3

seas (or EEZ) and therefore outside of coastal State jurisdiction. Under Article 111 LOSC, a coastal state having "good reason to believe that the ship has violated the law and regulations of that state" may pursue and exercise enforcement jurisdiction over that vessel provided that the pursuit commenced while the subject vessel was in the internal or archipelagic waters, territorial sea, or contiguous zone, and provided the pursuit is uninterrupted. Finally, coastal States are also granted extensive enforcement jurisdiction under Article 109 LOSC over any vessel that is engaged in unauthorised radio or television broadcasting that can be received with the coastal State. The significance of the extension of the territorial sea to 12 nm is that this reduces the effectiveness of naval counter-piracy enforcement close to shore. This is particularly significant in areas such as straits where the entire sea space can fall within the territorial sea.

5.3.4 The Exclusive Economic Zone and the Continental Shelf

It was not only the territorial sea that expanded under UNCLOS III however. Even more substantial claims were made to regulate natural resources in a coastal space extending to 200 nm. Perhaps the first steps in this regard were in relation to the continental shelf. Churchill and Lowe note that the earliest claims to rights over the continental shelf may be attributable to a 1942 agreement between Venezuela and the UK in which the sea bed in the Gulf of Paria between Trinidad and Venezuela was partitioned by treaty.[68] The most significant historical development however was the 1945 Truman Proclamation, in which the then US President outlined the US position that the natural resources of the seabed of the continental shelf contiguous to its coast were subject to its jurisdiction and control.[69] At the same time, many African and Latin American States had begun to make extensive claims to sovereign rights far beyond the 12 mile territorial sea, and Latin American States had made multilateral declarations to that effect.[70] Although these claims met with approval from

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[68] *Ibid.* 143

[69] Truman Proclamation on Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf 28 September 1945

[70] See e.g. the Montevideo and Lima Declarations of 1970. See generally: Churchill and Lowe *The Law of the Sea* (n.1), 160-1

States who also wanted greater control over fisheries, such as Norway and Canada, they met with opposition from States such as Japan, concerned at the loss of the right to fish in broad areas of the ocean, but also maritime States such as the US and the Soviet Union, concerned that such claims might hamper the freedom of navigation and the projection of naval force. In the event compromises were made and the result was the inclusion of extended rights over the continental shelf under Part VI of the LOSC, and the creation of the concept of the Exclusive Economic Zone, or EEZ, under Part V.

The EEZ is said to have a "unique juridical nature" being neither high seas nor territorial sea,[71] and extends no more than 200nm from the baselines.[72] Under Article 56 LOSC a coastal state claiming an EEZ has "sovereign rights for the purpose of exploring and exploiting, conserving and managing" the living and non-living natural resources of the sea and seabed within the EEZ, as well as with regard to "other activities for the economic exploitation and exploration of the zone". Jurisdiction is granted to the coastal State over artificial islands and structures, over maritime research, and for the protection and preservation of the marine environment. Other States retain the freedom of navigation and overflight, and the right to lay submarine cables and pipelines.[73] Although the extension of the rights of the coastal State over continental shelf and the EEZ do not directly impact on the law of piracy, they do serve to illustrate the way in which jurisdiction has been extended steadily seaward, and although under the LOSC provisions coastal States may not exclude foreign naval forces from taking enforcement action within the EEZ, this has not stopped controversy arising in practice.[74]

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[71] R Barnes *The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?* in Freestone Barnes and Ong *Progress and Prospects* (n.1), 245

[72] Art.57 LOSC

[73] Art.58

[74] An issue that will be examined in Section 12.3 below.

5.3.5 The High Seas and the Sea Bed

According to the LOSC and customary international law, "no state may validly purport to subject any part of the high seas to its sovereignty".[75] Instead jurisdiction at sea is primarily, if not exclusively, that of the flag State of a vessel. As noted above, the idea that the sea bed might be subject to a 'free-for-all' has led to a very different regime, in which 'the Area' is subject to detailed regulation, including the establishment of the International Sea Bed Authority which regulates all activities concerning the exploitation of the mineral deposits of the sea bed, and detailed rules set out in Part XI of the LOSC, which according to Article 140 requires exploitation to be "carried out for the benefit of mankind as a whole." The exercise of authority on the high seas is not regulated in such detail, and the rest of this chapter is devoted to examining how control is exercised both under the LOSC, but also how mechanisms have also developed outside of the Convention to address specific problems.

Where high seas enforcement is concerned, there are different rules for wartime and peacetime. Under the laws of armed conflict at sea lawfully commissioned belligerent vessels are entitled to stop and search vessels outside of neutral waters where there is reasonable grounds to suspect they are liable to capture.[76] In peacetime however, the right of visit is much more tightly circumscribed. The basic principle is set out in Article 92 LOSC which states that ships "save in exceptional cases expressly provided for in international treaties or in this Convention" are subject to the exclusive jurisdiction of their flag state while on the high seas. That rule is subject to limited exceptions contained within Article 110 LOSC. That article provides that a warship on meeting a foreign vessel on the high seas "is not justified in boarding it unless there is reasonable ground for suspecting" that the ship is engaged in: piracy, the slave trade, unauthorised broadcasting (defined in Article 109), is without nationality, or though flying a foreign flag or not showing a flag is in reality of the same nationality as the warship.

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[75] Art.89 LOSC, Art.2 HSC

[76] L Doswald-Beck (ed.) (1995) *San Remo Manual on International Law Applicable to Armed Conflict at Sea* Cambridge: Cambridge University Press, para 118

Article 110 is copied from Article 22 HSC with the addition of the criteria of unauthorised broadcasting and vessels without nationality. It is obvious that the main provisions for high seas enforcement action relate to piracy, the slave trade, and drugs interdiction. Piracy is dealt with by articles 100 to 107 of the LOSC. Piracy is defined by article 101, and the right to act against pirate vessels is set out in Article 105, which states that a warship may seize a pirate vessel on the high seas, and that the courts of the seizing state may determine the action to be taken with it.[77] Article 99 obliges States to "take effective measures to prevent and punish the transport of slaves" in vessels entitled to fly their flag. Although it does place obligations on the flag State, in contrast with the piracy provisions, it gives no special powers to other States to interdict vessels suspected of slavery (apart from the Article 110 right of visit), nor to prosecute suspected slave traders. Drugs smuggling is addressed by Article 108 which provides that all states are to "co-operate" in the suppression of drugs trafficking. It too makes limited provision for the actual suppression of trafficking, providing under Article 108(1) that a flag State may request the cooperation of other states to "suppress such traffic. Again there is no provision within the Convention for the prosecution of drug smugglers or the interdiction or seizure of their vessels.

It can immediately be seen that the bases of non-flag state jurisdiction within the LOSC are extremely limited. The LOSC took little regard of problems such as maritime terrorism, illegal migration, and the smuggling of weapons, (of which weapons of mass destruction or WMDs are a particular contemporary concern). It is to the enforcement mechanisms that have been developed to tackle these problems that the chapter now turns.

5.5 High Seas Enforcement Measures outside the LOSC

The LOSC itself is sometimes described as affording a framework for the further development of rules for the regulation of specific activities. This is very much the case with high seas enforcement measures, where further instruments have been negotiated in an effort to 'fill in the gaps'. This is significant because it will

[77] The treaty provisions concerning piracy will be analysed in greater detail in Chapter 8 below.

be argued in Chapter 12 that the effort to tackle piracy and international maritime crime is increasingly involving measures that are in addition to those set out in the LOSC. This section surveys three areas in which non-LOSC high seas enforcement mechanisms have developed. Some of the mechanisms, in particular the regulation of fisheries are highly complex, and are in any case dealt with in detail elsewhere.[78] They are therefore only briefly surveyed here to provide an illustration of the mechanisms that States have adopted.

5.5.1 Fisheries Enforcement

The freedom to fish, together with the freedom of navigation, was considered to have been one of the historical freedoms of the high seas. During the 20th century, overfishing and the consequent depletion of fish stocks lent urgency to efforts to manage and conserve them. Of course, the question of controlling access to fisheries raises the age old *mare liberum/mare clausum* conflict between coastal States and States with distant sea fishing fleets, and this has been a feature of the efforts to control fishing. The problem was the specific subject matter of UNCLOS II in 1960, but no agreement was reached. In the meantime States had progressively been expanding towards the 200nm EEZ. The topic was again examined at the third conference. This established the right of coastal states to claim a 200 nm EEZ within which it has "sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources" which includes the regulation of fishing.

While the LOSC recognised the freedom to fish on the high seas, article 117 nevertheless provided an obligation on the part of states to negotiate, cooperate, and to implement necessary measures for the "conservation of the living resources of high seas". However, it was clear that the regulation of fisheries on the high seas, and so-called 'straddling stocks' would require detailed regulation, and this was achieved with the negotiation of the 1995 Straddling Stocks Agreement.[79] The Agreement is cited as an example of one of the ways

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[78] See generally: RG Rayfuse (2004) *Non-Flag State Enforcement in High Seas Fisheries* Leiden: Martinus Nijhoff; Guilfoyle *Shipping Interdiction* (n.1), 97-169

[79] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995) 2167 UNTS 88

that the 'framework' of the LOSC has been developed by further agreement. From the perspective of high seas enforcement jurisdiction, the significance of fisheries regulation is that it has developed regional cooperation agreement for the regulation of fishing, in the shape of Regional Fisheries Management Organisations (RFMOs). The Straddling Stocks Agreement requires States to join the relevant RFMOs and to ensure that their vessels and nationals comply with their regulations. The Agreement also establishes detailed mechanisms for boarding and inspection of fishing vessels within the management areas, far beyond those provided for within the LOSC.[80] It will be argued that the regulation of a historic freedom which also involves the problem of transboundary jurisdiction, increasing numbers of participants, and the increasing control of coastal States, suggests precedents for maritime law enforcement more generally.

5.5.2 WMD Counter-Proliferation

Although as Guilfoyle notes, weapons of mass destruction (WMDs) have long been recognised as a threat to international peace and security,[81] international concerns in the aftermath of the September 11 attacks against the United States focused attention on the prevention of their proliferation amid concerns that they could fall into the hands of terrorist organisations. Perhaps the most significant development in this respect was UN Security Council Resolution 1540 which required all States to adopt and enforce laws and controls to prevent the illicit traffic of WMDs.[82] From a maritime enforcement point of view, there have been two significant efforts to develop mechanisms for the interdiction of vessels suspected of carrying WMDs.

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[80] For more detail see: RG Rayfuse (2004) *Non-Flag State Enforcement in High Seas Fisheries* Leiden: Martinus Nijhoff*;* Guilfoyle *Shipping Interdiction* (n.1), 97-169; Churchill and Lowe *Law of the Sea* (n.1), 296-316; Papastavridis *Interception of Vessels p*.197-204

[81] Guilfoyle *Shipping Interdiction* (n.1), 233

[82] See generally US Department of State *The Proliferation Security Initiative* [www.state.gov/t/isn/c10390.htm] Guilfoyle, *Shipping Interdiction* (n.1), 232-62; M Byers (2004) *Policing the High Seas: The Proliferation Security Initiative* 98 AJIL 526; J Cotton (2005) *The Proliferation Security Initiative and North Korea: Legality and Limitations of a Coalition Strategy* 36 Security Dialogue 195; YH Song (2007) *The US-Led Proliferation Security Initiative and UNCLOS: Legality Implementation, and an Assessment* 38 ODIL 101; TV Thomas (2009) *The Proliferation Security Initiative: Towards Relegation of Navigational Freedoms in UNCLOS? An Indian Perspective* 8 Chinese Journal of International Law 657

The Proliferation Security Initiative (PSI) is led by the US and seeks to enhance cooperation between States on controlling WMD proliferation, under which the US has concluded eleven bilateral interdiction agreements.[83] The PSI is based on the PSI Statement of Interdiction Principles,[84] which is endorsed by more than 90 countries.[85] The Statement of Principles requires States to take effective measures, share information, and take action against vessels flying their flag and within their territorial waters. Although some authors question whether the PSI is intended to create sufficient State practice to amount to customary international law, the agreements are based on the consent of the participating States.

A further development in this field is the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Protocol) which is not yet in force, but is also aimed at coordinating efforts towards counter-proliferation, including creating criminal offences, and requiring States to establish jurisdiction over WMD smugglers.[86] The Protocol is intended to supplement the SUA Convention, and has the effect of inserting sections into the Convention for contracting parties. The SUA Protocol has several different elements that Guilfoyle notes are 'ambitious'. The Protocol defines terrorist offences relating to WMDs[87] and requires States to establish prescriptive jurisdiction over them,[88] but for present purposes the most interesting aspect is the high seas interdiction mechanism set out in Article 8 (which inserts Article 8*bis* into the SUA Convention). The interdiction arrangements allow for *ad hoc* boarding arrangements with flag States. These operate so that a State party may request permission from another State party to the convention to stop and search a vessel flying its flag. The permission is to be

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[83] US Department of State *Ship Boarding Agreements* [www.state.gov/t/isn/c27733.htm]

[84] US Department of State *Proliferation Security Initiative: Statement of Interdiction Principles: Fact Sheet* September 4 2003 [http://www.state.gov/t/isn/c27726.htm]

[85] US Department of State *Proliferation Security Initiative Participants* [www.state.gov/t/isn/c27732.htm]

[86] For further detail and discussion see: N Klein (2006-7) *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.* 35 Denver Journal of International Law and Policy 287

[87] SUA Protocol Art.4

[88] Art.6

presumed if no response is received within four hours of the request. In some cases consent is automatically given.

5.5.3 Drugs Smuggling

As Guilfoyle again observes, whilst interdiction of vessels smuggling drugs can take place within the territorial sea, this is not always practicable, and as discussed in Chapter 3, drugs interdictions more often than not take place on the high seas. As already noted, LOSC Art.108(1) only permits a flag State to request another State's cooperation with arresting drug smuggling vessels of the same nationality, and therefore does not give non-flag States any particular rights of interdiction.[89] The 1989 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides a framework for seeking flag State consent for interdiction of suspected drug smuggling vessels, but does not create any further powers than those contained within the LOSC.[90] State parties are however required to respond 'expeditiously' to requests for permission to intercept their vessels, and the Convention also encourages State parties to consider entering into bilateral or regional interdiction arrangements.[91] A number of such agreements have been negotiated including multiple bilateral agreements between the US and Caribbean States,[92] a 1990 agreement between Spain and Italy,[93] and a 2005 Council of Europe Agreement.[94] It can also be noted that there is evidence that States have also sought (and granted) case-by-case permission for the interdiction of suspected smuggling vessels. The practice was however criticised by the European Court of Human Rights in the case of *Medvedyev* on the basis that it provided

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[89] LOSC Article 108

[90] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) 1582 UNTS 95, Article 17

[91] See generally: Guilfoyle *Shipping Interdiction* (n.1), 79-96; Papastavridis *Interception of Vessels* (n.1), 204-58

[92] See Guilfoyle *Shipping Interdiction* (n.1), 89-91

[93] Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea (1990) 1776 UNTS 229

[94] Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1995) CETS No.156

insufficient legal certainty to defendants.[95] The mechanisms that have been developed to address the problems of trafficking drugs and WMDs also illustrate how high seas shipping interdiction has developed outside of the LOSC, based on separate agreements for the consensual interdiction and boarding of suspect vessels. Once again, it will be argued that such mechanisms may illustrate ways in which counter-piracy law enforcement can also be made more effective.

Conclusions

In conclusion, this chapter has examined a number of issues by way of explanation of the concept of enforcement jurisdiction at sea. The first is that enforcement jurisdiction is an issue separate to prescriptive jurisdiction, is determined by separate criteria, and is subject to different limitations. The chapter has observed that whereas the exercise of prescriptive (and adjudicative) jurisdiction is only limited by the requirement that it fall within one of the categories permitted by international law (based on a 'linking point'), enforcement jurisdiction is determined by the different maritime zones, and by the activities that take place within those zones.

The chapter has examined the theory of the division of competence in the law of the sea, and observed that there is in fact no overarching theory explaining how authority is allocated. The chapter then briefly examined the codification of the law of the sea during the 20th century, and the pressures placed on this process by the effects of decolonisation and the push for greater control over the allocation of natural resources at sea. The chapter argues that the law of the sea has throughout this period has been shifting further in the direction of *mare clausum* or greater control on the part of coastal States. The chapter therefore argues that the way in which the allocation of enforcement competence at sea has developed has produced a dramatically different maritime law enforcement environment to the one that existed as recently as the 19th century. The chapter has observed that this shift has occurred in an *ad hoc* fashion, since it has been driven in particular by claims to control natural resources. Consequently the

[95] *Medvedyev and Others v. France* ECHR 3394/03 (2010), para.92

allocation of competence at sea is not underpinned by a generally applicable theory. Finally, the chapter has also surveyed the law of the sea and the allocation of jurisdiction in each of the zones. In particular, the chapter has examined the fact that the LOSC codified very limited bases of enforcement jurisdiction on the high seas. The chapter has argued that although the LOSC is considered to be a package deal, not susceptible to piecemeal change, it is at the same time a 'framework' which has been added to in various ways, including the creation of mechanisms for high seas enforcement, and it is perfectly possible, even necessary for states to agree more specific mechanisms for the control of certain activities, which they have done in a number of areas. The chapter argues that these non-LOSC enforcement mechanisms have acquired a level of sophistication that is lacking in the LOSC provisions, in particular that of piracy. This chapter concludes the thesis' examination of the theory of jurisdiction in international law. The thesis now turns in Part II to the historical development of the law of piracy.

PART II

THE CONCEPT OF PIRACY

6 Piracy in Historical Context

As explained in the introduction, the law of piracy is routinely described as being historically settled and firmly established. This chapter and the two that follow will chart the historical development of the concept of piracy from its origins in Roman law up until its codification in the 20th century.[1] It will be recalled that the thesis argument is that piracy is not an international crime, or a crime of universal jurisdiction, but rather that it is a basis of enforcement jurisdiction. As noted in the introduction, discussion of the law of piracy invariably makes reference to its history as a concept, and to claim that piracy is the 'classic example' of an international crime.[2] The argument put forward by the thesis is that these assumptions about the historical concept of piracy are mistaken, and that the reality of the law of piracy is more complex. The thesis argues that piracy was not considered to be a serious crime directly proscribed by international law nor was it subject to universal jurisdiction.

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[1] LA Benton (2005) *Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism* 47 Comparative Studies in Society and History 700; LA Benton (2010) *A Search for Sovereignty: Law and Geography in European Empires 1400 -1900* Cambridge: CUP; LA Benton (2011) *Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction* 23 International Journal of Maritime History 225; D Cordingley (1996) *Under the Black Flag* New York: Random House; P Earle (2004) *The Pirate Wars* London: Methuen; P Gosse (2007) *The History of Piracy* Mineola, New York: Dover Publications; DD Hebb (1994). *Piracy and the English Government 1616-1642*. Aldershot: Scolar Press; C Johnson (1998). *A General History of Pirates*. London: Conway; A Konstam (2008) *Piracy: The Complete History*. DA Petrie (1999) *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail*. Anapolis: Naval Institute Press; M Rediker (2004) *Villains of all Nations: Atlantic Pirates in the Golden Age* London: Verso; J Thomson (1994) *Mercenaries, Pirates, and Sovereigns; State-Building and Extraterritorial Violence in Early Modern Europe* Princeton: Princeton University Press; CM Senior (1976) *A Nation of Pirates: English Piracy in its Heyday* Newton Abbott: David and Charles; N Tarling (1963) *Piracy and Politics in the Malay World: A Study of British Imperialism in Nineteenth Century South-East Asia* Melbourne: FW Cheshire; CH Karraker (1953) *Piracy was a Business* West Rindge, New Hampshire: Richard R. Smith; P de Souza (1999) *Piracy in the Graeco-Roman World*. Cambridge: CUP; DJ Starkey et al. (1997) *Pirates and Privateers: New Perspectives on the War on Trade in the Eighteenth and Nineteenth Centuries*. Exeter: University of Exeter Press; DJ Starkey (1990) *British Privateering Enterprise in the Eighteenth Century* Exeter: University of Exeter Press; M Kempe (2010) '*Even in the Remotest Corners of the World': Globalized Piracy and International Law* 5 Journal of Global History 353; TW Fulton (1911) *The Sovereignty of the Sea* Edinburgh: William Blackwood; PB Potter (1924) *The Freedom of the Seas in History, Law and Politics* New York: Longmans; AP Rubin (1988) *The Law of Piracy* Honolulu: University Press of the Pacific

[2] *Case concerning the Arrest Warrant of 11 April 2000*. (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, p.3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal p.63, 81

This chapter examines four elements within the history of piracy. The first is the treatment of piracy by Roman law and its concern with the acquisition of title to property. The second is the relationship between piracy and its lawful counterpart, privateering. The third is the relationship between piracy, privateering, and the competition between European powers for colonial expansion from the 16th to the 18th century. Finally, the chapter briefly examines the role of 'piracy' once Britain had acquired the position of dominant naval and colonial power.

This chapter examines four particular issues that have held a particular influence on the theorisation of the law of piracy. The first is the concept of piracy in the ancient world and in particular its significance in Roman law. The chapter explains that the fundamental definition of piracy was that pirates were not lawful belligerents, and thus could not acquire or pass title to property taken at sea. The second part of the chapter examines the period of struggle between European maritime States primarily during the approximately 200 years from the discovery of America until the so-called 'Golden Age' of piracy. The chapter argues that during this period privateering was barely distinguishable from piracy, but was a vital tool especially to England and the Netherlands in their struggle to break the colonial dominance of Spain and Portugal. The chapter examines how this struggle for colonial expansion also encompassed the theoretical struggle for the 'freedom of the seas', and how this battle together with policies of colonial mercantilism, fuelled the rise of the problem of piracy. The third part of the chapter argues that, once Britain in particular had succeeded in establishing its empire, the same privateers that had been so useful became a threat as pirates, and so became the subject of a concerted effort of extermination. The final part of the chapter examines how the concept of piracy was subsequently used as a label by the British authorities in its colonial administration.

This chapter makes three main arguments. The first is that the essence of the concept of piracy is that of takings at sea without authority. As Cassese observed the popular conception that piracy was a particularly serious crime is undermined by the fact that exactly the same objective conduct was in fact entirely legitimate and actively encouraged:

> […] when piracy was committed on behalf of a state (and was then called 'privateering'), there was no universal jurisdiction over it. This shows that the objective conduct amounting to piracy – identical to the conduct amounting to 'privateering' was not considered so abhorrent as to amount to an international crime.[3]

This view has also been expressed by Kontorovich who argued that piracy was not condemned merely by reason of its 'heinousness'.[4] It was therefore not the conduct of pirates *per se* that made them criminals, but the circumstances in which they acted (i.e. for private rather than public ends). Furthermore, for long periods of history, though the acts of foreign privateers might have been condemned as 'piracy', insofar as they were performed under public authority they were in fact lawful acts of war which all sides engaged in, and could not have been condemned and prosecuted as crimes by foreign States. The second argument challenges the idea that piracy was universally condemned and has always been the subject of criminal repression by any State. The chapter explains that what we conceive of as 'historical piracy' was largely the effort of one State (Britain) to suppress resistance by its own subjects to colonial rule, scarcely the basis of notions of international crimes and universal jurisdiction. Finally, the chapter also argues that the enforcement jurisdiction over piracy is connected to the concept of the freedom of the seas. This is because while States were able to claim sovereignty over the sea space, they had plenary competence to police them. It was only once this concept had been overturned in the 17th century that it became meaningful to speak of 'piracy jurisdiction'.

6.1 Piracy in the Ancient World

The literature on the subject of the law of piracy frequently draws on references to the treatment of the concept by the ancients, often suggesting that piracy was considered to be a serious crime historically. In fact the reality of the pre-Roman Mediterranean was that 'piracy' was considered all but endemic, and not always treated with condemnation. For example, de Souza notes that in Homer's

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[3] A Cassese *International Criminal Law* (2008) Oxford: OUP, 12

[4] E Kontorovich *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation* (2004) 45 Harv. Int'l L.J., 183

works there is a marked ambivalence towards piracy. Odysseus posing as a Cretan, tells a story in which his character gains riches and social standing as a result of "raiding strange coasts" and taking spoils. De Souza observes;

> [...] both pirates and heroes set off in their long ships to distant shores to plunder and kill. The difference between those who are heroes and those who are pirates seems only to be their god-given fate.[5]

As a consequence he argues that it is difficult to determine "even approximately, where any boundaries between warfare and piracy might be drawn".[6]

The most famous epithet applied to piracy is that of the paraphrased translation of Cicero referring to pirates as the 'enemy of mankind'. Cicero certainly provided much material on piracy.[7] However, in common with subsequent discussions, his references are often by way of analogy or example, such as his use of the term as a pejorative applied in his prosecution of the former consul of Sicily, Gaius Verres.[8] Piracy and robbery did however have a particular significance when it came to the question of property and armed conflict. In his work *de Officiis* (On Duties) Cicero famously argued that there was no obligation to honour a promise to pay a ransom to a pirate because no obligations are owed to those who do not honour them themselves:

> Thus, if you should not pay a price for your life, agreed on with robbers [praedonibus], it is no fraud if you should not perform it, though bound by an oath. For a pirate [pirata] is not comprehended in the number of lawful enemies, but is the common foe of all men

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[5] de Souza *Piracy in the Graeco-Roman World* (n.1), 19

[6] *Ibid*. 20

[7] For some recent discussion of Cicero's treatment of piracy see: HD Gould *Cicero's Ghost: Rethinking the Social Construction of Piracy* in MJ Struett et al. (eds.) *Maritime Piracy and the Construction of Global Governance* New York: Routledge; See also de Souza *Piracy in the Graeco-Roman World* (n.1), 149-85

[8] de Souza *Piracy in the Graeco-Roman World* (n.1), 150-7

> [communis hostis omnium]. With such a man neither faith nor an oath be in common.[9]

This passage referring to pirates as "a common enemy" (often referred to as *hostis humani generis*) demands closer examination. Several entries in the *Code of Justinian* appear to contradict Cicero's terminology.

> Pomponius, On Quintus Mucius, Book II: Those are enemies who declare war against us, or against whom we publicly declare war; others are robbers or brigands [praedones].[10]

And later:

> Ulpianus, Institutes, Book I: Enemies are those against whom the Roman people have publicly declared war, or who themselves have declared war against the Roman people; others are called robbers, or brigands [praedones]. Therefore, anyone who is captured by robbers, does not become their slave, nor has he any need of the right of postliminium.
>
> He, however, who has been taken by the enemy, for instance, by the Germans or Parthians, becomes their slave, and recovers his former condition by the right of postliminium.[11]

Thus, according to Roman law, the point was that pirates were emphatically *not* public enemies. In interpreting Cicero's comments, it is necessary to recall that for the ancient Romans, in sharp contrast with later State practice in Europe, war was a legal state of affairs involving strict formalities and religious ritual. Roman law had several different components. Broadly speaking the law applicable between Roman citizens was the *ius civile*.[12] Another branch of Roman law which governed both citizens and foreigners alike was theorised as being a body of law common to all legal systems, and was called the *ius gentium*

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[9] MT Cicero *On Duties* (W Miller tr.) (1947) London: W Heinemann, Book III, Chap XXIX:10 (pp. 384-5) (Original Latin terms inserted in the text)

[10] *The Civil Law* (SP Scott tr.) (1932) Cincinatti: Central Trust Company, L, 16, 118

[11] *Ibid*. XLIX, 15, 24

[12] Roman law evolved over time and the division between its different fields was not always clear. See A Borkowski *Textbook on Roman Law* (1997) Oxford: OUP, 26-62

(normally translated as the 'law of nations').[13] Another body of law governed the formal relations between Rome and other nations. This body of law was administered by a group of twenty priests called the *fetiales* whose job it was to manage foreign relations. They applied a law called the *jus fetiale* which was a law of treaties. They were therefore called into service when treaties of friendship and alliance were made, when war was commenced and peace was concluded, or when claims were settled. Each of these actions involved religious ceremonial oaths being taken and rituals performed.

Although Cicero was speaking on the question of obligations and duties generally, it seems clear that his discussion of robbers, brigands, and pirates, is simply an observation that criminals, though they may use, and be resisted by, force of arms, are not in a legal state of war. They are 'enemies of all', because they are strictly speaking not the legal 'enemies' of anyone particular. There has been no exchange of oaths with pirates and consequently no reciprocal obligations to observe the laws of war. This observation is not simply academic, because there are legal consequences that flow from this state of affairs. The first and most obvious consequence is that robbers and pirates, not having any lawful right to engage in acts of violence are able to be tried as criminals should they be captured. More complex however is the impact on the legal status of persons and property captured during conflict. Under Roman law, persons and property taken lawfully during an armed conflict were subject to the rules of *postliminium* or 're-entering borders'.[14] The consequences for individuals seem severe. A person taken captive in conflict would lose all of their legal rights, would be deemed to no longer have property rights or to be in contractual relationships. Their rights were however recovered upon their return, either by escaping captivity or by the cessation of hostilities.[15] In contrast, as noted in the above quote from the *Code,* someone taken hostage by robbers or pirates, as even the young Julius Caesar was, does not lose his legal rights. It was

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[13] On the *ius gentium* generally see: S Hall *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism* 12 EJIL, 293 et seq.

[14] J Woltag *Postliminium* in R Wolfrum (ed.) (2012) *The Max Planck Encyclopedia of Public International Law* Oxford: OUP

[15] Borkowski *Textbook on Roman Law* (n.14), 90-91

undoubtedly this legal phenomenon that Cicero was referring to in *de Officiis*. The consequences of the rules of *postliminium* for property, was that if it was lawfully taken, title passed to the captor. If the property was taken outside of an armed conflict, then title did not pass, since the laws of war did not apply. This position is summed up in the maxim *pirata non mutat dominum*. As Wortley noted: "The essence of piracy is that the act is done without State authority and without any other legal justification."[16] The position was also observed by Bynkershoek who noted that:

> It is of interest to define the terms 'pirate' and 'robber', since things captured by these are not considered to have changed masters, and accordingly do not require an application of the principles of postliminy.[17]

As the *Digest* explains:

> Paulus, On Sabinus, Book XVI: The right of postliminium is that of recovering from a stranger property which has been lost, and of restoring it to its former condition; and this right has been established among us and other free peoples and kings, by custom and by law. For when we recover anything that we have lost by war or even outside of war, we are said to recover it by the right of postliminium. This rule has been introduced by natural equity, so that anyone who has been detained unjustly by strangers will recover his former rights whenever he returns to his own country. [...] Persons who have been captured by pirates (piratis) or robbers remain free.[18]

The significance of piracy in Roman law, and the meaning of Cicero's characterisation of pirates as the 'enemy of all' is that pirates are not in a formal state of war. The Roman conception of war was one of an almost contractual relationship which involved formalities and the acceptance of reciprocal responsibilities. Pirates were not in such an arrangement, nor could they be

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[16] BA Wortley (1947) *Pirata non Mutat Dominum* 24 BYBIL 258, 258

[17] C van Bynkershoek (R Magoffin tr.) (1923) *De Dominio Maris Dissertatio* New York: OUP, 98

[18] *The Civil Law* (n.10) XLIX, 15, 19, 2

according to Cicero, because a state of war could only exist between two States, and not between a State and private individuals. To the extent that they were 'enemies' they were enemies of everyone, not in a bilateral legal state of war. As Molloy later observed:

> Though pirates are called enemies yet are they not properly so termed: For he is an enemy, says Cicero, who hath a Commonwealth, a Court, a Treasury, Consent and Concord of its Citizens.[19]

The fact that pirates and robbers were not able to acquire or pass title to the property that they stole was however the most important feature, which would remain in the civil law European legal systems, and in the English Admiralty law, and would eventually inform the development of the law of prize. This would become particularly significant in the Renaissance period, and the struggle between European powers for colonial expansion.

6.2 Privateering and the Freedom of the Seas

Tales of the exploits of pirates are present in all eras and places, and the period between the end of the Roman Empire and the Renaissance was one in which raiding of or by ships was all but endemic.[20] The period which interests the thesis however, is that of European expansion, and the means those States used to compete with one another to secure overseas trade and colonial rule. As noted above, the concept of piracy as a problem of international law only arose when claims to sovereignty over the sea space began to collapse. Rubin in particular notes that the term 'pirate' was hardly used before this period.

However, amongst the historical issues that impact upon the issue of the law of piracy, perhaps the most important is the issue of privateering. This is because from the Middle Ages until the nineteenth century European States were in a near constant state of armed conflict at sea, and those conflicts were largely fought by privateers, private individuals conducting war and seizing the ships and property of the enemy as prize, under the authority of commissions from

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[19] C Molloy (1690) *De Jure Maritimo et Navali or A Treatise of Affairs Maritime and of Commerce in Three Books* London: J Walthoe, 53

[20] Many texts on piracy skip over the period altogether. For an overview see: Konstam *Piracy* (n.1), 23-36

their sovereigns. Privateering was essentially the same conduct as piracy, save for the fact that it was sanctioned by a sovereign. The activity of privateering was however frequently at the margins of legality, on the one hand depending for legitimisation only on letters of marque and submitting takings to a prize court, and at the same time involving relentless violence against other States and their interests though not formally at war, and providing the sovereign with a certain level of 'deniability'. The practice proved invaluable in gaining States such as England and the Netherlands the opportunity to engage in trade and colonial expansion, but eventually outlived its usefulness and had to be brought back under control.

6.2.1 The Laws of War at Sea

In contrast with the Roman views on the legal state of war, during the Middle Ages sovereigns did not hold a monopoly on the use of force on the international stage. The concept of taking action against wrongful acts by another sovereign or state was one of the few bases of a 'just war'. According to this theory war might be undertaken for the purpose of the; "avenging of injuries suffered where the guilty party has refused to make amends'".[21] Sovereigns would also be prepared to use force short of declaring war in the form of *reprisals.*[22] A reprisal is now defined as an illegal act adopted by one State in retaliation against another State for the commission of a previous illegal act,[23] but the origin of the word reprisal is taken from the French, meaning to 'take back', so that where a foreign power or its subjects has taken unlawful action to seize the property of the sovereign or its subjects, a sovereign might authorise private persons to take action to recover either those goods or other goods to their value, either from the guilty party or from his countrymen. This right of private reprisal would eventually form the basis of the commissioning of privateers, whose authorisation was known to English law as 'letters of marque and reprise'.[24]

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[21] M Shaw (2008) *International Law* Cambridge: CUP, 1119

[22] G Clark (1933) *The English Practice with Regard to Reprisals by Private Persons* 27 AJIL 694

[23] Shaw *International Law* (n.25) 1129

[24] On the origins of the law relating to private reprisals see G Clark (1933) *The English Practice with Regard to Reprisals by Private Persons* 27 AJIL 694

The laws of armed conflict on land have developed in such a way as to be very restrictive where property is concerned. As O'Connell and Green observe, belligerents are generally prohibited from taking private property, except in the case of absolute military necessity, and even then with an obligation to restore or compensate.[25] At sea however, the laws of war developed in a rather different direction. The objective of war at sea is to disrupt the enemy's lines of supply, and as such the interference with, and seizure of, enemy vessels or those vessels assisting the enemy has always formed part of the law of war. As O'Connell observes, this is not a "disorderly" activity, and "is a matter of precise rules and of judicial condemnation by prize courts".[26]

Under the laws of war at sea, warships have the right to seize vessels belonging to, or trading with the enemy and to seek their condemnation as prize. Vessels and their cargos that are seized as prize must be submitted to a prize court, which is a national court. Historically in English law, the High Court of Admiralty would determine prize sitting in prize sessions. Although there were proposals for the establishment of an international prize court towards the end of the 19th century, this never came to pass.[27] Neutral vessels may be seized if they are assisting the enemy, or are carrying 'contraband' which is the term used to describe cargoes destined for the enemy war effort. Belligerent parties are also able to establish blockades and exclusion zones, violation of which would also lay neutral vessels open to seizure. As lawfully authorised belligerents, privateers were permitted to interdict and seize vessels by force in accordance with the laws of armed conflict. It was however clearly a condition of these rights that the privateer held a valid commission for a sovereign power capable of authorising belligerency, and to bring vessels that they had seized for condemnation as prize.

The consequences of committing belligerent acts of attacking and seizing other vessels without a valid commission were of course serious. A privateer without a

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[25] LC Green (2000) *The Contemporary Law of Armed Conflict* Manchester: Manchester University Press, 165-166

[26] DP O'Connell (I Shearer ed.)*The International Law of the Sea Vol. II* Oxford: Clarendon, 1112

[27] See generally: HB Brown (1908) *The Proposed International Prize Court* 2 AJIL 476; CN Gregory (1908) *The Proposed International Prize Court and Some of its Difficulties* 2 AJIL 458

commission, one who exceeded his commission, and one who failed to declare takings as prize, was an unlawful belligerent and guilty of piracy. As Bynkershoek observed: "those who rob on land or sea without the authorization of any sovereign, we call pirates and brigands."[28] The reality was that the dividing line between a privateer and a pirate was sometimes a fine one, and as Benton has observed, privateers therefore needed not only to be expert sailors and soldiers, but lawyers too:

> The legality of their actions depended upon open and conflicting interpretations of whether the timing, location and targets of raids fell within the terms of often dubious commissions. Not surprisingly, both captains and common sailors cultivated a certain expertise in representing their commissions as legitimate and the assets they seized as legal prizes.[29]

The varying fortunes of those who sought to make their fortunes at sea could perhaps be illustrated by a comparison between two almost contemporary figures. The first was William Kidd, commissioned as a privateer in 1695 with letters of marque to attack the French. Finding his commission less than lucrative however, he turned to commerce raiding, but made the mistake of attacking vessels belonging to the Mughal, protected by the British East India Company. Kidd was arrested, taken to England where he was tried, found guilty and hanged for piracy in 1701. By comparison Henry Morgan commenced his career as a buccaneer attacking Spanish possessions in the Caribbean, and gained notoriety for the sack of Panama, an act he performed while England was at peace with Spain. Morgan was captured and taken back to England in 1672, but when Spain entered the war England was engaged in against the Dutch, Morgan was released and appointed deputy governor of Jamaica, and received a knighthood. These examples serve to illustrate the fact that piracy was not itself a violation of the laws of war or an international crime, because it was not the

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[28] C van Bynkershoek (T Frank tr.) (1930) *Quaestionum Juris Publici Libri Duo:Volume Two The Translation* Oxford: Clarendon Press, 98

[29] Benton *Legal Spaces of Empire* (n.1), 707

conduct *per se* that was criminalised, but the fact that it was performed without authority.

6.2.2 Privateering as a Method of Colonial Expansion

As Bederman has observed, the first systematic use of privateering was by England and the Netherlands:

> The governments of England and the United Provinces of the Netherlands were among the first to inaugurate the extensive use of privateers, especially in their respective challenges to the Spanish and Portuguese colonial empires in the 16th and 17th centuries, and then in their own naval rivalry of the Anglo-Dutch Wars [...][30]

During the early 16th century first France, then England launched attacks against the 'Spanish Main'.[31] Spain had designated not only the islands of the Caribbean and the continental American territories as their own, but also the entire ocean space, which it had divided with Portugal under the Treaty of Tordesillas by means of drawing a line on the map separating their respective spheres of influence. English and French privateers were attracted to the region by the promise of intercepting the Spanish treasure fleets bound for Europe, and their policy of attacking Spanish interests found its most memorable expression in the phrase 'no peace beyond the line'.[32] France and Spain had been 'intermittently' at war with one another from 1495 and the first successful raid of Jean Fleury in 1523 sparked off a series of attacks by French *Corsairs* which by 1537 had reduced the Spanish royal income from American treasure by half.[33] French attacks were not confined to the treasure fleets however, and they also raided ashore sacking Havana, Santiago de Cuba, Cartagena, and San Juan in Puerto Rico, amongst others. Attacks by the French were only the beginning and by the 1560s English raids by famous privateers such as Hawkins and Drake had turned into open warfare. Peace was eventually concluded under the reign of

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[30] DJ Bederman *Privateering* in R Wolfrum (ed) (2012) *The Max Planck Encyclopedia of Public International Law* Oxford: OUP, 476

[31] For a general history of the period see in particular: Konstam *Piracy* (n.1), 37-72 and Gosse *History* (n.1), 104-15

[32] Gosse *History of Piracy* (n.1), 141

[33] Konstam *Piracy* (n.1), 46

James I of England and VI of Scotland in 1604, but Spain remained at war with the Dutch, who had been in revolt against Spanish rule since 1572, and whose war against Spain had also been primarily pursued by privateers, including the famous raids on Spanish America by Piet Heyn in 1626 and 1627. The use of privateers as 'piratical imperialism'[34] was only a part of the strategy however.

6.2.3 The Role of the Doctrine of Mare Liberum

In order to break the Spanish and Portuguese claims to monopoly over East Indian and American trade, other European States needed to assert the freedom of navigation, the doctrine of *mare liberum*. One of the particular problems with the concept of a historically static and firmly established law of piracy is the significance of the claim to the freedom of the high seas. On the one hand, the idea of the universal repression of piracy at sea presupposes that the concept of the freedom of the high seas has always been accepted. The reality is very different, however. The argument for the freedom of the high seas was in reality proposed by England and the Netherlands as justification for their challenge to the dominance of Spain, and in particular to further their own claims to trade and ultimately colonial expansion. As Zemanek observes, it is doubtful whether Grotius himself was actually in favour of the absolute freedom of the high seas, and in fact he soon found himself actually having to argue against it when it was offered as a justification by England against the Netherlands. In fact England and the Netherlands were as guilty of colonial mercantilism as anyone once Spain's dominance had been broken, and these policies themselves contributed in no small part to the persistence of the problem of piracy.[35]

After the fall of the Roman Empire it became common for European States to claim sovereignty over areas of the sea adjoining their coasts. This was in part in an effort to control trade, but also to afford security from piracy and attacks from the sea. England claimed sovereignty over most of the sea space around it, including in the North Sea and the English Channel, Venice claimed sovereignty over the Adriatic, and the Baltic Sea was also subject to sovereign claims. After

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[34] Earle *Pirate Wars* (n.1), 93

[35] K Zemanek (1999) *Was Hugo Grotius Really in Favour of the Freedom of the High Seas?* 1 Journal of the History of International Law 48, 56

the discovery of America in 1492, Spain and Portugal laid claim to ocean spaces both in the Atlantic and Pacific in an attempt to prevent other European States from exploring and trading with the new territories. This was fiercely resisted first by England, and then after its independence, the Netherlands as well.[36]

The most famous advocate of the freedom of the high seas was Elizabeth I In a famous argument with the Spanish ambassador Mendoza she relied on the Roman maxims contained in the *Digest* stating that the sea cannot be subject to ownership.[37] It was Portuguese attempts to exclude Dutch trade in the East Indies that provoked the most famous argument for the freedom of the seas, and when in 1605 a Dutch merchant vessel without a commission seized a Portuguese ship, the *Santa Catarina*, in the Straits of Malacca, Hugo Grotius was commissioned to prepare a legal argument in defence of the taking. [38]

Grotius sets out his argument concerning the dividing line between what is unlawful and what is lawful at sea, in terms of piracy and just action by way of prize and booty. He argues for the freedom of the seas, and argues that the prevention of other nations from having access to the seas and its trade the Portuguese actions are criminal and that the Dutch were justified in taking reprisal action accordingly.[39]

The argument for the freedom of the seas had a number of consequences. As Tambaro noted the claims to exercise sovereignty over the seas, in particular the North Sea, Baltic and parts of the Mediterranean, as well as the Spanish and Portuguese claims were in no small part made in order to effectively police those areas, to protect the coasts of the nations concerned, and to protect their

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[36] Gosse *History of Piracy* (n.1), 141

[37] Potter *Freedom of the Seas* (n.1), 55

[38] His arguments for the forfeiture of the *Santa Catarina* were set out in his first major work completed in or around 1605 and entitled *De Iure Praedae Commentarius*. *De Iure Praedae* was not published at the time, and remained hidden in the archives of the publishers until it was rediscovered in 1864. Only a part of the book, the 12th chapter entitled *Mare Liberum* was published anonymously in 1609. These works would in due course form the basis for Grotius' most famous work, *De Iure Bello ac Pacis*.

[39] H Grotius (GL Williams tr.) (1950) *De Iure Praedae Commentarius* Oxford: Clarendon Press

maritime trade.[40] The shift from control over the seas to a model based on the freedom of the high seas raised questions over who was able to exercise control at sea, and it is only in the context of the freedom of the seas that the problem of the pirate takes on its familiar dimensions, since jurisdiction over 'piracy' in sea spaces subject to sovereign claims was in reality no different to robbery on land. The other problem was that the States that sought to establish the 'freedom of the seas' were in reality not concerned with any such thing. As Potter observed:

> It will be recalled that Grotius was chiefly concerned in the trade to the Indies, that the Dutch were interested, in the seventeenth century, not so much in a right of navigation but in a right of entry or a right to trade. [...] the problem of the freedom of the seas was involved with the mercantilist systems of colonial trade, the monopolies granted to trading companies, and the navigation acts, port discriminations, and so on, characteristic of that period.[41]

6.2.4 Colonial Mercantilism and its Consequences

Spain's attempts to control its territories in the Caribbean proved disastrous. Its policies included attempting to prevent unofficial colonies being established, such as on the island of Hispaniola. The result was that those colonies that did become established both by Spanish subjects, and by English, French and Dutch colonisers, were hostile to Spanish interests. During the 17th century the 'Buccaneers of the Caribbean',[42] with particular support from France and England, continued to wage an unofficial war against Spanish colonial interests, a war that was also extremely profitable for the rapidly growing American colonies of those States.

The reason why the struggle for colonial expansion between European States was so violent was because States were not content with acquiring colonial territory and then trading with one another. For centuries the prevailing

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[40] G Tambaro *Pirateria* Il Digesto Italiano, 900, cited in Harvard Research in International Law *Draft Convention on Piracy with Comments* reproduced in: (1935) 26 AJIL Supplement 739, 765

[41] Potter *Freedom of the Seas* (n.1), 83

[42] The most famous, and considered the most authoritative work on the Buccaneers is that of AO Exquemelin *The Buccaneers of America* (1969) London: Folio Society

economic policy had been mercantilist, the practical effect of which was that the colonial territories were to be worked for the benefit of the metropolitan States back in Europe. Colonial territories were not permitted to trade with other States and vice versa. Thus the opening up of trade to newcomer States in the Americas and East Indies could only be achieved by force. That force was not first and foremost exerted by States themselves, but by the commercially minded privateers and pirates who, as well as plundering, were also engaged in illegal smuggling and trade in violation of the proclaimed State monopolies. This was not, however, a lesson that the new colonial powers learnt themselves. As Zemanek observed:

> Dutch practice towards Asian sea-borne trade and towards European competitors proved not a whit more liberal than Portuguese custom, which in many respects was even copied by the "Company". This was surely a long way off the ideas of the Mare Liberum.[43]

In fact the theory of *mare liberum* was scarcely put into practice, as O'Connell observed: "The freedom of the seas remained ambiguous until [the 1840s] because the practice of mercantilism tended to discount it." Zemanek also notes that the 17th century was "not a propitious time for the propagation of liberal overseas trade." He observes that the "rise of the centralized national (absolute) state made the made the financial and economic strength of the state a matter of great importance", and which in turn resulted in mercantilist policy. Gosse[44] and Zemanek separately observe that England which was by this time emerging as the leading merchant and sea power of the period passed a series of navigations laws starting in 1650 which prevented foreign trade with its colonies, policies which would result in conflict in particular with the Netherlands. The English Navigation Acts were only repealed in 1849.

Mercantilist policies had the effect of encouraging piracy since the effect in the colonies was that the raw materials produced there were sold into a closed market where prices were kept artificially low, while other goods were difficult

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[43] K Zemanek (1999) *Was Hugo Grotius Really in Favour of the Freedom of the Seas?* 1 Journal of the History of International Law 48, 56

[44] Gosse *History of Piracy* (n.1), 176

to obtain, and where they were imported from Europe were also heavily taxed. At the same time trade with neighbouring colonies belonging to foreign powers was prohibited. 'Piracy' did not have to involve the plundering of gold and valuables to be extremely lucrative. Simply intercepting any kind of merchant vessels and stealing their cargo was vital to the economies in particular of the east coast of North America, and consequently engaged in and supported by local administrations.

The claims to the freedom of navigation by England and the Netherlands proved effective doctrinal tools for the opening up of trade and colonial expansion in the face of Spanish domination. That process was assisted by Spanish mercantilist policy. There were however several problems that remained unresolved. The first was that the doctrine of the freedom of the seas left open the question of who had the right and responsibility to police the ocean space. A second problem was that those States who had succeeded Spain and Portugal as colonial powers continued to pursue the same economic policies that had proved so destructive. Finally, the 'unleashing' of private violence in the form of privateering was to prove as dangerous to the new powers as it was to Spain and Portugal.

6.3 The Consequences of Privateering

The cycle of conflict and peace between the European powers brought about alternating peaks and troughs of demand for privateers. Since privateers for the most part could not simply give up work during peacetime, they frequently continued their activities without licence, causing sharp increases in piracy during the lulls in conflict. This problem was not lost on many commentators at the time, as one observed:

> It is the opinion of every one this cursed trade [privateering] will breed so many pirates that, when peace comes, we shall be in more danger from them than we are now from the enemy.[45]

[45] Cited in Earle *Pirate Wars* (n.1), 159

As the balance of power between the European powers, and in particular the British Empire began to take shape, the same privateers who had been so useful in breaking the colonial power of Spain, now posed a threat to the new order.

6.3.1 The Barbary Corsairs.

The difficulty in drawing a clear line between piracy and privateering is nowhere better illustrated than in the case of the so-called 'Barbary Corsairs'. The origins of North African piracy are uncertain, though Gosse notes that the conflict is at least as old as the Crusades. The Corsairs were boosted by the reconquest of Spain and the expulsion of the Spanish Moors to North Africa, and consequently became progressively more active during the 16th century, and by the 17th century they were able to launch raids against England and northern Europe. North Africa would become a veritable pirate economy, and grew extremely wealthy. It would also attract renegade Europeans who brought with them more advanced skills of shipbuilding and sailing. A substantial proportion of Gentili's advocacy related to takings by the Barbary Corsairs.[46]

The problem however was that the Barbary States became so powerful, and were protected to varying degrees by the Ottoman Empire, that they were in fact recognised as such by many of the European powers, who sent consuls and negotiated treaties with them. In fact, many European States sought to negotiate arrangements by which they paid tribute in return for protection for their shipping, in the hope of gaining a commercial advantage over their competitors, a practice that only made the problem worse. As such the Barbary Corsairs were in effect *privateers* and their takings lawful. The problem was illustrated by a case in 1680, when Sir Leoline Jenkins, as a Privy Councillor was asked to provide advice to the Crown concerning a vessel taken by an "Algerine warship" and wrecked on the coast of Ireland. In spite of the fact that there was no declared war between England and Algiers Jenkins argued that the crew should have "the privileges of enemies in open war".[47] Bynkershoek also argued that the Barbary States were not piratical stating that:

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[46] GHJ Van der Molen(1968) *Alberico Gentili and the Development of International Law* Leiden: A.W. Sijthoff, 175-6

[47] Cited by Rubin *Law of Piracy* (n.1), 67-8

> I do not think that we can reasonably agree with Alberico Gentili and others who class as pirates the so-called Barbary peoples of Africa, and that captures made by them entail no change in property.[48]

In the event it was not until North Africa was invaded by France in the 19th century that the Barbary Corsairs were finally put out of business, by which time privateering had also fallen from favour amongst the European powers.

6.3.2 The 'Golden Age' of Piracy

At the time of the accession of James I to the English throne, England had become known as 'a nation of pirates'.[49] Part of his strategy for dealing with the problem had been to step back from Elizabethan freedoms of navigation and fishing, to reassert sovereign claims to the seas around Britain, and to clamp down on piracy. However, the turning point, and the most famous era of piracy, was to come 100 years later, at the beginning of the 18th century. The period from around 1715 to 1725 is referred to by historians as the 'Golden Age' of piracy.[50] During this period a combination of events and processes dramatically reduced the incidence of piracy, and brought an era to an end. This is one of the best documented periods of the history of piracy, and it exerted a considerable influence on the popular imagination down to the present day.[51] One of the most significant texts describing piracy during this period is the work of one Captain Charles Johnson, long thought to have been a work of fiction, and also long misattributed to Daniel Defoe.[52] In fact historical research has since proven the work to be extremely accurate, and it is thanks to Johnson that the pirates Avery, Teach (Blackbeard), Bonnet, Rackham, and Kidd are so famous.

The significance of the Golden Age is that during this period the British Government took the decision to stamp out the problem of piracy. There are a

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[48] Bynkershoek *Quaestionum Juris Publici* (n.29), 99

[49] CM Senior (1976) *A Nation of Pirates: English Piracy in its Heyday* David & Charles: Newton Abbott

[50] Earle *Piracy Wars* (n.1), 163

[51] "It has been said, and there seems no reason to question this, that Captain Johnson created the modern conception of pirates". D Cordingley *Introduction* in C Johnson (1998) *A General History of the Robberies and Murders of the Most Notorious Pirates* London: Conway, VIII

[52] *Ibid.*

number of reasons why this took place at this particular point of history. The first was the way in which piracy had become a serious threat to the British Empire. The colonies of North America had grown rich from trade and privateering in the Caribbean, and had become expert privateers, and the cities of the east coast, particularly Boston, Philadelphia, and New York, were well established business centres in both the funding and organising of privateer expeditions, and in welcoming the prizes and plunder that those expeditions brought back.[53] By the late 17th century these expeditions ventured via the Pacific and preyed on the coastal trade in India, and also in the Red Sea. No doubt partly prompted by this highly organised piracy, the English government was increasingly turning against the idea of privateering as Earle observed:

> Ever since the Treaty of Madrid had been signed by England and Spain in 1670, in which it was agreed that peace in Europe should in the future also mean peace in the West Indies, there had been a definitive change in the attitude of the English government towards piracy in American waters. No longer would this be openly (or even covertly) condoned. This change reflected a growing belief in mercantile and shipping circles that piratical imperialism had served its purpose and that it should henceforth be the duty of government and the navy to eradicate piracy and so make the seas safe for trade and shipping.[54]

One of the problems was that privateers often held foreign commissions for their activities, and put commercial interests before national allegiance. A further step towards the suppression of 'piracy' was the ending by France of the issuing of commissions to foreigners in 1684. The War of the Spanish Succession in 1702 brought about a renewed demand for privateers, but many English privateers took Spanish commissions during the war since they were able to seize more prizes, and make more money by doing so.[55] In April 1713, the signing of the Treaty of Utrecht brought an end to the War of Spanish

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[53] Gosse *History of Piracy* (n.1), 206

[54] Earle *Pirate Wars* (n.1), 135

[55] Gosse *History of Piracy* (n.1), 141

Succession, and all outstanding letters of marque were cancelled, as many as 6,000 by the British government alone.[56] The ranks of the pirates were multiplied by unemployed privateers, and the need for the suppression of their activities increased.

An aspect of the problem of piracy during this period that is given detailed treatment in particular by Rediker is the fact that by the turn of the 18th century as well as trade with India and the East Indies, the Atlantic in particular had effectively become an economic system.[57] He notes that England's trade tripled between 1660 and 1700, amounting to a 'commercial revolution'. That commerce was based on the exploitation of the colonies, in particular in slaves from Africa and commodities from the Americas. This revolution came at a time of massive human upheaval, not only for the displaced Native Americans and enslaved West Africans, but also in England where successive Enclosure Acts had sent thousands of disenfranchised labourers into the cities in search of work.[58] The transatlantic trade depended on oceangoing vessels, and the sailors who operated them. Whilst those sailors were often highly skilled however, they worked in a labour market subject to oversupply, their wages and rations were meagre, and the living conditions and discipline at sea were brutal.

The motivation behind Golden Age piracy appears to have been above all rebellion against exploitation. Pirate ships during this period were said to be run on democratic lines, and were well manned and supplied in contrast with merchant vessels. When merchant vessels were captured their crew were not ill-treated (in contrast with previous eras) and in fact were invited to join the pirates. The same was not necessarily the case for ship's captains however. Pirates, often former merchant sailors themselves would enquire of the captured crew whether their captain had treated them badly, and in the event of an affirmative answer, he might well be tortured and murdered. The equality observed amongst pirates probably extended ashore to places such as Madagascar, where pirates found refuge and formed communities, giving rise to

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[56] Konstam *Piracy* (n.1), 152

[57] Rediker *Villains of All Nations* (n.1), 37

[58] *Ibid.* 22

legends of 'pirate republics'. This rejection of their allegiance was manifested in various ways, none more obvious than the design of their own flags, the skull and crossed bones on a black background being just one variation on a theme. Our familiarity with the idea makes it difficult to imagine what a symbol of defiance this must have seemed at the time. The expression of rebellion even extended to the naming of vessels in support of the Jacobite Rebellion in 1715-16 such as the *King James*, the *Royal James*, and most famously, the name of Blackbeard's ship the *Queen Anne's Revenge*.[59] Far from being the 'villains of all nations' or the enemies of the human race, the most famous of these pirates were British subjects. Cordingley notes that "the pirates who terrorized the Caribbean from around 1715 to 1725, and used the island of Providence in the Bahamas as a base, were overwhelmingly from the English-speaking nations."[60] Of the 19 men and two women described by Johnson in his *General History* all were British subjects.[61]

In the effort to understand the significance of the 'war against piracy' during this period it has also been argued that the demise of the privateer, and of the pirate, was part of a bigger picture in which European States turned away from the authorisation of privatised violence, towards the consolidation of the means of coercion in the hands of the State. This thesis is advanced by Thomson, who has examined the way in which not just privateers, but also the use of mercantile companies and mercenaries also fell from favour during the 18th century. As Thomson observes:

> [...] there was nothing new about piracy in the early European state system. What was new was not only the scale and scope of the piracy that emerged in the seventeenth century but the political nature of organized piracy. In several instances, groups of pirates formed communities or quasi-states based on the democratisation of politics and violence. This organized piracy presented a threat not only to

[59] Earle *Pirate Wars* (n.1), 170

[60] Cordingley *Under the Black Flag* (n.1), 15

[61] Johnson *General History* (n.1)

> property but to the developing national state and its way of organizing politics and society.[62]

Furthermore:

> At this time individuals had particularly good reasons for resisting the nascent European national state. The judicial system was rapidly turning into a mechanism for defending property and for producing and disciplining labor. Capital punishment was expanded with a vengeance.[63]

Thomson notes in particular that:

> France applied the death penalty to almost any form of larceny, while in England the number of crimes punishable by death increased from fifty in 1689 to two hundred in 1800. Again these crimes were mostly some form of theft. By 1800 "at least in theory, English property was protected by the most comprehensive system of capital punishment statutes ever devised."[64]

The ability of the pirates to damage the Atlantic economy was substantial, since the distances involved and the lack of an effective opposing force meant that they could attack at will. Nowhere was that better illustrated by mutinies and piracy against the West African slave trade by Howel Davis and Bartholomew Roberts during the 1720's during which period they raided the slave ports and destroyed any vessels that stood in their way, having converted some into pirate ships.[65]

The response to this open rebellion was not confined to the military expeditions sent to track the pirates down. It would involve a demonstration of the power of the State. The first step was to reform the law relating to piracy. At the end of the 17th century prosecutions for piracy under English law could only take place in England. As a result acts of piracy were frequently not prosecuted. New Acts

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[62] Thomson *Mercenaries, Pirates and Sovereigns* (n.1), 45

[63] *Ibid.* 46

[64] *Ibid.*

[65] Rediker *Villains of All Nations* (n.1), 138-43

of 1695 and 1700 changed the rules so that piracy was subject to trial by the common law, and prosecutions could be undertaken in the colonies.[66]

The treatment of captured pirates was also intended to set an example. Pirate trials frequently involved whole crews being tried, as many as 80 at a time. The proceedings, which were effectively show trials were also presided over by as many as six or seven judges. The proceedings were short since the pirates did not have legal representation and were often unable to mount a defence. The punishment of the convicted pirates was also designed to send a message to others. Hangings, again in large numbers, symbolically at the water's edge, were followed by the public display of the bodies in view of passing ships.[67] The punishment of pirates was also accompanied by a propaganda campaign in which pirates were described as "sea-monsters", "savage beasts", and "vermin" in a process that Rediker describes as vilification and demonization, and pamphlets were produced and distributed detailing the pirates' crimes.[68] Thus the contemporary imagination of pirates as terrible criminals was largely invented by a campaign of suppression lasting little more than 10 years. Ironically, far from being a problem of international law, this campaign was waged by a colonial power against its own subjects.

6.3.3 The Declaration of Paris and the End of Privateering?

Privateering was eventually outlawed by the Declaration of Paris, a side agreement to the Treaty of Paris, the peace treaty ending the Crimean War in 1856. The Declaration banned privateering and established the principle of "free ships make free goods" prohibiting the seizure of neutral shipping in time of conflict. Although initially binding only on the signing powers, within 5 years it had attracted over 40 ratifications,[69] and is today considered to represent

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[66] *An Act for the More Effectual Suppression of Piracy* 11 & 12 William III c.7 (1700)

[67] Cordingley *Under the Black Flag* (n.1), 228-9

[68] Rediker *Villains of All Nations* (n.1), 130

[69] SC Neff *A Short History of International Law* in M Evans (ed.) (2006) *International Law* Oxford: OUP, 41.

customary law.[70] Although the United States did not sign the Declaration, the US government offered to do so at the outbreak of the American Civil War when the Confederacy licensed privateers to fight against the Union. In the event European States would not allow the US to retrospectively prohibit privateering on the part of the Confederacy, and the US never became a party. Nevertheless the use of privateers by States was all but concluded. Privateering would however make a return in the shape of insurgent vessels during the struggles for independence during the 19th century, a subject that will be addressed in Chapter 7 below.[71]

6.4 Piracy and the British Empire

By the middle of the 19th century, the British Empire had grown into the largest empire in the world, and not by coincidence, Britain was also the unopposed dominant maritime power. Having effectively created a powerful concept of piracy as a serious crime, British authorities could not resist the temptation to continue to use it to justify their colonial rule. Rubin in particular has argued that the theory of 'universal jurisdiction' over piracy did not in fact coalesce until the height of the British Empire, at which point Britain was the only State capable of asserting it.[72] This theory of control was based not on the idea of *mare clausum* that Britain in particular had sought to overthrow, but on a freedom of the seas that was maintained by British naval power. As O'Connell observed, "the absolute freedom of the seas was relatively short-lived, and coexistent with the naval supremacy of Great Britain."[73] As Rubin notes, at the height of the British Empire following the Napoleonic Wars the Royal Navy had acquired a dominant position on the high seas, and that it is consequently difficult to determine whether activities pursued by Britain were examples of "statements of international law acquiesced in by other states" or pure

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[70] Green *Contemporary Law of Armed Conflict* (n.29), 168. Some authors argue that since the United States never became a party to the Declaration, it still retains the right to commission privateers. The argument is beyond the scope of the thesis.

[71] See Section 7.3.2 below.

[72] Rubin *Law of Piracy* (n.1), 342

[73] DP O'Connell (I Shearer ed.) (1982) *The International Law of the Sea Volume I* Oxford: Clarendon, 1

unilateralism.[74] The consequences of this analysis are that, it must remain doubtful whether the actions of Britain alone could give rise to special rules of jurisdiction at sea. Furthermore, to the extent that such rules did become settled, the question arises whether they could have survived the process of decolonisation, and the loss of imperial power.

6.4.1 The British East India Company

The use of the term 'pirate' as a label justifying foreign intervention appears to have been used most extensively by the British East India Company. Al Qasimi has argued that the term was used towards the end of the 18th century in order to justify forcible action to gain commercial advantage in the Arabian Gulf:

> The competition that the Company faced became increasingly tougher and a way had to be found if the Company was to continue trading in the Gulf [...] Its obvious intention, in face of the increasing competition, was to use 'protection' as an excuse to employ the force of the Bombay Marine to squash the competitors. Instead of peaceful trade, it became gun-boat trade.[75]

By applying the term to foreign vessels, they were able to secure the effects of *mare clausum* whilst portraying their activities as law enforcement.

> Their eventual demand that all ships trading in the Gulf should have British 'passes' suggests that they considered themselves the masters of the Gulf waters and were of the opinion that trade should be conducted there solely for their benefit [...] Indeed, to the British the French ships that attempted to approach the Gulf were 'privateers', while the Arabs there were 'pirates'.[76]

The policy was also deployed in the East Indies in an effort to control trade.[77] Rubin observes however, that the use of the terminology of piracy during this period was as a pretext for the interference with foreign shipping at sea, not as a

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[74] Rubin *Law of Piracy* (n.1), 201

[75] SM Al-Quasimi (1986) *The Myth of Arab Piracy in the Gulf* Beckenham: Croom Helm, 27-28

[76] *Ibid.* 31

[77] N Tarling (1963) *Piracy and Politics in the Malay World* Melbourne: F.W. Cheshire, 14; See also Rubin *Law of Piracy* (n.1), 220-6

basis on which to conduct criminal prosecutions, (in other words enforcement, not prescriptive jurisdiction) and that in fact actual instances of trials based on universal jurisdiction were in reality almost non-existent.[78] By characterising the exercise of colonial power as an (extensive) claim to enforcement jurisdiction the same result was achieved as earlier claims to *mare clausum*, but in a way that was consistent with the doctrine of the freedom of the seas which had given Britain the ability to extend its colonial power in the first place. In this sense there remains more than an echo of Gentili's use of claims to jurisdiction as a means of reconciling the exercise of authority with the freedom of the seas.[79]

6.4.2 The Limits of Colonial Authority over Piracy?

Rubin offers the example of the *Huáscar* incident to illustrate how the British imperial law of piracy was ultimately limited. This incident involved the Peruvian warship the *Huáscar* which, on 6 May 1877, during the Peruvian civil war, was taken over by its mutinous crew and set sail from Callao, a port north of Lima. The Peruvian government almost immediately disowned the actions of the insurgents and called for the capture and return of the ship.[80]

On 10 and 11 May, the *Huáscar* detained 2 British ships first taking an amount of coal, which apparently belonged to Peruvian owners, and also taking on board 2 Britons apparently to serve in their professional capacity (one being an engineer). The *Huáscar* subsequently put into port in Chile. The status of the ship and the insurgents was the subject of correspondence between the Peruvian and Chilean governments concerning whether a mutinous vessel could be guilty of piracy, and ultimately coming to the conclusion that Chile should not involve itself with what was an internal matter for Peru. On 29 May, the *Huáscar,* having set sail again was fired upon by the Royal Navy ships *HMS Shah* and *HMS Amethyst* commanded by Rear-Admiral de Horsey whilst in Peruvian waters. The *Huáscar* escaped and the following day surrendered to the

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[78] Rubin *Law of Piracy* (n.1), 220-6

[79] See Section 5.1.2 above.

[80] Rubin *Law of Piracy* (n.1), 259

Peruvian authorities. Defending his actions, de Horsey claimed that the status of the ship was "that of a pirate".

The fact that the Royal Navy had attacked a Peruvian ship in Peruvian waters however, even though under the command of insurgents, was the subject of condemnation by the Peruvian government, which the foreign minister called a "flagrant violation" of Peru's sovereignty.[81] The British government defended its actions against Peruvian criticism. Lauterpacht took the view that the *Huáscar* "was justly considered as a pirate",[82] but as the end of the 19th century approached, this incident, also known the Battle of Pacocha, may in retrospect have marked the passing of the ability of an imperial power to unilaterally define the law of piracy.

In the final analysis, it could be argued that British colonial rule had established a rule of customary international law that piracy was a crime under international law subject to universal jurisdiction. It could equally be questioned whether assertions of irresistible naval power in the colonial setting absent any real State practice in terms of the actual prosecution of significant numbers of 'pirates', could establish such a rule.

Conclusions

The chapter has made several observations concerning the history of piracy. First, it has explained that the legal significance of piracy from Roman times was the fact that 'pirates' were not lawful belligerents, and consequently were not able to acquire or alter title to property. This issue became increasingly significant with the use of privateers, often outside declared states of war. The chapter has observed that the distinction between piracy and privateering was often a very fine one, and effectively turned on the possession of a valid commission.

The chapter has also examined how the most extensive use of privateers was by England and the Netherlands against Spain and Portugal reaching its peak with

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[81] Cited in Rubin *Law of Piracy* (n.1) 264

[82] HA Lauterpacht (ed.) (1947) *Oppenheim's International Law Volume 1 – Peace* London: Longman, 561

the so-called Buccaneers of the Caribbean, in an effort to break their monopoly on colonial power. In this endeavour, they also relied on the doctrine of the freedom of the seas in opposition to Spanish and Portuguese claims to sovereignty over the ocean space. This policy ultimately succeeded in making Britain the preeminent global power, but Britain continued to pursue the same mercantilist policies that had proven the downfall of Spanish colonial policy, and began to fall victim to the non-state violence that it had itself unleashed.

In spite of the fact that the 'Golden Age' of piracy is the best known period of the history of piracy, and the fact that it undoubtedly forms the basis of the contemporary image of the pirate, historians such as Earle and Rediker in particular have illustrated how this period was more complex than it appears. 'Piracy' in the early 17th century was above all a conflict between the British government and its own subjects. There are two particular consequences of this analysis. First, piracy was not a shocking 'heinous' crime subject to repression by virtue of its seriousness. Its illegality stemmed from the fact that it was effectively unauthorised belligerency, and as a result was essentially robbery at sea. Secondly, the most famous era of piracy was not a story of international criminals who every State was obliged to capture and punish. It was above all the story of Britain consolidating colonial rule over its own subjects, scarcely the material from which international criminal law and universal jurisdiction are made. Having examined the issues that influenced the concept of piracy, the thesis now turns to an examination of the development of the legal theory relating to piracy, and the concept of piracy as a crime.

7 The Development of the Law of Piracy

This chapter continues the analysis of the history of piracy, this time focusing in on the legal treatment of piracy in terms of its definition as an offence and the jurisdiction over it, both enforcement and prescription. The chapter examines three different aspects in turn. The first is the history of the development of the law of piracy first in England, and then in the United States. This examination is undertaken because it was in these two legal systems that the law received the most analysis, and they were to have the most impact on the future development of international law. This analysis illustrates that, far from being an international crime affecting all States, piracy was primarily treated as robbery and as treason, a common crime, and a crime primarily against the State. The second aspect explored by the chapter is the analysis of the international law of piracy that was undertaken by leading jurists dating from the period leading up to the codification of the international law of piracy. Finally, the chapter examines the way in which States sought to apply the supposed principles of piracy to three problems in particular, the transatlantic slave trade, the problem of insurgent vessels, and the attempt to assimilate piracy with war crimes arising out of the problem of unrestricted submarine warfare. Each of these three problems would also serve to illustrate the extent of the law of piracy, and would influence the future codification efforts.

7.1 The Crime of Piracy

It is a central argument of the thesis that piracy is not a crime at international law, but is instead a crime at municipal law. It is a frequently recited caveat in the literature that piracy at municipal law needs to be distinguished from piracy at international law.[1] In any case, it is undoubtedly the position that prior to the effort to codify the international law of piracy, the concept of the crime was only

[1] BH Dubner (1980) *The Law of International Sea Piracy* The Hague: Martinus Nijhoff; AP Rubin (1988) *The Law of Piracy* Honolulu: University Press of the Pacific; Harvard Research in International Law *Draft Convention on Piracy with Comments* Reproduced in (1935) 26 AJIL Supplement 739; E Coke (1979) *The Third Part of the Institutes of the Laws of England. Reprint of the 1628 Edition* New York: Garland Publishing; W Blackstone (1979) *Commentaries on the Laws of England, Volume IV of Public Wrongs. A Facsimile of the First Edition of 1765-1769* Chicago: University of Chicago Press;

discernible in municipal law and in the decisions of municipal courts. Analysing the historical development of the law of piracy is however potentially a huge undertaking since in theory it could encompass comparative analysis of different legal systems extending back to Roman times. In reality the scholarly enquiries that have been undertaken have arrived at the conclusion that the historical 'law of piracy' is not in fact as extensive as is often supposed. Perhaps the most detailed examination of this particular issue, that of Rubin's *Law of Piracy*, after examining the historical development of the English law of piracy found that "the word 'pirate' does not appear with a precise meaning in English legal literature until the 16th century".[2] Rubin also notes that other scholars such as Marsden cast doubt on the supposed historically established concept of piracy:

> The records do not, to the present writer, appear to support the view insisted upon by some of the judges in Reg. v. Keyn [...] that piracy has from the first been recognized by the law of England as a crime distinct from robbery and murder on land.[3]

It must also be observed that the concept of 'piracy' was capable of having different definitions in different municipal legal systems. Thus in discussing the Dutch laws on piracy, Bynkershoek recorded that:

> There are also various other persons who are punished as pirates on account of the atrocity of their crimes, though they are not actually pirates, as for instance those who sail too near the land contrary to the prohibition of the sovereign [...] commit frauds in matters of insurance [...] and also those who cut the nets of the herring-fishers.[4]

Lauterpacht noted of piracy at English law:

> [...] every British subject is, inter alia, deemed to be a pirate who gives aid or comfort upon the sea to the King's enemies during a war,

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[2] Rubin *Law of Piracy* (n.1), 32

[3] RG Marsden (ed.) (1915) Documents Relating to the Law and Custom of the Sea: *Vol. I A.D. 1205-1649* London: Navy Records Society, 100

[4] C van Bynkershoek (T Frank tr.) (1930) *Quaestionum Juris Publici Libri Duo:Volume Two The Translation* Oxford: Clarendon Press, 99

> or who transports slaves on the high seas. However since a State cannot enforce its Municipal Laws on the open sea against others than its own subjects, it cannot treat foreigners on the open sea as pirates, unless they are pirates according to the Law of Nations.[5]

It is for this reason that it is necessary to differentiate municipal law definitions from piracy by the law of nations (piracy *jure gentium*). The significance of this is that piracy *jure gentium* is a subset of the law of piracy that all States agree on, and thus all States may therefore enforce.

This chapter suggests that the English law of piracy was nevertheless particularly important because of the role that Britain would come to play as the dominant naval and colonial power in the development of the law of the sea. This chapter argues that piracy, contrary to popular perception, was not a particularly special crime, it was in fact merely a label attached to what was in fact an unexceptional criminal activity: robbery at sea. At the same time, less well analysed yet lurking in the background, are the implications of performing belligerent acts without permission, or even worse, against one's fellow nationals, as acts of treason. This section therefore examines the concepts and implications of piracy both as robbery and as treason.

7.1.1 Piracy as Robbery

An issue that is often overlooked in the analysis of the case law relating to piracy is the fact that many of the historical cases addressing the issue of piracy were heard by the High Court of Admiralty. In dealing with these cases the issue of criminal liability would not have been the only, or even the most important aspect of proceedings. The Court also had *in rem* jurisdiction to adjudicate property disputes concerning property and vessels in ports in England. Therefore 'piracy' also potentially involved adjudication over prize claims, claims for salvage where goods or vessels had been recovered from pirates, and also claims arising from allegations that property had been previously stolen and sold on by pirates, and that the current possessor of the goods did not have title to them. From the criminal law perspective, piracy was simply robbery at

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[5] HA Lauterpacht (ed.) (1947) *Oppenheim's International Law Volume 1 – Peace* London: Longman, 566

sea. Sir Charles Hedges noted in the case of *R. v. Dawson* that: "piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty".[6]

This was acknowledged not just in England but also in the decisions and writings in the United States. In the case of *Bonnet's Trial* Judge Trott stated that "piracy is robbery committed on the sea, and a pirate is a sea thief",[7] and in the case of *US v Smith* it was stated that:

> Whatever may be the diversity of definitions, in other respects, all writers concur, in holding that robbery or forcible depredations upon the sea, animo furandi is piracy.[8]

The concept of *animus furandi* relates to the English law definition of theft or robbery (that is theft by means of violence, an aggravated form of theft), which has a special *mens rea* requirement of the intent to steal. Even today the English law definition of theft requires the "intent to permanently deprive" the owner of their property.[9] According to Coke's definition of larceny or theft at common law:

> Larceny, by the common law, is the felonious and fraudulent taking and carrying away by any man or woman, of the mere personal goods of another [...] First it must be felonious, id est, cum animum furandi [...].[10]

Strictly speaking then, the requirement of *animus furandi* related only to the criminal offence at English municipal law. However, the term continued to be used in connection with piracy as a shorthand for a completely different issue, namely the fact that robbery involves the unlawful taking of property, as distinguished from acts of lawfully seizing property at sea such as the taking of prize in armed conflict. In other words, *without public authority*. If property was taken under a lawful commission and declared as prize, this was a lawful act

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[6] *R. v. Dawson* (1596) 13 Howell's State Trial 451, 454.

[7] *Bonnet's Trial,* (1718) 15 Howell's State Trial 1231, 1234

[8] *US v Smith* 5 Wheat. 153 (1820)

[9] Theft Act 1968 c.60 s.1(1)

[10] Coke *Third Part of the Institutes* (n.1), 106

of war for which individuals could not have been sanctioned, and for which they would in fact have been entitled to claim individual functional immunity. The act was not theirs; it was an act wholly attributable to the State under whose authority it was performed. If the taking was performed without that authorisation however it was a criminal act: robbery at sea, and since the perpetrators were not acting in an official capacity, they were unable to rely on functional immunity because the taking was performed *for private ends*.

As noted in the previous chapter, this was the distinction between a pirate and a privateer: whether the activities were performed under public authority. It had been Gentili's observation that war was only possible between sovereigns: "war on both sides must be public and official and there must be sovereigns on both sides to direct the war",[11] for which he was able to cite as authority both Augustine and "the other theologians", and Ulpian and Pomponius in the *Digest*.[12] The categorisation of pirates with robbers and brigands had also been made by Ayala:

> The laws of war, therefore, and of captivity and of postliminy, which only apply in the case of enemies, can not apply in the case of brigands; and those who are taken prisoners by pirates or brigands remain entirely free. [...] Again, our remarks about pirates and brigands apply equally to rebels: they can not be called "just" enemies [...].[13]

The significance of this issue for present purposes is that discussion of piracy in the literature often bases the notion of universal jurisdiction over piracy on the fact that pirates may be punished by anyone into whose hands they fall. It is argued here that the reason why this is the case is not because of the severity of their crime, but because their activities are unauthorised. The right of anyone to punish a pirate as a robber and brigand is therefore not as commonly supposed an assertion of universal jurisdiction. Pirates are not treated as robbers and

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[11] A Gentili (JC Rolfe tr.) (1933)*De Iure Belli Libri Tres* Oxford: Clarendon Press, 15

[12] Discussed at Section 6.1 above.

[13] B Ayala (JP Bate tr.) (1912) *De Jure et Oficiis Bellicis et Disciplina Militari Libri III: Vol. Two The Translation* Washington: Carnegie Institution, 60

brigands because their crimes are 'heinous' or because they amount to war crimes or crimes against humanity, in fact precisely the opposite. Pirates can be treated as robbers and brigands, because that is essentially what they are: common criminals, and as common criminals they are not entitled to the functional immunity that would normally protect someone acting under public authority. Such robbers and brigands could be punished under ordinary bases of jurisdiction such as that of the flag State, under the protective principle, or under the passive personality principle.

In reality, the idea of exercising criminal jurisdiction over foreign nationals abroad was generally frowned upon. Referring to Locke in particular,[14] O'Connell observed that the "theory of dominion was that no prince, except to enforce the law of nature, might punish the subjects of another, for he lacks power over them."[15] Vattel drew a clear distinction between acts that did not justify foreign jurisdiction and those that did:

> If a person has been exiled or banished from his country because of some crime, the Nation in which he takes refuge has no right to punish him for the offense committed in a foreign country; for nature only confers upon men and Nations the right to punish to be used for their defense and security; whence it follows that we can punish only those who have done us an injury. But this principle also makes it clear that while the jurisdiction of each State is in general limited to punishing crimes committed in its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. Men who by profession are poisoners, assassins, or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations, by destroying the foundations

[14] J Locke (JW Gough ed.) (1948) *The Second Treatise on Civil Government and a Letter Concerning Toleration* Oxford: B. Blackwell, 6

[15] DP O'Connell (I Shearer ed.) (1982) *The International Law of the Sea Volume I* Oxford: Clarendon Press, 13

> of their common safety. Thus pirates are hanged by the first persons into whose hands they fall.[16]

That the jurisdiction over piracy was complex is well illustrated by Molloy, who was himself an Admiralty judge and experienced in piracy cases. In his *Treatise* he noted that foreign nationals could bring cases before the High Court of Admiralty both for a civil claim and for a claim for criminal punishment. So far as those captured at sea were concerned he stated that anyone (he gives the example of French subjects) who committed piracy within the British Seas was *only* punishable by the English Crown, but that:

> [...] if Piracy be committed on the Ocean, and the Pirates in the attempt there happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment, by hanging them up at the Main-yard end before a departure; for the old natural liberty remains in places where there are no judgments.[17]

In other words, Molloy seems to deny that there is prescriptive/adjudicative jurisdiction over pirates captured on the high seas, even though he claims that they can be summarily executed. Bynkershoek was undecided on the question of whether it was possible to try a foreigner for an act of piracy and Woodeson was also sceptical of the existence of universal jurisdiction over it, observing that:

> A charge of piracy may properly be exhibited in any country, to which either the party accused, or the owner of the goods, belongs. But whether the law of nations will allow the fact to be tried in a country where they are both aliens, and which therefore seems to have nothing whereon to ground the reasonableness of its jurisdiction, is left undecided by the judicious Bynkershoek.[18]

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[16] E de Vattel (CG Fenwick tr.) (1916) *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns: Volume Three Translation of Edition of 1758* Washington: Carnegie Institution, 92-3 (Book I Chapter XIX s232)

[17] J Molloy (1690) *De Jure Maritimo et Navali or a Treatise of Affairs Maritime and of Commerce in Three Books* London: A Swalle, 57

[18] R Wooddeson (1794) *A Systematical View of the Laws of England* London: T. Payne, 427

7.1.2 Piracy as Treason in English Law

In his description of the law of piracy, Coke explained that piracy in English law was also *petit treason*, or *"contra ligeanciæ suæ debitum"* and the earliest statutes against piracy in the reign of Henry VIII described pirates as, amongst other things, traitors. The first statutory definition of piracy comes from an English Statute of 1536 which reformed the trial of "traitors, pirates, thieves, robbers, murderers and 'confederates'," so that they would no longer stand trial according to the civil law as then administered by the courts of the Admirals, but be tried as if the acts had been committed on land.[19] These laws were however exclusively directed against his own subjects, not against foreigners. Again, this categorisation of the crime of piracy has implications for the assertion of universal jurisdiction. As already noted in the previous chapter, the most famous pirates, particularly during the 18th century, were British subjects who carried out their acts of piracy against British colonial interests. Not only does this undermine the idea that historical state practice supports the concept of universal jurisdiction, but also presents an explanation for the way in which they were pursued, prosecuted, and punished.

7.1.3 International Law, Municipal Law, and the 'Law of Nations'

Another issue that demands further investigation is the use of the term piracy *jure gentium* or piracy by the law of nations. Piracy on the high seas was known to English law as 'piracy *jure gentium*'.[20] Today the terms 'law of nations' and 'international law' are considered interchangeable, but historically this was not the case, and lack of appreciation of the distinction appears to have been the cause of considerable confusion. It will be noted that during the codification the Harvard Research repeatedly referred to piracy's position in 'the law of nations', by which they clearly meant piracy at international law, but which was a term that they did not use in conjunction with their analysis of any other area of international law. The term 'law of nations' has its origins in the ancient Roman *jus gentium* of which it is a loose translation. The *jus gentium* was however not what we would today recognise as international law. It was in theory at least, a

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[19] Offences at Sea Act. 28 Henry VIII c.15 (1536) 2 Statutes at Large (1763 ed.) 258

[20] *In Re Piracy Jure Gentium* (1934) A.C. 586

body of law common to all nations, generally accepted municipal law rules, and incorporated elements of both public and private international law. As Berman notes, the *jus gentium* was considered to be the 'law common to all men', based on the concept of natural law and of much broader scope than 'international law'.[21]

Suganami observes that although the Romans did not actually consider it to reflect the laws of different nations, "the phrase nevertheless expressed the idea that the validity of transactions made under that system of rules was recognized by all nations".[22] As already noted above, the law of treaties between peoples was in Roman times governed by a separate body of law; the *jus fetiale*. The most important element of the law of nations was the law merchant which incorporated maritime or shipping law. Shaw notes that:

> English law established the Law Merchant, a code of rules covering foreign traders, and this was declared to be of universal application. [...] a network of common regulations and practices weaved its way across the commercial fabric of Europe and constituted an embryonic international trade law.[23]

In continental Europe, the legal systems continued to rely on Roman law, which formed the basis of the Civil Law. As the law governing relations between States developed it became increasingly clear that different terminology would be needed to distinguish the public international law aspects of the law of nations from the private international law aspects. Suganami notes that Suarez was aware that there were two different forms of law expressed under the term *jus gentium*.[24] He was followed by Zouche (also an Admiralty judge), whose 1650 work referred to public international law as *jus fetiale* or *jus inter gentes*.[25]

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[21] HJ Berman (2005) *The Alien Torts Claim Act and the Law of Nations* 19 Emory International Law Review 69, 70-5

[22] H Suganami (1978) *A Note on the Origin of the Word "International"* 4 British Journal of International Studies 226, 228

[23] M Shaw (2008) *International Law* Cambridge: CUP, 19

[24] GL Williams et al (eds.) (1944) *Selections from Three Works of Francisco Suárez: Volume Two The Translation* Oxford: Clarendon Press, 347-9

[25] R Zouche (TE Holland ed.) (1911) *Iuris et Iudicii Fecialis, sive, Iuris Inter Gentes et Quaestorum de Eodem Explicatio* Washington: Carnegie Institution

Although Vattel persisted with the term law of nations,[26] the search for a better term continued, and was finally resolved by Bentham in 1780 when he coined the term 'international law'.[27] It is important to recognise that the introduction of the terms *jus inter gentes* and 'international law' were not a simple rebranding exercise. Suarez, Zouche, and Bentham did not simply decide to rename the law of nations. The term international law was born out of the recognition that public international law was *different* to the law of nations and that it needed to be recognised as a separate concept.[28]

The devising of the term by Bentham appears to have been a direct result of the use of the term 'law of nations' by Blackstone of whom he had been a student. The reason why this is of interest here is because Blackstone's use of the term in relation to piracy appears to be the source of much of the confusion about the position of piracy in international law. Writing in 1765 he analysed English law by dividing it into different categories, one of which was "Offences against the Law of Nations". That category was made up of three offences, namely the violation of safe conducts, the infringement of the rights of ambassadors, and piracy. He described piracy thus:

> [...] the crime of piracy, or robbery and depredation on the high seas, a pirate being, according to Sir Edward Coke, hostis humani generis. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: So that every community hath a right, by the rule of self defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property [...][29]

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[26] Vattel *Law of Nations* (n.16)

[27] J Bentham (JH Burns and HLA Hart eds.) (1996) *An Introduction to the Principles of Morals and Legislation* Oxford: Clarendon Press

[28] MW Janis *Jeremy Bentham and the Fashioning of "International Law"* (1984) 78 AJIL 405, 409

[29] W Blackstone (1979) Commentaries on the Laws of England, Volume IV Of Public Wrongs. A Facsimile of the First Edition of 1765-1769. Chicago: University of Chicago Press, 71

This passage is frequently referred to as justification for the assertion that piracy was a crime at international law, and that it was a crime of universal jurisdiction, on the basis that "every community" had a right to "inflict punishment" on a pirate. Blackstone's analysis of the law of piracy seems however to have been taken out of context. Firstly, it is not at all clear from the relevant chapter that Blackstone is using the phrase 'law of nations' to strictly mean public international law, because he also explains that that term includes "the law merchant" and issues of maritime law such as "freight, average, demurrage, insurances, bottomry," as well as prize and shipwrecks. In other words the law of nations in the sense of the ancient Roman *jus gentium* or the laws considered to form part of the municipal law of all states.

Furthermore, although the offences he lists (violation of safe conducts, the infringement of the rights of ambassadors, and piracy) are activities contrary to a state's obligations owed to other states as a matter of public international law he is not arguing that they are 'international crimes' punishable by any State. On the contrary, his analysis argues that these are offences which States are under an obligation to punish in their own subjects:

> [...] where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of this subject's crime, and draws upon his community the calamities of foreign war.[30]

Thus the three "offences against the law of nations" are offences which impact upon the sovereign's relationship with other states to the extent that they risk

[30] *Ibid.*

conflict between them. This sheds some light upon the idea that piracy was primarily a crime of treason. It also casts doubt on the interpretation that one State might be able to bring criminal proceedings against a foreign national for the offences outlined, since it is the individual's own state which is said to have the authority to prosecute them.

Schwartzenberger noted that Blackstone's "offences against the law of nations" are not "crimes under international law",[31] and recalls that it was noted in the later case of In re *Piracy Jure Gentium* that recognition of acts of piracy as "constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country."[32] The misunderstanding of this issue would however cause problems as the law of piracy was developed in the United States, since Blackstone's writings were highly influential in the early US legal system. The complexities of the confusion between the *jus gentes* and *jus inter gentes* even in the drafting of the US Constitution (granting Congress the right to "define and punish" piracy), are examined in detail by Rubin,[33] but for the present purposes it may be sufficient to note Janis' observation that:

> Though we Americans happily conflate the two terms, we have long struggled to reconcile Blackstone's and Bentham's competing notions about the nature of the discipline, however it be named.[34]

7.1.4 The Development of the Law in the United States

The notion of piracy at common law saw its most extensive development in the United States. Initially, the US courts did not seek to extend jurisdiction over cases where there was no direct nexus with the offence. However, within a few short years at the beginning of the 19th century, US federal law went from a situation where the crime of piracy was defined by domestic statute and applicable only to cases in which there was an evident jurisdictional nexus, to one where the definition of the crime was reconceptualised as being defined "by

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[31] G Schwartzenberger (1950) *The Problem of an International Criminal Law* 3 Current Legal Problems 263, 267

[32] *Ibid.*

[33] AP Rubin (1997) *Ethics and Authority in International Law* CUP: Cambridge, 70-97

[34] MW Janis (2010) *America and the Law of Nations 1776-1939* Oxford: OUP, 1

the law of nations" and over which the US courts might claim jurisdiction, even without a connection to the offence. In the 1818 case of *US v Palmer* it was stated that:

> [...] the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging also exclusively to the subjects of a foreign state, is not piracy within the true intent and meaning of the act [...] and is not punishable in the courts of the United States.[35]

In the case of *US v. Klintock,* it was subsequently held that the US criminal code did not apply in the absence of an ordinary jurisdictional nexus.

> The Court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, or persons within a vessel belonging exclusively to the subjects of a foreign state, is not a piracy within the true intent and meaning of the Act for the punishment of certain crimes against the United States.[36]

This position was complicated by the passing by Congress of a new statute in 1819: "An Act to Protect the Commerce of the United States and Punish the Crime of Piracy" which provided:

> That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into or found in the United States, every such offender or offenders shall upon conviction thereof [...] be punishable with death.[37]

According to the statute, piracy was "defined by the law of nations", and this was the interpretation given by Story in the case of *US v. Smith* in 1820.[38] *Smith* was

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[35] *US v. Palmer et al.* 3 Wheat. 610 (1818).

[36] *US v Klintock,* 5 Wheat. 144 (1820) at 633-4.

[37] 3 Stat. 510

[38] *US v. Smith,* 5 Wheat. 153 (1820)

the first case under the new law, and Story gave a footnote seventeen pages long attempting to discern the historical definition of piracy. The wording of the statute appears to be problematic. Whilst piracy *jure gentium* was a crime *recognised* by the law of nations in the sense that it was considered to be an offence proscribed by all States, and thus all States agreed that it could be enforced on the high seas, it was a completely different matter to suggest that piracy was actually *defined* by the law of nations. Rubin argues that:

> When Smith was decided, the "law of nations" meant essentially the rules of many legal orders, the municipal laws of many states, supposed by analogy to apply to all legal orders, including public international law. The notion has been common since at least the 2nd century AD, when Gaius considered the "jus gentium" to be evidence of general principles of natural law that must be present in all legal orders based on reason in harmony with nature.[39]

Rubin notes that ironically it was Story himself who effectively undermined precisely this concept:

> In 1834, Story published his great work on Conflict of Laws. It destroyed at a stroke the entire underpinning of this natural law theory. It expressly rejected the notion of uniform natural law and "comity" as a reason for states to pay respect to the municipal laws of other states [...].

Rubin notes that there was only one dissenting opinion in the *Smith* judgment, that of Justice Livingstone who held the view that the idea that individuals could be prosecuted for a criminal offence not defined by statute, but theoretically by international law, was unsatisfactory.[40] Lenoir writing in the 1930s said of the *Smith* decision that:

> It is doubtful whether the Court would hold this view today, nor is it considered a correct statement of the present international law on piracy. In the first place piracy is not sufficiently defined by

[39] AP Rubin (1990-1991) *Revising the Law of "Piracy"* 21 California Western International Law Journal 129, 130

[40] Rubin *Law of Piracy* (n.1), 146

> international law so that offenders may be prosecuted by reference to that law alone. [...] Nor is piracy generally considered to be a crime against international law. Piracy is an offence against the municipal law; international law enters into the matter by condemning the practice and permitting the states to exercise jurisdiction over it.

This issue would however come back to haunt future piracy prosecutions, an issue that will be discussed in Chapter 8. In the meantime, the courts also finally clarified another issue: the intent to steal was not a necessary component of the crime of piracy. In the case of *United States v. The Brig Malek Adhel*, the accused had repeatedly attacked other vessels at sea without apparent motive. It was Justice Story once again who commented that there was no requirement of *animus furandi* (intent to steal).

> If he wilfully sinks or destroys an innocent merchant ship without any other object than to gratify his lawless appetite for mischief, it is just as much piratical aggression, in the sense of the law of nations and of the act of congress, as if he did it solely and exclusively for the sake of plunder, lucri causa.[41]

In summary, the development of piracy at municipal law was developed from the simple concepts of robbery and treason into a basis of enforcement jurisdiction on the basis that piracy *jure gentium* was an offence recognised by all legal systems. This concept of piracy 'by the law of nations' was however developed in US law based on the idea that piracy was directly proscribed by international law, a mistake apparently caused by the conflation of the terms 'law of nations' and 'international law'.

7.2 Doctrinal Examinations Prior to Codification

Towards the end of the 19th century international lawyers were increasingly turning their attention to the potential for codifying public international law. Authors including Wheaton,[42] Bluntschli,[43] Field,[44] and Fiore[45] examined the

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[41] 2 How. 210 (1844) p.232

[42] H Wheaton (RH Dana ed.) (1866) *Elements of International Law* Boston: Little, Brown & Co.

problem in their studies of international law, many of which were accompanied by 'draft codes of international law'. Hall dealt with piracy in chapter VI of his work under the title "Jurisdiction in Places not Within the Territory of any State". He considered the jurisdiction that a flag state exercises over its own vessels to be:

> Protective jurisdiction to the extent of guarding the vessel against interference of any kind on the part of other powers, unless she commits acts of hostility against them, or does certain acts during war between two or more of them which belligerents are permitted to restrain.[46]

Consequently a State bears responsibility for the activities of vessels flying its flag:

> A state is responsible for all acts of hostility against another state done on the ocean by a merchant vessel belonging to it, and it is bound to offer the means of obtaining redress in its courts for wrongful acts committed against foreign individuals by her or by persons on board her. It is not responsible for those acts above mentioned which belligerents are permitted to restrain, or for acts, to be defined presently, which constitute piracy.[47]

When it came to defining acts of piracy, Hall recalled Bynkershoek's definition of pirates as those who depredate without authority from a sovereign, but noted that the definition was both too wide and too narrow at the same time. In his analysis, the definition of piracy hinged on the fact that pirates acted in circumstances in which no State was responsible for their actions. Piracy, he said:

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[43] JC Bluntschli (MC Lardy tr.) (1895) *Le Droit International Codifié* Paris: Guillaumin & Co. Reproduced in: Harvard Research *Draft Convention on Piracy* (n.1), 882

[44] DD Field (1872) *Draft Outlines of an International Code* New York: Diossy & Co.

[45] P Fiore (EM Borchard tr.) (1918) *International Law Codified and its Legal Sanction* New York: Baker, Voorhis & Co.

[46] WE Hall (1890) *A Treatise on International Law* Oxford: Clarendon Press, 250-1

[47] *Ibid.*

> [...] 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, or 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 [...] if a body of men of uncertain origin seize upon a vessel and scour the ocean for plunder, no one nation has more right of control over them, or more responsibility for their doings, than another [...].[48]

In other words, according to Hall, the distinguishing feature of the pirate vessel is that it is not authorised by, and therefore not under the control or authority of its flag State. Consequently, since the flag State cannot be held responsible, nor expected to restrain a pirate vessel, the rule of the exclusive enforcement jurisdiction of the flag State cannot apply.

Wheaton seemed to echo this analysis, also basing his analysis of the concept of piracy on the fact that pirates acted without State sanction. Piracy, he said;

> [...] is defined by the text-writers to be the offence of depredating on the seas without being authorized by any sovereign State, or with commissions from different sovereigns at war with each other. [...] Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals.[49]

Wheaton went on to distinguish between piracy *jure gentium* and piracy at municipal law, noting that acts committed on board a foreign vessel by foreigners cannot be justiciable by just any State, but that if that vessel

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[48] *Ibid.* 252-4

[49] Wheaton *Elements of International Law* (n.42), 192-3

acknowledges "obedience to no flag whatsoever" then any state having custody of them may punish them as pirates. Dana as editor of Wheaton noted that:

> It is true, that a pirate jure gentium can be seized and tried by any nation, irrespective of his national character, or of that of the vessel on board which, against which, or from which, the act was done. [...] This can result only from the fact, that it is committed where all have a common, and no nation and exclusive, jurisdiction, -i.e., upon the high seas; and if on board a ship, and by her own crew, then the ship must be one in which no national authority reigns. [...] On the other hand, that is too wide a definition which would embrace all acts of plunder and violence, in degree sufficient to constitute piracy, simply because done on the high seas. As every crime may be committed at sea, piracy might thus be extended to the whole criminal code. [50]

Other authors on international law prepared draft codes of international law. Field included in his definition of 'piracy', the damaging of oceanic cables, international railways, lighthouses and other similar works or structures, as well as slavery.[51] Fiore also asserted that States were entitled to exercise jurisdiction over those offences in the same way as piracy.[52] In contrast, Bluntschli took the view that:

> Pirates are not tolerated because they are a threat and a common danger for all nations. They are in no way entitled to respect for their flag, and may be attacked and captured at any time at sea. Ships are considered to be pirates which, without the authorisation of a belligerent power seeking to seize persons or make booty (of ships and cargo) or to destroy the property of others for criminal purposes.[53]

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[50] *Ibid.* 193-4

[51] Field *Draft Outlines* (n.44), 32-3

[52] Fiore *International Law Codified* (n.45), 190

[53] Bluntschli *Droit International Codifié* (n.43)

In the *Lotus* case Lord Finlay stated that pirates "might be tried in the courts of any country"[54] (which is uncontroversial and carefully worded), but Judge Moore went further saying that a pirate might be "tried and punished by any nation into whose jurisdiction he may come."[55] However he also said that piracy in its jurisdictional aspects was *sui generis:*

> Piracy by law of nations, in its jurisdictional aspects, is sui generis. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations in the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of mankind – hostis humani generis – whom any nation may in the interest of all capture and punish.[56]

As noted in Chapter 4, Moore was put in some difficulty in reconciling this view with that of the judgment in the *Lotus* case in respect of prescriptive jurisdiction at least, serving to illustrate the fact that to the extent that the law of piracy is in fact *sui generis* it is only such in respect of *enforcement jurisdiction*.[57]

A particularly influential work was a monograph by Stiel specifically on the subject of piracy,[58] which followed his earlier thesis on the same subject.[59] Stiel would be quoted extensively by the Harvard Research, and would prove to be a decisive influence when it came to deciding whether piracy should be codified as an international crime. Stiel started his study with the argument that only States are subjects of international law, and that as a consequence, piracy cannot be an

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[54] *Case of the SS Lotus* (France/Turkey) (1927) PCIJ, Series A, No.10, p.4 Dissenting Opinion of Lord Finlay, 7

[55] *Case of the SS Lotus* (France/Turkey) (1927) PCIJ, Series A, No.10, p.4 Dissenting Opinion of Judge Moore, 70

[56] *Ibid.*

[57] The *Lotus* judgment asserted that Turkey was entitled to exercise prescriptive jurisdiction over the collision involving its vessel, which somewhat undermines the idea that the right to claim prescriptive jurisdiction over acts of piracy is in some way extraordinary.

[58] P Stiel (1905) *Der Tatbestand der Piraterie nach geltendem Völkerrecht* Leipzig: Duncker and Humboldt

[59] P Stiel (1905) *Die Piraterie Beiträge zum Internationale Seerecht* Berlin: E. Ebering

international crime.[60] He argued that piracy was not a problem of prescriptive jurisdiction, but a problem of "sea policing" or enforcement jurisdiction.[61] He theorised that acts of piracy had the effect of the "constructive denationalisation"[62] of the vessels concerned, and held the view that the act itself "breaks the connection" between the vessel and the flag State.[63]

Stiel's analysis divided thought on the content of the law of piracy between Anglo-American writers for whom piracy was a question of international criminal law, whilst in his view the continental European writers thought of it as sea policing or enforcement.[64] This analysis was criticised by Rubin who noted that the distinction between the two approaches did not divide so neatly, particularly since Grotius and other European lawyers had advocated criminal sanctions for pirates.[65]

The constituent elements of piracy according to Stiel are that it is necessarily committed on the high seas or outside the jurisdiction of any state.[66] He argued that it is by its nature, non-political and directed against all nations in general.[67] He argued that acts directed against a single state were not piracy.[68] He further argued that piracy therefore excluded acts conducted for "political ends". The definition of political ends went to purpose and not intent. The definition of political purposes was in his view whether or not the activities had state authority or were perpetrated by recognised belligerents.[69] Under this definition

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[60] Stiel *Tatbestand der Piraterie* (n.58), 1

[61] *Ibid.* 3-15. See also discussion of the point in: Harvard Research *Draft Convention on Piracy* (n.1), 761

[62] Stiel *Tatbestand der Piraterie* (n.58), 8

[63] *Ibid.* 10

[64] *Ibid.* 14

[65] Rubin *Law of Piracy* (n.1), 311

[66] *Ibid.* 65

[67] Stiel *Tatbestand der Piraterie* (n.58), 28

[68] *Ibid.* 72

[69] *Ibid.* 80

revolutionary action would therefore not be piracy, provided the belligerency was recognised.[70]

7.3 Attempts to Extend the Concept of Piracy

There are three further issues which would illustrate the extent of the law of piracy, and influence its codification, specifically developments relating to the suppression of the slave trade, the characterisation of certain unlawful acts during armed conflict as "piracy" and the problem of insurgent vessels. Apparent attempts to extend the scope of the concept of piracy.

7.3.1 Piracy and the Slave Trade

Some of the earliest evidence of the recognition of a special jurisdiction over piracy comes from Britain's attempts to assimilate the slave trade to piracy, during the efforts towards abolition. In the case of *Darnaud* which involved the prosecution of a French national as the master of a US flagged vessel for taking part in the slave trade, it was stated that:

> [...] no State can make a general law applicable to all upon the high seas. Where an act has been denounced as a crime by the universal law of nations, where the evil to be guarded against is one which all mankind recognize as an evil, where the offence is one that all mankind concurs in punishing, we have an offence against the law of nations, which any nation may vindicate through the instrumentality of its courts. Thus the robber on the high seas, the murderer on the high seas, the ravisher on the high seas, pirates all of them, recognizing allegiance to any country, because the very act violates their allegiance to all their fellow men, if caught may be punished by the first taker. [...] But so soon as we leave these crimes of universal recognition, the jurisdiction of a State over the acts of men upon the high seas becomes more circumscribed. [...] That the offence is called in our particular statute piracy, does not vary the legal position [...]

[70] *Ibid.* 89

> The slave trade, however horrible it may be, is not within that category.[71]

In January 1816, the French flagged ship the *Le Louis* was seized off the coast of Africa. The ship was condemned by the Vice-Admiralty Court at Sierra Leone for slaving, and for resistance to arrest characterised as "piratical".[72] However, the ship's owners appealed, and the decision was overturned. Lord Stowell observed that States did not have a general right of stop and search in time of peace:

> Upon the first question, whether the right of search exists in time of peace, I have to observe, that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states. [...] This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. [...] I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals.[73]

He went on apparently to argue that the right of visit and search against pirates was derived from the laws of war:

> With professed pirates there is no state of peace. They are the enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war. [...] But at present,

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[71] *US v Darnaud* 3 Wallace 143 (3rd Circ.) (1855)

[72] HL Kern (2004) *Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade* 6 Journal of the History of International Law 233, 239

[73] *The Le Louis* (1817) 2 Dods. 2010, III-110

> under the law, as now generally understood and practised, no nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim. If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt; that it has not the same foundation on which alone it is tolerated in war,-the necessities of self-defence.

Slavery was as a consequence not successfully assimilated to the concept of piracy at international law, despite the fact that this was the case at English law and that an 1820 US Law equated slave trading with piracy, punishable by death penalty. The issue of the attempts to assimilate the slave trade to piracy serves to illustrate two particular points. The first is that the law of piracy was not sustained by the notion of piracy as a serious crime. If jurisdiction had been justified over piracy on the basis that it was a serious crime, then there would have been no objection to extending it to cover the slave trade. The second issue is that the law of piracy was concerned not with the punishment of a criminal offence (prescriptive jurisdiction), but the power of high seas interdiction (enforcement jurisdiction).

7.3.2 Pirates and Insurgents

A particular problem that was to arise at the beginning of the 19th century was that of insurgent vessels. As the slow process of decolonisation commenced, rebellions frequently involved conflict at sea, particularly the seizure of vessels and attempts to enforce blockades.[74] The problem was that these activities were carried out by vessels on behalf of rebels, who until such time as they gained recognition were technically performing belligerent acts at sea without legitimate public authority. In other words, they fell within the definition of piracy. The question then was whether neutral third States should treat unrecognised insurgent vessels as piratical or not. There was in reality no straightforward solution. The government against whom the rebels were fighting would be likely to declare them piratical, and would demand that other States do likewise. To refuse to do so might be taken as recognition or even

[74] See for example: P Earle (2004) *The Pirate Wars* London: Methuen, 212 *et seq.*

support of the rebellion. If third States did intervene however, they risked being effectively 'sucked in' to the conflict, and potentially involved on the side of the incumbent government.

The problem first arose in connection with the wars of independence in Latin America. In many cases rebellions by the nascent States against Spanish colonial rule involved the use of privateers to intercept vessels at sea and to attempt to establish blockades. The United States and many European States were sympathetic to these independence movements, not least because independent Latin American States offered greater opportunities for trade.

The problem also became an issue during the struggle for Greek independence from Ottoman rule, a period examined in detail by Rubin. British involvement in the situation had extended to the declaration of a "Protectorate of the Ionian islands", and asserted a position of "strict neutrality".[75] Greek insurgents for their part had commenced a campaign of "flying" blockades against ports in the eastern Mediterranean. A legal opinion obtained by the British Cabinet in 1821 suggested that it "would not be proper" to treat Greek insurgent vessels as piratical, but at the same time that the Royal Navy should intervene to prevent vessels under British protection from being subject to visit, search, and seizure under the laws of war.[76] This approach was sorely tested however as "the depredations of the Greek pirates were on such a scale that they seemed likely to bring the trade of the eastern Mediterranean, fair or not, to a complete standstill."[77] Earle records that British Admiralty records reported "150 British vessels plundered by Greek pirates between March 1825 and October 1827." According to Rubin's analysis, British practice appears confused. After new orders from London, in February 1828 British forces captured or destroyed 11 Greek vessels in the harbour of Grabusa, unopposed by the Greek garrison, and demands were made that certain "pirates" be handed over for trial in Malta. This was refused by the provisional Greek authorities, pointing out that Britain supported Greek independence, something that was inconsistent with the

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[75] Rubin *The Law of Piracy* (n.1), 212

[76] *Ibid.* 213

[77] Earle *The Pirate Wars* (n.74), 226

demands that its sailors be handed over, and instead offered to try any infractions themselves.[78]

The US case of the *Ambrose Light* in 1885 also illustrated the difficulties, when the vessel was seized and sought to be condemned as piratical in *in rem* proceedings, the Court found that the insurgency had been recognised by the State Department, and refused to grant judgment against the vessel.[79] From a doctrinal point of view, authors found it difficult to make clear statements of the law concerning insurgent vessels. Dana as editor of Wheaton stated that:

> The following propositions are offered, not as statements of settled law (for most of them are not covered by a settled usage of nations, by judicial decisions of present authority, or by the agreement of jurists), but as suggestions or principles.[80]

And went on to note that:

> If a foreigner knowingly cruises against the commerce of a State under a rebel commission, he takes the chance of being treated as a pirate jure gentium, or a belligerent.[81]

Dubner observed that "whether a nation chooses to treat a vessel as insurgent or belligerent is usually a political choice, not a legal one."[82] Hall argued that "acts which are allowed in war, when authorised by a politically organised society, are not piratical."[83] Furthermore, he observed that insurgents and rebels who directed attacks only against their own government would not be pirates.

> Sometimes they are wholly political in their objects and are directed solely against a particular state, with careful avoidance of depredation or attack upon the persons or property of the subjects of other states. In such cases, though the acts done are piratical with

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[78] Rubin *The Law of Piracy* (n.1), 218-9

[79] *US v Ambrose Light* 25 F. 408

[80] Wheaton *Elements of International Law* (n.42), 200

[81] *Ibid.*

[82] Dubner *The Law of International Sea Piracy* (n.1), 51

[83] WE Hall (1890) *A Treatise on International Law* Oxford: Clarendon, 256

> reference to the state attacked, they are for practical purposes not piratical with reference to other states, because they neither interfere with nor menace the safety of those states nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction.[84]

Hyde argued that insurgents should be treated the same whether they had external recognition or not:

> As the success of an insurgent movement produces a legal condition of affairs demanding recognition by foreign powers, the commission of acts of force on the high seas by means of which that result is accomplished should not, as Hall declares, be treated as piratical merely on account of the lack of external recognition of the political power by whose authority they were committed. [...] It is not believed that the acts of insurgents when duly authorized by those in control of the insurgent movement, if committed in furtherance thereof, and directed solely against the vessels of the government sought to be overthrown, should be regarded as piratical.[85]

In the final analysis, the question of whether insurgent vessels could (or should) be treated as piratical was probably never settled definitively in state practice, for the simple reason that this was above all a question of policy, not of law. Nevertheless, authors generally expressed the view that insurgents, recognised or not, should not be treated as piratical, though the precise rationale for this distinction was less than clear, especially since the idea that insurgents might only direct their hostilities against their own government scarcely reflected the reality of acts of war at sea, especially the establishment of blockades.

7.3.3 Piracy as a War Crime

The third way in which the label of "pirate" was applied more broadly was in relation to the developing notion of war crimes. This idea was a feature of the

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[84] *Ibid.* 258

[85] CC Hyde (1947) *International Law Chiefly as Interpreted and Applied by the United States* Boston: Little, Brown & Co.,773-4

same confusion over whether "pirates" could have belligerent rights that characterised the problem of insurgency. The issue was resurrected in the inclusion of a clause in the Lieber Code in 1863 on the issue of civilians who took part in hostilities. Article 82 of the Code stated that individuals:

> [...] who commit hostilities, whether by fighting [...] or by committing raids of any kind, without commission, without being part and portion of the organized army, and without sharing continuously in the war, but who do so with intermittent return to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers – such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.[86]

In reality, this article was not controversial. Civilians who took part in raids without marking themselves as belligerents did indeed risk being punished as criminals for their activities since, as this chapter has already explored, they did not have functional immunity for their activities, and as such could be tried and punished for murder, robbery, and other relevant crimes. The use of the term 'piracy' was to cause much more confusion and controversy in relation to the question of submarine warfare. The analogy of piracy was used again in 1922 at the Washington Conference on the Limitation of Armaments, which addressed the issue of unrestricted submarine warfare during the First World War, and in particular the sinking of the *Lusitania* in 1915. The Conference agreed a draft treaty which reaffirmed that the rules forbidding the destruction of merchant ships without first placing the crew and passengers in safety applied to submarines as well as warships. The treaty stated that any individual:

> [...] who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have

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[86] Lieber Code, General Orders No 100 of the United States Federal Army, promulgated by President Lincoln 24 April 1863

> violated the laws of war and shall be liable to trial and punishment as if for an act of piracy.[87]

The treaty was never ratified, and once again was probably not as controversial as it seemed since it clearly stated that contravention of the rules rendered perpetrators liable to prosecution *as if* for an act of piracy, not actually *for* piracy. This use of the term by analogy was however wrong as a matter of law. Nevertheless in an era before the establishment of formal mechanisms for the prosecution of violations of the laws of war, the piracy analogy may have seemed the only way of explaining the criminal responsibility of individuals before foreign courts.

A further agreement was reached in London in 1930: the Treaty for the Limitation and Reduction of Naval Armaments,[88] which was followed by a further protocol also agreed in London in 1936 with the addition of a number of State parties. That agreement repeated the substance of Article 1 of the Washington Treaty but did not repeat the reference to piracy. The problem of submarine warfare soon returned to the fore however with the outbreak of the Spanish Civil War when submarines of unknown nationality had attacked merchant vessels and warships of neutral nations in the Mediterranean. This led to the negotiation of a further agreement at Nyon, Switzerland in 1937.[89] The Agreement stated in its preamble that:

> Whereas these attacks are violations of rules of international law referred to in Part IV of the Treaty of London of April 22, 1930 with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy [...] it is necessary in the first place to agree

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[87] Treaty Relating to the Use of Submarines and Noxious Gases in Wartime, Washington, 6 February 1922 cited in Rubin *Law of Piracy* (n.1), 294

[88] Treaty for the Limitation and Reduction of Naval Armaments, London, 22 April 1930 cited in Rubin *Law of Piracy* (n.1), 295

[89] The Nyon Arrangement and the Agreement Supplementary to the Nyon Arrangement. C.409.M.273.1937. VII. Reproduced in 18 League of Nations Official Journal 669

> upon certain special collective measures against piratical acts by submarines.[90]

The substance of the Agreement was however that no state had admitted responsibility for the submarine's activities, and since they were attacking the vessels of other States indiscriminately, the State parties to the agreement would coordinate operations against them. Unlike the Washington Treaty, the Agreement did not specify that criminal law consequences should flow from this characterisation. Nevertheless, the use of the term of piracy was the subject of considerable discussion. Its use to describe indiscriminate attacks by submarines had become commonplace in political discourse, and Rech notes that it used in speeches in the House of Commons, including by Prime Minister Asquith, concerning captured German submarine crews. He records that the British Admiralty "provisionally decided that, pending trials for violations of the rules of war, they 'were to be made the subject of special restriction, and neither to be accorded the distinction of their rank, nor allowed to mingle with other prisoners of war'."[91]

This situation led several jurists to write letters to the *Times* arguing against conceptualising unrestricted submarine warfare as piracy. TE Holland commented that it would be "desirable, in discussing the execrable tactics of the German submarines, to abandon the employment of the terms "piracy" and "murder" unless with a distinct understanding that they are used merely as terms of abuse" going on to explain that the essence of the offence of piracy "is absence of authority" and that:

> In ordering the conduct of which we complain, Germany commits an atrocious crime against humanity and public law; but those who, being duly commissioned, carry out her orders, are neither pirates nor murderers.[92]

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[90] *Ibid. Preamble*

[91] W Rech (2012) *Rightless Enemies: Schmitt and Lauterpacht on Political Piracy.* 32 Oxford Journal of Legal Studies 235, 240

[92] TE Holland (1921) *Letters to "The Times" Upon War and Neutrality (1881-1920)* London: Longmans, Green & Co., 69

In reality the attempt to assimilate war crimes to piracy was only half-hearted, but this did not stop Lauterpacht from hailing these instruments as a step towards the establishment of a body of international criminal law.[93] Lauterpacht's assessment caused controversy on two levels, one was the idea that there was in fact such a thing as international criminal law, still an idea ahead of its time, but also the way in which he argued that submarine crews who violated the laws of war could be punished. Lauterpacht citing Molloy argued that if captured at sea they should be summarily executed.[94] On this second point, Schmitt objected that "labelling political enemies as pirates entailed creating a new, rightless enemy and placing him in a zone of indeterminacy between wartime and peacetime." [95]

It is surprising on the one hand that a figure such as Lauterpacht who is regarded as a champion of human rights, should appear to argue for the summary execution of prisoners, something that was itself almost certainly a war crime at the time he was writing (summary execution of prisoners on land was prohibited under Article 23(c) of the 1907 Hague Regulations, and spies, for example, could not be punished without trial according to Article 30).[96] So far as the claims of the establishment of international criminal law were concerned, these were later criticised by Schwarzenberger.[97] He argued that:

> In Professor Lauterpacht's view the Nyon Agreement of 1937 has a special significance as its signatories claim to assume jurisdiction over 'offenders of whatever nationality'. Here 'we are confronted with the direct subjection of individuals to international law in a manner which cannot be interpreted as a mutual concession of jurisdictional rights'. In the light of what should be common knowledge to any student of international relations and of the hardly hidden intentions

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[93] H Lauterpacht (1939) *Insurrection et Piraterie* 46 Revue de Droit International Public 513

[94] *Ibid.* 528

[95] C Schmitt (2011) *The Concept of Piracy* 2 Humanity 1

[96] Regulations Respecting the Laws and Customs of War on Land *annex to the* 1907 Hague Convention IV Respecting the Laws and Customs of War on Land *reproduced in* (1908) AJIL Supp. 90-117

[97] G Schwartzenberger (1950) *The Problem of an International Criminal Law* 3 Current Legal Problems 263, 286

> of the contracting parties, this apparent difficulty resolves itself without undue difficulties. It must only be remembered that these submarines were of, at most, three possible nationalities. For the sake of politeness, these countries were not specifically named. It was clear that if any such submarine were met and sunk its home State would not claim any connection with such a 'pirate' submarine. Yet to base any development of rules of international law on a typical instance of politesse diplomatique is a feat of remarkable mental acrobatics.[98]

The reference to piracy in the Nyon Agreement would however be brought up again repeatedly later on during the codification of the law of piracy, and in particular in the discussions by the ILC. The idea that military vessels under the control of governmental authority could nevertheless commit acts of "piracy" would raise questions about whether piracy was necessarily confined to vessels acting "for private ends". The idea that piracy was a basis for the development of an international criminal law too would arise in the codification process.

Conclusions

This chapter has illustrated the complexity of the problem of piracy, and the different issues caught up within it. It will be obvious that the argument that the law of piracy is historically settled and well established is in fact difficult to sustain. The chapter has examined several key issues. Firstly, the chapter has observed that the crime of piracy at municipal law primarily involved two issues. The first was the idea that piracy was a property crime: robbery at sea, stemming from the fact that piracy was a commercial enterprise, the taking of prize without authority. The second aspect flowed from the fact that the activity was unauthorised, and that it was not only treasonous because pirates often attacked their own countrymen and government, but also because they pursued belligerent acts against foreigners without permission.

Secondly, the chapter has examined the question of piracy 'by the law of nations', and has explained that although this term is often used

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[98] *Ibid.* 287

interchangeably today with the term 'international law', historically this was not the case. The chapter argues that the law of nations also included aspects of what would today be categorised as private international law and shipping law. These rules encompassed issues such as property determinations, prize proceedings, and the law of piracy. The chapter argues that basing the idea that piracy is directly criminalised by international law on the fact that the right to seize and adjudicate in cases of piracy was considered to form part of the 'law of nations' is in fact mistaken, since they are fundamentally different issues.

Finally, the chapter has surveyed the doctrinal writings on the subject of piracy, and examined three issues that would influence the codification process: piracy and the slave trade, insurgent vessels, and the use of the piracy analogy in the discussion of violations of the laws of war at sea. The chapter has explored in particular the way in which attempts to apply the law of piracy by analogy to the slave trade and to unrestricted submarine warfare were unsuccessful, underscoring the fact that piracy was not punished by virtue of being an international crime. The next chapter now turns to the process of the codification of the law of piracy and examines how all of these issues came to be reconciled in the contemporary law of piracy.

8 The Codification of the Law of Piracy

The period following the First World War saw the beginning of an effort to codify public international law. It was perhaps because the law of piracy had attracted so much attention in the various doctrinal works on international law that it was chosen as one of the very first subjects as being suitable for codification. The task was however to prove formidable, partly because of the lack of agreement on what the international law relating to piracy actually was. This was not a problem unique to piracy however, as Lauterpacht observed:

> The experience of codification under the United Nations fully confirms the lesson of past attempts to the effect that there is very little to codify [...] For once we approach at close quarters practically any branch of international law, we are driven [...] to the conclusion that [...] there is no semblance of agreement in relation to specific rules and problems.[1]

In the case of piracy, the problem was not that there was no law to codify, but that (as the Harvard Research observed) at the time of the codification there had been few recent judicial decisions and little State practice, because piracy was essentially a historical problem.[2] Furthermore, as the previous chapter has illustrated, the developments that had taken place had confused rather than clarified the picture. In many ways some of the codification efforts would unfortunately add to the confusion. The codification had several important stages. The process started initially under the League of Nations in 1924. That effort was subsequently abandoned, and the work was taken up by the private initiative of the Harvard Law School whose lengthy report was taken as the starting point by the ILC in its work on the draft articles on the regime of the high seas. The ILC's draft was adopted with very little discussion into the High

[1] H Lauterpacht (1955) *Codification and Development of International Law*. 49 AJIL 16, 17

[2] Harvard Research in International Law *Draft Convention on Piracy with Comments* Reproduced in (1935) 26 AJIL Supplement 739, 749

Seas Convention,[3] the piracy provisions of which were in turn incorporated without significant changes into the 1982 Law of the Sea Convention.[4]

The purpose of examining the process of the codification of the international law of piracy is to cast light on the process by which the contemporary international law of piracy was arrived at. This analysis is deemed necessary because although most works on the subject refer to various parts of that process, none have systematically scrutinised how its various stages fit together chronologically and thematically, which it is argued is important to understanding how they developed. Of the two main studies that have looked at the codification of the international law of piracy, only two, Dubner,[5] and Rubin,[6] have examined the codification process in any detail. However Dubner's work focuses almost entirely on the work of the Harvard Research but without identifying all of the issues it raised. Rubin on the other hand devotes a substantial part of his concluding chapter to the codification process, but it might be suggested that this represents more of an overview than a focused examination of the issues that arose. Neither Rubin nor Dubner mention Pella's contribution to the codification process, and the latter author's Hague Academy lecture today remains largely untouched in terms of examination and analysis. As discussed in the introduction, strictly speaking materials other than the treaty itself and the preparatory works are not legitimate tools of treaty interpretation. Nevertheless, the purpose here is not to interpret specific articles of the treaty definition, but to understand how the debate over those treaty provisions was informed, and to assess the extent to which the preoccupations that shaped them are the same as those challenges the international community faces today.

This chapter makes two main arguments. The first is that contrary to much scholarly opinion the law of piracy that was eventually codified in the High Seas Convention and the Law of the Sea Convention does not in fact set out a crime

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[3] Convention on the High Seas (1958) 450 UNTS 11

[4] United Nations Convention on the Law of the Sea (1982) 1833 UNTS3

[5] BH Dubner (1980) *The Law of International Sea Piracy* The Hague: Martinus Nijhoff

[6] AP Rubin (1988) *The Law of Piracy* Newport, Rhode Island: Naval War College Press

of piracy. This idea was explicitly rejected by the Harvard Research (the starting point of the ILC's discussions), and the evidence suggests that this position was not modified by the ILC during the codifying process, or by the first UN Conference on the Law of the Sea (UNCLOS I) in particular because the ILC and the Conference were concerned with codifying the law of the sea, not international criminal law. Instead the codification efforts concentrated on the definition of piracy as a basis of *jurisdiction*. Furthermore, and remarkably given the often repeated theory that piracy is a crime of universal jurisdiction, there was very little discussion showing an appreciation of the difference between prescription, adjudication, and enforcement. Secondly, the chapter also argues that the piracy provisions as codified are nowhere near as coherent or as substantial as they are commonly believed to be, and are in effect simply based on the idea that States agree to waive the immunity of their merchant vessels on the high seas if they commit acts of violence against other vessels.

8.1 The League of Nations Committee of Experts.

The first attempts at codification were taken during the interwar years under the auspices of the League of Nations. In 1924 the Assembly of the League of Nations requested the Council of the League to prepare a list of subjects they deemed suitable for codification.[7] The list was to be submitted to governments for their comments, and then a final report was to be prepared taking these replies into account and to be sent to the Council. The subsequently established Committee of Experts for the Progressive Codification of International Law, in the process of compiling this list, identified the international law of piracy as one of seven areas suitable for codification in its second session in January 1926. Questionnaire No. 6 accordingly took as its framing question:

> Whether, and to what extent, it would be possible to establish by an international convention, appropriate provisions to secure the suppression of piracy.[8]

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[7] League of Nations *First Session of the Committee of Experts for the Progressive Codification of International Law*. Reproduced in: (1926) 20 Spec. Num. AJIL Spec. Supp. 12

[8] League of Nations *Committee of Experts for the Progressive Codification of International Law. Questionnaire No. 6; Piracy*. Reproduced in: (1926) 20 Spec. Num. AJIL Spec. Supp. 222

The Committee of Experts established a sub-committee of two; Matsuda and Wang Chung-Hui. The seven page report, which was subsequently compiled by Matsuda alone, comprised what was essentially a statement of the author's views of the international law of piracy followed by 'draft provisions' comprising eight articles.[9] The report was slightly unusual in that it did not include any references, whether to judgments, instances of state practice, or any of the leading texts on the subject. As a result, although it is apparent that Matsuda was drawing on such materials, it is left to the reader to guess what they were. The lack of references in the work also makes it difficult to determine whether the views expressed are with reference to specific issues (such as cases or instants of state practice) since everything is discussed in the abstract.

The report started by arguing that there was a "confusion of opinion on the subject of piracy" caused by a failure to distinguish between piracy "in the strict sense of the word" coming within the scope of international law, and "practices similar to piracy [defined] either under international treaty law in force between two or more States or simply under a national law".[10] The report followed this observation with a proposed definition of piracy at international law:

> [...] 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. The pirate attacks merchant ships of any and every nation without making any distinction [...] He is a sea-robber, pillaging by force of arms, stealing or destroying the property of others and committing outrages of all kinds upon individuals.[11]

The report went on to argue that piracy could only be committed on the high seas, stating that acts that would otherwise amount to piracy but were perpetrated in a State's territorial waters were a matter exclusively for the coastal State and did not fall within the purview of international law. The report nevertheless proposed that warships might intervene to seize pirate vessels in

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[9] *Ibid.* 228

[10] *Ibid.* 223

[11] *Ibid.* 223-4

the territorial waters of third States, but if they did so the vessel and crew should be handed over to the authorities of the coastal State. The report argued that pirate vessels, by committing an act of piracy, lose the protection of their flag and are thus subject to seizure by the warships of any State on the high seas.[12] The report proposed that suspect vessels might be visited to determine whether they were in fact engaged in piracy, and if they were, could be seized and the crew tried accordingly. Should the vessel be innocent, the interdicting state would be liable for compensation.[13]

These points were dealt with without difficulty, but the major part of the report was devoted to an examination of the question of who might commit acts of piracy, clearly influenced by the controversies surrounding insurgent vessels. The report first of all dismissed the idea that the "desire for gain" was a required element of piracy, stating that it was however "contained within the larger qualification of for private ends."[14] The report argued that it was better "to be content with the external character of the facts without entering too far into the often delicate question of motives." The report immediately qualified this however, by stating that:

> [...] when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime.[15]

The report did not explain what it meant by "political motives", or how this could be reconciled with its aforementioned determination not to enquire into the "delicate question" of motives.[16] The report then went on to affirm that piracy could only be committed by private vessels. If a public vessel should commit acts of "unjustifiable violence", then it was the responsibility of the flag State to punish the perpetrators and to pay damages to the victims. The report

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[12] *Ibid.* 224

[13] *Ibid.* 225

[14] *Ibid.* 224

[15] *Ibid.*

[16] *Ibid.*

nevertheless took the view that a public vessel whose crew mutinied and then sailed for its own purposes ceased to be a public one, and would then be regarded as piratical.[17] The report went on to cloud the issue further by raising the specific issue of insurgent vessels, a case which it considered to be "more difficult". The report argued that warships that take the side of the rebellion in a civil war, prior to being recognised as lawful belligerents, should not be treated as pirates by other States unless they commit acts of violence against the vessels of those States.[18] Illustrating his inability to come to any firm conclusions on the issue, Matsuda ended his discussion of the problem by stating:

> [...] third powers, on the other hand, may consider such ships as pirates when they commit acts of violence and depredations upon vessels belonging to those powers, unless the acts are inspired by purely political motives, in which case it would be exaggeratedly rigorous to treat the ships as declared enemies of the community of civilized States.[19]

The report concluded with draft articles which defined piracy as occurring:

> [...] only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons. It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.[20]

It stated that where the crew of a ship had committed an act of piracy, any warship was permitted to capture it, and would have jurisdiction over it. In the final analysis the report, short though it was, failed to provide a clear definition of piracy by clouding the issue with a comparatively lengthy discussion of the problem of unrecognised insurgent vessels. As already noted in the previous chapter the question raised by insurgent vessels was whether or not neutral

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[17] *Ibid.* 225

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.* 228

States should be permitted to seize and prosecute them as pirates. The simple answer was that there were good reasons why neutral States should not use the law of piracy to intervene in civil wars, whether recognised or not, and that if such conflicts did spill over to the extent that other States were being attacked, then that was a military problem, not a law enforcement one. From a definitional perspective the problem was how unrecognised insurgents, who are technically unlawful belligerents and therefore pirates, could be excluded from the definition without causing more confusion.

Unfortunately Matsuda's report failed to make this distinction clear, and it seems that he was unable to make up his mind on a firm principle. Worst of all however, was the fact that he chose to distinguish unrecognised insurgents from pirates by reference to their "political motives", in the face of his own assertion that motives should not be taken into account. This turn of phrase caused confusion later in the codification process, and still causes confusion today. The report itself did not meet with approval from scholars. Dickinson was critical of what he called "the so-called questionnaire on piracy", noting that the failure to reference the report meant that concepts within it remained unexplained: "One is tempted" he said "to ask what the subcommittee means by 'sailing the seas for private ends'." On the subject of the codification of the law of piracy, he observed, "much remains to be done."[21]

8.1.1 The Responses to the League of Nations Questionnaire

Matsuda's questionnaire was submitted to governments and their replies revealed a wide variety of opinions. 29 states responded, of whom 18 agreed that the subject of piracy was a subject capable of codification, though they expressed a wide variety of opinions on the subject.[22] The US and France both expressed the view that the law of piracy was not suitable for codification.[23] Some of the responses (such as that of Portugal) were quite detailed,[24] but the

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[21] ED Dickinson (1926) *The Questionnaire on Piracy* 20 AJIL 750, 750-1

[22] League of Nations *Third Session of the Committee of Experts for the Progressive Codification of International Law* Reproduced in: (1928) 22 Spec. Num. AJIL Spec. Supp. 1, 25

[23] *Ibid.* 33

[24] *Ibid.* 29-31

one that particularly stood out was that of Romania, drafted by Pella. Pella advocated that piracy should be categorised as an international crime. His proposal acknowledged that this was a novel idea:

> We already see here in embryo the principle – which, in future social relations will become the practice – of penalising throughout the world violations of laws which are common in every country. [...] If we can evolve with reference to the suppression of piracy, a new combination of the principles of penal law and international law, we shall be able to bring to light hitherto unsuspected aspects of this question which render an international convention indispensable.[25]

The Harvard Research would note that for Pella, piracy was:

> [...] a prototype to which should be assimilated in time all crimes universally recognized as offences against society. The perpetrators of such crimes, he says, should be punished by any state which seizes them, pending the establishment of an international court of criminal justice.[26]

Notwithstanding Pella's efforts however, ultimately the League of Nations abandoned the attempt to codify the law of piracy in 1927 stating that; "the question of piracy is of insufficient real interest in the present state of the world". Only three of the original seven areas were considered "ripe for codification". Rubin suggests that the real reason why the codification of the law of piracy was abandoned was because the State responses to the draft encouraged little optimism that any agreement would be achieved.[27]

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[25] *Roumanian Draft for the Suppression of Piracy Submitted by the Roumanian Government in reply to the Questionaire of the League of Nations Committee of Experts.* (1927) League of Nations Document C.196.M.70.1927.V p.220-1 *Reproduced in* Harvard Research *Draft Convention on Piracy* (n.2), 874-5

[26] Harvard Research *Draft Convention on Piracy* (n.2), 752

[27] AP Rubin (1990-1991) *Revising the Law of Piracy*. 21 California Western International Law Journal 129, 135

8.1.2 Pella's Hague Academy Lecture

Immediately following the response to the League of Nations, Pella developed his proposals further in a lecture to the Hague Academy.[28] Inexplicably this work has substantially escaped examination in the literature on piracy (it is for instance not even mentioned by Rubin in his otherwise wide reaching analysis). In the lecture Pella sets out a theory of the criminal law of piracy. In the second section of the first chapter of his lecture (entitled *Les Classifications)*, he argues that there are two different ways of classifying piracy.[29] The first, or classic, method involves distinguishing piracy by the law of nations or *piraterie absolue* subject to "universal repression" on the one hand from piracy at municipal law or as defined by particular treaties between two or more States which he described as *piraterie relative*.[30] He observed that the difference between the two is that where the former is concerned, the constitutive elements of the crime are *the same for all States*, and consequently any State may capture and prosecute the perpetrators. In the case of the latter, enforcement can only be carried out against foreign vessels if the other State has agreed to extend the concept of piracy by treaty.[31]

At the same time, Pella argued for a new and different method of classifying acts of piracy, which involved three classifications. These were offenses against the *droit commun* (or common or universal law), political offences, and international offences.[32] The first category was "ordinary" piracy, which Pella argued, all States were under an obligation to cooperate to repress. He argued that this common duty was not due to the nature of the crime, which he described as "ordinary", but due to the location where it is committed.[33] The second category was what he termed piracy that is "political in nature" (*piraterie à caractère politique)*. This category included the "insurgent ship on the high seas" which he argued did not justify universal repression, since its

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[28] VV Pella (1926) *La Répression de la Piraterie* 15 RCADI 145

[29] *Ibid.* 171

[30] *Ibid.* 172

[31] *Ibid.*

[32] *Ibid.* 173

[33] *Ibid.* 174

activities were directed against a particular State, and that if another state were to intervene it would thereby interfere with the sovereignty of the State it was claiming to defend. He argued that there was a "principle of non-collaboration" between States in the prosecution of political offences.[34]

The final category he proposed was that of *international* piracy in which he categorised violations of the laws of war at sea, such as attacking neutral vessels without justification and attacking private vessels without warning or placing passengers in a place of safety.[35] Pella devoted the major part of his lecture to discussing the criminal law aspects of piracy. He proposed that the crime itself had five elements: acts of violence or destruction (*déprédation*), the absence of authorisation, the motive to steal (*esprit de lucre*), that the acts take place outside of any state's ordinary jurisdiction, and the acts take place on the high seas.[36] He also argued that the principle of *nullum crimen* precluded the possibility that piracy could be defined by customary international law, and that the criminal definition was on the contrary to be found in the legislation of different States.[37]

8.2 The Harvard Research on Piracy

The next significant step in the codification process was the work of the Harvard Research in International Law. It published its report into the international law of piracy in 1932. The report would prove to be particularly important because it was subsequently adopted by the ILC as the starting point of its examination of the law of piracy when preparing its draft convention on the high seas. The report comprised an introduction setting out the terms of the report, a draft piracy convention of 19 articles, and a commentary on each of the draft articles. In sharp contrast to the League of Nations report, the Harvard report includes an extensive number of quotes from writers classical and contemporary in their

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[34] *Ibid.* 175

[35] *Ibid.* 176 Clearly influenced by the controversy surrounding the problem of submarine warfare.

[36] *Ibid.* 184-230

[37] *Ibid.* 181

original languages, and runs to 147 pages in length.[38] The introduction observed that the law of piracy at international law was the subject of a considerable "diversity of opinion".[39] The report noted that this diversity was "especially remarkable" with regard to three issues it considered fundamental: first the definition of piracy in international law, second; the question of whether piracy was an "offence or a crime against the law of nations" and third; the question of the "common jurisdiction of all states to prosecute and punish pirates". Their starting point was one that had been made repeatedly by previous authors: the observation that there was a distinction between the concept of piracy "by the law of nations" and piracy at municipal law. It seems that the Harvard Research were also influenced by previous writings such as Blackstone who had described piracy as being prohibited by the "law of nations" because throughout the text they use that term instead of 'international law' despite the fact that the latter term would have been far more usual at the time.

The report stated at the outset that the law of piracy was the subject of widely divergent opinions, noting that the "diversity is especially remarkable" concerning its definition, the "meaning and justification of the traditional assertions that piracy is an offence or a crime under the law of nations" and the question of jurisdiction over it.[40] It was observed that this was primarily due to the fact that piracy had not been a serious international problem for so long.[41] So far as the question of a definition was concerned, the report recalled that the League of Nations Report had also observed that there was a clear distinction between the municipal law and the international law definitions of piracy, and that there was no necessary convergence between the various definitions of the offence in the municipal legislation of various countries.[42]

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[38] Harvard Research *Draft Convention on Piracy* (n.2)

[39] *Ibid.* 749

[40] *Ibid.*

[41] *Ibid.* 764

[42] *Ibid.* See also Rubin *Law of Piracy* (n.4), 309

8.2.1 An International Crime or a Basis of Jurisdiction?

Perhaps the most important question the report needed to address was whether piracy was an international crime or not. Like Pella, they came to the view that the criminal definition of piracy was a matter of municipal law:

> [...] there is an important distinction between international law piracy and municipal law piracy which affects the theme of the draft. In municipal law, piracy (if the term has any special significance) is principally a crime. The municipal lawyer finds it difficult to think of it otherwise. There is a natural tendency for him to carry over this conception into his view of international law piracy, where it prejudices his thinking on the topic. This tendency is evidenced and supported by the traditional statements of jurists that piracy is "an offence" or "a crime" against or by the law of nations.[43]

In deciding whether piracy was a crime at international law, the Harvard Research were forced to choose between two different doctrinal opinions, on the one hand that of Stiel, who had argued that piracy could not be an 'international crime' and on the other the proposals made by Pella to the League of Nations urging that piracy should be the subject of international criminalisation.[44] Perhaps unsurprisingly, given the fact that the prevailing view of international law at the time was voluntarist in nature, and given Pella's own admission that his proposals were entirely normative, the Harvard Research chose to reject the idea of piracy as an international crime, stating that it ran contrary to:

> [...] the modern orthodox theory of the nature and scope of the law of nations. According to it, the law of nations is a law between states only and limits their respective jurisdictions. Private individuals are not legal persons under the law of nations. The rights, duties, privileges, and powers which it defines are only those of states. There

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[43] Harvard Research *Draft Convention on Piracy* (n.2), 751

[44] *Ibid.* 752-7

> is no legal universal society of private persons regulated by international law.[45]

As a result, the Harvard Research also did not consider it justified to conclude that there existed an international crime of piracy,[46] nor, taking into account the fact that not all states undertook to "punish a pirate who has not offended against its particular interests", did they conclude that States generally accepted that they were under a duty to prosecute acts of piracy.[47]

They further argued that an international crime would require "the consent of all states to a treaty provision that they owe each other mutual duties to prosecute all pirates before their tribunals" but noted that there was no instance of State practice admitting of such a duty, nor was there "provision in the law of many states for punishing foreigners whose piratical offence was committed outside the state's ordinary jurisdiction."[48] Instead, they argued that:

> Properly speaking, then, piracy is not a legal crime or offence under the law of nations. [...] International law piracy is only a special ground of state jurisdiction [...] How far it is used depends on the municipal law of the state, not on the law of nations. The law of nations is permissive only. It justifies state action within limits and fixes those limits. It goes no further [...] The theory of this draft Convention, then, is that piracy is not a crime by the law of nations, It is the basis of an extraordinary jurisdiction in every state to seize and to prosecute persons, and to seize and dispose of property. [...] The purpose of the convention is to define this extraordinary jurisdiction in general outline.[49]

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[45] *Ibid.* 754

[46] *Ibid.*

[47] *Ibid.* 756

[48] *Ibid.*

[49] *Ibid.* 759-60

Consequently, the draft convention would also not create an obligation on states to act against piracy.[50]

8.2.2 The Problem of 'For Private Ends'

Having dealt decisively with the question of piracy as an international crime, it might have been hoped that the report would then set out a clear theory of jurisdiction over piracy. Unfortunately, the report immediately became entangled in the very same issue that had undermined the League of Nations report: the question of insurgent vessels. The report noted, as the League of Nations had before it, that subjective motive was irrelevant to the concept of piracy at international law. However, the report went on to say that it excluded from its definition

> [...] all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bands. Under present conditions there seems no good reason why jurisdiction over genuine cases of this type should not be confined to the injured state, the state or recognized government on whose behalf the forces were acting, and the states of nationality and domicile of the offender.[51]

The definition of piracy in Article 3 of the Draft Convention described piracy as being "for private ends without bona fide purpose of asserting a claim of right" and the commentary to Article 3 stated that:

> Although states at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, or privateers whose commissions violated the announced policy of the captor, and although there is authority for subjecting some cases of these types to the common jurisdiction of all states, it

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[50] *Ibid.*

[51] *Ibid.* 786

> seems best to confine the common jurisdiction to offenders acting for private ends only.[52]

The report examined the problem again in relation to Article 16 which notes that the convention provisions "do not diminish a state's right under international law to take measures for the protection of its nationals, ships, and commerce where those measures are not based on the law of piracy."[53] In the comment to that Article they refer to the problem as "the troublesome matter of illegal forcible acts for political ends against foreign commerce, committed on the high sea by unrecognized organizations."[54] They noted that:

> Some writers assert that such illegal attacks on foreign commerce by unrecognized revolutionaries are piracies in the international law sense; and there is even judicial authority to this effect. It is the better view, however, that these are not cases falling under the common jurisdiction of all states as piracy by the traditional law, but are special cases of offences for which the perpetrators may be punished by an offended state as it sees fit.[55]

The problem with this line of reasoning is that it is preoccupied with the idea that *punishment* of unrecognised insurgents should be reserved to an affected State. What the report does not seem to have appreciated however, is the fact that the 'jurisdiction' it is discussing is *enforcement jurisdiction to seize a pirate vessel*. Thus by excluding unrecognised insurgents from 'piracy jurisdiction', the report is in effect leaving such vessels to the default position which reserves enforcement jurisdiction to the flag State. This is of course highly problematic since unrecognised insurgent vessels are not actually answerable to one.[56]

The lack of coherence in the argument for excluding jurisdiction over vessels belonging to unrecognised insurgents was only underlined by drawing a

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[52] *Ibid.* 798

[53] *Ibid.* 857

[54] *Ibid.*

[55] *Ibid.*

[56] Vessels belonging to unrecognised revolutionary forces normally flew their own flags, and obviously did not submit to the authority of the government against which they were in rebellion.

distinction with warships whose crews had mutinied. The report took the view that the latter would:

> [...] of course [...] be piracy and fall under the 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 governmental acts.[57]

The practical problems with these assertions seem to have escaped the attention of the drafters. According to this line of reasoning, on the one hand a vessel belonging to an unrecognised rebel movement flying an unrecognised flag and attacking and seizing neutral shipping without authorisation and unanswerable to any public authority is to be excluded from the jurisdiction of foreign states, and yet a warship whose crew have mutinied and whose crew are acting for their own motives loses its immunity and may be seized by foreign vessels, even though the fact that it is acting without authority may not be outwardly obvious, and even though the crew of the vessel remain answerable to their own government. It also ignored the fact that in practice rebel warships would often be former government vessels manned by their mutinous crews who had joined the rebellion.

The mistake of the Harvard Research was to adopt the error of the League of Nations report of drawing a distinction between private and political 'ends'. The notion of 'private ends' does not relate to motivation, it relates to the question of authority. As explained in Chapter 7, piracy was historically defined as belligerent activity (in particular the taking of prize) without public authority. If a public vessel belonging to a recognised government commits belligerent acts, foreign States have a choice either to consider them acts of war, or to complain to the flag State and seek reparation. The crew of such a vessel cannot be held criminally liable for their activities since they are lawful belligerents and are entitled to functional immunities. Conversely, if a private vessel acting without public authority attacks and seizes foreign vessels on the high seas, its activities cannot be attributed to the flag State. As noted in Chapter 3, where the actions of a public official are performed for private ends and not official business, then

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[57] Harvard Research *Draft Convention on Piracy* (n.2), 798

no functional immunity attaches. An unlawful belligerent is not entitled to functional immunity by reason of the fact that he is not acting in an official capacity.

In reality, the problem of unrecognised insurgent vessels sits uncomfortably between the law of the sea and the law of armed conflict, and the Harvard Research explicitly preserved the rights of States under Article 16 to take measures to protect their vessels. There was however no need to have devoted so much of the draft to examination of the issue. It was clear from the literature and from judicial decisions that the question of insurgent vessels was one of fact in each case, and one of policy more than law. The Harvard Research could justifiably have either included or excluded insurgent vessels from the Draft Convention on policy grounds. However, to exclude insurgents on the basis of their *motives* was simply misconceived because, as they themselves had noted, piracy was not an international crime, and motive was irrelevant to the question of jurisdiction over pirate vessels. The distinction between lawful and unlawful takings at sea had always been the question of public authority, and in the case of rebels and insurgents, that depended on the recognition of a state of belligerency.

8.2.3 The Harvard Definition

Turning to the question of the definition of piracy in the Draft Convention, the Harvard Research rejected the idea that the definition could be based on municipal law:

> [...] although the traditional nonstatutory crime of piracy in English law corresponded to international law piracy, there is not sufficient authority to justify the assertion that it was coextensive. Few if any states punish criminally the perpetrators of all acts which are piratical by the law of nations.[58]

The definition is contained in Article 3 of the Draft Convention, and included a substantial level of complexity. Rather than trying to narrow down what piracy might encompass, after reviewing the literature on the subject they came up

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[58] *Ibid.* 821

with no less than sixteen different definitions (or elements of a definition) ranging from robbery, homicide and malicious destruction to "sailing a ship not authorised by any state or recognized belligerent government while disclaiming allegiance to any state."[59] They nevertheless (correctly) noted that:

> It is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority.[60]

Despite having clearly identified the definition of piracy however, Article 3 of the Draft Convention was drafted in completely different terms and read as follows:

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
> 2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
> 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.[61]

The Harvard draft therefore defined piracy by excluding from it; acts taking place within the territorial jurisdiction of any state; acts taking place entirely within a vessel and thus being reserved to the flag state without external interference and; any acts not conducted for "private ends." Once again, the Draft exhibits a substantial level of confusion. Once again the question of intent

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[59] *Ibid.* 773-82

[60] *Ibid.* 750

[61] *Ibid.* 743

had crept into the definition despite the fact that it was not intended to be the definition of a crime. Furthermore, as subsequently noted in the ILC discussions the idea that violence with the intent to rob, rape, or enslave could be justified by a "bona fide purpose of asserting a right" was absurd and illogical.[62]

Commentators have expressed different views about the Harvard draft. Rubin is critical of the analysis undertaken, in particular of the apparent over-reliance on Stiel. In his view;

> [...] the Harvard Draft must be evaluated on its own merits as a legislative proposal, and cannot be supported as a reflection of a scholarly analysis of precedent and theory.[63]

Dubner on the other hand argues that the Harvard Research "included every possible thought and idea in existence at the time of its preparation".[64] In the final analysis perhaps the most important aspect of the Harvard Draft was the fact that it clarified the fact that piracy was not a crime at international law, but was instead a basis of jurisdiction. As to the other elements, still more work would be required. In the event the Draft's importance would come via its consideration by the ILC.

8.3 Codification under the Auspices of the UN

The efforts of the Harvard Research were never taken up by the League of Nations, and it was not until after World War Two that the issue of the codification of the law of piracy would again be addressed, this time by the United Nations. Up until this point, piracy had been discussed as a discrete topic. Now however, piracy would be considered as part of the codification of the law of the sea, specifically as part of the codification of the regime of the high seas, and therefore only one of several issues to be considered, including fisheries, navigation and the nationality of vessels, pollution, the safety of vessels, and underwater cables.

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[62] ILC *Summary Records of the Seventh Session 2 May – 8 July 1955* A/CN.4/SER.A/1955, YBILC 1955 Vol.1, 43

[63] Rubin *Law of Piracy* (1988) (n.4), 313

[64] Dubner *Law of International Sea Piracy* (n.3), 37

8.3.1 The International Law Commission

As part of the work on a draft code for the high seas in 1955 J.P.A. François, the ILC Special Rapporteur, prepared draft articles on the international law of piracy based on the Harvard Draft Convention. Presenting his draft to the ILC committee in its seventh session, he noted that this was essentially derived from the Harvard Draft;

> He had felt that he could not do better than to take the principal articles in Professor Bingham's report, and the comments thereon, as a basis for the discussion on the subject of piracy, [...]. He had attached no comment to his individual articles, that appended to the Harvard articles, to which he referred members, being exhaustive and entirely satisfactory.[65]

Rubin suggests that "key elements of the evolution of the text" do not form part of the record of the discussions, having been discussed only by the drafting committee effectively off the record.[66] Furthermore it is difficult to extrapolate firm principles from the discussion, because it is clear that the committee members were talking at cross purposes throughout the discussion.

The major part of the discussion within the committee would see François attempting to steer his concept through at times fierce opposition, in particular from the Czechoslovak and Soviet delegates as Cold War tensions came to dominate the discussion. The debates were coloured by a controversy that had arisen between Poland and the Republic of China (Taiwan) concerning the interference with ships destined for mainland China.[67] The Polish government had previously submitted a memorandum to the General Assembly which had been rejected.[68] The memorandum was resubmitted to the ILC committee,[69] and the Czechoslovakian delegate, Jaroslav Zourek, argued that the activities of

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[65] ILC *Seventh Session* (n.63), 39

[66] Rubin *Law of Piracy* (n.4), 136

[67] ILC *Seventh Session* (n.63), 37-9

[68] *Ibid.*

[69] *Regime of the High Seas. Observations of the Government of Poland Concerning Freedom of Navigation on the High Seas.* A/CN.4/L.53

the Republic of China should be condemned as piracy.[70] This issue would continue to be raised throughout the discussion as Zourek, with the support of the Soviet committee member, S.B. Krylov, repeatedly argued that actions by warships and vessels under public authority could be guilty of piracy. This controversy undoubtedly limited the level of agreement that could be reached, because it ensured constant argument and disagreement. However it also served to clarify the meaning of the term 'for private ends' as excluding acts undertaken under public authority.

François commenced his analysis with a by now familiar distinction, noting that the Commission "was concerned with the notion of piracy at international law, and not with the national concept of that crime."[71] He went on to state that the draft articles were:

> [...] based on three important principles [...] that animus furandi did not have to be present; the principle that only acts committed on the high seas could be described as piracy; and the principle that acts of piracy were necessarily acts committed by one ship against another ship.[72]

Agreeing with Oppenheim,[73] and the Harvard Research, it was noted that the draft articles were limited to the high seas.[74] Acknowledging the distinction between enforcement and prescription he observed that "Exclusion from common jurisdiction did not preclude the possibility of prosecution, as was made clear in the Harvard Comment."[75] It was also decided to limit the provisions to cases of acts committed by one ship against another: "This limitation also is designed to exclude offences committed in a place subject to the ordinary jurisdiction of a State."[76] The draft therefore excluded acts entirely

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[70] ILC *Seventh Session* (n.63), 37

[71] *Ibid.*

[72] *Ibid.* 40

[73] HA Lauterpacht (ed.) Oppenheim's International Law Vol.1 – Peace London: Longman, 565

[74] ILC *Seventh Session* (n.63), 41

[75] *Ibid.*

[76] *Ibid.* 42

contained with the vessel and which would therefore fall under the exclusive jurisdiction of the flag state.

His explanation of the meaning of the term 'for private ends' remained muddled however:

> Following the Harvard precedent, he had defined as piracy acts of violence or of depredation committed for private ends, thus leaving outside the scope of the definition all wrongful acts perpetrated for a political purpose.[77]

He observed that the Harvard Research had said that it "seems best to confine the common jurisdiction to offenders acting for private ends only" noting that "In cases of a political nature, it was open to the aggrieved State to take reprisals or to claim damages, or, again to take certain other measures."[78]

> The situations described by the Polish Government's memorandum could only be dealt with on the basis of the principles thus enunciated. No warship, even if it belonged to a government which was not recognized by some States, could be described as a pirate ship in the international sense of the word. [...] All that was made clear by the words "for private ends", as used in article 23 and the Polish memorandum was in fact a challenge to that element of his definition of piracy. He would insist on those words being retained.[79]

The draft had apparently included a clause specifically excluding politically motivated acts from the definition of piracy.[80] The Nyon Arrangement had been relied on as evidence that warships could commit piracy, but Fitzmaurice "reminded the Commission of the peculiar feature of the events leading up to the Nyon Arrangement, namely, the sinking of ships in the Mediterranean by submarines of which no country was willing to admit ownership".[81] Krylov proposed that the words 'Acts committed for political ends cannot be regarded

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[77] *Ibid.*

[78] *Ibid.* 41

[79] *Ibid.*

[80] *Ibid.* 266

[81] *Ibid.* 43

as piratical acts' should be deleted "on the ground that it was impossible to establish a criterion to distinguish between acts committed for private ends and acts committed for political ends." [82] François was once again reluctant to enter into discussion of the issue arguing that "the controversial question whether a political act could be regarded as piracy had been discussed at great length in the past and had been raised in the Harvard Draft". He stated that he would prefer to keep the reference to political ends, but at the same time acknowledged that: "it might be desirable to explain a little more fully what was meant by acts committed for private ends." [83] Sandström expressed opposition, but Zourek agreed with Krylov's proposal.[84]

Giving the appearance that members of the Commission were talking at cross purposes Fitzmaurice said that he could accept Krylov's proposal, but:

> [...] thought that the Commission should at its next session reconsider the wording of the first sentence in sub-paragraph 2 so as to find some better expression than "for private ends". The real antithesis which needed to be brought out was between authorized and unauthorized acts and acts committed in a public or in a private capacity. An act committed in a private capacity could have a political purpose but be unauthorized—as, for example, the seizure of a vessel by the member of an opposition party.[85]

In the end, the reason why insurgent vessels were not subject to counter-piracy enforcement was not their motive, but the implications of trying to seize warships on the high seas. François "urged" the Commission to:

> [...] reflect most carefully on the consequence of allowing seizure of a warship by a State on suspicion that it had committed acts of piracy. Such a step carried far more serious implications than in the case of seizure of merchantmen. [...] he pointed out that the whole question of civil war aroused complex issues such as the recognition of

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[82] *Ibid.* 266

[83] *Ibid.*

[84] *Ibid.*

[85] *Ibid.* 267

> revolutionaries as belligerents and recognition of governments, which could not be disposed of in the way suggested by Mr Zourek, who wished to assimilate to acts of piracy all acts against a State not party to the conflict. He was categorically opposed to such a provision, which would increase rather than restrain disorder on the high seas."[86]

As well as debate over the issue of 'for private ends', the question of whether piracy was an 'international crime' was also raised sporadically. Early on in the discussion Garcia Amador questioned:

> [...] why a fairly detailed study of piracy had been embodied in the draft articles, considering that the latter were not meant to be an exhaustive codification of the law of piracy. The matter of collisions on the high seas, for instance, had been the subject of only one article.[87]

This comment drew a response from the secretary to the committee (Liang) who regretted that it was not possible to circulate the Harvard draft and noted that:

> In making that exhaustive study, Professor Bingham had considered piracy only in relation to the jurisdiction of States on the high seas; it had not been his intention to study piracy as a crime against the law of nations, or to report on international criminal law.[88]

This comment seemed to draw criticism from several of the other committee members. Amado argued that "It was a customary rule of international law that piracy in the classical sense, that was, any act of violence committed by a ship on the high seas in a private capacity, was a crime against the *jus gentium*." And stated that he did not find the Special Rapporteur's formulation particularly satisfactory.[89] Scelle stated that "he deplored the tendency to formalism. He would be unable to support a provision defining piracy by reference to

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[86] *Ibid.* 56

[87] *Ibid.* 42

[88] *Ibid.*

[89] *Ibid.*

jurisdiction and not the nature of the act."[90] These statements drew a sharp response from François however, replying that:

> Mr. Scelle, in his keen concern to establish an international police, considered that acts committed on land should be treated on the same footing as acts committed on the high seas, thereby departing from the doctrine held by most authorities whereby States could only take steps against acts of piracy committed on the high seas. The acceptance of the new idea propounded by Mr. Scelle would only serve to complicate the issue.[91]

Zourek's response appeared to suggest in his view the committee was not attempting to codify the criminal law of piracy, but that these aspects would remain in the form of customary international law:

> "[…] some members had referred to the penal aspect of the problem, but that should raise no difficulty since, under customary international law, piracy was recognized as an international crime."[92]

In what appears to have then been a (misplaced) effort to purge the draft provisions of their criminal law aspects, François subsequently prepared and submitted "a revised version of article 23, from which he had omitted the provisions contained in paragraphs 2 and 3 of the original text, since they dealt with details of international penal law." (the parts relating to abetting and facilitating).[93] This despite the fact that the Harvard Research had included them clearly not considering them to be "penal" in nature. These sections would in any event be reinstated to the draft in due course.

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[90] *Ibid.* 43

[91] *Ibid.*

[92] *Ibid.*

[93] *Ibid.* 44

8.3.2 The UN Conferences on the Law of the Sea

The ILC submitted its report on the Regime of the High Seas and the Territorial Sea in January 1956,[94] and the draft proposals were taken up by the Geneva Conference on the Law of the Sea in 1958 (UNCLOS I). There was however almost no appetite for reopening discussion of the piracy provisions. Dubner notes that there were objections to them being included in the High Seas Convention, and motions introduced to remove them.[95] In the Eleventh meeting the Czechoslovak delegation argued that the piracy articles "occupied a disproportionate amount of space."[96] Nevertheless, the ILC draft was adopted with only a small number of minor amendments.[97] The topic of piracy was again only briefly discussed during UNCLOS III, and incorporated into the LOSC, again with only minor amendments.

One of the problems identified was the question of whether the rules on piracy applied to the EEZ. Peru suggested during the seventh and ninth sessions that the piracy provisions should be amended to include this zone, but the proposals were not accepted.[98] Guilfoyle suggests that the piracy provisions nevertheless apply to the EEZ by virtue of Article 58(2) which provides that the articles relating to the high seas apply to the EEZ "in so far as they are not incompatible" with the rules governing the EEZ (Part V of the LOSC).[99]

The provisions dealing with piracy are contained within Articles 100 to 107 and Article 110 of the LOSC. The relevant articles are copied almost exactly from the HSC. Article 101 LOSC reads as follows:

Piracy consists of any of the following acts:

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[94] ILC *Regime of the High Seas and Regime of the Territorial Sea: Report by JPA François, Special Raporteur* Doc. A/CN.4/97 YBILC 1956 vol. II, 1

[95] Dubner *The Law of International Sea Piracy* (n.3), 123

[96] *UN Conference on the Law of the Sea: Official Records Vol. IV, Second Committee (High Seas: General Régime)* Doc. A/CONF.13/40, 25

[97] SN Nandan and S Rosenne *United Nations Convention on the Law of the Sea 1982: A Commentary Vol. III* (1995) The Hague: Martinus Nijhoff, 196-223

[98] *Ibid.* 183-184, 199-200

[99] D Guilfoyle (2009) *Shipping Interdiction and the Law of the Sea* Cambridge: CUP, 44

(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 105 LOSC provides as follows:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship 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.

Apart from these two articles, Article 100 requires States to "co-operate to the fullest possible extent in the repression of piracy", Articles 95 and 96 grant complete immunity to warships and ships on governmental non-commercial service, Article 107 limits the right of seizure to warships or duly authorised ships or aircraft clearly marked and identifiable as being on government service. Article 106 provides for liability for seizure without adequate grounds.

Conclusions

In the final analysis, the international law of piracy was an attempt to reconcile a considerable number of historical issues into one general rule. That task was also complicated by a number of other factors. First and most obvious was the fact that at the time of the codification, piracy was an entirely historical problem. There had been no State practice or judicial decisions of note for some

time. Secondly, there was a large volume of doctrinal opinion on the subject that had unfortunately obscured the issues more than they had clarified them. Finally, the effort to distil out the main issues within the law of piracy were also hampered by the excessive attention given to largely insignificant issues such as unrecognised insurgent vessels, and also by the efforts to use piracy as a platform on which to base the nascent concept of international criminal law.

The first issue that the codification needed to address was the question of whether piracy was an international crime, and whether it was possible or desirable to attempt to codify it as such. It is clear that the Harvard Research rejected this idea, and that Special Rapporteur François succeeded in preserving this decision through the discussions in the ILC. As noted above, the idea that the codification of the law of the sea should be concerned with codifying international criminal law seems not to have been a realistic proposition.

It is instead clear that the law of piracy as codified is entirely concerned with the issue of jurisdiction. That jurisdiction is defined within the very definition of piracy itself in Article 101 LOSC. The definition is limited to the high seas and outside the (territorial) jurisdiction of States, and requires two vessels (thus excluding activities contained entirely within one vessel). These restrictions are characteristic of *enforcement* jurisdiction, since they preserve the rights of coastal States and flag States from foreign intervention. It is therefore argued that the LOSC in fact codifies a basis of *enforcement* jurisdiction rather than a crime or a basis of prescriptive jurisdiction as such. This should come as no surprise, because the 'object and purpose' of the HSC and the LOSC is clearly not the creation of international criminal law. The purpose of the Conventions is, on the contrary, the establishment of rules for the regulation of the ocean space, one aspect of which is the allocation of (enforcement) jurisdictional competence.

As to the extent of that enforcement competence, it is sufficient to note at this point that the justification for the loss of the immunity normally accorded to merchant vessels on the high seas in peacetime is based on the fact that that immunity is accorded for the preservation of the freedom of navigation, and since pirate vessels violate those freedoms, they are not themselves entitled to

rely on them. However, as Fitzmaurice observed, the precise mechanics of this process appear be that since a pirate vessel is committing acts of violence against other vessels, and since its flag State does not authorise or adopt its activities, it is effectively presumed that the flag State would not seek to assert its rights over the vessel. In reality therefore, the 'law of piracy' as codified is not as robust as it first appears. The thesis returns to an analysis of the enforcement jurisdiction over piracy in Chapter 10 below. The third part of the thesis now turns to an examination of the international law of jurisdiction as it applies to the contemporary piracy problem. This part comprises four chapters. First Chapter 9 examines the concept of piracy as an international crime, then the following chapters examine in turn the question of prescriptive jurisdiction over piracy, the applicability of the SUA Convention to piracy, and the issue of enforcement jurisdiction over piracy.

PART III

JURISDICTION OVER PIRACY IN PRACTICE

9 Piracy as an International Crime

This chapter examines the concept of piracy as an international crime. This is a significant issue because the categorisation of the crime of piracy has consequences for the prescriptive jurisdiction over it. It will be recalled from Chapter 1 that there is a sharp difference of opinion in the literature between those who argue for the notion of piracy as an international crime, and those who argue against that characterisation. This chapter will survey some of the issues already identified in this respect, and will also evaluate the idea that the LOSC codified a criminal offence, and whether there may still be a separate crime of piracy as a matter of customary international law. It will argue that piracy is better characterised as a 'transnational crime' rather than an 'international crime', and that there are practical consequences for its categorisation.

9.1 The Evidence for the Crime of Piracy

As noted in Chapter 1, there is a considerable body of opinion in support of the view that piracy is an international crime. Foremost among those views are those expressed by Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant* case, to the effect that piracy is the "classic example" of "a crime regarded as the most heinous by the international community."[1] Colombos stated that the act of piracy is "often described as an 'international crime'",[2] and both McDougal and Burke,[3] and O'Connell also claimed that it is "a crime in international law".[4] Guilfoyle also argues that "piracy is a crime of individual liability under general (or customary) international law."[5] Lauterpacht

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[1] *Case concerning the Arrest Warrant of 11 April 2000.* (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, p.3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal p.63, 81

[2] CJ Colombos (1967) *The International Law of the Sea* London: Longmans, Green and Co., 443

[3] MS McDougal and WT Burke (1987) *The Public Order of the Oceans: A Contemporary International Law of the Sea* New Haven: New Haven Press, 877

[4] DP O'Connell (I Shearer ed.)*The International Law of the Sea Vol. II* Oxford: Clarendon, 967

[5] D Guilfoyle (2009) *Shipping Interdiction and the Law of the Sea* Cambridge: CUP, 27

described piracy as "a so-called" 'international crime'.[6] but this was criticised by Brownlie as "an unusually wide conception".[7] Kress stated that the views expressed by Judges Higgins, Kooijmans, and Buergenthal in their dissenting opinion "provoke a measure of astonishment". Kress agrees with Schwartzenberger in his assessment that piracy is an "internationally authorized municipal law".[8] Amongst other authors who have argued against categorising piracy as an international crime, Rubin argued that:

> It may be concluded that [...] there is no public international law defining "piracy"; that the only legal definitions of "piracy" exist in municipal law and are applicable only in municipal tribunals bound to apply that law.[9]

For Geiss and Petrig the treaty definition of piracy "can hardly be conceived of" as an international crime,[10] and Cassese also argued that the definition of international crimes "does not encompass" piracy.[11] Writing in 1957 Johnson argued that:

> In my view the expression "international crime" is scarcely appropriate for the present stage of international law. If and when an International Criminal Court is established with a definite jurisdiction, such an expression may become suitable. But, meanwhile, to use the expression "international crime" in respect of piracy, in respect even of the so-called piracy jure gentium, is to obscure the fact that there is in modern international law no agreed definition of this crime. [12]

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[6] HA Lauterpacht (ed.) (1947) *Oppenheim's International Law Volume 1 – Peace* London: Longman, 559

[7] I Brownlie (2008) *Principles of Public International Law* Oxford: OUP, 229

[8] C Kreß (2006) *Universal Jurisdiction over International Crimes and the Institut de Droit International* 4 JICJ 561, 569

[9] AP Rubin (1988) *The Law of Piracy* Honolulu: University Press of the Pacific, 344

[10] R Geiss and A Petrig (2011) *Piracy and Armed Robbery at Sea* Oxford: OUP, 140

[11] A Cassese (2008) *International Criminal Law* Oxford: OUP, 12

[12] DHN Johnson (1957) *Piracy in Modern International Law* 43 Transactions of the Grotius Society 63, 69

In Chapter 2 it was explained that there are two categories of crimes in international law, namely international crimes directly proscribed by international law, and transnational crimes which are proscribed at municipal law, also known as 'crimes of international concern' or offences against the law of nations (*delicta juris gentium*). It was noted in that chapter that piracy was considered by the AIDP to be a 'crime of international concern', a view reiterated by Pella. In Chapter 6 it was observed that piracy was treated by English law simply as robbery at sea, and as treason, since pirates were normally punished for performing belligerent attacks against their own state or against foreigners without permission.

At the same time as piracy was categorised as a 'crime of international concern', instruments listing international crimes have always excluded piracy. Piracy does not appear in either the ILC's 1954 Draft Code of Offences against the Peace and Security of Mankind,[13] or the 1996 Draft Code of Crimes against the Peace and Security of Mankind.[14] Discussion of the Draft Code by the ILC in 1950 briefly considered whether piracy should be included, but this was rejected on the basis that piracy was an "ordinary crime" not an international one.[15] Piracy was also not even considered for inclusion in the Rome Statute of the International Criminal Court, although several other offences were considered and subsequently rejected, including drugs trafficking and international terrorism.[16] Piracy has also never featured in the statutes of any of the international criminal tribunals.

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[13] ILC *Draft Code of Offences against the Peace and Security of Mankind* YBILC, 1954, vol. II, 151

[14] ILC *Draft Code of Crimes against the Peace and Security of Mankind* YBILC, 1996, vol. II, Part Two, 17

[15] ILC *61st Meeting: Preparation of a draft Code of Offences against the Peace and Security of Mankind* YBILC 1950 vol.1, 162-3

[16] See: P Robinson *The Missing Crimes* in A Cassese, P Gaeta, and JRWD Jones (eds.) (2002) *The Rome Statute of the International Criminal Court: A Commentary* Oxford: OUP, 497 et seq.

9.2 Article 101 as a Criminal Offence

There is almost no dissent from the view that the public international law definition of piracy is codified in Article 15 HSC and 101 LOSC.[17] In Chapter 8 the thesis examined the treatment of the issue of piracy as an international crime in the codification process, and observed that the Harvard Research categorically rejected the idea that piracy was an international crime. McDougal and Burke have argued that the Harvard Research's view that piracy at international law was merely a basis of jurisdiction (and not a crime) was a "preoccupation" which "seems to have substantially disappeared", arguing that the Harvard Research's "insistence that the convention merely defines the conditions for the exercise of this jurisdiction, are noticeably omitted from the (ILC) recommendations."[18] Having examined the discussion in the ILC and at the preparatory conferences however, it is difficult to see how McDougal and Burke arrive at this conclusion. The reality seems to be that, although there appears to have been some disagreement in the committee on the issue the ILC did in fact decide not to codify a crime of piracy, and were instead content to prepare their draft on the basis that they were codifying only the jurisdiction over it. That decision was not modified by the preparatory conferences. It would in any case have been unusual for committees attempting to codify the rules applicable to the use of the sea to instead attempt to codify international crimes.

It is not merely the views expressed in the codification of the law of the sea that militate against the conclusion that Article 101 LOSC defines a criminal offence, however. The way in which that article is framed makes it very difficult to sustain an argument either that the Convention defines and proscribes piracy as an international crime, or that the Convention defines piracy as a crime for States to proscribe in the manner of a 'suppression convention'. The first problem is that the Article itself does not make any reference to piracy being a crime, or that the conduct is proscribed, nor does it place any obligation on

[17] Although there are some who argue that the HSC did not completely codify the concept, a point addressed below in Part 9.3

[18] McDougal and Burke *Public Order of the Oceans* (n.3), 877

States to criminalise or punish it. Geiss and Petrig observe that analysis of Article 101 LOSC and Article 15 HSC:

> [...] shows that they merely provide definitions of piracy, but not offense descriptions, i.e. criminal norms. [...] the provision does not state that it is prohibited for an individual to engage in such conduct, nor does it threaten the commission of acts of piracy with punishment.[19]

They note that by way of comparison, Article 1 of the Genocide Convention specifically states that Genocide

> [...] is a crime under international law which [States] undertake to prevent and punish. [...] Rather than constituting an international crime on which criminal prosecutions can directly be based, the definition of piracy in Article 101 UNCLOS is of a jurisdictional nature. It has, first and foremost, the function to set out the personal and material scope of application of the enforcement measures authorized under Article 105 UNCLOS.[20]

It might be further observed that Article 105 does not even compare favourably with other Articles in the LOSC such as (for instance) Article 113 which states that:

> Every State shall adopt the laws and regulations necessary to provide that the breaking and injury [...] of a submarine cable beneath the high seas [...] shall be a punishable offence.

The second aspect of the problem is that the main articles in the LOSC on piracy are Article 101 which provides the definition, and Article 105 which allocates jurisdiction over it. If the Convention were defining a criminal offence then Article 101 would be limited to the *conduct* amounting to 'piracy' together with any other aspects of the criminal offence, leaving all jurisdictional issues to be addressed in Article 105. This is not what the Convention does however. The Article 101 'definition' does not merely define the conduct amounting to piracy,

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[19] Geiss and Petrig *Piracy and Armed Robbery at Sea* (n.9), 140

[20] *Ibid.* 141

it also delimits it spatially (on the high seas or outside the jurisdiction of any State together with the 'two-ships' requirement), and in terms of immunity (it can only be committed by a private vessel, and for 'private ends'). In other words, *the very definition* of 'piracy' in Article 101 is delimiting jurisdictional competence.

The obvious objection is that if 'piracy' is a crime, it should still be a crime wherever it takes place, and not be subject to spatial limitation. It is certainly normal for *enforcement jurisdiction* to be limited spatially, but it makes little sense to limit a criminal offence in this way. If this were the case, then exactly the same conduct would be an 'international crime' or a municipal crime (or no crime at all) depending on which side of a maritime boundary it is performed.[21] As noted above, the LOSC imposes no specific obligation to prosecute acts of piracy. Treaty crimes, without exception, are accompanied by a specific obligation to criminalise the conduct and to prosecute perpetrators. This is true of both international crimes and transnational crimes. Examples of such obligations include the "Grave Breaches" mechanism in the four Geneva Conventions of 1949,[22] the Genocide Convention[23] (which also states that genocide "is a crime under international law"[24]), and the Torture Convention.[25] It will be recalled that the Harvard Research argued that it was not possible to impose an obligation on States to combat piracy, and although the ILC took the view that: "Any state having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international

[21] It might be objected that international crimes that are defined with reference to a geographical area do exist, such as (for example) 'pillage' taking place in occupied territory. Nevertheless this might be distinguished on the basis that special obligations arise under the law of belligerent occupation, whereas it has never been suggested that the high seas by themselves generate such special obligations for individuals.

[22] For example Article 129 Geneva III: "Each High contracting Party shall be under an obligation to search for persons alleged to have committed [...] such grave breaches, and shall bring such persons [...] before its own courts."

[23] Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277 Articles IV, V and VI.

[24] *Ibid.* Article I

[25] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85 Articles 2 to 7.

law", Johnson considered that this would be "a little difficult to reconcile with the traditional concept of State sovereignty".[26]

Schwartzenberger argued that every state was "under an international obligation to suppress piracy within its own territorial jurisdiction" but he argued that if a State "should fail to do so or should associate itself persistently with piratical ventures, it [...] is liable for the commission of an international tort and, in an extreme case, may even forfeit its own international personality and be treated as an international outlaw."[27] That view would also have been difficult to reconcile with the state of international law at the time.

The LOSC does provide for duties in relation to the suppression of piracy, set out in Article 100, which requires States merely to "co-operate to the fullest possible extent." Although some authors have taken this to mean that there is an obligation on States to actually suppress piracy, the reality is that it almost certainly does no such thing. The obligation to cooperate features repeatedly within the LOSC in connection with numerous other activities including the setting up of traffic separation measures, the prevention of pollution, the conservation of fish stocks, establishing search and rescue services, and in fact almost every other area of the Convention. The concept of the "duty to cooperate" has therefore been the subject of considerable analysis in connection with the regulation of other activities and in particular in relation to fisheries conservation. In that context it has been argued to amount to an obligation simply to negotiate in good faith to agree specific regulatory measures, but that states are not under a specific obligation to actually reach an agreement, or to implement effective measures under it.[28]

9.3 A Residual Customary International Crime of Piracy?

If Article 101 does not define a criminal offence, then it is necessary to consider whether there could be a separate, customary international law definition of a

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[26] Johnson *Piracy in Modern International Law* (n.12), 65

[27] G Schwartzenberger (1950) *The Problem of an International Criminal Law* 3 Current Legal Problems 263, 269

[28] See for example in the context of fisheries management: M Hayashi (1993) *The Management of Transboundary Fish Stocks under the LOS Convention* 8 IJMCL 245

crime of piracy, and whether such a customary rule could have survived the codification process. As noted in the introduction, the HSC explicitly states that it is "generally declaratory of established principles of international law." O'Connell argued however that the HSC did not codify the law of piracy completely. "Article 15 is one of the least successful essays in the codification of the Law of the Sea, and the question is open whether it is comprehensive so as to preclude reliance [upon customary international law]"[29] Some authors such as Berg have argued that there is still a customary international crime of piracy.[30] For Noyes, the question was unclear,[31] whilst participating in the same symposium Dubner argued that "there is definitely no custom regarding a modern definition of piracy".[32] Geiss and Petrig avoid considering whether there might be a separate, remaining, international crime as a matter of customary international law, but Guilfoyle has rejected the possibility completely, arguing that the fact that the HSC definition was incorporated in the LOSC without any material changes, the widespread ratification of both conventions, and the fact that no States have "articulated" an alternative definition make the idea that there is still a historical customary international crime of piracy "unlikely".

In further analysis however, Guilfoyle reviewing Geiss and Petrig observes that he has "some difficulty agreeing" with their argument that piracy was not a crime at international law. Describing the argument that piracy was not a crime but a basis of jurisdiction as having "long been a respectable interpretation", he observes that their argument was that an international crime needed to have an express textual prohibition and threat of punishment. He argues that this is not necessary and that the law of war crimes is for example "largely customary" and with the exception of the grave breaches of the Geneva Conventions, are not

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[29] O'Connell *Law of the Sea Vol. II* (n.4), 970

[30] J Berg *"You're Gonna Need a Bigger Boat": Somali Piracy and the Erosion of Customary Piracy Suppression* (2009-2010) 44 New England Law Review 343

[31] JE Noyes *An Introduction to the International Law of Piracy* (1990-1991) 21 California Western International Law Journal 105, 109

[32] BH Dubner *Piracy in Contemporary National and International Law* (1990-1991) 21 California Western International Law Journal 139, 143

expressly criminalised by treaty.[33] Whilst it is possible to agree with the objection to Geiss and Petrig's demand for express textual prohibition, it is not entirely correct to say that war crimes are entirely customary, since although war crimes are not always expressly criminalised, they are conceptually speaking violations of the laws of war, which are in fact defined (though not necessarily criminalised) by treaty including the 1949 Geneva Conventions, the Hague Regulations, and so on. In any case, war crimes have also been the subject of numerous codifications including the Charters of the International Military Tribunals, the ILC's two Draft Codes, and the Statutes of the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and the ICC, as well as other criminal courts and tribunals. The problem with the law of piracy is that the argument is that the treaty definition of piracy relates only to enforcement jurisdiction and not a criminal offence, and that as a consequence there is no definition of piracy at international law that could form the basis of a crime as a matter of customary international law.

9.3.1 Peremptory Norms and International Crimes

Another consideration in determining whether piracy is an international crime is the question of whether the prohibition of piracy is a peremptory norm (or *jus cogens*). According to Orakhelashvili,[34] and Goodwin-Gill,[35] the peremptory status of a rule is a strong indicator, if not a requirement, of an international crime. Bassiouni states that the prohibition of piracy is *jus cogens* but doesn't cite any authority for this statement. He concedes that:

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[33] D Guilfoyle (2011) *Robin Geiss and Anna Petrig, Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* 11 International Criminal Law Review 910, 912-3

[34] A Orakhelashvili (2006) *Peremptory Norms in International Law* Oxford: OUP, 288

[35] G Goodwin-Gill *Crime and International Law: Obligations Erga Omnes and the Duty to Prosecute* in G Goodwin-Gill and S Talmon (eds.) (1999) *The Reality of International Law: Essays in Honour of Ian Brownlie* Oxford: OUP, 213

> Piracy, almost non-existent nowadays, neither threatens peace and security nor shocks the conscience of humanity, although it may have at one time.[36]

Peremptory norms were recognised by the ILC in its Draft Articles on the Law of Treaties, (which ultimately became the Vienna Convention),[37] where they noted that peremptory norms were "substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values."[38] The ILC gave examples of peremptory norms in the Draft Articles. In their commentary to Article 50 (which provides that treaties are void if they conflict with peremptory norms) the ILC gave as an example of such a treaty as one: "contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide".[39] However, the ILC examined the concept again in preparing the Draft Articles on State Responsibility, and this time piracy was not included. In paragraph 5 of its comments to Article 26 it noted:

> Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[40]

The problem with the idea that the prohibition of piracy as a peremptory norm is the fact that a peremptory norm is one that lies outside of conduct that a State is able to approve or sanction. To the extent to which a State does sanction or encourage that conduct it commits an internationally wrongful act, and individuals who commit the acts in question can still be subject to individual criminal responsibility. As already discussed in detail in previous chapters however, it is of the very essence of the concept of piracy that it is performed

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[36] MC Bassiouni (2012) *Introduction to International Criminal Law* Leiden: Martinus Nijhoff, 242

[37] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331

[38] ILC *Draft Articles on the Law of Treaties* YBILC 1966 vol. II, 237 (Commentary to Article 40)

[39] *Ibid.* 247 (Commentary to Article 50)

[40] ILC *Draft Articles on State Responsibility with Commentaries* YBILC 2001 vol. II, Part Two, 85

without authority (for private ends). As Cassese observed, the objective conduct underlying piracy, that is forcible takings at sea, was exactly the same as that undertaken by privateers and indeed permitted by the laws of war generally, provided it was undertaken with due authority.[41] Not only does it therefore lie well within a State's ability to authorise the objective conduct amounting to piracy (essentially violence and takings at sea) but to the extent that it is authorised by the State, the conduct is no longer piratical at all. Furthermore, it is hard to see how the ILC imagined that a State might agree a treaty for the commission of 'piracy' since if the relevant acts are in fact commissioned by a State then, again, they do not fall within the definition of piracy. It is therefore difficult to reach any conclusion other than the fact that the ILC was initially wrong in categorising piracy as a peremptory norm.

9.3.2 Functional Immunity and International Crimes

As observed in Section 3.5 above, functional immunity can be lost in two circumstances. The first is that offenders cannot rely on functional immunity for serious violations of international law. Individual functional immunities do not shield an individual who commits an international crime. The second way in which an individual can lose his functional immunity is where he performs an illegal act and does so in his individual private capacity, so that the act is not attributable to the State, but only to him. In other words he performs the act *for private ends* or without official or public authority.

Here again, it can be observed that piracy does not fit into the category of international crimes. In sharp contrast to treaties relating to international crimes such as the Genocide[42] and Torture Conventions,[43] not only can piracy by definition not be committed under the colour of public authority (when it would be privateering), but the treaty definition specifically includes several reservations that prevent its application to acts committed under such authority. Under Articles 95 and 96 LOSC warships and ships used on

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[41] Cassese *International Criminal Law* (n.11), 12

[42] Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277

[43] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85

government non-commercial service "on the high seas have complete immunity from the jurisdiction of any State other than the flag State, unless their crews have mutinied and taken control of their vessel".[44] Secondly under the Article 101(a) definition, piracy can only be committed by a private ship or a private aircraft. Finally, the Article 101 definition also requires that piracy be carried out "for private ends" and so any acts of violence or detention performed under public authority are excluded from the very definition. As Guilfoyle observes: "The essence of a piratical act is that it neither raises the immunity which pertains to state or governmental acts, nor engages state responsibility."[45]

The point here is that pirates are denied functional immunity for the simple reason that their activities are performed without authority, and are instead committed for private purposes. Pirates are therefore susceptible to prosecution not because of the gravity of their offences, but because of their private nature. Piratical vessels lose the immunity of their flag because they engage in an activity reserved to governmental vessels but do so *for private ends* which exposes them (in the same way as other unlawful belligerents) to criminal sanction for the acts of violence or interference with property that they commit.

9.4 Problems with the Concept

It has been argued that the Article 101 definition of piracy is not a criminal definition, but merely describes the circumstances in which the Article 105 enforcement jurisdiction can be exercised. This chapter has argued in particular that the very *constituent elements* of the definition relate to enforcement jurisdiction, its geographical limitation in particular. It was also recognised during the codification that there was no uniformity in municipal criminal definitions. The consequence of this situation is rarely appreciated: there is in reality *no single definition of the crime of piracy*. Piracy is defined separately by the different municipal legal systems, and is not defined by international law.

The correct categorisation of the crime of piracy is not merely an academic exercise. The thesis argues that wrongly categorising piracy as an international

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[44] LOSC Article 102

[45] Guilfoyle *Shipping Interdiction* (n.4), 36-7

crime causes practical problems for the prosecution of piracy suspects. These problems include that of ineffective or non-existent municipal legislation caused by modelling municipal law definitions on the LOSC, and legislation that is so ill-defined that it potentially violates the rule of *nullum crimen*. Wrongly categorising the crime has also caused the UN Security Council to spend a considerable amount of time discussing the establishment of international tribunals for the prosecution of piracy suspects, before eventually dropping the idea.

The precise extent of the significance of piracy prosecutions in the context of Somali piracy is difficult to gauge. There has been little empirical analysis of piracy prosecutions, and such a detailed study is beyond the scope of the present work. The total number of detained Somali piracy suspects is however very low, currently 1,200 according to statistics from UNODC.[46] The total number of detained pirates has not increased significantly in the last few years, whilst during the same period successful pirate attacks have dropped significantly. Whilst it could be argued on the one hand that piracy prosecutions are therefore not that important an element in the counter-piracy effort, it could also be that piracy prosecution has proven so problematic that the international community has found other ways of tackling the problem (such as addressing the security situation in Somalia itself, stepping up disruptive patrols, and the better implementation of security aboard merchant vessels including the use of armed guards). The reality of piracy detention and prosecution is less than inspiring, and is perhaps encapsulated in the statistic disclosed in the January 2011 report by the Special Adviser to the UN Secretary General where he noted that 90% of detained piracy suspects were being released without charge.[47]

9.4.1 The Problem of Nullum Crimen

The first potential problem with the idea that a crime of piracy is defined by international law is the fact that using poorly defined criminal offences may

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[46] UNODC *Counter Piracy Programme Brochure* Issue 11: March 2013, 2

[47] UN Security Council. *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia. (Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council.* S/2011/30. 25 January 2011 (Lang Report), 13

contravene human rights obligations. The issue of the legality of criminal punishment is a large topic which cannot be dealt with here in detail, but the point can be made without detailed analysis. Cassese observed that at the domestic level many legal systems demand that criminal offences must be written down, must be defined with sufficient specificity, cannot be retroactive, and cannot criminalise by analogy.[48] Where international criminal law is concerned the historical position is that these requirements were not strictly applied, as in the case of the Charter of the Nuremberg IMT which defined many crimes for the first time. Cassese also notes that many aspects of contemporary international crimes prosecuted by international tribunals also do not strictly meet the requirements of specificity, including the inclusion of "other inhumane acts" in the definition of crimes against humanity, and the lack of clarity over the content of defences.

Nevertheless, the problem with piracy is that it is not an international crime, and it is not prosecuted by international tribunals. It is a municipal crime prosecuted by municipal courts. Pella argued that piracy could not be defined and proscribed at customary international law because the lack of definition would contravene the principle of *nullum crimen sine lege*.[49] The idea of *nullum crimen* is not simply that the accused might be 'on notice' that his conduct is criminal, but that the criminal law be sufficiently defined that it is not possible for the State to arbitrarily define its content and thus fit it to the circumstances, thereby 'moving the goal posts'. Furthermore, it is required so that a defendant might be able to mount a defence, which he would not be able to do if the constituent elements of the crime itself were not defined. The principle is considered to be a principle of natural justice, and is also codified by human rights instruments, including *inter alia* Article 15 ICCPR and Article 7 ECHR (which are almost identical). Whilst that provision appears to be primarily concerned with the prohibition of retrospective criminalisation, the ECtHR Grand Chamber noted in the case of *Kononov* that:

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[48] Cassese *International Criminal Law* (n.11), 37-8

[49] VV Pella (1926) *La Répression de la Piraterie* 15 Recueil des Cours de l'Académie de Droit International 145, 180-1

> Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen/nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law.[50]

9.4.2 Absence of Municipal Law Defining Offences

Since the resurgence in the problem of piracy considerable discussion has arisen concerning the municipal law of different States addressing the problem of piracy. It has been noted in previous chapters that in spite of the fact that piracy was, at a theoretical level at least, proscribed by the municipal law of all nations (that being the meaning of the term "offence against the law of nations") the reality was that the laws of most States did not show any sign of convergence. A survey of national legislation was undertaken as part of the codification effort in 1932,[51] which led to the Harvard Research observing that there was no generally accepted "law of piracy".[52]

There have been a number of recent efforts to collate and examine the different municipal criminal laws relating to piracy including an initiative by the IMO, UN Division for Ocean Affairs and the Law of the Sea, and UNODC which has compiled a collection of reports from States available online,[53] a private effort by the National University of Singapore Centre for International Law,[54] and a collection annexed to the letter dated 23 March 2012 from the Secretary General

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[50] *Kononov v Latvia* App. no. 36376/04 (2010) 52 EHRR 663, 56

[51] S Morrison (1932) *A Collection of Piracy Laws of Various Countries* 26 AJIL Sup. 887

[52] Harvard Research in International Law *Draft Convention on Piracy with Comments* Reproduced in (1935) 26 AJIL Supp. 739, 749

[53] UN Division for Ocean Affairs and the Law of the Sea *National Legislation on Piracy* www.un.org/Depts/los/piracy/piracy_national_legislation.htm

[54] National University of Singapore, Centre for International Law: *Working Papers on National Implementation of Global Conventions on Maritime Crimes.* cil.nus.edu.sg/research-projects/cil-research-projects/international-maritime-crimes/cil-organised-events/

to the President of the Security Council.[55] Analysis of these submissions has been undertaken by the IMO, Dutton,[56] and Beckman and Roach.[57] In August 2009 the IMO published a report that made three main observations: that only a few countries incorporate the Article 101 definition as a criminal offence; that most municipal legislation includes offences against shipping with other ordinary offences including robbery and kidnapping, and do not include universal jurisdiction and; in some cases municipal legislation has no definition of piracy and simply refers to international law, a situation which they acknowledge "may present obstacles to prosecution".[58]

For states with monist legal systems, it is assumed that the crime of piracy is automatically incorporated into municipal law. This is obviously highly problematic if no such crime exists in international law. Dualist legal systems fare little better, because, at the prompting of the IMO, states are increasingly introducing new municipal criminal laws that incorporate the LOSC definition as if it were a crime. The result is also that many states have criminal offences of piracy which do not criminalise offences against shipping that do not meet the LOSC definition of piracy.

9.4.3 Problems with Piracy Prosecutions

The deficiencies in (or lack of) municipal definitions of piracy are evident in the problems States have experienced in prosecuting pirate suspects. After having arrested significant numbers of Somali pirates, India discovered that it did not in fact have any criminal law relating to piracy, and was forced to introduce new

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[55] UN Security Council *Letter dated 23 March 2012 from the Secretary General to the President of the Security Council* S/2012/177

[56] Y Dutton (2011) *Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?* 86 Tulane Law Revue 111; Y Dutton *Maritime Piracy and the Impunity Gap: Domestic Implementation of International Treaty Provisions* in Struett et al (eds.) (2013) *Maritime Piracy and the Construction of Global Governance* New York: Routledge

[57] RC Beckman and JA Roach *Ratification and Implementation of Global Conventions on Piracy and Maritime Crimes* in RC Beckman and JA Roach (eds.) (2012) *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation*. Cheltenham: Edward Elgar

[58] IMO Legal Committee, *Piracy: Review of National Legislation, Note by the Secretariat* LEG96/7 (20 August 2009)

criminal provisions.[59] In Kenya, piracy convictions were overturned on the basis that new criminal legislation had not incorporated jurisdiction over offences on the high seas,[60] though the decision was later overturned,[61] and in Malaysia a lack of piracy legislation resulted in Somali piracy suspects being prosecuted only for firearms offences.[62] Perhaps the most publicised problems with piracy prosecutions have however involved Somali suspects before the US Courts. In the case of *US v Said* the Defendants who stood accused of firing on the *USS Ashland* a US military vessel they had mistaken for a merchant vessel were accused of numerous offences, amongst which was piracy under 18 U.S.C. § 1651, which, as noted above refers to piracy being "defined by the law of nations". The District Court held that the definition of piracy in US law was that set out in the Supreme Court decision in the 1820 case of *US v Smith* which defined piracy as "robbery at sea"[63] and rejected the argument that the definition had evolved. The Court accordingly struck out the charges of piracy.[64] The problem arose again in the case of *US v Dire* in 2012, another case against suspected Somali pirates, again for attacking a US warship. This time the Court rejected the defence against the charge of piracy that robbery was an essential component of the offence, and that other definitions were too uncertain. The case was appealed to the Court of Appeals (Fourth Circuit) which decided that the definition of piracy had in fact evolved "with the law of nations" and that it incorporated the definition of the HSC and LOSC.[65] The Defendants applied for leave to appeal to the US Supreme Court which was denied. For the time being

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[59] The Hindu. 'Piracy Bill in Lok Sabha Provides for Strict Punishment' 25 April 2012; [http://www.thehindu.com/news/national/article3350206.ece]

[60] *Republic* v *Chief Magistrate's Court, Mombasa Ex-parte Mohamud Mohamed Hashi and 8 Others* [2010] eKLR. (High Court of Mombasa. Misc. App. 434 of 2009) [www.kenyalaw.org/CaseSearch/view_preview1.php?link=722915019785713525466O1]

[61] *Attorney General* v *Mohamud Mohamed Hashi and 8 Others* [2012] eKLR (Court of Appeal at Nairobi. Civil Appeal 113 of 2011) [www.kenyalaw.org/CaseSearch/view_preview1.php?link=41470401589581806134430]

[62] BBC News. 'Somalia 'Pirates' Charged in Malaysia' 11 February 2011 [www.bbc.co.uk/news/world-asia-pacific-12430671]

[63] 5 Wheat 153

[64] *US v. Said* 757 F.Supp. 554 (E.D. Va. 2010) see also; *US* v. *Hasan* 747 F.Supp. 2d 599 (ED. Va. 2010)

[65] *US v. Dire* 680 F. Supp. 3d 446 (4th Cir. 2012)

at least, the crime of piracy in US criminal law uses the definition in Article 101 LOSC.

9.4.4 The Attempt to 'Internationalise' Piracy Prosecutions

As well as difficulties in prosecuting pirates in municipal courts, the idea that piracy is an international crime has also prompted discussion about the possibility of piracy prosecutions in international tribunals. Some authors have suggested that pirates should be prosecuted in the International Criminal Court (ICC),[66] despite the fact that piracy was not even considered when drafting the Rome Statute. Others have also suggested using the International Tribunal for the Law of the Sea (ITLOS) notwithstanding the fact that criminal prosecutions have never fallen within its remit.[67] Perhaps even more surprisingly, the UN Security Council spent a substantial amount of time discussing the possibility of setting up international mechanisms for prosecuting pirates. The question was discussed at length and reports prepared by the UN Secretary General outlining a variety of options including the establishment of international or quasi-international tribunals.[68] In the event, after much disagreement, the idea was dropped in 2012.[69]

Conclusions

In conclusion, this chapter has examined the notion of piracy as an international crime. It has been noted in previous chapters that piracy had historically been characterised as robbery and as treason, and that piracy was nothing more than takings at sea without public authority. It has been noted that piracy was often defined in opposition to privateering, objectively precisely

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[66] YM Dutton (2010) *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court* 11 Chicago Journal of International Law 201

[67] B Pemberton *The International Tribunal for the Law of the Sea as a High Court of Piracy* One Earth Future Foundation Working Paper. (5 November 2010) [oneearthfuture.org/sites/oneearthfuture.org/files//documents/publications/ITLOS-Beck-Pemberton.pdf]

[68] UN Security Council. *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 Sea off the Coast of Somalia (etc.)* S/2010/394. 26 July 2010.

[69] For examination of the discussions in the Security Council on this issue see: C Massarella (2011) UN Security Council Resolution 1976 (2011) and Efforts to Support Piracy Prosecutions 26 IJMCL 679; and D Guilfoyle (2012) *Prosecuting Somali Pirates: A Critical Evaluation of the Options* 10 JICJ 767

the same conduct, but distinguished by the fact that it was unauthorised. Chapter 2 had explained the distinction between international crimes and transnational crimes, and the fact that piracy had been categorised as a transnational crime. Finally it was also observed in Chapter 8 that the codification of the law of piracy appears to have taken a conscious decision to reject the idea of codifying piracy as an international crime.

This chapter has examined the concept in greater detail, and has surveyed three main issues: the question of whether Article 101 LOSC defines a criminal offence, the question of whether there could still be an international crime of piracy at customary international law, and the practical consequences of theorising piracy as an international crime. The chapter has argued that an analysis of the structure and wording of the LOSC provisions militate against their interpretation as a criminal definition. The chapter notes that the provisions are geographically limited (characteristic of enforcement jurisdiction, but problematic in a criminal definition). It further notes that the language does not express the definition to be prohibited, subject to punishment or to be a crime, or impose an obligation on States to prosecute piracy.

The chapter has further observed that the idea that piracy is a crime at customary international law is also problematic, since the LOSC is considered to have codified the customary position. It is also noted that piracy does not 'fit' into the category of international crimes because its prohibition is not a peremptory norm, that its perpetrators are not entitled to functional immunities because they are private actors (not because they are international criminals), and because it has never been included in any codes or statutes defining international crimes, or prosecuted by any international tribunals.

Finally, the chapter has examined the consequences of theorising piracy as an international crime, and noted that this appears to have contributed substantially to the difficulties being experienced in prosecuting pirates, in particular because it frequently means that municipal piracy law is ineffective, inadequate, or simply non-existent, and that it is likely to contravene the principle of *nullum crimen* and consequent claims for human rights violations.

10 Prescriptive Jurisdiction over Piracy

One of the more contentious aspects of the law of piracy is the question of whether priacy is in fact a crime attracting universal jurisdiction, and if so, whether categorising it as such is a help or hindrance. It will be recalled from the consideration of the theory of prescriptive jurisdiction in Chapter 4, that prescriptive jurisdiction is perhaps more complex than it is often given credit for in the literature. The examination of the history of piracy, in particular in Chapters 6 and 7 has illustrated how, contrary to popular perception, piracy was historically as likely to be prosecuted under any of the other bases of prescriptive jurisdiction as under universal jurisdiction. Finally, the preceding chapters have also explained why piracy is perhaps more accurately classified as a 'transnational crime' rather than an 'international' one. This chapter evaluates whether piracy is in fact the "paradigmatic" crime of universal jurisdiction, and if so, whether it represents an effective means of combating contemporary piracy and maritime crime.

10.1 Piracy and Universal Jurisdiction in Theory

Just as there is a diversity of opinion on the question of whether piracy is an international crime, there is also considerable disagreement on the question of whether piracy is subject to universal jurisdiction. The debate is typically framed in terms of the historical treatment of piracy. Those who argue that piracy is subject to universal jurisdiction claim that piracy has 'always' been subject to the jurisdiction of any State. It may be argued that the prevailing view in the literature is that piracy is the "paradigmatic" crime of universal jurisdiction. This view has been expressed by many authors,[1] and has also been

[1] Princeton Project on Universal Jurisdiction (S Macedo ed.) (2001) *The Princeton Principles on Universal Jurisdiction* Princeton: Princeton University Press, 29; Harvard Research in International Law (1935) *Jurisdiction with Respect to Crime. Article 9. Universality–Piracy*. 29 AJIL Supp. 563, 564; G Abi-Saab (2003) *The Proper Role of Universal Jurisdiction* 1 JICJ 596, 599; MC Bassiouni *The History of Universal Jurisdiction* in S Macedo (ed.) (2004) *Universal Jurisdiction*. Philadelphia: University of Pennsylvania Press, 47; DP O'Connell (I Shearer ed.)*The International Law of the Sea Volume II* Oxford: Clarendon, 967; R Geiss and A Petrig (2011) *Piracy and Armed Robbery at Sea*. Oxford: OUP, 143; DR Rothwell and T Stephens

asserted in international decisions.[2] State practice, in terms of what States actually say at least, supports the contention that piracy is subject to universal jurisdiction.[3]

There are said to be two different theoretical justifications for the extension of universal jurisdiction to piracy: the idea that piracy is (or was) a particularly serious crime justifying foreign intervention, or the fact that piracy takes place outside of the territorial jurisdiction of any State. Concerning the first category, some authors base their argument of universal jurisdiction on historical usage. Geiss and Petrig accept the view that piracy is the paradigmatic universal jurisdiction crime stating that:

> [...] it seems safe to say that piracy is not only the first, but also the paradigmatic universal jurisdiction crime as far as adjudicative jurisdiction is concerned.[4]

The Princeton Principles include piracy first, citing Art. 19 HSC as authority for the existence of universal jurisdiction:

> "Piracy" is a crime that paradigmatically is subject to prosecution by any nation based on principles of universality, and it is crucial to the origins of universal jurisdiction, so it comes first.[5]

They argue that universal jurisdiction is premised on how 'heinous' a crime is.[6] These arguments are unconvincing. As the thesis has argued in previous

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(2010) *The International Law of the Sea* Oxford: Hart, 162, C Ryngaert (2008) *Jurisdiction in International Law* Oxford: OUP, 108-9

[2] *The Case of the SS Lotus*. (France/Turkey). (1927). PCIJ, Series A, No.10, Dissenting Opinion of Judge Moore p.19 at 70. *Case concerning the Arrest Warrant of 11 April 2000*. (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, p.3, Separate Opinion of President Guillaume p.35, 37

[3] "The Scope and Application of the Principle of Universal Jurisdiction" was raised as a topic of discussion in the UNGA Sixth Committees 64th session in 2010 (UN General Assembly Sixth Committee *Request for the Inclusion of an Additional Item in the Agenda of the Sixty-Third Session: The Scope and Application of the Principle of Universal Jurisdiction* 23 July 2009 A/63/237/Rev.1) and subsequently discussed at the 65th, 66th and 67th sessions. Ironically many States expressed the view that universal jurisdiction is *only* applicable to piracy, and not to international crimes.

[4] R Geiss and A Petrig (2011) *Piracy and Armed Robbery at Sea* Oxford: OUP, 143-4

[5] S Macedo (ed.) (2001) *The Princeton Principles on Universal Jurisdiction* Princeton University: Princeton, 45

chapters, the objective conduct amounting to piracy was not considered to be a serious (or 'heinous') international crime. On the contrary, as already observed, the objective conduct was perfectly legal so long as it was performed with public authority. Furthermore, to the extent that piracy was considered to be a serious crime, and prosecuted with severity, it was on account of the fact that it was performed against the individual's own State and countrymen, and was considered an act of treason. Some authors have argued that piracy is not in fact the basis of any principle at all. Beckett for example noted that "Piracy stands on such an exceptional basis that it throws no light on the question of penal jurisdiction generally".[7]

Two authors in particular have argued that piracy is not subject to universal jurisdiction on the basis that it was a serious crime. The first is Kontorovich who argues that piracy is a "hollow foundation" for universal jurisdiction.[8] His argument is that piracy *is* subject to universal jurisdiction, but that since the historical context of piracy does not justify universality on the basis of the seriousness of the crime, universal jurisdiction over international crimes (which he calls "new universal jurisdiction") cannot be theoretically sustained.[9] Goodwin, on the other hand also examines the historical concept of piracy, and argues that piracy should no longer be considered as being subject to universal jurisdiction because it is not justified by his historical analysis, and that it is undesirable in the contemporary context.[10]

The second theoretical justification for universal jurisdiction over piracy is that it is necessary because it takes place outside of the territorial jurisdiction of any State. Judge Guillaume in the Arrest Warrant case, citing Art.19 HSC and Art.105 LOSC, stated that:

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[6] *Ibid*. 48

[7] WE Beckett (1925) *The Exercise of Criminal Jurisdiction over Foreigners* 6 BYBIL 44, 45

[8] E Kontorovich (2004) *The Piracy Analogy: Universal Jurisdiction's Hollow Foundation* 45 Harv. Int'l L. J., 183

[9] *Ibid*. 184-6

[10] JM Goodwin (2006) *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part* 39 Vand. J. Transnat'l L. 1011

> [...] under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory.[11]

Lowe claims that there are two strands to crimes of universal jurisdiction, namely those that are "so heinous that every State has a legitimate interest in their repression", and the case of piracy where universal jurisdiction is justified on the basis that it takes place outside the territorial jurisdiction of any State.[12]

The problem with this theory is that, as noted in Chapter 3 above, all crimes attracting the attention of prescriptive jurisdiction under international law take place outside of the territory of the prosecuting State. It was observed in Chapter 3 that States are able to assert prescriptive jurisdiction over such offences on a number of different bases. Prescriptive jurisdiction is far from being territorially bound. Any State with a linking point might prosecute pirates, including coastal States, flag States, the State(s) whose nationals have been attacked, and the State of which the perpetrators are nationals. Geographical location is one of the criteria for the establishment of *enforcement* jurisdiction. It is not one of the criteria for prescriptive jurisdiction.

Some authors have argued that universal jurisdiction over piracy is codified by the LOSC. The thesis argues however that what was in fact codified was not prescriptive jurisdiction at all, but *enforcement* jurisdiction, which also allows an arresting State to take the seized vessel and its crew for adjudication. As noted in Chapter 9, the component parts of the definition are all concerned with the delimitation of enforcement jurisdiction by protecting the flag State's exclusive jurisdiction over offences taking place entirely within a vessel, and protecting a coastal State's jurisdiction over its territorial and internal waters. Geographical limitations are characteristic of enforcement jurisdiction, they are irrelevant to considerations of prescriptive jurisdiction.

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[11] *Arrest Warrant Case* Separate Opinion of President Guillaume (n.2), 38

[12] V Lowe *Jurisdiction* in MD Evans (ed.)(2010) *International Law* Oxford: OUP, 326-7

Cassese argued that the judges in the *Arrest Warrant* case had confused enforcement jurisdiction and adjudicative jurisdiction. He observed of Article 105 LOSC that:

> It would seem [that piracy jurisdiction] does not constitute an exercise of jurisdiction in the sense used by the various Judges in their Opinions, that is, judicial jurisdiction. It only constitutes an exceptionally authorized use of enforcement powers over private ships not belonging to the capturing state (executive jurisdiction). Jurisdiction in the sense of exercise of judicial power by courts, will follow.[13]

He went on to observe that the notions of what he termed executive jurisdiction (i.e. enforcement jurisdiction) and judicial jurisdiction "ought to be distinguished" and that the Judges had confused the two.[14] Jesus also argued that the Article 105 provisions were "no more and no less than a special authority for any State to assert its jurisdiction over a foreign-flagged vessel".[15] Guilfoyle noted that it is "important to distinguish prescriptive and enforcement jurisdiction", and that:

> Regarding enforcement jurisdiction, the law of piracy codified under UNCLOS primarily provides a right of interference on the high seas and allows pirates to be subjected to the national law of the capturing warship.[16]

He also notes that universal jurisdiction today probably means something other than the special jurisdiction over piracy:

> […] recent writing on whether terrorism can constitute piracy tend to ignore elements of the conventional crime or become overly

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[13] A Cassese (2002) *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case* 13 EJIL 853, 858

[14] *Ibid.*

[15] JJ Jesus (2009-2010). *Troubled Waters: Combating Maritime Piracy with the Rule of Law: Foreword*. 59 American University Law Review 1213 at 1214-1215.

[16] D Guilfoyle (2009) *Shipping Interdiction and the Law of the Sea* Cambridge: CUP, 40

> concerned with 'universal jurisdiction' over piracy, an unfortunately misleading label, given the separate meaning that term has since acquired in international criminal law.[17]

He further noted that:

> The geographic scope of piracy is [...] unusually limited for a crime subject to universal jurisdiction, and discussing it in the same terms as other universal crimes may not be entirely helpful.[18]

Instead, Guilfoyle argued that:

> The better rationale is that, as piracy endangers a common interest of all states (high-seas freedom of navigation), the exclusive jurisdiction of flag states does not obtain. The consequences of this proposition have seldom been fully explored. If correct, piracy is not merely a head of jurisdiction, nor strictly an exception to the rule of exclusive flag-state jurisdiction. Such exceptions usually concern only a right of visit, not of seizure or law enforcement. Piracy may be thought of as a case where states, through a customary or conventional rule, have given comprehensive permission in advance to foreign state's assertion of law enforcement jurisdiction over their vessels resulting in the absence of any flag state immunity from boarding. [...] A theory predicated on pirates as 'hostes humani generis' would surely not draw such arbitrary geographical distinctions." [19]

Universal jurisdiction is therefore not codified by the LOSC, because universal jurisdiction is a basis of prescriptive jurisdiction, and the LOSC is concerned with enforcement, not prescription. In fact the LOSC grants enforcement jurisdiction to any State, and then *permits the seizing State* to apply its laws to detained piracy suspects. It is possible to argue that this is a mere technicality, since if any State may take enforcement action, then it could be presumed that

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[17] *Ibid.* 27

[18] *Ibid.* 43

[19] *Ibid.* 28-9

any state may prescribe rules to apply to the situation. However, this is not strictly speaking what Article 105 says. If the prescriptive jurisdiction permitted over maritime piracy were universal, then in theory any State might be able to arrest any individual and put them on trial for piracy wherever and whenever it may have been committed. This is clearly not what is envisaged by Article 105, and whilst again it might be argued that the LOSC provisions do not *prevent* a state from exercising such an extensive prescriptive jurisdiction, it must be restated that jurisdiction in international law remains restrictive and Article 105 can hardly be claimed to grant such authority.

Drawing an (artificial) distinction between territorial and extraterritorial jurisdiction creates the impression that universal jurisdiction is the only basis of extraterritorial jurisdiction, and that it is the only way of addressing the problem of piracy. As Chapter 3 has illustrated however, piracy was historically capable of being punished under almost every other basis of prescriptive jurisdiction. To the extent that the doctrine of the territoriality of ships or claims to sovereignty over areas of the sea were accepted, piracy was capable of falling under the territorial jurisdiction of States. Piracy was also capable of falling under the nationality principle, the passive personality principle, the flag State principle, and the protective principle.

Both Hall,[20] and Donnedieu de Vabres[21] considered action taken to prosecute pirates as falling under the protective principle, and Pella took the view that piracy did not take place outside the territory of any State, since it took place on board a State's vessels, and fell within the jurisdiction of the flag State of the victim vessel. As noted in Chapter 6 above, many of the most famous pirates, in particular those from the Golden Age of piracy were prosecuted by their own government (and thus under the nationality principle). Blackstone argued that states were under an obligation to prosecute their own nationals for acts of

[20] WE Hall (1890) *A Treatise on International Law* Oxford: Clarendon Press, 250-1

[21] H Donnedieu de Vabres (1928) *Les Principes Modernes du Droit Pénal International* Paris: Recueil Sirey, 110-1

piracy, and even in relation to Somali pirates, the vast majority of piracy prosecutions are conducted on the nationality principle.

10.2 Piracy Prosecution in Practice

It has been argued that the number of prosecutions that have taken place by so many different States are in themselves evidence for the existence of universal jurisdiction over piracy.[22] However, the reality is that there has been almost no empirical analysis of contemporary piracy prosecutions, and such a conclusion is far from proven. In fact it could be argued that those statistics that are available seem to paint a much more complex picture, and it may well be the case that very few instances of piracy prosecutions are genuinely exercises of universal jurisdiction. Research conducted by Kontorovich and Art has shown that universal jurisdiction is rarely exercised over piracy. Their study included 1158 cases of piracy from between 1998 and 2009, and they claim that only four countries have asserted universal jurisdiction; China, India, Kenya and Yemen. Of these two are immediate neighbours of Somalia. They identify four cases from 1998 to 2007 and a further 13 from the period 2008 to 2009. The latter group were all prosecuted in Kenya. The only case prosecuted in India involved a hijacked ship (the *Alondra Rainbow*) that was seized by the Indian Navy and Coast Guard off the coast of Goa.[23] It is argued here that prosecutions by regional States directly impacted by acts of piracy are not in fact evidence of the existence of universal jurisdiction.

UNODC have regularly published details of the number of Somali pirates in custody. The latest published figure is 1,200 in detention either having been convicted or awaiting trial.[24] No breakdown is provided with that statistic, but a previous report in December 2012 provided a breakdown of 1,071 Somali pirates in detention globally. Of those 922, or approximately 86% are detained in the Indian Ocean region in Somalia, Kenya, Tanzania, the Seychelles, the Comoros,

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[22] D Guilfoyle D (2012) *Prosecuting Somali Pirates: A Critical Evaluation of the Options*. 10 JICJ 767, 775

[23] E Kontorovich and S Art (2010) *An Empirical Examination of Universal Jurisdiction for Piracy* 104 AJIL 436

[24] UNODC *Counter Piracy Programme Brochure* Issue 11 March 2013

the Maldives, Madagascar, the UAE, Oman, Yemen, and India. The remaining 149 (14%) have been transferred out of the region to the US, Europe, Japan, South Korea, and Malaysia.[25] Those individuals have been transferred to face prosecution for attacking the vessels and nationals of those States. In other words there is no evidence at all that Somali pirates are being prosecuted by States with no direct interest in the acts of piracy.

The reality seems to be that most States are reluctant to undertake piracy prosecutions, which can involve transfer of the suspects thousands of miles to face trial, with associated problems of the risk of human rights claims, asylum applications, and problems with preserving and presenting evidence. Regional prosecution and imprisonment have therefore been the preferred option. UNODC has set up four regional piracy courts in Kenya, Somalia, the Seychelles and Mauritius with funding assistance from the EU, and the preferred option has been to establish prisons in Somalia (in Puntland and in Somaliland) for the long term detention of convicted pirates. Pirates captured by multinational taskforces in the Indian Ocean are transferred to the regional prosecution centres, and agreements between the relevant State parties have been agreed, such as the MOU between the EU and Kenya.[26]

10.3 Problems with Universal Jurisdiction over Piracy

Like the conceptualisation of piracy as an international crime, the objection to the theory that piracy is the "paradigmatic" crime of universal jurisdiction is not purely academic. It is argued that theorising universal jurisdiction over piracy is problematic for two very practical reasons. The first is that adopting this theory effectively undermines the fixing of positive obligations to prosecute pirates. The second is that it runs the risk of creating excessive claims to jurisdiction which will cause disputes between states. Finally, arguments that piracy should be subject to universal jurisdiction presuppose that universal jurisdiction is

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[25] UNODC *Counter Piracy Programme Brochure* Issue 10 December 2012

[26] *Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy. 6 March 2009*. 18 ILM 751

itself an uncontroversial concept, whereas recent State practice suggests otherwise.

The first problem with the theorisation of universal jurisdiction over maritime piracy is that it presents an obstacle to the effective prosecution of pirates. The problem is that States are not under a positive obligation to prosecute Somali piracy, and States are generally reluctant to shoulder the responsibility for their prosecution and detention. This situation is exacerbated by the theorisation of universal jurisdiction over piracy because due diligence obligations are undermined by the fact that it is possible to 'shift' responsibility to other States. If in theory any State may prosecute pirates, then there is no pressure on any given State to do so. A number of authors have sought ways to explain this phenomenon. One example is the problem of 'many hands' which theorises that it becomes more difficult to fix responsibility the more actors are involved in a situation.[27] Another theory is advanced by Bellish, who has drawn an analogy with the idea of the 'tragedy of the commons'.[28]

The problem is that the failure to bring pirates to justice is not a problem of a failure of jurisdiction, it is a failure of State responsibility, and of due diligence in particular. Due diligence obligations normally follow prescriptive jurisdiction. Thus a state will normally prosecute acts against its interests, its territory, its nationals, and its vessels. The problem with piracy is that it attacks diverse interests, and since jurisdiction is theorised as universal, the link between due diligence and jurisdiction has been severed. The challenge is to try and fix states with responsibility, which has so far been achieved by reaching agreements with coastal States. The second problem with the theorisation of universal jurisdiction over piracy is that it runs the risk of excessive claims to jurisdiction and consequent conflicts between States. If piracy is defined as any act of violence, detention or depredation on the high seas, and if piracy is further

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[27] See A Nollkaemper (2013) *Failures to Protect in International Law* SHARES Research Paper 26 ACIL 2013-15; DF Thompson (1980) *Moral Responsibility of Public Officials: the Problem of Many Hands* 74 American Political Science Review 905

[28] J Bellish (2013) *A High Seas Requirement for Inciters and Intentional Facilitators of Piracy Jure Gentium and its (Lack of) Implications for Impunity* 15 San Diego International Law Journal 115

theorised as a 'heinous' international crime meriting the stiffest penalties (in many jurisdictions even the death penalty) then perhaps theorising that any State may prosecute and punish the offence in the absence of any link with the actual incident seems dangerously excessive. It is not hard to imagine a scenario where individuals are arrested by a State with no link to an alleged offence. Recent decisions in cases involving the designation of environmental protection activists as pirates also illustrate the scope for problems in the future.[29] The problem is exacerbated by the lack of a clear definition of the crime of piracy, something which has been noted in relation to claims that universal jurisdiction should be extended to cover terrorism.[30]

The final reason why it may not be appropriate to extend universal jurisdiction to piracy is the fact that the concept has come under increasing pressure in recent years. If the doctrine of universal jurisdiction were firmly established in international law it might be possible to make a compelling argument for its assertion over piracy. The reality however is that universal jurisdiction as a theory is in fact deeply controversial, since assertions of jurisdiction over cases where the prosecuting State has no direct interest often brings States into conflict with one another. The problem may well be that while piracy was considered a purely historical and therefore defunct issue, it was thought acceptable to use it as a theoretical basis for the development of international criminal law. That effort was entirely normative however, though Pella was unusual in acknowledging it to be the case.[31] Now that piracy is once again a real contemporary issue the question of the prescriptive jurisdiction over it needs to be more carefully theorised.

The necessity of universal jurisdiction has been called into question in particular by the establishment of a permanent International Criminal Court, which in

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[29] See for example the controversy surrounding the case of the Arctic Sunrise. (International Tribunal for the Sea *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures* Case No. 22

[30] LE Nagle (2010-2011) *Terrorism and Universal Jurisdiction: Opening a Pandora's Box?* 27 Georgia State University Law Review 339, 365

[31] See Chapter 8 above.

theory should make universal jurisdiction redundant.[32] States that have sought to expand universal jurisdiction such as Spain[33] and Belgium[34] have been forced to scale back their ambitions, and there has been particular opposition to the concept from African States, who fear that universal jurisdiction is likely to be used disproportionately against them. Jalloh has noted that: "Since mid-2008, there has been a noticeable African government push-back against notions of universality, and more broadly, internationalized and even international justice."[35] This is a particularly problematic development considering that the effort to tackle the problem of attacks against shipping in both the East and West African regions will continue to depend on the cooperation of regional States. In general the prognosis for the development and adoption of universal jurisdiction generally appears to be overwhelmingly negative and it may be that Cassese was correct in his assessment that it "would seem that the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes".[36]

Conclusions

This chapter has built upon the findings of the previous chapter in examining the question of the prescriptive jurisdiction over piracy. Chapter 8 argued that the LOSC did not codify either a crime of piracy, or of prescriptive jurisdiction over it, except to grant prescriptive jurisdiction to the State seizing a pirate vessel on the high seas. This chapter has examined the proposition that piracy is subject to universal jurisdiction and has noted that the arguments for that categorisation (the seriousness of the offence or the fact that the offence takes place on the high seas) are insufficient to justify the extension of universal

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[32] See for example: G Bottini (2003-2004) *Universal Jurisdiction after the Creation of the International Criminal Court* 36 N.Y.U. Journal of International Law and Politics 503

[33] H Ascensio (2003) *Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals* 1 JICJ 690

[34] L Reydams (2003) *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law* 1 JICJ 679

[35] CC Jalloh (2010) *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction* 21 Criminal Law Forum 1

[36] A Cassese (2003*) Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction* 1 JICJ 589, 589

jurisdiction to piracy. The chapter has argued that in fact piracy is perfectly capable of being accommodated under other bases of prescriptive jurisdiction, and historically could potentially have been treated under *any* of the bases of prescription, though it is most logically accommodated under the protective principle. The chapter has also surveyed contemporary State practice and found that although State practice, in terms of what States actually say at least, affirms the existence of a rule of customary international law recognising universal jurisdiction over piracy, there appears to be a gap between what States say, and what they actually do. Contemporary piracy prosecutions are almost all undertaken by coastal States and flag States. Finally, the chapter has also briefly examined how the theorisation of universal jurisdiction over piracy may in fact be undermining the efforts to secure piracy prosecutions because, ironically perhaps, the failure to fix States with positive obligations creates a 'tragedy of the commons' scenario whereby no-one is prepared to take responsibility.

These problems are not unique to piracy however, and the normal way they are tackled is by way of so called 'suppression conventions' which require States to create criminal offences as a matter of municipal law, to establish jurisdiction over them, and to submit suspects for prosecution. Such a convention exists in relation to maritime crime, and the following chapter will evaluate its effectiveness as a means of addressing the problems that have been so far identified with the law of piracy.

11 Piracy and the SUA Convention

The two preceding chapters have identified two particular problems with the prosecution of piracy suspects. The first is that the theory that piracy is an 'international crime' directly proscribed by international law which contributes to a situation where States do not have adequate legislation criminalising piracy. The second is the fact that, despite (or perhaps even because of) the characterisation of piracy as a crime attracting universal jurisdiction, States appear reluctant to actually undertake prosecutions, and to accept their transfer for this purpose.

As recently as November 2012, concerned by the low rate of detention and prosecution of Somali piracy suspects, and in particular the practice of 'catch and release', the UN Security Council urged States to make use of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention)[1] as a means of creating criminal offences, establishing jurisdiction, and accepting delivery of piracy suspects, and thereby ensuring their prosecution.[2] Despite this endorsement however, there is little evidence that SUA has been used to any significant extent in the counter-piracy effort. It has on the contrary been suggested that SUA may not be an appropriate instrument for dealing with piracy, particularly because of the fact that it is a counter-terrorism convention. This chapter examines these arguments, and assesses whether SUA can assist in the effort to prosecute pirates.

The chapter is structured in four parts. First the chapter examines the background to the SUA Convention, the nature of the piracy prosecution problem, and the views that have been expressed about SUA's applicability to the problem. The chapter then examines the components of the Convention, before discussing the differences between piracy and terrorism and how this impacts upon the applicability of the Convention provisions. The chapter argues

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[1] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. (1988) 1678 UNTS 201

[2] UN Security Council Resolution 2125 (2013) S/RES/2125 (18 November 2013), 3, 8

that SUA does have a role to play in assisting States tackle piracy and maritime crime, but that its application is limited by the fact that it is a counter-terrorism convention, though not necessarily for the most obvious reasons. The chapter argues that piracy and terrorism do in fact share some common features, in particular the fact that neither benefits from a clear definition of the proscribed conduct as a criminal offence, either at international law or at municipal law. This makes the provisions requiring States to implement municipal law offences and establish jurisdiction useful in the counter-piracy context. At the same time however, the chapter also argues that piracy and terrorism are in fact very different in one important aspect. Whilst much of the literature that attempts to draw a distinction between piracy and terrorism claims that the difference lies in the subjective *motivation* of pirates and terrorists, it will be argued that the real difference is that piracy and terrorism target different *interests*. Specifically it is argued that it is in the very nature of terrorism that it targets specific State interests, whilst contemporary piracy, by virtue of the fact that a large proportion of the vessels attacked by pirates are registered under flags of convenience, and are the subject of such widely divergent interests that, as noted in Chapter 10 above, there is a failure of positive obligations to prosecute pirates.

11.1 The SUA Convention: Useful or Not?

A multilateral treaty, the SUA Convention was adopted on 10 March 1988 and entered into force on 1 March 1992. The Convention had 161 contracting States as of the end of July 2012. SUA was negotiated following the 1985 hijacking of the Italian flagged cruise liner the *Achille Lauro* by members of the Palestine Liberation Front. The situation resulted in disagreement over who was entitled to take custody of and to prosecute the suspects, and resulted in some escaping.[3] Efforts began almost immediately under the auspices of the IMO to negotiate a treaty dealing with the specific problem of offences against maritime navigation, and in particular the need to ensure that hijacking suspects did not escape prosecution, and took as its model the series of international treaties concerning

[3] For the background to the incident see: MK Bohn (2004) *The Achille Lauro Hijacking: Lessons in the Politics and Prejudice of Terrorism* Washington DC: Potomac Books

offences against civil aviation.[4] The Convention is as a result a 'suppression convention'. Nevertheless, whilst it mentions terrorism several times in its preamble, it does not use the term in its operative provisions.

As attacks by Somali pirates escalated in 2008 the UN Security Council urged the international community to use SUA as a mechanism for bringing them to prosecution, and dealing with the prevailing uncertainty as to what to do with captured piracy suspects. In Resolution 1846 (2008), the Security Council noted that the SUA Convention:

> [...] provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship [...][5]

That resolution urged States party to SUA:

> [...] to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.[6]

Again in December 2008 in Resolution 1897, the Security Council urged States to make use of SUA to close gaps in the counter-piracy effort noting in particular that:

> [...] lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice.[7]

This was reiterated in resolutions in November 2009,[8] in November 2010,[9] and again in November 2012.[10] The Security Council therefore looked to the SUA

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[4] D Freestone (1988) *'The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation'* 3 International Journal of Estuarine and Coastal Law 305, 306

[5] UN Security Council Resolution 1846 (2008) S/RES/1846 (2 December 2008), 4

[6] *Ibid.*

[7] UN Security Council Resolution 1851 (2008) S/RES/1851 (16 December 2008), 2

[8] UN Security Council Resolution 1897 (2009) S/RES/1897 (30 November 2009), 2,3,5

Convention as a means to resolve three key issues concerning the prosecution of captured Somali pirates. These are: first for States to introduce municipal legislation creating criminal offences covering acts of piracy, second for them to establish jurisdiction over those acts, and third to make arrangements and establish procedures for dealing with captured pirates to ensure that they are brought to court for prosecution. The question therefore, is whether SUA is an effective mechanism for accomplishing these goals. In between these resolutions a meeting convened by the IMO in Djibouti in January 2009 resulted in the adoption of a code of conduct concerning piracy in the Western Indian Ocean and Gulf of Aden (the "Djibouti Code"). Reiterating the wording of Resolution 1846 the Code also notes that:

> [...] the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation [...] provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force [...][11]

SUA has continued to be referred to as a possible basis for taking action against detained piracy suspects, and in his January 2011 report, in which it was observed that according to EUNAVFOR as many as 90% of detained piracy suspects were being released without charge,[12] the UN Secretary General's Special Adviser Jack Lang noted that SUA 'enshrines an obligation to prosecute or extradite, which can provide a useful way for States to combat piracy.'[13] At the same time however, doubts have been expressed concerning SUA's relevance to the problem. A report prepared by a workshop of international experts

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[9] UN Security Council Resolution 1950 (2010) S/RES/1950 (23 November 2010), 2,6

[10] UN Security Council Resolution 2077 (2012) S/RES/2077 (21 November 2012), 3,8

[11] IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden. Agreed at the Sub-Regional Meeting of the International Maritime Organisation, Djibouti (29 January 2009), 5

[12] UNSC Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia. (Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council. (25 January 2011) UN Doc S/2011/30, 13

[13] *Ibid*. 22

convened by the UN Secretary General's Special Representative to Somalia in 2008 was somewhat more equivocal, stating:

> The law of the sea does not adequately address what to do with persons committing acts of piracy who have been detained at sea. Many believe this gap has been filled by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).[14]

The report went on to qualify this statement in a footnote with the observation that:

> Some believe the 1988 SUA Convention is an inappropriate instrument because it was prepared in a counter-terrorist context. Others point out that the articles of the SUA Convention make no reference to terrorism and that the acts proscribed by SUA include all of those acts committed by pirates off Somalia, and other acts not covered by the traditional law of piracy.[15]

Different commentators have also expressed a variety of views concerning the potential application of SUA to the counter-piracy effort. Kraska and Wilson observe that whilst States "that want to prosecute maritime piracy but do not have national laws proscribing the crime could prosecute under legislation which implements SUA commitments", doubts have been raised about the number of States who have actually enacted such implementing legislation.[16] They also argue that "prosecuting pirates under SUA will not obviate the challenges associated with disposition of persons under control", in particular because of the practical problems in presenting witness and material evidence for a prosecution to go ahead.[17] For his part Bahar States that "despite the SUA Convention's title, the means for actual suppression of pirates or piratical

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[14] International Expert Group on Piracy off the Somali Coast. *Piracy off the Somali Coast. Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia. Final Report Assessments and Recommendations.* (10-21 December 2008), 26

[15] *Ibid.*

[16] J Kraska and B Wilson (2009) *The Pirates of the Gulf of Aden: The Coalition is the Strategy* 45 Stanford Journal of International Law 243, 281

[17] *Ibid.* 283

terrorists, jurisdiction notwithstanding, are scant" arguing that in practical terms there is "no real obligation" on the part of States to actually prosecute under the Convention.[18]

It can therefore be observed that whilst the Security Council set great store by SUA as a means of addressing shortcomings in the counter-piracy effort, there are also many who express reservations about its usefulness, if not its applicability, and the perception that SUA is a counter-terrorism convention rather than one applicable to the problem of piracy remains. In order to understand and evaluate whether this is a problem of substance or perception it is necessary to examine the way in which common problems affecting both piracy and terrorism have been dealt with, and the particular origins of the SUA Convention which lie in the effort to deal with terrorism against civil aviation.

11.2 Distinguishing Piracy from Terrorism

To understand the extent to which counter-terrorism measures are capable of application to the problem of piracy, it is first necessary to establish the difference between the two. Within the literature it is commonplace to make the distinction based on the subjective motivation of the perpetrators. Thus according to Tuerk:

> While piracy and terrorism at sea have many similarities and both are forms of violent interference with shipping, there is a marked difference between the goals of pirates and terrorists: while pirates usually seek financial gain, terrorists wish to make a "political or ideological point", most often coupled with the wanton destruction of human life.[19]

The distinction is framed in the same terms by Young and Valencia,[20] and also by Diaz and Dubner.[21]

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[18] M Bahar (2007) *Attaining Optimum Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations* 40 Vanderbilt Journal of Transnational Law 1, 24-25

[19] H Tuerk (2007-2008) *Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation* 15 University of Miami International and Comparative Law Review 337, 342-343

[20] AJ Young and MJ Valencia (2003) *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility* 25 Contemporary Southeast Asia 269, 274-275

11.2.1 The Meaning of 'For Private Ends'

Part of the problem is undoubtedly caused by a dispute over the meaning of the phrase 'for private ends' contained within the definition of piracy in Article 101(a) LOSC. The argument turns on the question of whether the distinction is between private/public or between private/political. The thesis has already examined how historically the definition of piracy turned on the question of whether the seizure of property at sea was performed under public authority. Some authors argue that 'for private ends' excludes politically motivated acts, and therefore that the definition of piracy excludes acts of terrorism.[22] In making this argument, they rely on texts prepared by the League of Nations subcommittee and Harvard Research in which they attempted to exclude insurgent vessels from the jurisdiction codified in their draft conventions.[23]

The better view, as noted in Chapter 8, is that those discussions erred in making the distinction based on the subjective (political) motivation of the individuals concerned. Both of those works had also clearly explained that subjective motive was not a constituent element of the definition of piracy at international law. Not only has this position been repeatedly restated in judicial decisions,[24] but it was also ultimately rejected by the ILC in preparing the draft articles on the law of the sea. It was noted by the Commission in discussing this point that:

> The real antithesis which needed to be brought out was between authorized and unauthorized acts and acts committed in a public or private capacity. An act committed in a private capacity could have a political purpose but be unauthorized.[25]

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[21] L Diaz and BH Dubner (2004-2005) *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: A Proactive Approach to the Evolution of International Law*. 32 Syracuse Journal of International Law and Commerce 1, 1

[22] See for example: KJ Heller *Why Political Ends are Public Ends, not Private Ends* (1 March 2013) Opinio Juris [opiniojuris.org/2013/03/01/a-final-word-about-politically-motivated-piracy]

[23] See Chapter 8 above.

[24] *United States v Brig Malek Adhel*, 43 US (2 How.) 210 (1844); *US v. Dire* 680 F. Supp. 3d 446 (4th Cir. 2012).

[25] *Ibid.* 267

The argument that for private ends excludes politically motivated acts has also been rejected by many contemporary authors, in particular Guilfoyle who has described the debate as "tired and impoverished".[26] Apart from being incorrect as a matter of law, it is also difficult to see what purpose the argument serves. It would for instance produce absurd and illogical results if the seizure of pirate vessels were to be ruled unlawful, and for piracy prosecutions to fail, merely because a defendant claimed an ideological or political motive.

Interestingly in the debate over whether insurgents could be pirates, the main argument that was advanced was the idea that if insurgents who directed their attacks only against their own government, they should be distinguished from pirates who theoretically attacked the vessels of all States, thus providing the justification of their seizure by the warships of any nation in order to protect the freedom of navigation. Halberstam has argued that terrorists should be subject to the same extensive jurisdiction as pirates because in her view:

> Terrorists today, like pirates of old, are a threat to all states [...] Since they do not confine their attacks to the vessels of a particular state, but attack vessels and nationals of many states indiscriminately, they are hostis humani generis in the truest sense.[27]

However the reality is that, whilst international terrorism can appear to be indiscriminate and to target multiple States, it will be argued here that the defining characteristic of terrorism is that it does in fact target specific State interests, since its very purpose is to compel State authorities to modify their behaviour in some way.

11.2.2 The Problem of Defining Terrorism

Whilst the effort to define piracy has proven problematic, the international community has also long struggled to reach agreement on a definition of terrorism outside of armed conflict. The desirability of reaching agreement on

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[26] D Guilfoyle (2011) *R Geiss and A Petrig Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia* 11 International Criminal Law Review 891, 911

[27] M Halberstam (1988) *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety* 82 AJIL 269, 289

the suppression of terrorism was first acknowledged in the inter-war period when a series of political assassinations prompted the League of Nations to convene a conference in 1937 which prepared two conventions, one of which, the 1937 Convention for the Prevention and Punishment of Terrorism defined international terrorist offences, but never entered into force.[28] This defined terrorism as 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or group of persons or the general public.'[29]

The lack of international agreement on measures to tackle terrorism was raised to prominence again with the US proposed draft counter-terrorism treaty following the 1972 Munich Olympics. This brought to the fore strong disagreement between Western, developing, and Communist countries in the UN General Assembly with developing countries in particular wanting discussion of terrorism to take into account the causes of terrorism and to exclude national liberation movements.[30] As a means of addressing the problem of international terrorism whilst at the same time avoiding the political controversies concerning its definition, Cassese notes that international measures instead took the form of:

> […] a string of conventions […] which […] imposed on contracting parties the obligation to make punishable and to prosecute in their domestic legal orders certain classes of actions. These actions were defined in each convention by indicating the principal outward elements of the offence. The conventions refrained from terming the conduct terrorist, nor did they point to the purpose of the conduct or motive of the perpetrators. Instead, they confined themselves to setting out the objective elements of prohibited conduct.[31]

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[28] B Saul (2006) *The Legal Response of the League of Nations to Terrorism* 4 JICJ 78, 79-81

[29] *Convention for the Prevention and Punishment of Terrorism* (Geneva, November 16th, 1937) C.546.M.383.1937.V *Reproduced in:* 18 League of Nations Official Journal 23 (1938), art 1

[30] B Saul (2008) *Defining Terrorism in International Law* Oxford: OUP, 194-202

[31] A Cassese (2008) *International Criminal Law* Oxford: OUP, 169-70

In other words, these counter-terrorism conventions impose obligations on State parties to implement municipal criminal legislation punishing acts of terrorism, but in doing so do not use the term 'terrorism', and do not make any reference to the motives of the perpetrators, instead confining the definitions of the criminal offences to the objective conduct. It must be noted here that it has been argued that motive *should* form part of the definition of terrorism, a position advocated by Saul.[32] However it will be argued that the question of motive is not in fact the defining characteristic of terrorism, a view, it is argued, that is increasingly being supported by legal developments.

Notwithstanding the longstanding difficulties in agreeing measures to address international terrorism, there have been a number of recent important steps towards the establishment of a single definition of terrorism which have focused on the target of the offence, rather than the motive. Although Cassese considered that a role remained for motive in distinguishing terrorism from ordinary criminal activities,[33] references to political motives such as that contained within the 1994 Declaration on Measures to Eliminate International Terrorism[34] are increasingly being abandoned.

Definitions have instead increasingly moved towards the formula of actions "designed to compel a government" such as that contained in the 1999 Convention for the Suppression of the Financing of Terrorism which defines terrorism as an act:

> [...] intended to cause death or serious bodily injury [...] when the purpose of such act [...] is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.[35]

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[32] B. Saul *The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient - Or Criminalising Thought?* in A Lynch, E MacDonald, and G Williams (eds.) (2007) *Law and Liberty in the War on Terror* Federation Press: Sydney, 28-8

[33] Cassese *International Criminal Law* (n.34), 167

[34] UNGA *Declaration on Measures to Eliminate International Terrorism.* Annex to UNGA Res 49/60 (9 December 1994) UN Doc A/RES/49/60, para 3

[35] International Convention for the Suppression of the Financing of Terrorism (1999) 2178 UNTS 197, art 2(1)(b)

Similar clauses can be found in UN Security Council Resolution 1566 (2004), the Hostage Convention,[36] and also within SUA itself.[37] In fact as Cassese observed:

> A number of international instruments and national laws provide that terrorists pursue the objective of either spreading terror among the population or compelling a government or an international organization to perform or abstain from performing an act.[38]

But he noted that "spreading terror" was merely a means to an end:

> [...] close scrutiny and legal logic demonstrate that in fact the primary goal of terrorists is always that of coercing a public (or private) institution to take a certain course of action. The spreading of deep fear or anxiety is only a means for compelling a government or another institution to do (or not to do) something; it is never an end in itself.[39]

Cassese originally suggested that such coercion could also be exercised against private entities (e.g. a multinational corporation), and also added the qualification that terrorism must be politically motivated, and not for private gain.[40] However, in early 2011 the Appeals Chamber of the Special Tribunal for Lebanon pronounced what it considered to be a customary international law definition of terrorism which makes no mention of either of these qualifications, but consists of the following elements:

> (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a

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[36] International Convention against the Taking of Hostages. (1979) 1316 UNTS 205, art 1(1)

[37] SUA art 6(2)(c)

[38] Cassese *International Criminal Law* (n.34), 166

[39] *Ibid.* 167

[40] *Ibid.*

national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.[41]

Although the STL claimed to be recognising the definition of an international crime in customary international law, it remains doubtful whether this is in fact sustainable. Saul strongly criticised that aspect of the decision, arguing that the cases and agreements that Tribunal cited did not support the assertion that customary international law recognised an international crime of terrorism, and that there is little evidence that the historical obstacles to the agreement of the definition of an international crime of terrorism are any closer to being resolved.[42]

Nevertheless, the significance of this decision is that it supports the view that terrorism, like piracy, is not defined by motive. Instead the distinguishing feature of terrorism is that it seeks to coerce governmental authorities. Unlike motive, it is argued that this definition has legal implications, specifically in relation to jurisdiction and positive obligations to extradite or prosecute.

11.3 The Components of the SUA Convention

The problems of implementing international rules against terrorism and the lack of precision in the definition of 'piracy' were both illustrated at the same time with the emergence of the phenomenon of aircraft hijacking in the 1960s. It is perhaps a strange coincidence that the problem was initially referred to as 'aerial piracy', even for some time in legal discussion. An edited collection of essays on the subject drawn from a conference held in Montreal in 1970 and published in 1971 was titled "Aerial Piracy and International Law" though this was apparently due to the difficulty of the bilingual Canadian conference finding a French translation for the word 'hijacking'.[43] The editor himself noted that the notion of aerial piracy was "a popular rather than a strictly legal term" and that

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[41] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*. Special Tribunal for Lebanon Appeals Chamber, Case No. STL-11-01/I (Feb. 16, 2011), 49-50

[42] B Saul (2011) *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism* 24 Leiden Journal of International Law 677

[43] ND Joyner (1974) *Aerial Hijacking as an International Crime* Dobbs Ferry, N.Y.: Oceana Publications, 118-9

the HSC definition of maritime piracy would be of limited assistance.[44] Joyner also noted that "classic international interpretations of piracy on the high seas appeared hopelessly inadequate as a basis of possible prosecution" of offences against aircraft.[45]

Action to deal with the problem consequently took the form of a series of international conventions addressing the particular problem of aircraft hijacking and acts endangering the safety of aircraft, specifically the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, (the Tokyo Convention)[46] the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, (the Hague Convention)[47] and the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention).[48] The Hague Convention defines as an offence the unlawful seizure of control of an aircraft, or the attempt to do so, by force, threat of force, or any form of intimidation.[49] The Montreal Convention takes this further, and defines offences including any activities which damage or endanger aircraft in flight.[50] Both of these treaties also incorporate provisions relating to the State parties creating relevant offences in municipal legislation, jurisdiction over the offences, rendering the offences extraditable, and to international cooperation.

As Bassiouni and Wise observe, the "structure of obligations established by the Hague Convention has been replicated in a series of subsequent agreements on the repression of international offenses" including the Montreal Convention, the Convention on Crimes against Internationally Protected Persons,[51] the Hostages

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[44] E McWhinney *International Legal Problem-Solving and the Practical Dilemma of Hijacking* in E McWhinney (ed.) (1971) *Aerial Piracy and International Law* Leiden: A.W. Sijthoff, 15

[45] Joyner (note 46) at 117

[46] Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) 704 UNTS 219

[47] Convention for the Suppression of Unlawful Seizure of Aircraft (1970) 860 UNTS 105

[48] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) 974 UNTS 177

[49] Hague Convention art 1

[50] Montreal Convention art 1

[51] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973) 1035 UNTS 107

Convention,[52] the Torture Convention,[53] and the SUA Convention.[54] The key objective of the suppression conventions is to ensure that where acts of violence are carried out against aircraft the destination State is in a position to either extradite or prosecute the suspects. Common Article 6 of the Hague and Montreal Conventions requires State parties on whose territory a suspect is found, to take them into custody and launch an investigation. Article 7 of both conventions requires State parties to submit individuals for prosecution if they choose not to extradite them, and Article 8 deems the convention offences to be extraditable in existing extradition arrangements. In practice, it is the priority of the victim State (either because it is the State of registration, or because its citizens have been the victims of hostage taking) to seek extradition, and that depends on a chain of procedure which starts with the receiving State (that is the State where the aircraft lands) accepting custody of the suspects. As Bassiouni and Wise also note:

> The wording of article 7 was a compromise worked out at the last moment during the negotiations which produced the Hague Convention. Those who drafted the convention sought, so far as possible, to deny a safe haven to aircraft hijackers. One way to do so might have been to impose an absolute obligation to extradite offenders to the state of registry of the aircraft (or to another state with a special jurisdictional interest). This was proposed, but rejected, since it potentially would require the extradition of nationals (which is anathema to some states) and also foreclose the possibility of political asylum in cases in which it might be thought appropriate. Efforts therefore centred on imposing an obligation to prosecute when extradition is refused.[55]

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[52] International Convention Against the Taking of Hostages. (1979) 1316 UNTS 205

[53] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (1984) 1465 UNTS 85

[54] M Cherif Bassiouni and EM Wise (1995) *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*. DordrechtMartinus Nijhoff, 17

[55] *Ibid.* 16

As a result the nature of the obligation to prosecute or extradite places the emphasis on the requirement to extradite, and only where the State with custody of the accused refuses to extradite does the requirement to submit the matter to its prosecutorial authorities arise.

11.3.1 The SUA Offences

Another feature of the extradite or prosecute conventions is the requirement of the States party to establish criminal rules and jurisdiction themselves as well. This is because of the *double criminality* rule, where the crime with which the suspect is accused must be recognised as an offence in both the sending and receiving State for the purposes of extradition. Treves observes that in the same way as the counter-terrorism conventions did not seek to define terrorism as an offence, SUA does not attempt to frame its convention offences within either a definition of terrorism or of piracy, but instead:

> [...] follows the 'sectorial' approach to the fight against terrorism adopted in a number of multilateral conventions such as those for combating unlawful acts against the safety of air navigation, against internationally protected persons and against the taking of hostages.[56]

In other words, the Convention sidestepped all definitional controversies in favour of specific offences following the method used to avoid the similar problems experienced in the development of the other international conventions dealing with terrorism, and in particular the treaties concerning offences against civil aviation. Whilst the preamble to SUA notes that the reason for the negotiation of the Convention is because of concern over the "world-wide escalation of acts of terrorism" the Convention itself does not use either the words terrorism or piracy in its operative provisions, nor does it attempt to define them or refer to those concepts in defining the Convention offences.

The SUA offences are set out in Article 3 of the Convention. Treves notes that these are inspired by Article 1 of the Hague Convention and Article 1 of the

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[56] T Treves *The Rome Convention for the Suppression of Unlawful Acts* in N Ronzitti (ed.) (1990) *Maritime Terrorism and International Law* Dordrecht: Martinus Nijhoff, 70-1

Montreal Convention.[57] Article 3(1) defines the core SUA offences, many of which would apply equally to acts of piracy, including seizing or exercising control over a ship by force, threat of force or intimidation,[58] and carrying out acts of violence against persons on board if it is likely to endanger the safe navigation of the ship.[59] As Geiss and Petrig note,[60] other articles are much more clearly terrorism orientated, defining offences of destroying or damaging a ship or its cargo so as to endanger its safe navigation,[61] and the placing of a device or substance likely to destroy or damage it or its cargo so as to endanger its safe navigation.[62] Article 3(2) of the Convention also enumerates offences of attempting to commit the Article 3(1) offences, abetting their commission, and threatening to commit them with the aim of "compelling a physical or juridical person to do or refrain from doing any act".[63] Article 5 requires each State Party to make the offences 'punishable by appropriate penalties', and Article 4 States that the Convention applies to incidents occurring with respect to any ship which is navigating, or is scheduled to navigate into, through or from the territorial sea of a State.

The significance of the SUA offences is that, although the SUA Convention is specifically targeted at acts of terrorism at sea, the way in which it is framed (following the precedent of the conventions concerning civil aviation) is without reference to terrorism itself. Since the objective criminal conduct of hijacking ships and attacking those aboard is the same whether it is committed by pirates or terrorists, provided States have complied with their Article 5 obligation to implement the convention offences in their municipal legal systems, those offences are therefore available for application to either pirates or terrorists, regardless of the original objectives of the convention itself. As a result, as

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[57] *Ibid.* 77

[58] SUA art 3(1)(a)

[59] *Ibid.* art 3(1)(b)

[60] R Geiss and A Petrig (2011) *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, 153

[61] SUA art 3(1)(c)

[62] *Ibid.* art 3(1)(d)

[63] *Ibid.* art 3(2)(c)

Kraska and Wilson noted,[64] so far as creating criminal offences are concerned, SUA is capable of being of considerable assistance to States seeking to prosecute offences against shipping.

11.3.2 Jurisdiction

The second element of the convention is that of establishing jurisdiction. This is dealt with by Article 6 which divides the possible bases of jurisdiction into several categories. First, Article 6(1) *requires* States to establish jurisdiction over Article 3 offences where they are committed against or on board a ship flying its flag,[65] where the offence is committed within its territory and territorial sea,[66] or by its nationals.[67] Article 6(2) also *permits* States to assert jurisdiction over offences committed by stateless persons resident in that State, over offences against their nationals (the passive personality principle),[68] and under Article 6(2)(c) over any such offence when 'it is committed in an attempt to compel that State to do or abstain from doing any act' which Geiss and Petrig suggest is a form of the protective principle.[69] This formula, it is argued, is significant because of its conformity with the emerging definition of terrorism. An additional requirement of Article 6(4) is that a State must also:

> [...] take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

This requirement was referred to (in the context of the Hague Convention) by Judge Guillaume in the *Arrest Warrant* case as 'a novel mechanism:

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[64] Kraska and Wilson *Pirates of the Gulf of Aden* (n. 18)

[65] SUA art 6(1)(a)

[66] *Ibid.* art 6(1)(b)

[67] *Ibid.* art 6(1)(c)

[68] *Ibid.* art 6(2)(b)

[69] Geiss and Petrig *Piracy and Armed Robbery* (n.63), 161

compulsory, albeit subsidiary, universal jurisdiction'.[70] Guilfoyle observes that this requirement creates an effect amounting to "quasi-universality" at least as amongst States party to the Convention,[71] and Cameron refers to it as a 'reciprocating states regime'.[72] However, it can be seen from a survey of Article 6 that the extent of the jurisdictional components in SUA are relatively limited, since a contracting State is only obliged to establish jurisdiction over offences with which it has a direct link (under Article 6(1)) or offences that have a direct link with one of the other contracting parties (under Article 6(4)) while even the optional bases of jurisdiction under Article 6(2) involve incidents with a relatively close link to the State in question. Nevertheless, to the extent that significant numbers of States have implemented their obligations under Article 6(4), a "network" of jurisdiction over offences against shipping would be created, ensuring that most States would be in a position to prosecute them.

11.3.3 Transfer and Extradition

The final area in which it had been thought that SUA might be of assistance with dealing with acts of piracy was in the compulsory establishment of mechanisms for the transfer, extradition and prosecution of suspects. As Halberstam notes, the "heart" of the Convention is the 'extradite or prosecute' obligation.[73] Article 7 of the Convention provides that:

> [...] any State Party in the territory of which the [...] alleged offender is present shall, in accordance with its law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

Article 10 further provides that:

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[70] *Case concerning the Arrest Warrant of 11 April 2000.* (Democratic Republic of Congo v. Belgium) Judgment, ICJ Reports 2002, 3, Separate Opinion of President Guillaume at 38

[71] D Guilfoyle *The Legal Challenges in Fighting Piracy* in B Van Ginkel and F Van Der Putten (eds.) (2010) *The International Response to Somali Piracy: Challenges and Opportunities* Leiden: Martinus Nijhoff, 133

[72] I Cameron (1994) *The Protective Principle of International Criminal Jurisdiction* Aldershot: Dartmouth Publishing, 80

[73] Halberstam *Terrorism on the High Seas* (n.29), 292

> The State Party in the territory of which [...] the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution.

Article 11 also makes further provisions concerning extradition, in particular "deeming" existing extradition treaties to include the SUA offences.[74] In between these articles, Article 8 provides for a mechanism by which the master of a ship may "deliver" a person suspected of committing an Article 3 offence to a coastal State party to the Convention. Article 8(1) states:

> The master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3.

Further, according to Article 8(3):

> The receiving State shall accept the delivery, except where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery [...] Any refusal to accept a delivery shall be accompanied by a statement of the reasons for refusal.

Freestone acknowledges that Article 8 is an "unusual" provision, that there was opposition to it during its drafting history, and that it was not included in the draft prepared by the Preparatory Committee submitted to the Legal Committee, but was reintroduced by the diplomatic conference.[75] By way of explanation of the rationale behind the Article 8 mechanism, he notes that article 8 was included to deal with the fact that the master of a ship could not be expected to detain terrorist suspects aboard a commercial vessel for long periods of time, or be in a position to return them to the home State without assistance, given that the flag State may be thousands of miles away, and could

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[74] SUA art.11(1)

[75] Freestone *1988 International Convention* (n.4), 314-5

even be a landlocked State.[76] Although one of the delegates in the Legal Committee suggested that the situation would not be comparable to that of the case of detaining a hijacker aboard and aircraft, the observer from the International Chamber of Shipping argued that it was "an illusion" to think that the master of a commercial vessel would have the facility to detain suspects aboard for long periods.[77]

This mechanism may have been thought necessary since whilst the transfer of suspects who are aboard an aircraft is relatively straightforward, the same might not necessarily be the case where transfer is sought from a ship to a port State. Although Article 8 has no direct counterpart in either the Hague or Montreal Conventions, it appears to be an additional mechanism concerned with ensuring that there is no "gap" in the chain of custody, and is closely related to common Article 6 of the Hague and Montreal conventions (and the similarly worded Article 7 of SUA), requiring the destination State of the aircraft to take custody of those aboard suspected of committing the convention offences. Guilfoyle argues that there is in theory nothing preventing a warship from seeking to rely on article 8, but that there is no evidence that article 8(1) has ever "been used to 'force' a port State to receive suspects."[78]

The operation of extradite or prosecute provisions has been the subject of study for a number of years by the ILC, but has received its most detailed examination in the recent case before the ICJ[79] involving Belgium's requests for the extradition of the former President of Chad, Hissène Habré, under the provisions of the Torture Convention which the Court noted are based on similar provisions in the Hague Convention.[80] There are several key aspects of the obligation that are noteworthy. First, the ICJ held that any State party to the

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[76] *Ibid.* 313-4

[77] IMO *International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. Comments from the Legal Committee of the IMO.* SUA/CONF/5, Annex: *Comments of the Legal Committee (Excerpts from the report of the Legal Committee (document LEG/ES.1/5)),* 6

[78] D Guilfoyle (2010) *Counter-Piracy Law Enforcement and Human Rights* 59 ICLQ 141, 149

[79] *Questions Relating to the Obligation to Prosecute or Extradite.* (Belgium v Senegal) ICJ Judgment of 20 July 2012 [www.icj-cij.org/docket/files/144/17064.pdf]

[80] *Ibid.* para 90

Convention did have standing to bring proceedings against a State which was not complying with its obligations to extradite or prosecute, noting that:

> All the States parties have a "legal interest" in the protection of the rights involved. […] These obligations may be defined as "obligations erga omnes partes" in the sense that each State party has an interest in compliance with them in any given case. […] The common interest in compliance with the relevant obligations under the Convention […] implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.[81]

Second, it noted that the obligation to extradite or prosecute is connected to the obligation to establish relevant criminal offences and establish jurisdiction.

> These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility if proven.[82]

Third, the Court noted that the obligation to prosecute extends only to submitting the case 'to its competent authorities for the purpose of prosecution'. As the Court observed, the obligation

> was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems.

The Court also listed the obligations as implementing the necessary legislation as required under the Convention, making a preliminary enquiry into the facts of the case, and, if it did not extradite the accused, to submit the accused to its competent authorities for the purpose of prosecution.[83]

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[81] *Ibid.* paras 68-9. Whether the erga omnes obligation stems from the nature of the offence of torture (as observed by the ICTY in the case of *Furundzija*) or whether it is a feature of the obligation to extradite or prosecute generally, is not entirely clear.

[82] *Ibid.* para 91

[83] *Ibid.* para 90

To summarise the obligations that SUA imposes on State parties therefore, State parties are required to implement municipal legislation establishing the criminal offences set out in Article 3, and are further required to establish jurisdiction (again by way of municipal legislation) over those offences where they fall within the categories set out within Articles 6(1) and 6(4). Secondly a State party in whose territory the suspect(s) is found is required to take them into custody (Article 7(1)), launch an inquiry into the facts (Article 7(2)), and under Article 10, submit the case "to its competent authorities for the purpose of prosecution". It is however not under an obligation to actually prosecute. Where Article 8 is concerned, it seems likely that the requirement is simply a development of the mechanisms incorporated in the conventions concerning offences against aircraft to ensure that hijackers are taken into custody by the destination State and not simply allowed to escape. It seems unlikely that Article 8 permits an arresting State to compel another State to accept transfer of suspects for prosecution.

Conclusions

In conclusion, the question of whether the SUA Convention is of assistance in the effort to secure the prosecution of piracy suspects has two elements. The first argument is that SUA is potentially very useful in that it requires States party to the Convention to establish criminal offences and jurisdiction over offences against the safety of shipping. As the chapter has noted, the concepts of terrorism and piracy do have one feature in common, which is the fact that there is almost certainly no agreed definition of either of them as criminal offences in international law. The consequence of this situation so far as terrorism is concerned it that counter-terrorism conventions have been drafted in such a way that they do not refer to terrorism or to political motives, but instead confine themselves to defining the objective conduct involved in terrorist offences. As a result, to the extent that those particular activities are involved, then provided States have complied with their treaty obligations, they will be in a position to prosecute them. Thus since the SUA Convention defines offences against the safety of shipping without designating them as terrorism, States are able to equally prosecute acts of piracy under as convention offences.

The problem with Article 8, and the obligation to extradite or prosecute, in connection with the problem of piracy is that it illustrates the difference between piracy and terrorism. It was noted above in Section 9.1.1 that the problem with piracy is the nature of the dispersed interests inherent in contemporary commercial shipping, not least because of the use of flags of convenience and crews from labour sending States. Consequently the problem of piracy is one of a failure of positive obligations. In contrast, it is argued that it is inherent in the nature of terrorism that acts of terror are actually aimed at particular States. Thus the practical effect is that in cases of piracy States are reluctant to prosecute pirates, whereas in cases of terrorism, the affected State wishes to secure custody of the suspects and prosecute them.

The reality behind Article 8 is that it was almost certainly not intended as a mechanism to allow naval forces who had arrested piracy suspects to simply transfer them to a coastal state and expect them to prosecute them. On the contrary, the purpose of Article 8 appears to be to ensure that civilian vessels might be able to entrust suspects to the nearest authorities, and to establish a chain of custody so that an interested State (such as the flag state) might then apply for extradition. It is suggested that Article 8 therefore has a particular role within the process of the obligation to extradite or prosecute to ensure that suspects do not escape before steps can be taken to prosecute them, as in fact happened with several of the hijackers in the *Achille Lauro* incident.

Consequently, a coastal state faced with demands from another state (which itself has no intention of conducting a prosecution) that it accept transfer of piracy suspects under Article 8 would therefore almost certainly have a good argument that the provision does not apply, and refuse the transfer under the provisions of Article 8(3). Geiss and Petrig argue that the obligation to prosecute arises even on the part of a flag State which has detained piracy suspects aboard one of its naval vessels. However, Guilfoyle suggests that this is an unsustainably wide interpretation of the requirement that the suspects be "within the territory" of the State in question.

At the same time however, the SUA Convention is less useful when it comes to the transfer of piracy suspects for prosecution. Here the difference between

piracy and terrorism becomes obvious. The problem is that piracy normally targets diverse such diverse interests that no single State is affected to the extent that it is compelled by hijackers and hostage takers to intervene. Unlike acts of terrorism which are (it is argued) by definition aimed at coercing governmental authorities, the coercion applied by pirates who hijack vessels is directed at the shipping companies who pay ransoms to secure the return of their vessels. As a result unlike in the case of acts of terrorism where the victim State will seek the extradition and prosecution of the suspects, precisely the opposite situation arises in the case of piracy, with piracy suspects being captured, but States being unwilling to take custody of them or prosecute them.

A Future Role for SUA?

Is this the case for all acts of piracy? A final aspect of the problem is that there are a small, proportion of piracy attacks that are treated differently to the normal situations where ransoms are paid by shipping companies. They fall into two different groups. The first category comprises those cases where piratical attacks are aimed at vessels and nationals belonging to developed states, and where ransoms are sought from their governments. In these cases it is argued that the attempt to coerce those governments falls within the notion of terrorism as outlined by the Special Tribunal for Lebanon, and more importantly, is treated by those states in the same way as acts of terrorism. Evidence of this different treatment can be seen in the statistics relating to the detention of Somali pirates. As noted above, around 14% of piracy suspects have been taken out of the region for prosecution. These cases have typically involved the capture of vessels and citizens of those states, and the demand for ransom from their governments. The distinction in these cases is that, rather than seeking ransoms from shipping companies and their insurers, these incidents have involved the coercion of national authorities, an activity which brings them within both the legal, and more significantly practical, definition of terrorism.

In such cases, those governments have come under political pressure to act, and consequently the response is typically much more robust. Examples include the responses to the hijacking of the French vessels the *Le Ponant* and the *Carré-*

d'As IV,[84] the hijacking of the US flagged *Maersk Alabama,*[85] and the South Korean *Samho Jewelry,*[86] incidents marked by forcible intervention by the flag state, followed by transfer of the captured piracy suspects for trial by the arresting state. In cases of this type, and in contrast to typical instances of piracy, SUA is likely to prove useful in its entirety, since if those states have SUA implementing legislation, they will not only be able to make use of the convention offences and bases for exercising jurisdiction, but if they are not the arresting state, are also likely to wish to seek the extradition and prosecution of the perpetrators.

Secondly, there has been increasing evidence that the international naval contingents patrolling the Gulf of Aden are having a deterrent effect on Somali piracy. Unfortunately, the evidence of this has been in the fact that piratical attacks have taken place further afield using mother ships to launch attacks, and are being displaced in particular into the Arabian Sea, Gulf of Oman and towards the coast of India.[87] It is possible that increasing numbers of pirates will be arrested by naval forces from states such as India, as in the case in early 2011 when the Indian Navy arrested 61 Somali pirates in a single operation, less than 700 miles from the Indian coast.[88] In these cases it is entirely possible that states will be increasingly prosecuting Somali pirates for attacks on their nationals and vessels, and even within their territorial sea.[89] In such cases the jurisdictional elements of SUA may therefore prove increasingly applicable.

In conclusion, it can be observed that the criticisms of the SUA Convention as being ill suited to the problem of Somali piracy by virtue of its counter-terrorism

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[84] BBC News. 'France Holds First Trial of Suspected Somali Pirates' (15 November 2011) <http://www.bbc.co.uk/news/world-europe-15740344>

[85] BBC News. 'Somali Pirate Sentenced to 33 Years in US Prison' (16 February 2011) <http://www.bbc.co.uk/news/world-us-canada-12486129>

[86] Lloyds List. 'Samho Jewelry Pirate Trial Begins' (23 May 2011) <http://www.lloydslist.com/ll/sector/ship-operations/article371133.ece>

[87] ICC International Maritime Bureau. *Piracy and Armed Robbery Against Ships*. Report for the Period 1 January-30 June 2012, 21

[88] BBC News. 'Indian Navy Captures 61 Pirates on Mozambican Ship' (14 March 2011) <http://www.bbc.co.uk/news/world-south-asia-12729629>

[89] Reuters. 'Somali Pirates Hijack Indian Ship with 21 Crew Off Oman' (20 August 2011) <http://www.reuters.com/article/2011/08/20/india-hijack-idUSL4E7JK05T20110820>

roots are not entirely justified, since the Convention can indeed be of use in ensuring that States have sufficient municipal legislation to prosecute pirates, provided they have complied with their treaty obligations. States may in fact find it much more straightforward to prosecute pirates for SUA offences than for piracy. At the same time however, to the extent that it was hoped that SUA might provide the basis for transferring piracy suspects to coastal States for prosecution, the Security Council may have been too optimistic, and the international community will need to continue to support coastal States to enable them to prosecute piracy suspects, a task they cannot be "forced" to carry out. Finally, to the extent that pirates extend their operations to the coastal regions of other States, and to the extent that they target the interests of developed States, the distinction between piracy and terrorism becomes less obvious, and the SUA Convention becomes increasingly applicable.

12 Enforcement Jurisdiction over Piracy

The thesis has argued that the international law of piracy is primarily a question of enforcement jurisdiction.[1] This chapter now turns to an examination of the way in which enforcement jurisdiction is exercised over piracy and maritime crime today. It will be recalled from the examination undertaken in Chapter 5 that the thesis has argued that during the 20th century, the law of the sea has shifted significantly away from the paradigm of the freedom of the seas, driven by the process of decolonisation, and in particular by greater demands of the ocean's natural resources and greater awareness of the need for their conservation. Consequently the law of the sea is subject to increasing control by coastal States, a process that may not yet have settled but is even now subject to the pressures of so-called 'creeping jurisdiction'.[2]

This chapter will argue that this 'paradigm shift' away from *mare liberum* and increasingly in favour of *mare clausum* has significant implications for maritime security. This is because the law of piracy is premised on the ability of maritime powers to unilaterally perform acts of enforcement on the high seas which has steadily been diminished most especially by the extension of the territorial sea to 12 nautical miles. It is argued that this shift reflects the need for maritime enforcement initiatives to be consensual and to involve the coordination of enforcement activities by coastal States at the regional level. The

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[1] J Kraska (2011) *Maritime Power and the Law of the Sea* Oxford: OUP; I Shearer (1986) *Problems of Jurisdiction and Law Enforcement against Delinquent Vessels* 35 ICLQ 320; N Klein (2011) *Maritime Security and the Law of the Sea* Oxford: OUP; D Guilfoyle (2009) *Shipping Interdiction and the Law of the Sea* Cambridge: CUP; D Guilfoyle (2007) *Interdicting Vessels to Protect the Common Interest: Maritime Countermeasures and the Use of Force* 56 ICLQ 69; E Papastavridis (2012) *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* Oxford: Hart; JJ Lenoir (1935-1936) *Criminal Jurisdiction over Foreign Merchant Ships* 10 Tulane Law Review 13; RG Rayfuse (2004) *Non-Flag State Enforcement in High Seas Fisheries* Leiden: Martinus Nijhoff; P Wendel (2007) *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* Heidelberg: Springer; DR Rothwell and T Stephens (2010) *The International Law of the Sea* Oxford: Hart; R Geiss and A Petrig (2011) *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* Oxford; OUP; RC Beckman and JA Roach (2012) *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* Cheltenham: Edward Elgar

[2] B Kwiatkowska (1991) *Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice* 22 ODIL 153

chapter will evaluate in turn: the enforcement rights conferred by Article 105 LOSC, the use of UN Security Council Chapter VII authority, regional cooperation in the field of maritime security, and finally seeks to identify what a contemporary maritime law enforcement framework might look like.

The chapter will argue that the LOSC provisions may not be as effective as they are assumed to be. Furthermore, the chapter will also argue that the use of Chapter VII authority by the Security Council is unlikely to prove a durable solution. The chapter argues instead that the only practical way forward is the development of mechanisms to facilitate regional cooperation.

12.1 Community Interests and the Law of the Sea

As international law has developed during the 20th century, there has been increasing discussion of the concept of the 'international community'. Simma and Paulus observed that international law has moved from the idea expressed as the 'Lotus Principle' characterising individual States acting only in their own self-interest, to recognition that many aspects of international relations can only be effectively regulated through international cooperation.[3] This idea is also echoed by Villalpando,[4] Allott,[5] and Schrijver and Prislan.[6]

In her analysis of the law concerning maritime security, Klein argues that although maritime security is often considered to be an exclusive interest (using the terminology of McDougal and Burke), it "can and should be viewed as an inclusive interest, given the common interest in combating an array of maritime security threats".[7] Unfortunately, although Klein is correct to argue that maritime security is a community interest, the inclusive/exclusive dichotomy masks the true nature of the problem. As observed in the previous chapter, whereas the protection of a State's individual interests is straightforward (since

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[3] B Simma and AL Paulus (1998) *The 'International Community': Facing the Challenge of Globalization* 9 EJIL 266

[4] S Villalpando (2010) *The Legal Dimension of the International Community: How Community Interests are Protected in International Law* 21 EJIL 387

[5] P Allott (1983) *Power Sharing in the Law of the Sea* 77 AJIL 1

[6] N Schrijver and V Prislan (2009) *From Mare Liberum to Global Commons: Building on the Global Heritage* 30 Grotiana 168

[7] N Klein (2011) *Maritime Security and the Law of the Sea* Oxford: OUP, 3

it is protected by the individual State) the protection of community interests such as the freedom of navigation and the natural resources of the high seas is much more complex.

The problem with protecting such common interests in practice is that since the interest belongs to everyone, no one in particular bears responsibility for its protection. This phenomenon, often referred to as the 'tragedy of the commons' is well understood in particular in the context of the overexploitation of fish stocks.[8] In reality the only way that this problem can be overcome is not by theorising it as a problem belonging to everyone, but to either devise concrete mechanisms for international cooperation, or where possible to 'particularise' State responsibility, typically by giving property rights to States, entities, or individuals so that they take responsibility for them.

It is argued that although maritime security is different in many respects from other aspects of ocean management, in reality the problem is not severable from the general framework of the law of the sea, and maritime security is not susceptible of development in a way that is incompatible with that general framework. This chapter argues that it is increasingly being recognised that the regulation of the ocean space demands multilateral and regional cooperation because of the transboundary nature of ocean management issues. More specifically, the demands for the protection of general rights of navigation and the protection of the sovereign interests of coastal States are such that extensive claims to unilateral policing authority are anathema to the contemporary law of the sea.

This chapter therefore argues that the 'traditional' theory of the law of piracy and its repression by foreign naval forces is in reality severely limited in its potential effectiveness. Instead it is argued that developments in the law of the sea illustrate how a maritime security framework is developing. One emerging

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[8] The term was first coined by Hardin (G Hardin (1968) *The Tragedy of the Commons* 162 Science 1243. In the context of fisheries management see: Rothwell and Stephens *International Law of the Sea* (n.1), 292. The concept has recently been applied to the problem of piracy by Bellish: J Bellish (2013) *A High Seas Requirement for Inciters and Intentional Facilitators of Piracy Jure Gentium and its (Lack of) Implications for Impunity* 15 San Diego International Law Journal 115

principle is the idea of 'ocean governance' in relation to which Rothwell and Stephens note:

> The Preamble to the LOSC acknowledges that 'the problems of the ocean space are closely interrelated and need to be considered as a whole'. This entreaty to manage oceans issues in an integrated and coordinated manner is at the heart of the concept of oceans governance that has gained increasing currency in recent decades.[9]

They argue that "many contemporary oceans threats" including maritime security "pose profound challenges to an issue-by-issue and zone-by-zone approach to oceans management."[10] A further element is the recognition that the coordination of the regulation of the high seas also has specific demands, and with this in mind principles have been developed for the regulation of "areas beyond national jurisdiction" or ABNJ.[11] Although this has focused on the conservation of living resources, control of pollution and protection of the marine, environment, and the regulation of deep sea mining and prospecting, some of the principles (in particular international cooperation, transparent decision making, and information sharing) are also applicable to the development of maritime security initiatives. In order to appreciate why this conceptual shift has become necessary, the chapter will examine and compare the different ways in which the law of piracy and maritime security is developing.

12.2 The Enforcement Rights Conferred by the LOSC

Article 105 LOSC defines the rights of jurisdiction over pirate vessels. As already noted, the enforcement jurisdiction it codifies is a special exception to the

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[9] Rothwell and Stephens *International Law of the Sea* (n.1), 461

[10] *Ibid.*

[11] D Freestone (2008) *Editorial: Principles Applicable to Modern Oceans Governance* 23 IJMCL 385; RA Barnes (2012) *Consolidating Governance Principles for Areas Beyond National Jurisdiction* 27 IJMCL 261; D Freestone (2012) *International Governance, Responsibility and Management of Areas Beyond National Jurisdiction* 27 IJMCL 191; AG Oude Elferink (2012) *Governance Principles for Areas Beyond National Jurisdiction* 27 IJMCL 205; EL Miles (1999)*The Concept of Ocean Governance: Evolution Toward the 21st Century and the Principle of Sustainable Ocean Use* 27 Coastal Management 1; L de la Fayette *The Role of the United Nations in International Oceans Governance* in D Freestone, R Barnes and D Ong (eds.) (2006) *The Law of the Sea: Progress and Prospects* Oxford: OUP

exclusive jurisdiction of the flag State, or put another way, it is the only way (together with unauthorised broadcasting) that a vessel may automatically lose its immunity from foreign jurisdiction on the high seas. This right is not subject to any need for further authorisation by the flag State. There are two kinds of restrictions on this special 'piracy jurisdiction' however. On the one hand it is subject to restrictions *vis-à-vis* the flag State, and on the other, and perhaps more significantly, it is subject to geographical restrictions in coastal waters.

In terms of limitations on high seas interdiction, a policing technique available to States within their territorial jurisdiction and also against vessels flying their flag is that of 'stop and search' which, provided it is subject to reasonable exercise, due notice, and legal basis, can be an effective method of identifying and tackling criminal activity. This technique is however not available to non-flag States on the high seas, even in the case of piracy. Instead, naval vessels are permitted a right of visit under Article 110 LOSC. That right is subject to limitations; Article 110(1) states that in the case of piracy a warship is "not justified" in boarding another vessel "unless there is reasonable ground for suspecting that [...] the ship is engaged in piracy." Where there is reasonable suspicion, the warship is able to exercise the right of visit over the suspected vessel. If the vessel proves to be piratical the warship may seize the vessel and arrest the crew. However, if the vessel is in fact not piratical, and if the right of visit was not justified by the activities of the vessel in question, then the intercepting State is liable for compensation under Article 110(3) (and Article 106 if the vessel has been seized.)

The only instances of counter-piracy interdiction in recent times have obviously been in the context of Somali piracy. In many cases such interdiction operations have been uncontroversial. In some cases this is because identifying vessels that have been hijacked by pirates has been straightforward where piracy materiel such as towed skiffs are in evidence, or where pirates have opened fire on naval forces and thus given their presence away. In other cases the interdiction has resulted in the recapture of merchant vessels, and the safe release of crewmembers, which is obviously a desirable outcome for all concerned. Nevertheless, it is not difficult to imagine that robust counter-piracy enforcement by naval forces in other regions of the world, where piracy is of

lower intensity, could well be the cause of protest. Even more worrying is the problem of the accidental loss of life of innocent parties in enforcement action, evident but nevertheless rarely discussed in the context of Somali piracy. The toll exacted on fishermen in particular is probably much greater than reported, but involves cases where fishing vessels have been mistakenly targeted by naval forces or by security detachments aboard merchant vessels, as well as cases where fishermen have been used by pirates as human shields aboard hijacked fishing vessels used as 'mother ships'. The World Bank report into piracy observed that between 2005 and 2011 44 fishing vessels were hijacked by Somali pirates, representing one fifth of all hijackings, and it is thought that at least 234 fishermen were on vessels either sunk or taken captive up until May 2012. The report goes on to note that attacks on fishing vessels "are very likely to be underreported".[12]

The second limitation of the LOSC enforcement jurisdiction over piracy is the fact that it is limited to the high seas or places outside the jurisdiction of any State.[13] This restriction was included to protect the sovereignty of coastal States from enforcement action by naval States. Whereas a State's ability to exercise prescriptive and adjudicative jurisdiction is circumscribed by the obligation to respect the sovereign prerogatives of other States, the restrictions on the exercise of enforcement jurisdiction are somewhat more robust. This is because attempting to perform acts of enforcement on the territory of another State without consent is likely to involve a violation of the prohibition of the use or threat of force imposed by Article 2(4) of the UN Charter. Thus sending forces into the territorial sea of another State, or forcibly interdicting vessels belonging to another State without clear authorisation, consent, Security Council Chapter VII authority, or in circumstances of self-defence, would be unlawful.

The PCIJ in the *Corfu Channel* case held that British forcible incursion into Albanian territorial waters in an effort to secure evidence relating to the sinking

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[12] World Bank Regional Vice-Presidency for Africa (2013) *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation* Washington: World Bank, 58

[13] See also: SP Menefee (1999) *Foreign Naval Intervention in Cases of Piracy: Problems and Strategies* 14 IJMCL 353, 361; IA Shearer (1986) *Problems of Jurisdiction and Law Enforcement against Delinquent Vessels* 35 ICLQ 320

of its vessels was a violation of Albanian sovereignty.[14] Lubell notes that Article 105 LOSC "does not cover situations in which the ship is in the territorial waters of a State. Neither can the doctrine of hot pursuit allow for pursuing a ship into the territorial waters of another State." Furthermore: "action against pirate ships is permitted on the high seas, but forcible measures against pirates cannot take place in the territorial waters of a State without its consent."[15] The concept of "reverse hot pursuit", though proposed by the League of Nations subcommittee and the Harvard Research, was rejected by the ILC.[16]

Some authors, such as Judge Jesus of ITLOS, have argued that foreign States should be allowed to intervene in territorial waters in emergencies to render assistance.[17] Rothwell and Stephens suggest that there is the possibility of an exceptional right to enter the territorial sea "on a temporary basis" known as 'assistance entry' based on the need to provide humanitarian assistance to ships and persons in distress arguably under customary international law and the LOSC Article 98 duty to render assistance to ships and persons at sea.[18] However, to the extent that these "rights" exist, they almost certainly do not extend to any kind of significant policing operations by warships within another State's territorial sea without its permission.

The problem is that acts of maritime crime, including piracy, always start from land, and do not respect maritime zones, either as between the territorial sea of a State and its EEZ and the high seas, or indeed between the adjacent territorial seas of different States. Somali piracy has attracted a considerable amount of interest because it falls squarely within the treaty definition of piracy. However, as noted in Chapter 1, incidents in other areas of the world where attacks against shipping frequently occur (such as the Straits of Malacca and the Gulf of Guinea) typically take place within territorial, archipelagic, and internal waters.

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[14] *Corfu Channel Case* Judgment of April 9th 1949 ICJ Reports (1949) p.4, 34-5

[15] N Lubell (2010) *Extraterritorial Use of Force against Non-State Actors* Oxford; OUP, 73-74:

[16] See Chapter 8 above.

[17] JJ Jesus, (2009-2010) *Troubled Waters: Combating Maritime Piracy with the Rule of Law: Foreword* 59 American University Law Review 1213

[18] Rothwell and Stephens *International Law of the Sea* (n.1), 77

Those regions also feature geography that permits criminal suspects to easily move between the territorial waters of different States and thus avoid capture.

Where the EEZ is concerned, an anomaly is that it is not mentioned in the enforcement jurisdiction granted by Article 105 LOSC. As noted in Chapter 8, this was pointed out at UNCLOS III and proposals made to amend the piracy provision to include the EEZ, but these were rejected. Guilfoyle notes that Article 58(2) would operate so as to apply the counter piracy provisions to the EEZ,[19] but the uncertainty caused by this oversight can only make foreign policing activities more difficult. The problem is also exacerbated by the fact that many States protest any kind of military activities within their EEZ, even to the extent of claiming territorial seas out to 200nm. Of such claims the most famous is undoubtedly that of China,[20] but Kraska observes that 17 other States also make potentially excessive claims to sovereignty in the EEZ.[21] Although these claims are unlawful, they make maritime security operations even more complex and sensitive.

In summary the enforcement mechanisms for tackling piracy and maritime crime are severely constrained on the one hand by the inherent limitations on non-consensual interdiction which are not entirely circumvented by the LOSC piracy provisions. At the same time counter-piracy enforcement is even more constrained by the increasing claims to exclusive maritime jurisdiction by coastal States. One of the ways in which these constraints may in theory be circumvented is by securing UN Security Council authorisation under Chapter VII. The next section evaluates this possibility.

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[19] Guilfoyle *Shipping Interdiction* (n.1), 44

[20] M Hayashi (2012) *Military Activities in the Exclusive Economic Zones of Foreign Coastal States* 27 IJMCL 795; R Pedrozo (2010) *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone* 9 Chinese Journal of International Law 9; H Zhang (2010) *Is it Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ* 9 Chinese Journal of International Law 31

[21] J Kraska (2011) *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* Oxford: OUP, 293; See also: TA Clingan *The Law of Piracy* in E Ellen (1989) (ed.) *Piracy at Sea* Paris: ICC, 170

12.3 Enforcement Authorised by the UN Security Council

Prior to the rise to prominence of Somali piracy, the area of the world worst afflicted by maritime crime was Southeast Asia, and in particular the Straits of Malacca and Singapore. In 2004 the US attempted to establish a Regional Maritime Security Initiative (RMSI) in the Southeast Asia region, but particularly focusing on the Straits of Malacca and Singapore. Suggestions that this would involve the deployment of US naval vessels into the straits to perform policing operations provoked strong opposition in particular from Malaysia and Indonesia. Ultimately these plans were dropped in favour of greater cooperation and capacity building measures.[22]

In April 2008 the French yacht the *Le Ponant* was hijacked in the Indian Ocean by Somali pirates. Following a ransom payment, the vessel and the crew were released by the hijackers who were then pursued by French naval commandos on land in Somalia, resulting in the arrest of several suspects. Although the Somali transitional federal government (TFG) subsequently approved the operation, France co-sponsored UN Security Council Resolution 1816 which authorised participating States to treat Somali territorial waters as if they were the high seas for the purpose of counter-piracy enforcement.[23] This resolution was followed by Resolution 1856, which authorised counter-piracy operations on the territory of Somalia.[24] Both resolutions were adopted under Chapter VII, but they also noted that they had been implemented with the consent of Somalia. Chapter VII authority was also granted on the basis that the continuing conflict within Somalia was a threat to international peace and security, as determined in Security Council Resolution 733 (1992),[25] rather than piracy itself amounting to a threat to international peace and security. Although the UN Security Council has long had involvement with authorising naval interdiction in the context of conflict and in the case of sanctions regimes particularly those

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[22] See generally: Y Song *Security in the Strait of Malacca and the Regional Maritime Security Initiative: Responses to the US Proposal* in MD Carsten (ed.)(2007) *Command of the Commons, Strategic Communications, and Natural Disasters* Newport, Rhode Island: Naval War College

[23] UN Security Council Resolution 1816 (2008) S/RES/1816 (2 June 2008)

[24] UN Security Council Resolution 1851 (2008) S/RES/1851 (16 December 2008)

[25] UN Security Council Resolution 733 (1992) S/RES/733 (23 January 1992)

targeting the transfer of WMD technologies,[26] this was the first time that Chapter VII authority had been deployed in the context of piracy and maritime crime.

The negotiation of the resolutions was however the subject of contention within the Security Council, in particular with reservations being expressed by Indonesia, a non-permanent member of the Security Council at the time, concerned that these measures might allow other States to interfere in its territorial waters, particularly in the light of the controversy over the proposed RMSI four years earlier. A clause was therefore inserted into Resolution 1816 specifically stating that it related only to Somalia, that it did not intend to modify international law including the LOSC, and that it should "not be considered as establishing customary international law".[27]

The terminology used by the Security Council nevertheless retains the ability to cause further controversy. This is due to the fact that discussions (and resolutions) do not merely refer to piracy, but to "piracy and armed robbery" or more recently "piracy and armed robbery at sea". The problems with this apparently benign term are all the worse for being concealed within its hidden meaning. The term appears to have been devised by the IMO as a means of categorising statistics relating to attacks against merchant shipping. It was in use by the IMO at least as early as 1983,[28] but has been used with increasing frequency not only by the IMO, but also by the UN Security Council, and also in regional cooperation agreements.

A preliminary issue with the term is that as Geiss and Petrig have observed, it is defined differently in different legal instruments.[29] However, the main definition according to the IMO is essentially:

> [...] any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private

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[26] See in particular Papastavridis *Interception of Vessels* (n.1), 84-160; R Barnes (2011) *Sanctions against Iran and the Law of the Sea* 26 IJMCL 343

[27] UNSC Res. 1816 (n.23), 3

[28] IMO *Measures to Prevent Acts of Piracy and Armed Robbery against Ships* Resolution A.545(13) Adopted on 17 November 1983

[29] Geiss and Petrig *Piracy and Armed Robbery* (n.1), 73

> 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 [...] [30]

In other words it is effectively defined as acts that would otherwise amount to piracy, but that take place within internal, archipelagic, or territorial waters, and also does not specify the "two-ships" requirement for those zones. There are three (related) problems with this terminology.

The first problem is that the IMO Code of Conduct is not a formal legal instrument. It does not create any rights or obligations on the part of States or individuals, nor does it purport to. It cannot in itself grant States the right to interdict or seize vessels, nor does it form the basis for criminal legislation or adjudication. In other words it has no legal effect. Geiss and Petrig question "whether the term armed robbery at sea is of any legal significance at all."[31] Secondly, the definition of the term does not match what the term actually says. Firstly it does not mean "armed robbery" since the definition of the term is "any illegal act of violence, detention, or depredation" which is clearly not the same thing. Secondly the wording "at sea" scarcely conveys the actual meaning which is acts that are specifically *not* on the high seas (or indeed in the EEZ), but *only* within internal, archipelagic, and territorial waters. Zou also notes that the "shortcoming of such a division is obvious".[32]

The third problem is that of the practical effect of the use of the term. By referring to attacks against shipping as "acts of piracy and armed robbery at sea" the sense is conveyed that there is some kind of international law relating to the suppression of acts of violence within internal, archipelagic, and territorial waters. Furthermore the use of that phrase also effectively redefines piracy by qualifying it so as to remove the jurisdictional safeguards protecting the exclusive enforcement jurisdiction of a coastal State within its internal,

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[30] IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships Resolution A.1025(26) Annex para. 2.2

[31] Geiss and Petrig *Piracy and Armed Robbery* (n.1), 72

[32] K Zou (2009) *New Developments in the International Law of Piracy* 8 Chinese Journal of International Law 323, 326-327

archipelagic, and territorial waters, as well as the flag State's prerogative relating to matters internal to its vessels within those zones.

Thus when the Security Council, having already granted Chapter VII authority in relation to Somalia, speaks about taking action against "piracy and armed robbery at sea" as a general concept, there should be no surprise that States raise objections, since theoretically at least, recognising "piracy and armed robbery at sea" as a threat to international peace and security *per se* leaves open the possibility that Chapter VII authority could be granted allowing naval States to intervene in the internal, archipelagic, and internal waters of other States at will, a scenario that seems likely to undermine international peace and security more than piracy ever could.

On 19 November 2012 UN Security Council met at the request of India to discuss piracy as a global problem, which the agenda described as "Maintenance of International Peace and Security" and then underneath "Piracy".[33] The meeting did not result in a resolution, so the Council has not actually decided to designate the global problem of piracy a threat to international peace and security at this stage, and there are a number of reasons why this would be an unusual step. Although most States focused on efforts to tackle maritime crime, several States voiced concerns that the Security Council should recognise that the law of piracy is as set out by the LOSC. Argentina's ambassador argued that piracy and armed robbery at sea was not in fact a matter for the Council, and South Africa observed that:

> […] the Council's mandate remains the maintenance of international peace and security. The Council can act in relation to piracy only to the extent that a specific situation, such as the piracy off the coast of Somalia, amounts to a threat to international peace and security.[34]

The Brazilian delegation also urged the Council to deal with piracy within the framework of the LOSC.[35] Malaysia stated that "regional and international cooperation should not impinge on the sovereignty and territorial integrity of

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[33] UN Security Council 6865th Meeting, 19 November 2012 S/PV.6865

[34] *Ibid.* 12

[35] UN Security Council 6865th Meeting, 19 November 2012 S/PV.6865 (Resumption 1), 2

affected states in any respect."[36] Indonesia stressed that the LOSC "should serve as the primary legal framework for combating piracy."[37] In the final Presidential Statement the idea that piracy might be a threat to international peace and security is only mentioned in the introduction, and thereafter not at all. On the contrary, the Statement notes that:

> The Security Council reaffirms its primary responsibility for the maintenance of international peace and security, in accordance with the Charter of the United Nations, and recognizes the primary responsibility of States in the eradication of piracy.[38]

It further noted that:

> The Security Council reaffirms its respect for the sovereignty, territorial integrity, and political independence of States concerned.[39]

The Statement also "reaffirmed" that "international law as reflected in" the LOSC "sets out the legal framework applicable to combating piracy and armed robbery at sea".[40] The issue arose again in August 2013 when the President made a further Statement welcoming a recent West African initiative in tackling maritime crime. That Statement too claimed that the LOSC set out "the legal framework applicable to [...[piracy and armed robbery at sea".[41]

Although the Statements underline the importance of the LOSC, the lack of legal precision remains disappointing, since clearly the LOSC does not set a legal framework for "armed robbery at sea". The evident lack of understanding of the law of piracy within the Security Council discussions remains a source of concern, and it remains to be seen whether it will cause further controversy in the future.

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[36] *Ibid.* 18

[37] *Ibid.* 28

[38] Statement by the President of the Security Council, 19 November 2012 S/PRST/2012/24, 1

[39] *Ibid.*

[40] *Ibid.* 2

[41] Statement by the President of the Security Council, 14 August 2013 S/PRST/2013/13

12.4 Regional Counter-Piracy Enforcement Measures

In contrast with the relevant provisions of the LOSC, and the involvement of the UN Security Council, this chapter argues that the most significant developments in the effort to tackle piracy and maritime crime have come through what Bueger and Stockbruegger have described as an "astonishing story of international cooperation."[42] These have evolved in different regions, though especially in relation to Somalia.

The Southeast Asian region was one of the first to address regional cooperation in the suppression of maritime crime. In the Malacca Straits, the MALSINDO Malacca Straits Coordinated Patrol operates between Malaysia, Singapore and Indonesia.[43] It co-ordinates patrols between the three States, and although those patrols do not cross into one another's jurisdictions, joint aerial patrols operate with combined teams and are able to conduct overflight of each other's territories. A region wide initiative is the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships (ReCAAP) which was negotiated with the assistance of the IMO.[44] It has 17 States participating from the South East Asia region, but not Indonesia or Malaysia. This agreement is primarily concerned with information sharing and providing a framework for law enforcement cooperation but does not allow one State to intervene in that of another.[45] An increasingly important role is being played by ASEAN, which as a regional organisation is increasingly coordinating collective security in the

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[42] C Bueger and J Stockbruegger *Security Communities, Alliances and Macrosecuritization* in MJ Struett et al. (2013) *Maritime Piracy and the Construction of Global Governance* New York: Routledge, 100

[43] See: Singapore Ministry of Defence *Launch of Trilateral Coordinated Patrols - MALSINDO Malacca Straits Coordinated Patrol* 20July 2004 [www.mindef.gov.sg/imindef/press_room/official_releases/nr/2004/jul/20jul04_nr.html#.U4MxyrlOVMs] See also: Guilfoyle *Shipping Interdiction* (n.1), 56-7

[44] *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* (28 April 2005) 44 ILM 829

[45] See generally: M Hayashi (2005) *Introductory Note to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* 44 ILM 826*;* J Ho (2009) *Combating Piracy and Armed Robbery in Asia: The ReCAAP Information Sharing Centre (ISC)* 33 Marine Policy 432

region, a component of which is maritime security and tackling transnational crime.[46]

Previous chapters have observed that regional cooperation and capacity building have played an important role arranging for the transfer, trial, and detention of piracy suspects in the Indian Ocean region. This cooperation has been even more in evidence in relation to maritime law enforcement.[47] Policing in the Gulf of Aden is largely performed by the EU (EUNAVFOR Operation Atalanta),[48] this is supplemented by a US multinational initiative under Combined Maritime Forces Coalition Task Force 151 (CTF 151) which itself grew out of multilateral arrangements aimed at interdicting weapons of mass destruction in the region.[49] Further coordinating mechanisms exist under the auspices of NATO, including Operations Allied Protector and Ocean Shield, the former of which was initiated in 2008 to protect World Food Program (WFP) shipments into Somalia. Other States including Russia, India, Japan, and China also have naval forces in the region and have performed escort and patrol duties in cooperation with other States.[50]

EUNAVFOR has a coordination centre known as the Maritime Security Centre – Horn of Africa (MSC-HOA)[51] and was the main actor in the establishment of the Internationally Recommended Transit Corridor (IRTC) which aims to "deconflict commercial transit traffic with Yemeni fishermen, provide a measure of traffic separation, and allow maritime forces to conduct deterrent operations."[52] Another important element in the coordination effort is the

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[46] See generally T Chalermpalanupap and M Ibañez *ASEAN Measures in Combating Piracy and Other Maritime Crimes* in Beckman and Roach (eds.) *Piracy and International Maritime Crimes in ASEAN* (n.1)

[47] See generally: K Homan and S Kamerling *Operational Challenges to Counterpiracy Operations* in B van Ginkel and F van der Putten (2010) *The International Response to Somali Piracy: Challenges and Opportunities* Leiden: Martinus Nijhoff

[48] See: M Jacobsson *International Legal Cooperation to Combat Piracy in the Horn of Africa* in Beckman and Roach (eds.) *Piracy and International Maritime Crimes in ASEAN* (n.1), 106-15; Geiss and Petrig *Piracy and Armed Robbery at Sea* (n.1), 18-21

[49] Geiss and Petrig *Piracy and Armed Robbery at Sea* (n.1), 24-5

[50] *Ibid.* 22-4

[51] See: [www.mschoa.org/on-shore/home]

[52] Homan and Kamerling *Operational Challenges* (n.50), 74

regular meeting of naval forces representatives with other international and shipping organisations known as Shared Awareness and Deconfliction (SHADE) meetings that are held in Bahrain.[53]

Finally, these measures have also been supplemented by the Djibouti Code of Conduct, which is an MOU negotiated with the assistance of the IMO between the States in the Horn of Africa region, modelled on ReCAAP, and although it envisages the possibility of agreements to use shipriders (embarked law enforcement officials to allow shipping interdiction) it also specifically excludes the right of States to intervene in each other's territory.[54]

The most recent developments in regional cooperation against maritime crime are in the West Africa region, where the sudden increase in attacks in the Gulf of Guinea has prompted collective security efforts. There are multiple organisations involved in regional maritime security, perhaps the most important being that of the Maritime Organisation of West and Central Africa (MOWCA) which established a sub-regional integrated coastguard network in 2008 for the protection of commercial shipping.[55]

12.5 A Framework for Maritime Law Enforcement?

In considering the question of whether there is a general law of shipping interdiction, Guilfoyle argues that the main way in which interdiction can take place is by means of consent. He argues that consequently "it cannot be said that there is a single unified theory which will indicate when interdictions are *permitted*, in the sense of vesting unilateral rights in a boarding state."[56] It has been observed that the law of piracy provides one special basis on which interdiction of foreign vessels on the high seas is permitted. The thesis has argued however that this basis is not as reliable or effective as it first seems, and

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[53] Geiss and Petrig Piracy and Armed Robbery at Sea (n.1), 27

[54] IMO *Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden* (Djibouti Code) annexed to the report of the Sub-Regional Meeting to Conclude Agreements on Maritime Security, Piracy and Armed Robbery against Ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea Areas, 3 April 2009 C102/14

[55] See: [www.amssa.net/framework/MOWCA.aspx]

[56] Guilfoyle *Shipping Interdiction*(n.1), 344

perhaps more importantly, the law of the sea has developed much more sophisticated mechanisms of maritime enforcement.

It is argued that there are in fact some identifiable principles that have developed in this context. The first is that shipping interdiction is generally facilitated by bilateral boarding agreements negotiated to deal with specific threats in particular areas. These agreements are most prevalent in the case of the interdiction of WMDs, and the interdiction of vessels suspected of smuggling drugs or illegal migrants. The second is that of regional cooperation agreements which have seen particular development in the areas again of smuggling, but also the establishment of regional fisheries management organisations.

12.5.1 Regional Cooperation Agreements

In examining the development of mechanisms to tackle the contemporary problem of piracy and maritime crime, and the mechanisms that have developed to deal with other issues of maritime law enforcement, it has been observed that one of the main ways in which these have developed is through regional cooperation. It has been noted that regional coordination has been seen as one of the most important developments in the effort to tackle piracy and maritime crime. The efforts to address other areas of maritime law enforcement have also involved the establishment of regional initiatives, including Regional Fisheries Management Organisations, and measures adopted to tackle drugs smuggling and illegal migration.

The reason why regional cooperation is so important is because, as Rothwell and Stephens observed, problems of maritime law enforcement do not respect maritime boundaries, and consequently cannot be addressed by States individually.[57] This chapter has examined how efforts to grant States unilateral powers to tackle piracy and maritime crime have inevitably struggled to cope with the nature of the problem, and to the extent that they do not respect the rights of coastal States, represent even more of a risk to peace and security than the problems they seek to address. As a consequence, regional cooperation and

[57] Rothwell and Stephens *International Law of the Sea (*n.1), 461

multilateral efforts have been far more important than the 'traditional' methods of counter-piracy enforcement. It is argued here that the development of maritime law enforcement mechanisms in the future will be most effective where they seek to coordinate action at the multilateral level, and where they ensure that the sovereign rights of coastal States are protected.

12.5.2 Bilateral Interdiction Agreements

The second way in which enforcement jurisdiction addressing maritime security at sea can be made more robust is by the negotiation of bilateral interdiction agreements. This model has proven particularly effective in the context of drugs interdiction, where States have been prepared to agree robust measures for the interdiction of suspect vessels. The experience under the PSI also suggests that the increased use of flags of convenience can in fact work in favour of States wishing to establish interdiction mechanisms, since a significant proportion of the world's merchant vessels are registered with a relatively small number of registries, who themselves have a limited direct interest in guarding vessels flying their flag from inspection, and who may well be prepared to cooperate with law enforcement initiatives. This type of measure could prove useful should instances of maritime flare up in the future in circumstances where it becomes desirable for instance to establish a stop and search regime within a circumscribed area to tackle the use of "mother ships" to attack merchant vessels.

Conclusions

In conclusion, this chapter has examined the way in which enforcement jurisdiction applies to the problem of piracy and maritime crime. The chapter argues that the regulation of activities at sea can be tackled by applying one of two different paradigms. The first is a unilateral approach which involves the enforcement of rules by individual maritime powers, or by centralised institutions such as the UN Security Council. The second is a multilateral approach which involves cooperation between interested States, and the agreement of multilateral and bilateral instruments to allow the regulation of seaborne activities. The chapter argues that the problems relating to law

enforcement activities against piracy and maritime crime are not unique, and that lessons can be learnt from the regulation of other seaborne activities.

The chapter has examined both the piracy provisions in the LOSC, and the efforts of the UN Security Council to allow States to intervene against coastal States for the purpose of maritime law enforcement, and has argued that both avenues are severely limited, both in terms of the rights they are able to grant as against flag States and against coastal States It is argued that both are more likely to cause conflict and dispute than they are to resolve problems of piracy and maritime crime. The chapter argues instead that the law of the sea has developed in the field of maritime law enforcement in a completely different direction. It is argued that this is reflected not only in the mechanisms that have been developed to tackle the problem of piracy and maritime crime, but also the separate measures that have developed to address the regulation of fisheries, the proliferation of weapons of mass destruction, and the suppression of illegal migration and drugs smuggling.

It is argued that the international law relating to maritime law enforcement is in fact most effective when it involves consent and coordination, and that the development of maritime law enforcement initiatives need on the one hand to involve regional cooperation agreements that coordinate efforts between maritime/naval States and coastal States in such a way as to preserve their sovereign interests, and where high seas enforcement is concerned, to develop legal instruments facilitating interdiction by consent to deal with specific problems, again preserving so far as possible flag State's interests in the freedom of navigation.

Conclusions

The thesis has undertaken an examination of the international law relating to jurisdiction over maritime piracy. The thesis has sought to set out a clear theory of what the international law relating to piracy actually is. The thesis argues that piracy in international law is in fact nothing more than a basis of jurisdiction, and that the theorisation of the international law of piracy is in need of development if it is to become an effective means of tackling transnational maritime crime. The thesis has examined in turn, the question of whether piracy is directly criminalised by international law, the meaning of piracy as a basis of jurisdiction, and more specifically, the significance of piracy as a matter of prescriptive jurisdiction, and as a matter of enforcement jurisdiction.

The thesis challenges the received wisdom concerning the international law of piracy, and seeks to close a gap between the prevailing doctrine and actual practice. The thesis argues that piracy is better categorised as a transnational crime, subject to the protective principle in the community interest, and enforced through multilateral regional cooperation agreements and by agreement with flag States.

The Problem of Piracy in International Law

The thesis has identified as its starting point the fact observed by Gidel that the international law of piracy is the subject of confusion because it simultaneously engages two different areas of international law, namely international criminal law (ICL) and the law of the sea. Gidel observed (in 1932) that the international law of piracy was being developed in two different directions by the two different areas of law. On the one hand, piracy in the law of the sea is essentially a question of enforcement jurisdiction, whilst on the other hand, piracy was also used by those seeking to develop ICL as a basis for the recognition of jurisdictional competence over international and transnational crimes. The thesis argues that this second element has been given undue weight that has militated against an accurate understanding of the problem.

Piracy as an International Crime

The first issue addressed by the thesis is that of the question of whether piracy is an 'international crime'. This is an important issue since the question of whether piracy is directly proscribed by international law impacts upon the question of jurisdiction over it. The thesis has explained how there is an important distinction between *international* crimes, which are directly proscribed by customary international law, and *transnational* crimes, which though defined by international treaties are proscribed as a matter of municipal law. The thesis has shown how the history of the crime of piracy was a complex one. Piracy was essentially the illegitimate opposite of *privateering*, effectively belligerent activities at sea (seizing vessels and their cargos) without lawful authority.

The consequences of this point have rarely been explored. Piracy was in reality not the shocking crime against humanity that it is often portrayed as. After all, all of the European powers commissioned and encouraged private individuals to wage this form of irregular warfare on their competitors. As Blackstone explained, piracy was above all an offence of treason, since it was engaging in belligerency without the sovereign's authority. The thesis has explored how the idea that piracy is an international crime partly involves a misunderstanding of the concept of a *delicta juris gentium* or offence against the law of nations, and has recalled that piracy has never been categorised as an 'international crime' in any of the work codifying international criminal law. The thesis has observed that the categorisation of piracy as an international crime has practical consequences for its prosecution. Many States have inadequate domestic legislation creating criminal offences relating to piracy and establishing jurisdiction over them, and piracy prosecutions have struggled as a result. The attempts by the UN Security Council to establish international mechanisms for piracy prosecution were ultimately abandoned.

Prescriptive Jurisdiction over Piracy

The thesis has explained that jurisdiction in public international law has two different dimensions, that of prescription and enforcement. It is necessary to be clear about the distinction, primarily because they are determined by different criteria. Where prescriptive jurisdiction is concerned, the thesis has noted that it

is frequently claimed that piracy is the original crime of universal jurisdiction, and that State practice in the form of the statements of governments, as well as the opinions of several judges in opinions of the ICJ and PICJ also accord with this analysis. However, the thesis has also observed that universal jurisdiction over piracy is not so effective in practice. In reality States appear to be reluctant to engage in piracy prosecutions unless they have a link to the incidents themselves.

The thesis has also examined the theory behind the notion that piracy is subject to universal jurisdiction, and has argued that the explanations given in the literature are unsatisfactory. Universal jurisdiction is not justified on the basis that piracy is (or was) a particularly serious crime, and it is also not justified merely on the basis that the offence takes place outside of the territory of any State. Furthermore, in reality piracy does not justify a special basis of prescriptive jurisdiction, since it is practice no different to the numerous other situations in which foreign flagged vessels commit offences on the high seas. The thesis has explained how historically piracy could have been prosecuted under potentially all of the other bases of prescriptive jurisdiction, not least on the basis of flag State jurisdiction. The thesis has noted in particular that the judgment in the *Lotus* case illustrated how piracy was by no means a special basis of prescriptive jurisdiction.

At the same time, the thesis has also suggested that theorising piracy as a crime of universal jurisdiction may in fact be a factor hindering the prosecution of piracy suspects. This is because it is well understood that the regulation of activities on the high seas, depends on the development of mechanisms fixing States with responsibility to regulate. This has been particularly evident in the case of unregulated high seas fishing. In the case of piracy prosecutions, the idea that the burden of prosecuting suspects falls on all States in general and none in particular, undermines the normal basis of due diligence obligations to prosecute. At the same time, the thesis has also argued that the theorisation of universal jurisdiction over such an ill-defined concept as piracy also increases the risk of excessive claims to jurisdiction over foreigners and foreign flagged vessels, and the risk of bringing States into conflict with one another. The thesis has instead contended that in practice the concept of the protective principle in

defence of community interests has developed to address similar problems in the shape of drugs smuggling by sea, and in relation to port State jurisdiction in relation to substandard vessels and marine pollution. The thesis argues that this approach is likely to prove a more effective means of allocating jurisdiction in the case of piracy as well.

Piracy as Enforcement Jurisdiction

The thesis has argued that maritime piracy is not an 'international crime', and is also not a special basis of prescriptive jurisdiction. The thesis has argued that on the contrary, the distinctive feature of the international law of maritime piracy is the fact that it is an almost unique exception to the exclusiveness of flag State jurisdiction over vessels on the high seas, or put another way, is a special circumstance in which vessels on the high seas can lose their immunity from foreign jurisdiction. Nevertheless, the thesis suggests that what initially appears to be a robust basis of enforcement jurisdiction, is in fact severely constrained in several respects. On the one hand, the right of visit under Article 110 LOSC and the right of seizure under Article 105 do not permit stop and search or similar policing methods. On the other, the enforcement rights conferred by the LOSC do not extend to territorial, internal, and archipelagic waters.

The thesis has observed that the paradigm on which the international piracy is based is fundamentally one that places its emphasis on the freedom of the high seas or *mare liberum*. The thesis has also argued however, that the prevailing balance of interests in the law of the sea is in reality increasingly inclined towards greater control by coastal States, or *mare clausum*, as a result of a number of factors including decolonisation and greater demands for the control of natural resources. The thesis has observed that since the negotiation of LOSC provisions on piracy, the law of the sea has developed a number of mechanisms to deal with the challenges of high seas policing, in particular in respect of fisheries management, the proliferation of weapons of mass destruction, and drugs smuggling. The thesis argues that an effective counter-piracy and maritime security strategy would benefit from adopting elements of these enforcement mechanisms which are primarily based on regional cooperation agreements, and by agreements with flag States.

Towards More Effective Counter-Piracy Mechanisms

In conclusion, the thesis has argued that the misapprehension that the international law of maritime piracy offers a comprehensive and effective mechanism for tackling the problem of piracy and maritime crime has been illustrated by the difficulties experienced in addressing the problem of Somali piracy, as well as maritime crime in other regions of the world. As a result of its examination of the law and its effectiveness, the thesis argues that piracy is better categorised as a transnational crime, and that States should focus more closely on ensuring that they have adequate municipal legislation to prosecute it. The thesis endorses the UN Security Council's appeals to use the SUA Convention for this purpose. In terms of prescription, the thesis has observed that prosecutions are normally only undertaken by States directly interested in the acts of piracy, and that piracy prosecution capacity building is likely to continue to focus on assisting neighbouring and coastal States, rather than relying on universal jurisdiction. Finally, the thesis has argued that even in terms of enforcement jurisdiction, the law of piracy may be outdated, and that it could benefit from being developed along the same lines as other contemporary high seas enforcement mechanisms.

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