

THE OXFORD HANDBOOK OF
**THE LAW
OF THE SEA**

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PIRACY

ANNA PETRIG

1 CONTEMPORARY PIRACY

1.1 Necessity of a counter-piracy legal regime

FOR many years, piracy was perceived as an outdated ‘eighteenth-century concept’ of chiefly historical interest. During the drafting of the 1958 Convention on the High Seas (HSC), some delegations even proposed the deletion *in toto* of the provisions on piracy because the phenomenon ‘no longer constituted a general problem’. Others argued that devoting eight articles to a specific type of violence at sea, ‘which was no longer a very real problem’, would be ‘out of all proportion’ and supported the idea of boiling down the provisions on piracy to a single article.¹ These radical proposals did not meet with success, yet the rather slipshod craftsmanship of the counter-piracy rules in the HSC (which were later borrowed for the 1982 United Nations Convention on the Law of the Sea (LOSC)) are arguably the result of a reluctance to deeply discuss and reflect on the issue of piracy for the purpose of a contemporary codification on the law of the sea.

However, not many years after the adoption of the LOSC the upsurge of violence against ships and their crews in various maritime areas of the world, notably in Southeast Asia, off the coast of Somalia, and in the Gulf of Guinea, brought about a change in attitude regarding the necessity of having a legal regime in place aimed

¹ (1958) IV *Official Records of the UN Conference on the Law of the Sea*, Second Committee (High Seas: General Regime), UN Doc A/CONF.13/40 (24 February–27 April 1958) 78–9 and 128.

at the suppression of piracy at sea and on land. The sharp spike in piratical activity in these waters has even provoked calls for additional rules and mechanisms to counter maritime piracy, going so far as to propose the adoption of a convention on piracy or the creation of a universal piracy tribunal.

1.2 Forms of contemporary piracy

Piracy is the single label that has been placed on an entire criminal phenomenon, which is actually quite diverse and to a large extent contingent on the maritime region in which it occurs. Broadly speaking, contemporary piracy takes two forms.

One form of piracy consists of hijacking ships and crews. This may occur for the purpose of negotiating a ransom for their release, which is archetypical for Somali-based piracy.² Alternatively, ships are hijacked to be sold after being repainted and renamed—a type of piracy witnessed in Southeast Asia since 2008.³ Another form of piracy consists of the commission of property offences, which run the gamut from robbing the crew of their valuables—the main form of piracy in Southeast Asia⁴—to stealing the entire cargo, as occurs in the West African part of the Gulf of Guinea during ship-to-ship operations.⁵

1.3 Applicable legal framework and its historical roots

It is the LOSC—notably Articles 100–107 and 110—that sets out the primary legal framework for countering piracy.⁶ The largely similar provisions in Articles 14–22 of the HSC are of relevance for the six States currently parties to the HSC but not the LOSC.⁷ In addition to the LOSC provisions on piracy, which have attained the status of customary international law,⁸ other bodies of international law, most notably

² The World Bank, *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation* (2013) 1, 92 and 94, available at <<http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf>>.

³ R Beckman, 'Piracy and Armed Robbery Against Ships in Southeast Asia' in D Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing 2013) 13, 15–16 and 23–25.

⁴ *Ibid.*

⁵ United Nations Security Council (UNSC), *Report of the United Nations Assessment Mission on Piracy in the Gulf of Guinea*, UN Doc S/2012/45 (19 January 2012) [5] and [35].

⁶ Emphasized in UNSC Res 2125 (18 November 2013) Preamble, [9], and other resolutions concerning Somali-based piracy.

⁷ This chapter therefore concentrates on the 1982 United Nations Convention on the Law of the Sea (hereinafter LOSC); however, its findings are generally also valid for the 1958 Convention on the High Seas (hereinafter HSC).

⁸ D Guilfoyle, 'Legal Issues Relating to Counter-Piracy Operations off the Coast of Somalia (Written Evidence)' in House of Commons Foreign Affairs Committee (UK), *Tenth Report of Session 2010–12: Piracy off the coast of Somalia* (2012) Ev 80.

international criminal law and human rights law, as well as domestic law, play a role in the suppression of piracy at sea and on land.

The provisions on piracy of the HSC and the LOSC date back to the beginning of the twentieth century. The first attempt to codify counter-piracy rules at the universal level, which took place under the auspices of the League of Nations, was ultimately abandoned in light of doubts as to whether piracy was 'of sufficient real interest in the present state of the world'⁹ to be codified.¹⁰ However, the initiative of the League of Nations prompted Harvard Law School to coordinate research on piracy that eventually resulted in the 1932 Harvard Draft Convention on Piracy.¹¹

The Harvard Draft Convention on Piracy heavily impacted the work of the International Law Commission (ILC), which built the foundation for the piracy provisions of the HSC that, in turn, strongly influenced the piracy regime of the LOSC. The six provisions on piracy in the draft text by ILC Rapporteur François entitled 'Regime on the High Seas', were simply French translations of the Harvard Draft Convention's provisions.¹² The provisions on piracy adopted by the ILC in 1956 as part of the Draft Articles Concerning the Law of the Sea¹³ were also influenced by the Harvard research, which 'the Commission was able to endorse'.¹⁴ Since piracy was perceived as an historical rather than contemporary problem, these provisions did not receive a great deal of attention during the First United Nations Conference on the Law of the Sea in 1958 (UNCLOS I), and they were included, in an amended form, in Articles 14–21 of the HSC. The interest devoted to piracy during the drafting of the LOSC was equally marginal. The counter-piracy provisions of the HSC were—with some minor changes that remain largely unexplained—simply imported into the LOSC.¹⁵

The following discussion provides an analysis of the scope of counter-piracy enforcement powers (in Section 3) and the legal regime governing the criminal prosecution of alleged pirates (in Section 4), which assumes a holistic approach that goes beyond the law of the sea. Since the notions of 'piracy' and 'pirate ship' are central to both aspects, it is necessary to first elaborate these concepts (Section 2).

⁹ League of Nations, Doc C.254.1927.V (1928) 22 *American Journal of International Law* Suppl 215, 222.

¹⁰ American Society of International Law (ASIL), 'General Introduction' (1932) 26 *American Journal of International Law* Suppl 1, 1–2; A Rubin, *The Law of Piracy* (2nd edn Transnational Publishers New York 1998) 331–5.

¹¹ ASIL, n 10, 5, 10, and 12–13; Harvard Draft Convention and Commentary, reprinted in ASIL, 'Codification of International Law: Part IV—Piracy' (1932) 26 *American Journal of International Law* Suppl 739, 743.

¹² Rubin, n 10, 348–9.

¹³ ILC, 'Articles Concerning the Law of the Sea with Commentaries' in *Report of the International Law Commission*, 8th session, UN Doc A/3159 (1956).

¹⁴ *Ibid*, 282.

¹⁵ Rubin, n 10, 216.

2 PIRACY UNDER INTERNATIONAL LAW

2.1 Definition of piracy

Article 101 of the LOSC defines three different offences, all of which are labelled ‘piracy’.

2.1.1 *Piracy as defined in Article 101(a) of the LOSC*

Article 101(a) of the LOSC states that piracy consists of ‘any illegal acts of violence or detention, or any act of depredation’ committed for private ends on the high seas or in a place outside the jurisdiction of any State by the crew or the passengers of a private craft against another vessel or person or property aboard.

This rather broad description of acts amounting to piracy carries with it two ambiguities. First, the meaning of the word ‘illegal’ preceding ‘acts of violence and detention’ is unclear. The term could refer to the absence of grounds negating criminal liability despite the use of violence (such as self-defence), or to exceptional situations in which private detention may be lawful (eg in holding a person caught red-handed in the commission of a crime until he is surrendered to law enforcement officials). However, such reference is generally absent from the provisions that define offences, and is indeed missing from Article 101(a) of the LOSC with regard to depredation. What is more, Article 101 of the LOSC is arguably not drafted as a criminal norm.¹⁶ It is debatable whether the element was added with the idea of requiring any qualified illegality,¹⁷ the more likely scenario being that it was slipped into the wording as a result of the shallow examination of the counter-piracy provisions during the drafting of the LOSC.¹⁸ The same may hold true regarding the second ambiguity, which relates to the question whether the words ‘acts of violence or detention’ require a plurality of acts. A comparison with the remainder of Article 101(a) of the LOSC and sub-paragraphs (b) and (c) of the provision—where the singular ‘act’ is used—suggests that a single act of violence or detention will suffice.¹⁹

Moreover, the requirement that the prohibited act must be committed ‘for private ends’ is fraught with uncertainty and has sparked ample debate in the past.

¹⁶ See Section 4.1 below.

¹⁷ D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press Cambridge 2009) 43.

¹⁸ Absent in the Harvard Draft Convention, n 11, Art 3, the element was included (without any explanation) in ILC Articles Concerning the Law of the Sea, n 13, Art 39, which resulted in HSC, n 7, Art 15. It was inserted into LOSC, n 7, Art 101 after a brief discussion during which Greece (unsuccessfully) proposed the deletion of the term: *Virginia Commentaries*, Vol III, 200–1.

¹⁹ ILC Articles Concerning the Law of the Sea, n 13, Art 39, refers to a single act throughout the provision.

The interpretative divide is along the dichotomies of ‘private/political acts’ and ‘private/public acts.’ Following the first view, the private ends requirement excludes any act that is politically or ideologically motivated from the ambit of piracy.²⁰ Following this view, maritime terrorism, and violent ecological activism at sea²¹ do not amount to piracy because they are politically motivated. If, however, the notion of ‘private’ is understood as the counterpart to ‘public’, the subjective motivation of the acting person is irrelevant. As long as an act of violence is lacking State sanction (ie is not authorized or attributable to a State), it is not public but rather undertaken for private ends.²² Such a reading of the private ends requirement fits best with Article 102 of the LOEC, according to which a warship or a government vessel cannot be a pirate ship unless its crew has mutinied and taken control of it.²³ It was in application of the private/public test that the US 9th Circuit Court of Appeals decided in *Institute of Cetacean Research v Sea Shepherd Conservation Society*, an action brought under the Alien Tort Statute against environmental activists by Japanese researchers hunting whales, that acts of violence committed in pursuit of a political goal can amount to piracy.²⁴ The same holds true for the decision *Castle John v NV Mabeco* issued by the Belgian Cour de Cassation concerning violent protest by Greenpeace activists against a Dutch vessel in order to publicize its polluting activities.²⁵ Furthermore, if the subjective motivation is irrelevant, the defence of alleged Somali pirates that their acts are motivated by the political aim to protect the country’s natural resources can easily be discarded.

In order to amount to piracy, acts referred to in Article 101(a) of the LOSC must be committed on the ‘high seas’ or ‘in a place outside the jurisdiction of any State.’ The geographical limitation to acts committed on the high seas seems at first sight to exclude acts committed in the exclusive economic zone (EEZ). However, Article 58(2) of the LOSC suggests the contrary by stipulating that Articles 88 to 115 LOSC pertaining to the high seas—which include the provisions on piracy—also apply to the EEZ in so far as they are ‘not incompatible’ with the LOSC’s Part V governing that zone. Generally, nothing in Article 56 of the LOSC defining the coastal State’s

²⁰ See eg Harvard Draft Convention and Commentary, n 11, 786; C Crockett, ‘Toward a Revision of the International Law of Piracy’ (1976) 26 *DePaul Law Review* 78, 79–80 (in relation to the HSC, n 7); M Shaw, *International Law* (6th edn Cambridge University Press Cambridge 2008) 615 (in relation to the LOSC, n 7).

²¹ See eg *Institute of Cetacean Research v Sea Shepherd Conservation Society* (2012) 860 F.Supp.2d 1216, 1233 (reversed on appeal; see n 24).

²² M Halberstam, ‘Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety’ (1988) 82 *American Journal of International Law* 269, 290; M Bahar, ‘Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations’ (2007) 40 *Vanderbilt Journal of Transnational Law* 1, 26–37.

²³ Guilfoyle, n 17, 36.

²⁴ *Institute of Cetacean Research v Sea Shepherd Conservation Society* (2013) 725 F.3d 940 (9th Cir), 943–44; Alien Tort Statute, 28 USC § 1350.

²⁵ *Castle John v NV Mabeco* (1986) 77 ILR 537 (Court of Cassation, Belgium).

sovereign rights in the EEZ is incompatible with the LOSC provisions on piracy, which therefore apply to all seas *outside* any State's territorial waters.²⁶

Article 101(a)(i) of the LOSC further requires that the prohibited acts are committed 'by the crew or the passengers of a private ship' and directed 'against another ship.' This implies that at least two ships must be involved, which excludes crew seizures, mutiny and passenger takeovers from the definition of piracy. The fact that internal seizures, such as the *Achille Lauro* incident, are not piracy under international law prompted the conclusion of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) which establishes certain offences without a 'two-ship requirement'.²⁷ From the wording of Article 101(a) of the LOSC it follows that the victim ship does not necessarily need to be a private ship.²⁸ Furthermore, the size of the attacked ship is irrelevant and piracy can, for instance, be committed against yachts. However, submarine cables and pipelines or fixed platforms are not ships in the sense of Article 101 of the LOSC.²⁹ This excludes attacks against oil rigs, as witnessed in the Gulf of Guinea,³⁰ from the ambit of piracy under international law.³¹

2.1.2 Piracy as defined in Article 101(b) and (c) of the LOSC

Article 101 of the LOSC describes two additional situations that amount to piracy under international law.

First, Article 101(b) LOSC qualifies as piracy 'any act of voluntary participation in the operation of a ship ... with knowledge of facts making it a pirate ship.' As we will see later in this chapter, a pirate ship is not simply one that has been used for a pirate attack, but also one that is *intended* to be used for such a purpose.³² Therefore, a person who voluntarily participates in the operation of a ship, in the knowledge that it is intended to be used for a pirate attack, commits piracy under international law as soon as the ship enters the EEZ or high seas.³³ This inchoate offence, which arguably

²⁶ *Virginia Commentaries*, Vol III, 202.

²⁷ Halberstam, n 22, 270 and 284–7.

²⁸ See *eg R v Musa Abdullahi Said & Six others* (2009) CR 1184/2009 (Chief Magistrate's Court of Mombasa) qualifying the attempted attack against the supply ship *Spessart* of the German Navy as piracy.

²⁹ R Lagoni, 'Piraterie und widerrechtliche Handlungen gegen die Sicherheit der Schifffahrt' in J Ipsen and E Schmidt-Jortzig (eds), *Recht-Staat-Gemeinwohl: Festschrift für Dietrich Rauschnig* (Carl Heymanns Cologne 2001) 501, 515–16.

³⁰ UNSC, *Piracy in the Gulf of Guinea*, n 5, [35].

³¹ The *Arctic Sunrise* incident (for a summary of the facts, see A Oude Elferink, 'The Arctic Sunrise Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 *The International Journal of Marine and Coastal Law* 244, 244–51) therefore could not amount to piracy under international law, even if, *arguendo*, violence was used by the Greenpeace activists attempting to board the Russian oil platform.

³² See Section 2.2 below.

³³ Article 101(b) of the LOSC, n 7, does not explicitly contain a 'high seas requirement'; but its reference to 'pirate ship' as defined in Art 103 of the LOSC, which in turn refers to Art 101(a) of the LOSC containing such a requirement, makes it an implicit element of Art 101(b) of the LOSC.

comes close to the common law concept of conspiracy, was included in Article 3(2) of the Harvard Draft Convention. In the view of the drafters, the provision covering 'piratical roving before any attack has been committed' serves 'as a basis for international police prevention of attacks'.³⁴ The similar Article 101(b) of the LOSC thus provides a legal basis for the formulation of broad counter-piracy mandates allowing patrolling naval States to intervene at a very early stage. The mandate of the European Union Naval Force countering piracy off the coast of Somalia, for instance, includes the taking of 'measures, including the use of force, to deter, *prevent* and intervene in order to bring to an end acts of piracy'³⁵ and to 'arrest, detain and transfer persons suspected of *intending*... to commit, committing or having committed acts of piracy'.³⁶

Second, by virtue of Article 101(c) of the LOSC, the instigation or facilitation of piratical acts defined in sub-paragraphs (a) and (b) amounts to piracy. Unlike Article 101(a) LOSC, this provision does not contain the geographical limitation 'on the high seas' and does not require that the prohibited acts take place aboard a ship. Hence, it encompasses inciting and intentionally facilitating acts described in Article 101(a) and (b) of the LOSC from ashore, sometimes referred to as 'dry land piracy', or waters subject to a State's jurisdiction.³⁷

2.2 Definition of pirate ship

In addition to the concept of piracy, the LOSC defines the term 'pirate ship'. According to Article 103 of the LOSC, two categories of vessels qualify as pirate ships: ships that have been used to commit acts referred to in Article 101 of the LOSC, so long as the ship remains under the control of the persons guilty of that act, and ships intended to be used for the purpose of committing such an act.

The reference found in Article 103 to Article 101 of the LOSC is, *prima facie*, to the provision as a whole, ie the three distinct situations amounting to piracy. This global reference creates several difficulties. First, part of the reference is circular in that Article 101(b) of the LOSC requires involvement in the operation of a 'pirate ship', which Article 103 of the LOSC defines by reference to Article 101 of the LOSC. Second, Article 101(c) of the LOSC includes instigation and facilitation of piratical acts from waters under a State's jurisdiction. This would imply that

³⁴ Harvard Draft Convention and Commentary, n 11, 820.

³⁵ Council Joint Action 2008/851/CFSP, [2008] OJ L301/33 (10 November 2008) Art 2(d) (emphasis added), as amended several times and latest by Council Decision 2012/174/CFSP [2012] OJ L89/69 (23 March 2012).

³⁶ *Ibid*, Art 2(e).

³⁷ Lagoni, n 29, 520; *US v Ali* (2013) 718 F.3d 929, 936–9; D Guilfoyle, 'Committing Piracy on Dry Land: Liability for Facilitating Piracy', *EJIL Talk!* (26 July 2012), available at <www.ejiltalk.org/committing-piracy-on-dry-land-liability-for-facilitating-piracy/>.

vessels that have been used or are intended to be used for acts of participation or instigation of piracy in the territorial waters or ports of a given State, qualify as pirate ships, and would thus be subject to seizure if later encountered on the high seas. At the same time, a ship that directly engages in acts similar to those defined in Article 101(a) of the LOSC in territorial waters cannot be seized by virtue of Article 105, which is limited to the high seas. This leads to an illogical discrepancy. A possible way out of this circular and arguably too broad reference in Article 103 of the LOSC to the definition of piracy *in toto* is to limit it, by way of a teleological reduction, to acts defined in Article 101(a)(i) of the LOSC.³⁸ Article 4 of the Harvard Draft Convention defining the concept of ‘pirate ship’ was limited in such way, while the ILC expanded the reference to all three offences of piracy without further explanation.

In sum, Articles 101 and 103 of the LOSC define the concepts of piracy and pirate ship under *international law*—but not without ambiguity and based on a rather complicated and sometimes circular system of cross-references. The situation is further complicated by the fact that these concepts are at times not distinguished from potentially differing definitions of piracy under municipal law primarily embodied in criminal law provisions. What is more, the term ‘piracy’ is often (too rashly) used to condemn any kind of violence occurring in the maritime environment,³⁹ and is frequently not sharply differentiated from the offence of armed robbery at sea.

2.3 Armed robbery at sea—an offence distinct from piracy

A considerable number of violent acts against ships and their crews, the characteristics of which are similar to acts of piracy defined by Article 101(a) of the LOSC, take place in maritime areas other than the high seas and the EEZ and therefore do not fulfil the definition of piracy under international law. Similarly, persons cruising the waters under a State’s jurisdiction with the intention of committing piracy-like attacks fall outside the scope of piracy as defined by Article 101(b) of the LOSC. These offences are commonly referred to as ‘armed robbery at sea’.

³⁸ R Geiss and A Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press Oxford 2011) 64–5.

³⁹ The *Mavi Marmara* incident, for example, was qualified in a Security Council debate as ‘tantamount to banditry and piracy’ and as ‘an action that could be described as piracy’ (UNSC, Verbatim Record UN Doc S/PV.6325 (31 May 2010) 4, 11–12), even though the acts in question were carried out by the navy (and not by a ‘private ship’ or a ‘warship... whose crew has mutinied’) and with State sanction (ie not for ‘private ends’).

The definitional elements of armed robbery at sea are far from settled under international law.⁴⁰ There seems to be general agreement as regards the place of commission of the offence that it can only be within waters under a State's full sovereignty and jurisdiction, that is, *not* the high seas or the EEZ. The offence of armed robbery at sea generally covers acts similar to those mentioned in Article 101(a) of the LOSC. Some definitions also include acts akin to those of Article 101(b) and (c) of the LOSC. Many, but not all, definitions expressly require that the offence of armed robbery at sea be committed 'for private ends'. What remains unclear is whether the definition of armed robbery at sea contains a two-ship requirement. Arguably, the wording 'violence... directed against *a* ship', as it appears in various definitions of armed robbery at sea, can be read as including internal seizures—as opposed to the words 'violence... directed... against *another* ship' used in Article 101(a)(i) of the LOSC.⁴¹

3 COUNTER-PIRACY ENFORCEMENT POWERS

3.1 The right of visit, seizure, and arrest

To counter piracy at sea, the LOSC grants—as an exception to the generally exclusive enforcement jurisdiction of the flag State on the high seas⁴²—certain universal policing powers.

According to Article 110 of the LOSC, a warship or any other duly authorized ship clearly marked and identifiable as being on government service that encounters a foreign ship on the high seas or EEZ is authorized to board that ship if there is reasonable ground for suspecting that it is engaged in piracy. The provision does not specify the meaning of the words 'reasonable ground for suspecting'. What follows from a comparison of Articles 110 and 105 of the LOSC is

⁴⁰ The following analysis is based on the definitions of armed robbery at sea contained in *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships* IMO Assembly Res A.26/Rs. 1025 (18 January 2010) [2.2] and IMO Assembly Res A.22/Res.922 (22 January 2002) [2.2]; Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, Art 1(2), available at <www.recaap.org/AboutReCAAPISC.aspx>; and Djibouti Code of Conduct, IMO Doc C102/14 (3 April 2009) Annex 5, Art 1(2)(a).

⁴¹ Emphasis added. According to the *Virginia Commentaries*, Vol III, 201, Art 101(a)(ii) of the LOSC referring to 'a ship' includes internal seizures.

⁴² LOSC, n 7, Art 92(1); *Virginia Commentaries*, Vol III, 213, 238–9, and 244.

that a different degree of probability that a ship is engaged in piracy is required to trigger the respective enforcement powers. Article 105 of the LOSC allows for the seizure of ships and the arrest of suspects aboard, that is, measures that are more intrusive and in greater conflict with the freedom of navigation as compared with those flowing from the right of visit. Consequently, 'reasonable ground for suspecting' that a ship has engaged in piracy is not sufficient to make the enforcement powers of Article 105 of the LOSC available; rather, they are only granted vis-à-vis a vessel identified as 'a pirate ship' as defined in Article 103 of the LOSC. The different standard is in line with the graduation of enforcement powers laid out in these provisions. Further guidance follows from the wording of Article 110 of the LOSC. From its third paragraph ('[i]f the suspicions prove to be unfounded, and provided that the ship boarded has not committed any suspicious act') it follows that an initial suspicion triggering the right of visit may arise even if the ship in question has not committed any suspicious act. This is in line with Article 101(b) of the LOSC defining piracy as the voluntary participation in the operation of a ship knowing that it is a pirate ship, which can be a vessel intended to be used for a future pirate attack. Hence, a reasonable suspicion that a ship is 'cruising with pirate intent' makes it one that is 'engaged in piracy' and triggers the right of visit. Furthermore, the second paragraph of Article 110 of the LOSC also contains a gradual scheme: the initial suspicion justifies verification of the ship's right to fly its flag and only '[i]f suspicion remains' after the document check can the more intrusive examination aboard take place. In sum, the degree of suspicion required to justify a right to inspect the ship's papers (the measure at the bottom of the array of gradually more intrusive enforcement measures) must not be set too high. Indicative criteria, such as the bearing of arms or the use of ships typically involved in pirate attacks seem sufficient, especially in a region prone to piracy. Such an interpretation of the 'reasonable suspicion' criterion is justified in light of the rather temporary interference with the freedom of navigation and the compensation to the ship foreseen in Article 110(3) of the LOSC in cases of unjustified boarding.

The object and purpose of the right of visit is to verify whether a ship is indeed engaged in piracy, which makes the enforcement powers of Article 105 of the LOSC available. To this end, the personnel of a warship may proceed to an examination of the ship's papers, which presupposes a right to stop the suspected vessel. If this does not allay the suspicion that the ship is engaged in piracy, an examination on board may take place.

An initial suspicion can also be substantiated by means others than dispatching a boarding team, notably by identifying a pirate ship from a distance through airborne surveillance by maritime patrol aircrafts and helicopters.⁴³ Not only is this

⁴³ D Osler, *Operation Atalanta 'Capability Shortfalls' Criticised* (Lloyd's List London 2011).

less of an interference with the liberty of navigation, but it may be more effective in terms of preserving evidence for later criminal proceedings since piracy paraphernalia is often thrown overboard as soon as a law enforcement vessel approaches.⁴⁴ If a ship already identified as a pirate ship from a distance is ultimately stopped, the enforcement powers taken against it stem directly from Article 105 rather than from Article 110 of the LOSC.

The first sentence of Article 105 of the LOSC authorizes every State to seize a 'pirate ship' or 'a ship taken by piracy and under the control of pirates,' that is, a ship that has become the victim of acts defined in Article 101(a) of the LOSC⁴⁵ and has then fallen under the control of persons carrying out these acts, referred to as 'pirates' in the provision but which the LOSC does not specifically define.⁴⁶ A fishing vessel hijacked by Somali pirates, who detain the fishermen aboard and use the vessel as a 'mother ship' from which to launch further attacks, is an example of 'a ship taken by piracy and under the control of pirates.'

Article 105 of the LOSC further grants States a right to seize property on board the ships it refers to. Since the second sentence of Article 105 declares the courts of the seizing State competent to determine the action to be taken vis-à-vis seized vessels and property, the seizing State is arguably not permitted to dispose of them summarily. Some commentators suggest that the counter-piracy resolutions authorize the summary disposal of boats and paraphernalia used by alleged Somali pirates.⁴⁷ However, the Security Council simply calls upon States to actively fight piracy through, *inter alia*, seizing and disposing of vessels and other piracy equipment in a way that is consistent with the relevant resolutions (which designate the LOSC as the primary legal framework to observe in counter-piracy operations) and international law.⁴⁸ Hence, Article 105 of the LOSC remains the governing standard.

Finally, Article 105 of the LOSC allows for the arrest of persons on board a pirate ship or a ship taken by piracy and under the control of pirates. The scope of this right is quite narrow since it does not permit the arrest of persons encountered anywhere other than on board the mentioned ships, such as a person suspected of piracy travelling as a passenger on a non-pirate vessel. At the same time, the provision allows, based on the face of its wording, the arrest of 'persons... on board' the specified ships, without any further requirements. However, an initial suspicion that they have engaged in piracy or intend to commit an act of piracy seems to be necessary.⁴⁹

⁴⁴ UNSC, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council Resolution 1916 (2010)*, UN Doc S/2011/433 (2011) [94].

⁴⁵ A ship can hardly come under the control of pirates by acts defined as piracy in Article 101(b) and (c) of the LOSC, n 7, ie 'conspiracy' and instigation or facilitation of acts of piracy.

⁴⁶ Geiss and Petrig, n 38, 66.

⁴⁷ Guilfoyle, n 8, Ev 83.

⁴⁸ See eg UNSC Res 2125, n 6, [10].

⁴⁹ Geiss and Petrig, n 38, 66–7.

3.2 Extension of enforcement powers—the example of Somali-based piracy

While the policing powers that can be taken against piracy are universal, the taking of enforcement measures against persons suspected of armed robbery at sea is within the sole competence of the State that has jurisdiction over the waters in which the offence occurs. However, the respective State can consent to foreign or joint patrols in its waters.⁵⁰ For instance, in 2011, Nigeria and Benin agreed to carry out the joint patrol programme ‘Operation Prosperity’ along the latter’s coast to more effectively prevent and suppress attacks against ships and crews.⁵¹

As regards Somali-based piracy, it was the Security Council—acting at the request and with the consent of the Somali Government—that paved the way for enforcement measures by third States and regional organizations in areas under Somalia’s jurisdiction.⁵² It did so based on its Chapter VII powers by qualifying the situation in Somalia, one exacerbated by incidents of piracy and armed robbery at sea (rather than the criminal phenomenon alone), as a ‘threat to international peace and security in the region.’⁵³

By adopting Resolution 1846, the Security Council authorized all States and regional organizations to enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea and to use ‘all necessary means’ to do so within that area.⁵⁴ Despite this strong wording, the authorization does not go beyond the enforcement measures that are provided by Articles 110 and 105 of the LOSC. This follows from the authorization specifying that enforcement powers are to be exercised ‘in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law’⁵⁵ and the repeated emphasis by the Security Council that the LOSC sets out the relevant international law.⁵⁶ On the operational level, the call to suppress Somali-based piracy at sea has received a truly international response with States around the globe deploying assets and personnel, as well as three international missions contributing to the naval operations.⁵⁷

⁵⁰ T Treves, ‘Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia’ (2009) 20 *European Journal of International Law* 399, 406; S Wolf, ‘Territorial Sea’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press Oxford 2012) [21] and [43], available at <<http://opil.ouplaw.com/home/EPIL>>.

⁵¹ UNSC, n 5, [18]–[19].

⁵² See Treves, n 50, 406–8, on what the Security Council authorizations add in light of Somalia’s consent to enforcement measures in areas under its jurisdiction.

⁵³ See eg UNSC Res 2125, n 6, Preamble, [34].

⁵⁴ UNSC Res 1846 (2 December 2008) [10]; for the latest renewal of this time-limited authorization, see UNSC Res 2125, n 6, [12].

⁵⁵ UNSC Res 1846, n 54, [10].

⁵⁶ See eg UNSC Res 2125, n 6, Preamble, [9].

⁵⁷ On naval activities in 2013, see UNSC, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, UN Doc S/2013/623 (2013) [37]–[41].

In adopting Resolution 1851, the Security Council authorized States and regional organizations ‘to undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.’⁵⁸ In contrast to Resolution 1846, the enforcement powers authorized by this resolution are not in any way linked to or confined by the type of enforcement measures allowed under the LOSC regime. Rather, in line with the common understanding of the phrase ‘all necessary means’, a broad range of measures, including military force, are allowed.⁵⁹ Except for the singular instance where the European Union Naval Force destroyed piracy logistics on shore (boats and fuel dumps) in May 2012,⁶⁰ the authorization has not been used thus far.

3.3 Legal constraints on counter-piracy enforcement powers

The exercise of the far-reaching counter-piracy enforcement powers granted by virtue of the LOSC and HSC implies the use of force and coercion. However, neither treaty indicates the allowable degree of force or coercion. The legal constraints limiting these powers instead emerge from general safeguards applicable to maritime interception operations and human rights law. The rules of international humanitarian law (IHL) governing the conduct of hostilities are, however, inapplicable.

3.3.1 *Inapplicability of international humanitarian law*

The measures for the suppression of piracy authorized or referred to by the law of the sea—notably interdiction, seizure, arrest, and the imposition of penalties—clearly have a law enforcement character. The fact that military means, namely warships and military personnel, are used in order to combat piracy at sea does not entail the application of IHL, which requires the existence of an armed conflict. However, rarely, if ever, will counter-piracy operations meet the threshold of an international or non-international conflict given the actors involved and the level of violence used.⁶¹ The choice of using military means to counter piracy is instead rooted in Article 107 of the LOSC, which designates warships (and other

⁵⁸ UNSC Res 1851 (16 December 2008) [6]; for the latest renewal of this time-limited authorization, see UNSC Res 2125, n 6, [12].

⁵⁹ Geiss and Petrig, n 38, 83.

⁶⁰ European Union Naval Force (EUNAVFOR), *Statement by the Spokesperson of EU High Representative Catherine Ashton following the Disruption of Pirate Logistical Dumps in Somalia by EU Naval Force—Operation Atalanta*, A 225/12 (Brussels, 15 May 2012).

⁶¹ On why counter-piracy operations off the coast of Somalia do not amount to an armed conflict, see Geiss and Petrig, n 38, 131–5 and A Murdoch and D Guilfoyle, ‘Capture and Disruption Operations: The Use of Force in Counter-Piracy off Somalia’ in Guilfoyle (ed), n 3, 147, 155–8.

ships clearly marked and identifiable as being on government service and authorized to that effect) as the only competent vessels to carry out a seizure on account of piracy. This is primarily due to the pragmatic reason that warships navigate the high seas far more frequently than regular police vessels. Furthermore, the limitation on the type of vessels competent to seize alleged pirate ships enhances legal certainty, reduces the risk of abuse of enforcement powers and facilitates the allocation of responsibility in cases of unjustified interferences with the freedom of navigation.⁶²

3.3.2 *General safeguards for maritime interception operations*

While IHL is inapplicable to counter-piracy operations, and the law of piracy is silent regarding limits on the use of force and coercion, safeguards must be imported from international case law⁶³ and treaties⁶⁴ applicable to law enforcement at sea pertaining to criminal phenomena other than piracy. In essence, beyond the situation of self-defence, force must be avoided to the extent possible and only used *ultima ratio*. This presupposes a graduated response, whereby resorting to force is preceded by other measures, such as visual and auditory signals to stop and warning shots. Where force is unavoidable, it must not go beyond what is reasonable and necessary in the situation at hand.⁶⁵ These principles are, however, quite vague and provide little guidance for specific operations. Furthermore, they presuppose that deployed warships are appropriately equipped and that military personnel specifically trained for law enforcement missions, which differ from the conduct of hostilities. What is more, the safeguards are commonly aimed at protecting ships, their cargo, and the freedom of navigation rather than preserving the individual rights of persons subject to law enforcement measures.⁶⁶ Therefore, human rights law is another important source for inferring limits on the exercise of counter-piracy enforcement powers.

⁶² ILC Articles Concerning the Law of the Sea, n 13, 283; *Virginia Commentaries*, Vol III, 222; liability in cases of unjustified visit or seizure is governed by LOSC, n 7, Arts 110(3) and 106.

⁶³ See eg SS *'I'm Alone'* (*Canada/United States*) (1935) III RIAA 1609, 1615 and 1617; *The Red Crusader Case* (1962) 35 ILR 483, 538; *The M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) [1999] ITLOS Rep 10, [155]–[156].

⁶⁴ See eg 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Art 8bis(10) (hereinafter SUA Convention), as amended by the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 1995 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, Art 22(1) (FSA).

⁶⁵ In more details: Guilfoyle, n 17, 271–94.

⁶⁶ UNSC Res 2125, n 6, [15], for example, requests that the use of the authorized enforcement measures 'do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State'.

3.3.3 *Human rights law*

Patrolling naval States generally exercise counter-piracy enforcement powers in maritime areas not under their sovereignty. The requirements for the extraterritorial application of human rights in a maritime environment are not developed to the same extent as they are for land-based police operations beyond a State's territory.

For enforcement measures taken *on board* a military or government vessel, such as holding an arrested piracy suspect until surrender for prosecution, the human rights obligations of the enforcing State are, first of all, applicable by virtue of the flag State principle.⁶⁷ Furthermore, ships in the sense of Article 107 of the LOSC are largely made up of State agents exercising full control over the ship and the suspects held aboard. Therefore, the criterion of 'effective control over persons' by a State beyond its borders—recognized by various human rights bodies as another trigger for the extraterritorial application of human rights⁶⁸—is also fulfilled.⁶⁹ While the *applicability* of human rights law on board law enforcement vessels is now generally undisputed, controversial views exist on the content and meaning of certain human rights in the maritime environment. For instance, there are differing views as to whether piracy suspects must be brought promptly before a judge of the seizing State⁷⁰ or if it suffices that the legality of their arrest is controlled by a judge of the ultimately prosecuting State and whether the ordinary timelines apply.⁷¹

As regards enforcement measures, which are *not* taken *on board* the law enforcement vessel itself, but rather when a ship suspected of piracy is pursued, stopped and boarded, and the crew searched and arrested, the most viable basis for the application of human rights law seems to be the 'effective control over persons' criterion. During ship-to-ship operations, the distance between the vessels involved may be quite important and the alleged pirate ship generally tries to evade control by the warship or dispatched craft, yet the use of force in such

⁶⁷ *Medvedyev and Others v France*, Judgment of the European Court of Human Rights, App No 3394/03 (29 March 2010) [65]; *Hirsi Jamaa and Others v Italy*, Judgment of the European Court of Human Rights, App No 27765/09 (23 February 2012) [75]–[78].

⁶⁸ Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I* (2008) [10]; *Sonko v Spain* (2011) Comm No 368/2008 (Convention Against Torture Committee) [10.3].

⁶⁹ A Petrig, 'Human Rights in Counter-Piracy Operations: No Legal Vacuum but Legal Uncertainty' in M Meija, C Kojima and M Sawyer (eds), *Piracy at Sea* (Springer Berlin 2013) 36–8.

⁷⁰ For example by using video-link, see *Re 'MV Elly Mærsk'* (2011) U.2011.3066H, TfK2011.923/1 (Højesteret, Supreme Court of Denmark).

⁷¹ Issues discussed in *Re 'MV Courier'* (2011) 25 K 4280/09 (Verwaltungsgericht Köln, Administrative Court of Cologne, Germany). *In extenso* on arrest and detention of piracy suspects in light of the right to liberty, see A Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Martinus Nijhoff Leiden 2014) Part 4.

situations can have a considerable impact on the individual concerned. In light of this, it is important to note that recent case law supports the stance that control over persons can be established even before the person is physically in the hands of law enforcement personnel if a close causal link between the act of the State and the sustained injury exists.⁷² On the part of the European Court of Human Rights, there is even maritime-specific case law supporting the idea that human rights law applies extraterritorially from the moment a vessel is intercepted and thus prior to boarding.⁷³ *A fortiori*, control over the persons aboard should be regarded as established when boarding is completed—at the very latest. While the suspects may still try to hinder the establishment of total physical control over them—upon which the criterion is undeniably fulfilled—they have no possibility of fleeing the ship at that moment and find themselves in an inescapable situation.

In sum, international law limits the use of force and coercion in counter-piracy operations. However, the safeguards remain rather vague and, absent a coherently construed legal regime defining the constraints of law enforcement operations at sea, there is a genuine risk of protective gaps.

4 CRIMINAL PROSECUTION OF ALLEGED PIRATES

The criminal prosecution of piracy suspects has traditionally been a matter for domestic courts, which apply domestic criminal norms and procedures. Efforts to overcome or supplement this traditional approach in the case of Somali-based piracy by establishing an international(ized) prosecution model⁷⁴ have failed.⁷⁵

⁷² See eg *Andreou v Turkey*, Judgment of the European Court of Human Rights, App No 45653/99 (27 October 2009) A.3.c. (The Law); *Isaak and Others v Turkey*, Judgment of the European Court of Human Rights, App No 44587/98 (2006) A.2.b. (The Law); *Munaf v Romania* (2009) Comm No 1539/2006 (Human Rights Committee) [14.1]–[14.6].

⁷³ *Medvedyev and Others v France*, n 67, [87]; in *Women on Waves and Others v Portugal*, Judgment of the European Court of Human Rights, App No 31276/05 (3 February 2009), the Court declared the ECHR applicable simply on the basis that a Portuguese military ship intercepted a Dutch vessel on the high seas off the coast of Portugal (apparently without boarding it) in order to enforce a prohibition on entering Portugal's territorial waters that was previously issued to it.

⁷⁴ UNSC, *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*, UN Doc S/2010/394 (2010).

⁷⁵ Petrig, n 71, 25–8.

4.1 The criminal offence of piracy

The criminal prosecution of acts of piracy or armed robbery at sea requires, *inter alia*, the existence of criminal norms defining the prohibited conduct and the applicable penalty.

There are differing views whether Article 101 of the LOSC and Article 15 of the HSC, which define piracy, amount to international crimes based on which a piracy suspect can be prosecuted by domestic penal authorities.⁷⁶ It is submitted here that their primary purpose is to define the scope of the *enforcement* jurisdiction the two treaties confer upon States, rather than to criminalize piracy. Piracy suspects must be tried in application of domestic criminal norms⁷⁷. Article 14(2) of the Harvard Draft Convention expressly stipulates that ‘the law of the state which exercises such [criminal] jurisdiction defines the crime, governs the procedure and prescribes the penalty’. Nothing in the *travaux préparatoires* for the HSC or the LOSC points to a deviation from the theory of the Harvard Draft Convention, according to which piracy is ‘not a crime by the law of nations’ but rather the basis of universal enforcement and adjudicative jurisdiction.⁷⁸ According to the drafters of the Harvard Draft Convention, ‘[u]niversal adoption of the draft convention would not make piracy defined by it a legal crime . . . by force of the convention alone’—a result that would rather ‘be reached under the law of a state only through the operation of that state’s legal machinery’.⁷⁹ The fact that Article 101 of the LOSC or Article 15 HSC do not explicitly prohibit the commission of acts of piracy nor state what specific punishment attaches (in not being addressed to individuals, as criminal norms are, but rather to States, as the LOSC generally is⁸⁰) runs counter to the possibility of using them as a basis for domestic criminal prosecutions. To ground criminal charges on municipal rather than international law directly reflects current State practice.⁸¹

⁷⁶ Not an international crime: Rubin, n 10, 391–3; Lagoni, n 29, 523; doubts whether an international crime: C Kreß, ‘Universal Jurisdiction over International Crimes and the Institut de Droit international’ (2006) 4 *Journal of International Criminal Justice* 561, 569; arguing that it is an international crime: D Guilfoyle, ‘Book Review—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’ (2011) 11 *International Criminal Law Review* 910, 912–13.

⁷⁷ MD Fink and RJ Galvin, ‘Combating Pirates off the Coast of Somalia: Current Legal Challenges’ (2009) 56 *Netherlands International Law Review* 367, 389.

⁷⁸ Harvard Draft Convention and Commentary, n 11, Art 2: ‘Every state has jurisdiction to . . . seize and punish persons . . . because of piracy.’

⁷⁹ Harvard Draft Convention and Commentary, n 11, 760.

⁸⁰ On the ‘difficulty to configure persons as the beneficiaries of rights and the recipient of duties’ within the LOSC, n 7, and ‘the ensuing uncertain subjectivity of persons under the law of the sea, see I Papanicolopulu, ‘The Law of the Sea Convention: No Place for Persons?’ (2012) 27 *International Journal of Marine and Coastal Law* 867, 867.

⁸¹ This holds true for all 42 States contributing to the UNSC, *Compilation of Information Received from Member States on Measures they Have Taken to Criminalize Piracy under their Domestic Law and*

The law of the sea, and specifically Article 100 of the LOSC stipulating a duty of all States to cooperate to the fullest extent possible in the repression of piracy, cannot be read as encapsulating an obligation on the part of States to define a specific offence of piracy in their municipal law. In various jurisdictions, such a crime is indeed missing (or was abolished since considered superfluous in ‘modern times’⁸²). In such cases, suspects can potentially be tried for offences adopted in fulfilment of the obligation to criminalize the acts defined in Article 3 of the SUA Convention⁸³ or for more general crimes, such as property offences or offences against life, limb, or liberty.⁸⁴ The same holds true where the offence of armed robbery at sea⁸⁵ is absent from domestic criminal law.

4.2 Criminal jurisdiction over the offence of piracy

The criminal prosecution of an alleged pirate further requires that the State has criminal jurisdiction over the offence(s) with which he is charged.

It is well established that, by virtue of customary international law, any State is competent to try piracy suspects, even absent a link with the respective pirate attack.⁸⁶ However, customary international law only provides universal criminal jurisdiction for conduct matching the piracy definition under international law, which delimits the scope of universal enforcement and adjudicative jurisdiction, but not for domestic piracy offences that are defined differently.⁸⁷

Various rationales have been invoked for why piracy constitutes a universally cognizable offence under customary international law. Quite commonly, it is asserted that the heinousness of the crime gives rise to its unique jurisdictional status.⁸⁸

to Support the Prosecution of Individuals Suspected of Piracy off the Coast of Somalia and Imprisonment of Convicted Pirates, UN Doc S/2012/177 (2012).

⁸² As France did: L Briand, ‘Lutte contre la piraterie maritime: la France renforce son arsenal législatif: À propos de la loi n° 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l’exercice des pouvoirs de police de l’État en mer’ [2011] *Gazette du Palais* 8, 8.

⁸³ SUA Convention, n 64, Art 5.

⁸⁴ In the absence of a specific crime of piracy under domestic law, the Somali men who attacked the German-flagged *Taipan* were convicted for ‘attacks against air and maritime traffic’ and ‘abduction for the purpose of blackmail’ (German Criminal Code, §§ 316c and 239a): *German Piracy Trial*, *Regional Court of Hamburg (Landgericht Hamburg)*, Germany (2012), available at <www.internationalcrimesdatabase.org/Case/952/German-Piracy-Trial/>.

⁸⁵ Some States recently adopted such offence: see eg Kenyan Merchant Shipping Act 2009, s 371.

⁸⁶ *SS ‘Lotus’ (France v Turkey)* [1927] PCIJ Rep Series A No 10, Dissenting Opinion of Mr Moore, 70; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3, 35 Separate Opinion of President Guillaume, 37; *United States v Shi* (2008) 525 F.3d 709 (9th Cir), 722–4.

⁸⁷ This derives quite plainly from Art 9: ASIL, ‘Codification of International Law: Part II—Jurisdiction with Respect to Crime’ (1935) 29 *American Journal of International Law Suppl* 435 (hereinafter *Draft Convention on Jurisdiction with Respect to Crime with Commentary*).

⁸⁸ *Democratic Republic of Congo v Belgium*, n 86, 63, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, 75, 76, and 81.

However, despite the broadness of the spectrum of conduct amounting to piracy and the seriousness of some incidents, piracy generally does not even come close in terms of gravity to that of other universal jurisdiction crimes, such as genocide or crimes against humanity. It is instead comparable to property offences or hostage taking on dry land and thus offences over which customary law does not grant universal criminal jurisdiction.⁸⁹ Another explanation is the ‘de-nationalization’ of pirates and pirate ships as a legal consequence of piracy and the resulting jurisdictional gap.⁹⁰ Yet, under the LOSC, this rationale does not apply since the loss or retention of nationality is left to the law of the flag State and not governed by international law.⁹¹ The most convincing explanation for subjecting piracy to universal criminal jurisdiction is the special *locus delicti* of the offence: ‘[T]he seas where all have an interest in safety of commerce and where no state has territorial jurisdiction.’⁹²

Some authors assert that both customary international law and Article 105 of the LOSC provide for universal criminal jurisdiction over the offence of piracy.⁹³ However, it is difficult to see how the wording of the second sentence of Article 105—‘[t]he courts of the *State which carried out the seizure* may decide upon the penalties to be imposed’—can be interpreted as granting universal adjudicative jurisdiction, especially when contrasted with the universal enforcement jurisdiction so clearly expressed in the first sentence of the provision by the words ‘*every State may seize a pirate ship . . . and arrest the persons*’. The view held by other commentators that the provision refers to the power of the seizing State to prosecute a piracy suspect (*forum deprehensionis*) can be better reconciled with the wording of the provision.⁹⁴ However, the stance taken that the seizing State’s adjudicative jurisdiction conferred by Article 105 of the LOSC is *at the exclusion* of any other State—with the consequence that the seizing State is prohibited from surrendering the suspect for prosecution to a third State—seems quite odd.⁹⁵ Rather, without limiting universal jurisdiction granted *qua* customary international law, the provision clarifies the factual advantage of the seizing State to bring an alleged pirate to justice if there are competing claims to try a piracy suspect.⁹⁶

In addition to granting universal criminal jurisdiction, customary international law *permits* States to provide for other grounds of extraterritorial criminal

⁸⁹ Kreß, n 81, 569.

⁹⁰ Harvard Draft Convention and Commentary, n 11, 825–32.

⁹¹ LOSC, n 7, Art 104; see also HSC, n 7, Art 18; ILC Articles Concerning the Law of the Sea, n 13, Art 42.

⁹² Draft Convention on Jurisdiction with Respect to Crime with Commentary, n 87, 566, Art 9.

⁹³ I Shearer, ‘Piracy’ in Wolfrum (ed), n 50, [18].

⁹⁴ Guilfoyle, n 8, Ev 89.

⁹⁵ Arguing for exclusivity: E Kontorovich, ‘“A Guantánamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists’ (2010) 98 *California Law Review* 243, 270; and A Fischer-Lescano and L Kreck, ‘Piraterie und Menschenrechte: Rechtsfragen der Bekämpfung der Piraterie im Rahmen der europäischen Operation Atalanta’ (2009) 47 *Archiv des Völkerrechts* 481, 514–15 and 521; arguing against Petrig, n 71, 316–19.

⁹⁶ Lagoni, n 29, 521.

jurisdiction under their domestic law,⁹⁷ notably based on the nationality of the alleged pirate or supposed victim of a pirate attack (active and passive personality principle) or on the flag of the pirate ship or victim vessel (flag State principle). The SUA Convention and the 1979 International Convention Against the Taking of Hostages (Hostages Convention) even *oblige* State Parties to establish their jurisdictions over the offences defined in these treaties and potentially fulfilled by acts of piracy or armed robbery at sea, notably if committed within their territory (including their territorial sea), on board ships flying their flag or by their nationals.⁹⁸

4.3 Bridging policing and criminal prosecution

For the offence of piracy, international law grants both universal policing powers and universal criminal jurisdiction. And yet, despite these comprehensive authorizations, it has proven difficult to implement the basic tenet of every law enforcement operation—to bring apprehended suspects to justice—in the context of Somali-based piracy. Patrolling naval States seizing piracy suspects are often unable or unwilling to prosecute the suspects in their domestic courts. In such cases, the seizing State generally tries to surrender the suspects for prosecution to a third State, mainly located in the region prone to piracy. This implies that with each seizure, the path from policing to prosecution must be paved anew. To facilitate this task, various States, as well as the EU, have entered into transfer agreements with States such as Kenya, the Seychelles, and Mauritius, in which they declare their general willingness to accept piracy suspects for prosecution subject to their consent in each individual case and the fulfilment of specific conditions laid down in the respective agreement.⁹⁹ If a prosecuting State can be successfully identified in a specific case, transfers (rather than formal extraditions) are the prevalent means of surrendering the suspects to that State. Current transfer practices, including detention pending transfer, are not unproblematic in terms of human rights law, notably the principle of non-refoulement and the right to liberty.¹⁰⁰ The *Courier* decision, where Germany was held accountable for transferring an alleged Somali pirate to Kenya in breach of the prohibition of refoulement, demonstrated that this concern is not of a purely academic nature.¹⁰¹

⁹⁷ C Ryngaert, *Jurisdiction in International Law* (Oxford University Press Oxford 2008) 21–2.

⁹⁸ SUA Convention, n 64, Art 6; 1979 International Convention Against the Taking of Hostages, n 106, Art 5 (hereinafter Hostages Convention).

⁹⁹ See eg 2011 Agreement between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer [2011] OJ L254/3 (14 July 2011).

¹⁰⁰ See Petrig, n 71, on the mechanics of transfers (Part 2) and their potential incompatibility with human rights law (Parts 4 and 5).

¹⁰¹ *Re 'MV Courier'*, n 71; the case is pending at the appellate level: *Re 'MV Courier'* 4 A 2948/11 (Oberverwaltungsgericht Münster).

Despite efforts to bridge policing and prosecution more effectively, a significant number of captured suspects (up to nine out of 10¹⁰²) were released without facing justice despite the availability of evidence suggesting the commission of an offence—a fact over which the Security Council has noted its concern.¹⁰³ This catch-and-release practice raises the question whether there is a duty to prosecute or extradite piracy suspects. Article 105 of the LOSC, stipulating that the seizing State ‘may’ decide upon the penalties to be imposed, does not impose an obligation to try piracy suspects. Article 100 of the LOSC, which urges States to cooperate to the fullest possible extent in the repression of piracy, arguably does not entail a duty to prosecute or extradite either since States shall have ‘a certain latitude’ in determining the type of cooperation they engage in.¹⁰⁴ A more demanding proposal by Malta—‘[a]ll States have the obligation to prevent and *punish* piracy and to fully cooperate in its repression’—was rejected during the drafting of Article 100 of the LOSC.¹⁰⁵ The SUA and Hostages Conventions, which define offences potentially fulfilled by acts of piracy, oblige State Parties ‘in the territory of which’ the alleged offender is found to submit the case without delay to their competent authorities for the purpose of prosecution if they do not extradite the suspect.¹⁰⁶ However, unless the notion of territory is broadly interpreted—as meaning ‘under the jurisdiction’ of the respective State—it will be difficult to apply the obligation to a seizing State holding a piracy suspect on board its ship outside its territorial waters.¹⁰⁷

5 A MIXED APPRAISAL OF THE LEGAL REGIME ON PIRACY

At times, the legal regime on piracy of the HSC and LOSC has been appraised in pessimistic terms. Crockett concluded that ‘[t]he effect of the 1958 Geneva Convention has been to confuse the law of piracy.’¹⁰⁸ Rubin went a step further, stating that the

¹⁰² UNSC, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, UN Doc S/2011/30 (2011) [14].

¹⁰³ See eg UNSC Res 2125, n 6, Preamble, [7].

¹⁰⁴ ILC Articles Concerning the Law of the Sea, n 13, 282 (on a provision similar to Article 100 of the LOSC).

¹⁰⁵ *Virginia Commentaries*, Vol III, 183 (emphasis added).

¹⁰⁶ SUA Convention, n 64, Art 10; Hostages Convention, n 98, Art 8.

¹⁰⁷ Guilfoyle, n 76, 912 (arguing for a textual interpretation); Geiss and Petrig, n 38, 163–4 (arguing for a functional interpretation).

¹⁰⁸ Crockett, n 20, 98.

rules codified in the two treaties ‘when read carefully, are incomprehensible and therefore codify nothing’.¹⁰⁹ Yet when tested by the upsurge of what we refer to as ‘contemporary piracy’, the counter-piracy rules of the HSC and the LOSC proved to be a workable legal framework—despite their ambiguities and limitations.

In terms of enforcement jurisdiction, the LOSC grants an array of universal policing powers against piracy suspects, but they are limited to the high seas and EEZ. As regards Somali-based piracy, the Security Council cured this geographical limitation by authorizing similar enforcement measures in Somali territorial waters. Thereby, the Council relied on the specific situation in Somalia rather than the phenomenon of piracy and armed robbery at sea as such, which would have set a precedent for other States with waters affected by attacks against ships and crews. At the initiative of Indonesia, Resolutions 1846 affirm that the authorizations provided therein, to which Somalia consented, only apply with respect to Somalia and do not affect the rights and obligations of other States under international law and cannot be considered as establishing customary international law.¹¹⁰ This reflects how jealous States guard their sovereignty over territorial waters and the limited willingness to tamper with the LOSC, which strikes a subtle balance between exclusive flag State jurisdiction and the exceptions to it in order to combat criminal phenomena. Hence, there is little prospect that, *de lege ferenda*, any generally valid rules providing enforcement powers against armed robbery at sea will be enacted. At the same time, the approach taken by the Security Council in the case of Somali-based piracy was arguably unique since it was the ‘failed State’ situation, rather than piracy, that justified the use of Chapter VII measures. Therefore, it will, as a general rule, remain in the discretion of coastal States affected by armed robbery at sea whether to grant third States any enforcement powers in their territorial seas.

The LOSC rules on piracy are not without ambiguity, especially as regards the definitions of piracy and pirate ship. Furthermore, the LOSC is silent in terms of legal constraints on enforcement powers, and limits inferred from other bodies of law, notably human rights law, remain vague. Also, the applicable human rights standards pertaining to surrender for prosecution of persons intercepted at sea and never brought onto the land territory of the seizing State must be clarified. The need for such clarification is not necessarily because the existing lacuna hampers effective law enforcement, but to ensure that counter-piracy operations adhere to the rule of law and to prevent the ambiguities from resurfacing at a later stage, notably by delaying or impairing the criminal prosecution of piracy suspects.

In sum, any undifferentiated calls for more laws or to radically overcome the avenues currently followed to suppress piracy are not particularly helpful for bolstering the legal framework to counter piracy. Rather, it is essential to understand

¹⁰⁹ Rubin, n 10, 393.

¹¹⁰ UNSC Res 1846, n 54, [13]; affirmed in subsequent resolutions renewing the respective authorization; see eg UNSC Res 2125, n 6, [13].

the complex legal regime governing piracy today and how to properly deploy and articulate the array of available (general and piracy-specific) legal tools. This allows for the identification of gaps in the existing legal framework and for an assessment of the necessity and feasibility of filling them—by way of interpreting existing general rules in the context of counter-piracy operations or by enacting new specific rules.