The developing jurisprudence to combat modern maritime piracy: a crime of the high seas?*

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Abstract

Piracy, a crime of antiquity has resurged in recent years in the Gulf of Aden and off the coasts of Somalia and Yemen reaching epidemic proportions and thriving in the socio-economic and political chaos of Somalia. This article will provide an overview of the legal framework embodied in the United Nations Convention on the Law of the Sea (UNCLOS) applicable to the international community to intervene in combating piracy in this context and it argues that this framework has certain shortcomings and has at its foundation certain concepts which are outdated. This article will then illustrate these shortcomings by briefly examining the trends in recent reported piracy incidents. In attempting to identify the reasons for these shortcomings, this article further explores the development UNCLOS and the jurisprudence of early Admiralty Courts and concludes that the scope and definition of piracy in UNCLOS has been the product of a long history of uncertainty and inconsistency in the doctrines of piracy law. This situation necessitated special contemporary measures such as United Nations Security Council Resolutions to deal with the piracy epidemic. This article accordingly suggests that a review of the ambit and scope of the piracy definition of UNCLOS is necessary to successfully combat piracy.

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* Based on a paper presented at the Conference of the Society of Law Teachers of Southern Africa, 13–6 June 2009 University of KwaZulu-Natal, Pietermaritzburg. This paper forms part of a larger project of reviewing piracy laws which forms part of the writer's proposed doctoral study.

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Introduction

The sea, a vital highway in world economy, is characterised by its perilous nature. The vast bodies of open water without visible demarcations, can leave a sea-going vessel vulnerable. It is within this environment that the crime of piracy has thrived since antiquity. However, this substantive offence is not the historical curiosity that it is made out to be.[1] Not only has piracy never been completely eradicated, but the number of pirate attacks has increased steadily in recent months. Piracy in the Gulf of Aden and off the coasts of Somalia and Yemen has reached epidemic proportions, the scale of which have not been seen since the Barbary wars of the 19th century. According to the International Maritime Bureau (IMB), pirate attacks off the coast of Somalia have increased tenfold in the first three months of 2009, compared with the same period in 2008.[2] During 2008, pirates attacked more than 130 vessels in the Gulf of Aden, an increase of more than 200 per cent compared with 2007.[3] Between January and May 2009, pirates have carried out 109 attacks in this region with twenty-eight successful hijackings and the taking of nearly 300 hostages.[4] A total of 406 incidents of piracy and armed robbery have been reported in the 2009 annual piracy report issued by the ICC International Maritime Bureau's Piracy Reporting Centre.[5] The report reveals that Somali pirates account for more than half of the 2009 annual figures with 217 incidents including 47 hijackings and 867 hostages.[6] Each ship carries the potential of a million dollar ransom.[7]

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1 See generally V Surbun 'A review of developments in the nature and law of maritime piracy' (2008) unpublished LLM dissertation, University of KwaZulu-Natal.

2 Regular reports and statistics are prepared by the International Maritime Bureau and these are published quarterly. The bureau has also maintained a twenty-four-hour Piracy Reporting Centre in Kuala Lampur, Malaysia. Its database can be accessed on: www.icc-ccs.org.

3 'Seized oil tanker freed' *Independent Online* (2009) 27 April 2009, available at: http://www.iol.co.za/index.php?set_id=68&art_id=nw2009042710531680 (last accessed on 8 May 2009).

4 A Cawthorne 'Pirates seize Dutch vessel' *Independent Online* 7 May 2009 (available at: http://www.iol.co.za/index.php?set_id=68&art_id=nw2009050750445243C987225 (accessed: 08 May 2009).

5 ICC International Maritime Bureau 'Piracy and armed robbery against ships: Annual Report' 1 January–31 December 2009. See also Mukundan '2009 Worldwide piracy figures surpass 400' 14 January 2010 available at: http://www.icc-ccs.org/index.php?option=com_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60 news&Itemid=51 (accessed 20 January 2010).

6 *Ibid.*

7 'Brazen pirates laugh at the world' *The Star* (2009)15 April 2009 at 4.

Somalia, without an effective central government since 1991 and plagued by famine, corruption and civil war, has been described as the world's most utterly failed state.[8] The passage through the Gulf of Aden via the Red Sea is an ancient sea route and is one of the world's busiest shipping lanes with an estimated 20 000 vessels passing through it annually when combined with the lawless coast of Somalia, a toxic brew is created opening these waters to piracy. With ransoms of up to three million dollars per ship, piracy has become an attractive pastime.[9] The money earned[10] goes, amongst other things, towards procuring faster boats and navigation equipment, whilst some of the vessels are used as 'mother ships' – floating pirate bases from which speedboats can be launched against merchant vessels sailing hundreds of kilometres offshore.[11] The ransoms result in higher insurance premiums for the shipping industry, delays for customers as more ships choose the longer passage around the Cape of Good Hope, lower revenues for the Suez canal and for the oil markets, culminating in yet another variable to compute into volatile prices.[12] South African ports have benefited as companies divert their ships around the Cape. AP Moller-Maersk, the world's largest shipping company announced that it would reroute its fifty-strong oil tanker fleet via the Cape of Good Hope to avoid the risk of a pirate attack.[13]

A report in *The Economist* reveals that Somalia's 'Transitional Federal Government' is powerless to stop its citizens from resorting to piracy, just as it cannot stop insurgents who have plunged the country into chaos.[14] A former captain in Somalia's defunct navy states that 'all you need is three guys, a little boat, and the next day you're millionaires'.[15] However, the Security Council of the United Nations notes with concern that 'increasingly violent attacks of piracy are carried out with heavier weaponry, in a larger area off the coast of Somalia, using long range assets such as mother ships, and demonstrating more sophisticated organisation and methods of attack.'[16] In dealing with the problem of piracy in Africa, *The Economist* suggests that 'Africa may have to look to South Africa, the continent's sole coastal country

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8 'The path to ruin: The Horn of Africa' *The Economist* (US ed) 12 August 2006 for a report dealing with the situation in Somalia.

9 'Perils of the sea; piracy of Somalia' *The Economist* (US ed) 18 April 2009.

10 Some $US 100million have been paid in ransoms during 2008. See'The world's most utterly failed state' *The Economist* (US ed) 4 October 2008.

11 See n 9 above.

12 'Ahoy there! Somalia' *The Economist* (US ed) 22 November 2008

13 'Somalia's booming pirate economy: ships to seek new routes' *The Sunday Times* 23 November 2008 at 19.

14 See *The Economist* n 10 above.

15 See *The Sunday Times* n 13 above.

16 United Nations Security Council: Resolution 1838 (7 October 2008).

between the Red Sea and the Cape with a proper navy.'[17] It further suggests that 'it is up to South Africa to show the way' and 'it [South Africa] is the obvious country to call on to help out with African peace keeping duties.' Former South African president, Thabo Mbeki, is reported to have said: '…when something goes wrong in Somalia, the residents of Dead Man's Creek, Mississippi do not say something has gone wrong in Somalia, they say something has gone wrong in Africa.'[18]

In this context, this paper examines the legal framework applicable for countries like South Africa to intervene in combating piracy. It argues that this framework has certain shortcomings and has at its foundation concepts which are outdated. This paper further examines these concepts through the developing jurisprudence of the various Conventions on the Law of the Sea and the early Admiralty Courts, with a particular reference to the concept of jurisdiction and the high seas. From this examination, this paper concludes that these concepts are in need of review in the light of the trends in current media reports on piracy.

Delimitations

Before considering these concepts, it is necessary to demarcate the terms of reference. This paper will not examine the ideology behind the Somali pirate attacks,[19] nor will it consider measures and frameworks to prevent piracy,[20]

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17 'The most dangerous seas in the world; the Indian Ocean' *The Economist* (US ed) 19 July 2008.

18 'South Africa's role in the world' *The Economist* (US ed) September 2000, where Mr. Mbeki suggests that for Africa to succeed, its people must turn their backs on corruption, coups and senseless wars. Democratic African countries should not allow their neighbours to trample on human rights, because this damages the entire continent's reputation.

19 See the interview with a Somali pirate in'Pirates have seized the ship' *Gentlemen's Questionnaire* June 2009 at 68–74 in which the Somali pirate argues that: ' …we consider sea bandits those who illegally fish in our seas and carry weapons in our seas. We are simply patrolling our seas. Think of us as coast guards.' See also *The Economist* n 17 above referring to 'bio-pirates' that strip Africa's waters of valuable and sustainable resources. See also *The Economist* n 9 above referring to Somali pirates attacking ships for gain rather than out of ideology. See also A Crawford & O Brown 'Growing unrest: the links between farmed and fished resources and the risk of armed conflict' 2008 *International Institute for Sustainable Development* at 25–28.

20 See in this regard the International Ship and Port Facility Security (ISPS) Code (2002) International Maritime Organisation (IMO); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) (1988) IMO; Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships (1999) MSC/Cic622/Rev 1 IMO; Guidance to Ship-owners, Ship-operators, Ship-masters and Crews on Preventing and Suppressing Piracy and Armed Robbery Against Ships (2002) MSC/Circ 623/Rev 3 IMO.

or piracy under domestic legislation.[21] It is also beyond the scope of this paper to examine the methods and procedure in the prosecution of pirate suspects and the issue of human rights in relation thereto. This paper seeks solely to examine the development of the legal framework in place for the international community collectively to capture pirates as and where they commit acts of piracy.

The legal framework to combat piracy

Dugard notes that piracy was the earliest crime under customary international law.[22] However, the crime of piracy has been codified in the United Nations Convention on the Law of the Sea (UNCLOS),[23] which sets out the legal framework applicable to combatting piracy, as well as other ocean activities. Under article 100 of UNCLOS, there is an obligation on all states to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state. To this end, article 101 of UNCLOS defines piracy as constituting:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew of the passengers of a private ship or 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 the 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).

From this definition, it is clear that an act of piracy must occur in a place outside the jurisdiction of any state or on the high seas, and not merely on 'the seas'. Therefore, an understanding of the concept of 'the high seas' is essential. Shaw notes that the seas were at one time thought capable of subjection to national sovereignty.[24] However, Grotius had rejected this view declaring that the oceans, being *res communis,* are accessible to all nations, but incapable of appropriation.[25] The American jurist, Chief Justice Marshall,

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21 See the Model National Law on Acts of Piracy and Maritime Violence (2001) Comite Maritime International.

22 J Dugard *International law: a South African perspective* (2003) at 159.

23 United Nations Convention on the Law of the Sea, 10 December 1982.

24 MN Shaw *International law* (2003) at 490.

25 *Ibid.*

in 1812 stated that the seas were 'the common property of all nations' belonging 'equally to all'.[26] This 'freedom of the seas', according to White, 'stemmed from the assumption that it was human nature to wander and seek commerce and private gain in the process: to allow explorers to claim the seas for their countries would foster conflict and bloodshed'.[27] He notes further, however, that it was appropriate for a coastal nation to defend its land through the use of its cannon fire.[28] Therefore, the entire sea was clearly not characterised as 'the high seas' and made it acceptable in international law and as a general rule, for a coastal state to appropriate a maritime belt around its coastline as its territorial waters or territorial sea, and treat it as an indivisible part of its domain.[29]

This notion of the territorial sea has been codified in UNCLOS, and extends the sovereignty of a state beyond its land territory into an adjacent belt of sea, to a limit not exceeding twelve nautical miles from the coast.[30] The coastal state, as a general rule, enjoys sovereign rights within its maritime belt and can exercise its criminal jurisdiction over foreign ships in these waters.[31]

Part V of UNCLOS provides for a further zone – the Exclusive Economic Zone (EEZ) – in an area beyond and adjacent to the territorial sea, but not exceeding 200 nautical miles from the coast.[32] Within this zone, the coastal state enjoys certain sovereign rights with regard to the natural resources therein,[33] and may enforce its laws and regulations in the exercise of these sovereign rights.[34]

Part V of UNCLOS dealing with the high seas, restricts the application of its provisions to 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state or in the archipelagic waters of an archipelagic state'.[35] Therefore, assuming that a coastal state claimed the full extent of ocean permitted in terms of

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26 GE White 'The Marshall Court & international law: the piracy cases' 1983 *AJIL* 83 at 728.
27 *Ibid*.
28 *Ibid.*
29 See Shaw n 24 above.
30 Measured from the baselines. See part II, ss 1 & 2 of UNCLOS.
31 In defined situations. See art 27(1) of UNCLOS.
32 See art 57 of UNCLOS.
33 See art 56 of UNCLOS
34 In terms of art 73 of UNCLOS
35 See art 86 of UNCLOS.

UNCLOS as its EEZ,[36] the realm of the high seas would only commence approximately 200 nautical miles from the coast. In this realm, no state may claim sovereignty.[37]

The general rule with regard to the maintenance of order on the high seas is that the flag state (ie the nationality to which the vessel belongs) exercises exclusive jurisdiction over the ship.[38] The definition of piracy cited above displaces the general rule with the consequence that the 'jurisdiction of all states may be asserted to pursue, capture and punish the perpetrator of such an act and to seize and condemn the pirate ship. Jurisdiction is not confined to the countries whose subjects or interests have been directly affected.'[39] Under article 105 of UNCLOS, the courts of the state which carried out the seizure may decide on the penalties to be imposed.[40] The principle established is one of universal jurisdiction. This competence is based on the ground that 'punishable acts are committed upon the seas where all have an interest in the safety of commerce and where no state has territorial jurisdiction',[41] and was commonly explained by saying that the 'pirate who preyed upon all alike was an enemy of all alike'.[42]

Based on the principles cited above, universal jurisdiction over an act of piracy under the definition of article 101 of UNCLOS excludes an act committed within the territorial seas of any state, or in territorial waters after descent from the high seas.[43] The coastal state is vested with authority to define and prosecute offences occurring within its sovereign waters.[44] This distinction becomes crucial when consideration is given to press releases of the pirate attacks during the past year, as is discussed below.

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36 For a discussion on the history and development of EEZ claims, see RW Smith *Exclusive Economic Zone Claims: An analysis and primary documents* (1986).

37 See art 89 of UNCLOS.

38 See Shaw n 24 above at 548.

39 Australian Law Reform Commission 'Criminal Admiralty Jurisdiction and Prize' 1990 *ALRC* 48 at 41

40 For a comprehensive, though dated, list of penal codes under municipal legislation see: 'Article 9: universality – piracy'1935 *AJIL* 29 (Supplement: Research in International Law) at 564. (This article was sourced using the academic research database, JSTOR, which contains a scanned copy of the original text, without mentioning an author).

41 *Id* at 566.

42 *Ibid.*

43 In terms of art 111(3) of UNCLOS, the hot pursuit of a foreign ship ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state.

44 In terms of art 27(1) of UNCLOS.

Inconsistency in outcomes

At least seventeen international navies are operating in the Gulf of Aden in an attempt to thwart attacks.[45] Some European navies have been quite robust. The French commandos have used lethal force to free hostages, and other navies have arrested dozens of suspected pirates and sent them for trial in nearby countries.[46] On the 26 April 2009 a Spanish warship helped the Seychelles authorities detain nine Somali nationals linked to a foiled attack on an Italian cruise liner, the MSC Melody, a day earlier.[47] The liner had 1 500 people on board, including 126 South Africans on a voyage from Durban, South Africa to Genoa, Italy.[48] Also in April, a French frigate in the service of the European Union's anti-piracy naval mission spotted a pirate mother ship and hunted the vessel 500 nautical miles off the coast of Kenya. The mother ship was intercepted the next day and the eleven captured Somali pirates were handed over to Kenyan authorities together with evidence retrieved from the pirate ship.[49]

Many navies are arguably using Kenya as a 'dumping ground for pirates'[50] under an agreement between the European Union and Kenya.[51] Whilst Kenya has recently enacted the Merchant Shipping Act of 2009[52] which aims generally to consolidate the law relating to shipping, a report reveals that the 'chaotic state of the Kenyan system is painfully apparent: the justice minister resigned over political interference in the appointment of judges and a UN envoy called for the sacking of the attorney general'.[53] Article 105 of UNCLOS, dealing with seizure of a pirate ship, provides that: 'the courts of the state *which carried out the seizure* may decide on the penalties to be imposed, and may also determine the action to be taken with regard to the

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45 Independent Online (2009) 'Stability in Somalia key to stopping pirates' 22 April 2009, available at: http://www.iol.co.za/index.php?set_id=68&art_id=nw20090422052319652C270833 (accessed: 08 May 2009).

46 'Wrong Signals: piracy' *The Economist* (US ed) 23 April 2009.

47 *Ibid.*

48 'Melody pirates nabbed' *The Daily News* 28 April 2009 at 1.

49 'Eleven Somali's charged with piracy' *Independent Online* 23 April 2009, available at: http://www.iol.co.za/index.php?set_id=68&art_id=nw20090423163521319C434587 (last accessed on 08 May 2009) see also: Cape Times 23 April 2009 at 2.

50 Independent Online (2009) 'Kenya faces messy task of trying pirates' 19 April 2009, available at: http://www.iol.co.za/index.php?set_id=68&art_id=nw20090423163521319C434587 (accessed: 08 May 2009).

51 See 'Acts adopted under title V of the EU treaty: council decision 2009/293/CFSP of 26 February 2009' (March 2009) *Official Journal of the European Union* at L79/47–59.

52 Act 4 of 2009.

53 See n 50 above.

ships, aircraft or property…'[emphasis added]. A strict interpretation thereof would preclude transfers to third party states for prosecution.[54]

On the other hand, there are reports of instances where captured pirates have been released. Also during April 2009, it was reported that:

> the Dutch navy had boarded a fishing boat in the Gulf of Aden with 9 Somalis' on board, who had attempted to kidnap a Greek-owned freighter. The soldiers confiscated machine guns and an anti-tank missile and freed sixteen Yemeni fishermen who had been held captive on their own boat and used for forced labour for the past week. But after interrogating the Somalis', the Dutch commander let the pirates go – in their own speedboats.[55]

The Dutch commander is reported to have said that 'the warship must follow its national law…they can only arrest them if they are pirates from the Netherlands, the victims are from the Netherlands, or if they are in Netherlands waters'.[56] In a separate incident, NATO warships foiled a pirate attack on a Norwegian tanker. The Canadian frigate pursued the suspects and captured them in their skiff containing sufficient evidence to confirm that they were pirates. It is reported that the suspects were held and questioned but were released on the basis that they could not be charged with any offence because doing so was not within Canada's jurisdiction.[57] A further report reveals that the US Navy once had a pirate suspect onboard a ship for seven months largely due to confusion over where he would be prosecuted.[58]

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54 See E Kontovorich 'International legal responses to piracy off the coast of Somalia' available at: http://www.asil.org/insights090206.cfm (last accessed on 21 May 2009) citing a report of the International Law Commission at 283 (commentary of art 43) that noted: 'This article gives any state the right to seize pirate ships…and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another state.'

55 M Schenkel 'High time for piracy tribunal, experts say' NRC Handelsblad 20 April 2009, available at: http://www.nrc nl./international/Features/article2217817.ece/High_time_for_piracy_tribunal%2C_experts_say. (accessed: 21 May 2009).

56 *Ibid*.

57 Independent Online (2009) 'Nato ships foil pirate attack' 20 April 2009, available at http://www.iol.co.za/index.php?set_id=68&art_id=nw20090419170303103C886648 (accessed: 8 May 2009).

58 *Independent Online* (2009) 'Will piracy trials be held in Kenya?' 17 April 2009, available at: http://www.iol.co.za/index.php?set_id=68&art_id=nw20090417105659638C249937 (accessed: 8 May 2009).

What appears from the above incidents is an unfortunate trend toward inconsistent outcomes in the fight against piracy. Whilst UNCLOS creates a universal jurisdiction to combat piracy on the high seas by providing that 'all states shall cooperate to *the fullest possible extent* in the repression of piracy on the high seas'[59] [emphasis added], it appears that individual nations engaging their navies in the pursuit of pirates apply their own ad hoc approach in handling pirate suspects. They are only arrested and prosecuted in the courts of the arresting state if there is a national interest at stake, ie where their nationals have been held hostage, or their flag ships captured.[60] Prosecution of pirate suspects is determined under the municipal legislation of the arresting state.[61] There is, however, no uniform municipal legislation in force which has been adopted by all states. Many states have piracy laws that are over two hundred years old, which have rarely been applied in recent decades.[62] For instance, Britain's Royal Navy usually requires clear evidence of an actual attack, whereas the Portuguese navy will only make an arrest if its own nationals or ships are attacked.[63]

In the result, whilst scores of suspected pirates have been captured by foreign warships since piracy surged in the Gulf of Aden in late 2007, few have been taken into foreign custody. Most have been allowed to sail free minus their weapons, or have been handed over to authorities in the breakaway Somali state of Puntland, a major piracy hub.[64] Writers in international law[65] agree that this approach makes for arbitrary justice and undermines the approach to piracy if every country will only prosecute where a national interest is at stake.[66]

A further examination of the current media reports reveals that vessels captured by pirates are usually sailed into Somali territorial waters until a ransom is paid. There is a report of a Danish warship bound for Russia's far east which recently 'spent six weeks off the Somali coast after pirates captured it; its crew was fed with goats ferried from the parched shore and

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59 See art 100 of UNCLOS.
60 See Schenkel n 55 above.
61 Under art 105 of UNCLOS.
62 See NRC Handelsblad (2009) 'Dusting off ancient laws to deal with 21st century piracy' 22 April 2009 available at: http://www nrc nl/international/Features/article2220359.ece./Dusting_off_ancient_laws_todeal_with_21st_century_piracy (last accessed: 21 May 2009).
63 See *The Economist* n 46 above.
64 See *Independent Online* n 57 above.
65 Professor Liesbeth Zegveld and Geert-Jan Knoops, Dutch Professors of international law, cited in Schenkel n 55 above.
66 See Schenkel n 55 above.

slaughtered onboard.' Another Ukrainian ship had been held for nearly seven weeks.[67] *The Economist* reported how *The Sirius Star*, one of the world's largest oil tankers, was captured by pirates and 'had dropped anchor off the Somali pirate port of Haradheere. There it joined a dozen or more other vessels, all anchored at ransom, their crews, about 250 people in all, held at gunpoint.'[68] In this context, the Somali Prime Minister remarked that 'the best way to deal with this is to prevent [the pirates] from going into the waters' but it is not clear how this can be accomplished to cover the 3 100 km Somali coastline.[69]

As discussed above, the definition of piracy in UNCLOS precludes acts committed within the territorial waters of a sovereign state. The right of hot pursuit in article 111 of UNCLOS applies where a foreign ship has violated the laws of the coastal state and escaped into the high seas. It cannot be applied where an act of piracy has occurred in the high seas and the pirate ship has moved into the territorial waters of its purported flag state. Foreign navies have authority to engage pirates exclusively on the high seas,[70] which excludes the territorial waters and EEZ of a state.[71]

These inconsistencies are not new. They emerged as early as the 19th century before American admiralty courts who were confronted with these issues, as aptly summarised by White as follows:

> [o]n the one hand, sovereignty principles suggested that there are limits on the capacity of the courts of one nation to claim jurisdiction over the citizens of another; on the other, all nations had a common interest in bringing pirates before their tribunals. On the one hand, piracy was a domestic crime, defined by positivistic legislation, on the other, it was a crime against all civilized nations.[72]

In summation, it appears that in the application of the provisions of UNCLOS, there remains an insufficient framework for: (i) the application of

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67 See *The Economist* n 17 above.

68 See *The Economist* n 12 above. See also MH Abdinur 'Americans will be targeted, warns pirate boss' Cape Times 14 April 2009 at 2.

69 Independent Online (2009) 'Somali PM asks for more help to fight pirates' 16 April 2009, available at: http://www.iol.co.za/index.php?set_id=68&art_id=nw20090416174900322C833018 (last accessed: 8 May 2009).

70 In terms of art 105 of UNCLOS.

71 However, in terms of article 58(2) of UNCLOS, article 105 can be applied to the EEZ insofar as it is not incompatible with part 5 thereof.

72 See White n 26 above at 729.

a uniform penal code in the capture, arrest and prosecution of pirates captured on the high seas; (ii) the transfer of suspected pirates to third party states for prosecution; (iii) foreign navies to deter, prevent and respond to acts of piracy in sovereign territorial waters after descent from the high seas;[73] and (iv) the exercise of universal jurisdiction within the EEZ of a state.

A 'developing' jurisprudence?

Having illustrated some of the difficulties in the framework of UNCLOS to combat piracy in the context of the trends revealed in recent reports, this paper will now concisely explore developments in piracy law leading up to the formulation of UNCLOS in 1982. In the 1950s, the UN General Assembly requested that the International Law Commission (ILC) draft a convention codifying the international law of the sea.[74] Menefee in his compilation of the papers at these proceedings, recorded the views of the various Rapporteurs.[75] Some of the extracts relevant to the issues discussed above are reproduced below.

The special Rapporteur, JPA Francois, who had produced a French text of the regime of the high seas, noted that territorial jurisdiction must be construed in the most narrow sense, as comprising the land territory, the inland waters and the territorial sea of a state, but not to ships flying the flag of that state.[76]

Following from the work of the ILC, the 1958 Geneva conference codified the draft piracy provisions as part of the Convention on the High Seas.[77] At the committee discussions, the Czechoslovakian delegate noted that:

> … it would be out of all proportion for the present draft to contain eight articles dealing with an 18th century concept. The definition [of piracy] did not accord with the existing rules of international law and failed to enumerate all the categories of acts which were encompassed by that

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73 See *ALRC* n 39 above at 44 where it is argued that the UNCLOS 'definition of piracy includes acts of voluntary participation in the operation of pirate ships … and acts of inciting and facilitating piracy'. UNCLOS does not expressly limit there aspects of the offence to acts on the high seas of places outside the jurisdiction of any state, leaving open the possibility that the acts concerned could take place within the territorial jurisdiction of a state and yet still constitute piracy for the purposes of as assertion of jurisdiction by another state.

74 See the comprehensive narration of SP Menefee 'Contemporary piracy and international law' 1995 *Institute of Marine Law Special Publication 19* University of Cape Town at 13.

75 *Ibid*.

76 *Id* at 17.

77 Convention on the High Seas 1958, Geneva.

> concept. Furthermore, the definition…[excluded] attacks made in the territorial sea or in the mainland by vessels coming from the high seas and afterwards escaping thither.[78]

Subsequent to the 1958 Geneva Conventions, was the convening of the Third United Nations Conference on the Law of the Law,[79] In the conference discussions relating to piracy, Peru proposed deleting the reference to '*or in any place outside the jurisdiction of any state*' in the current article 100 of UNCLOS, and adding a second paragraph providing that '*in the exclusive economic zone, states shall co-operate with the respective coastal state in the repression of piracy*'. It accordingly suggested that the reference to places outside the jurisdiction of any state was unnecessary and inappropriate. The suggestion was rejected.[80]

With reference to the definition of piracy in article 101 of UNCLOS, Malta suggested that the ambit of the provision be extended to '*all areas on or above the seabed and internal waters*'.[81] Peru suggested that the article should read with the following addition as '*against another ship or aircraft…in the exclusive economic zone, or on the high seas.*[82] These suggestions too, were rejected.

In the discussion of article 105 of UNCLOS, relating to seizure, Malta suggested that '*if the seizure has taken place within the jurisdiction of a state other than the state undertaking the seizure, the two states shall decide by mutual agreement the courts that may decide upon the case.*'[83] At a further session of UNCLOS III, which dealt with the regime of the EEZ, several states informally supported a provision that would have required a state warship encountering a pirate ship or aircraft in the EEZ of another state, to notify and cooperate with the coastal state. These suggestions were, however, not adopted.[84]

In summation of the current provisions providing for criminal jurisdiction over acts of piracy under UNCLOS: the coastal state can exercise sovereign jurisdiction within its territorial waters in terms of article 27. Any state may exercise jurisdiction on the high seas in terms of articles 100 and 105.

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78 See Menefee n 74 above at 27.
79 Third United Nations Conference on the Law of the Sea (UNCLOS III) 1973, New York.
80 See Menefee n 74 above at 32.
81 *Ibid*.
82 *Id* at 33.
83 *Id* at 34.
84 *Ibid.*

However, it should be noted that this jurisdiction is restricted to the high seas in terms of article 86. The coastal state only has a limited jurisdiction in the EEZ to explore, exploit, conserve and manage living resources in terms of article 73. The extent of criminal jurisdiction within this realm of the EEZ is therefore vague.

It follows that there ought to have been a corresponding adjustment to the piracy provisions in UNCLOS by including the EEZ within its ambit, thereby filling the void in criminal jurisdiction created as was suggested by the Rapporteurs cited above. The effect of such adjustment would mean that many of the pirate ships presently lurking in the waters off the coast of Somalia, together with their victim ships, could be seized by virtue of the application of universal jurisdiction.

In attempting to identify the reason for the current shortcoming in the piracy provisions of UNCLOS, it would appear that at the time of the first session of the ILC in the 1950s, piracy was not as prevalent as it currently is. A Romanian delegate to the ILC at the time, felt that the commission 'had been mistaken in devoting so many articles to piracy, which was no longer a very real problem'.[85] In 1957, Johnson was of the view that *prima facie* it is:

> …remarkable that, of the seventy three articles comprising the law of the sea in time of peace adopted by the ILC at its 8th session in 1956, no fewer than eight are devoted to piracy…some explanation seems to be required why a doctrine of international law, which might reasonably have thought to be obsolete, or at any rate obsolescent, still retains enough vitality to be controversial and to warrant such extensive attention by international organs … .[86]

Menefee states that 'the opportunity to expand the concept of piracy in the 1958 convention broke down amid cold war bickering, while the 1982 convention generally froze the existing legal situation'.[87]

Prior to these Conventions on the Law of the Sea, the international approach to piracy in case law has shown a long line of inconsistent judgments. The jurisprudence of early English Admiralty Courts is particularly persuasive. Hare notes that nineteenth century English admiralty law and jurisdiction –

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85 *Id* at 27.

86 DHN Johnson 'Piracy in modern international law' 1957 *Transactions of the Grotius Society* 43 at 63.

87 See Menefee n 74 above at 64.

the whole bundle of statutory and inherent jurisdiction, common law, civilian practice and judicial precedent was confirmed to be a part of the Cape and Natal (erstwhile British colonies) by the 1890 Colonial Courts of Admiralty Act.[88] Hare notes further that old English admiralty jurisdiction remains relevant in South Africa in terms of section 6 of the South African Admiralty Jurisdiction Regulation Act 105 of 1983.[89]An examination of leading judgments in both American and English Admiralty Courts[90] illustrates firstly, the well established concept of universal jurisdiction, but also shows the uncertainty in the doctrine relating to the realm of the highs seas: a necessary concept of universal jurisdiction over piracy.

The earliest recorded case in the English courts in which the crime of piracy was defined was *Rex v Dawson* in 1696.[91] The judge president of the High Court of Admiralty, His Lordship Sir Charles Hedges, in his charge to the grand jury stated:

> [n]ow piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty. If any man be assaulted within that jurisdiction and his ship or goods violently taken away without authority, this is robbery and piracy.

For this purpose, the broadest possible jurisdiction was conferred upon the Admiralty Court, as Sir Hedges notes further:

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88 See J Hare *Shipping law and admiralty jurisdiction in South Africa* (2009) at 14. Section 2(1) of the Colonial Courts of Admiralty Act, 1890 provided: 'Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty … .'

89 See Hare n 88 above at 18

90 These were courts vested with jurisdiction over all types of maritime claims. For a discussion on the development and jurisdiction of these courts, see Hare n 88 above at 9–13.

91 13 State Trials, Col 541 also cited as 8 William III, 5 State Trials, 1 edit 1742. See also Surbun n 1 above at 13. See also Grotius *De jure belli et pacis* (1853) Vol 2, Ch.20, subsection 40. See also the Opinion of Sir Leoline Jenkins in his charge at the admiralty sessions in 1668 (*Life of Sir Leoline Jenkins* I, LXXXVI) where he says: 'You are therefore to inquire of all Pirates and sea-rovers; they are in the eye of the law *hostes humani gnereris*, enemies of not of one nation or of one sort of people only, but of all mankind. They are outlawed, as I may say, by the laws of all nations, that is, out of protection of all princes and of all laws whatsoever. Everybody is commissioned, and is to be armed against them, as against rebels and traitors, to subdue and root them out.'

> [t]he King of England hath not only an empire or sovereignty over the British seas for the punishment of piracy, but in concurrence with other princes and states, an undoubted jurisdiction and power in the most remote parts if the world. If any person therefore, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we are in amity, trade or correspondence, shall be robbed or spoiled, in the narrow or other seas, whether the Mediterranean, Atlantic, Southern or any branches thereof, either on this or other side of the line, it is a piracy, within the limits of your inquiry, and cognizable by this Court.[92]

The eminent American jurist, Justice Story, noted that the state trials during this period are entitled to:

> great consideration, both from the eminent talents of the judges who constituted the tribunal, and the universal approbation of the legal principles asserted by them. It is also worthy of remark, that in none of these indictments was there any averment that the prisoners were British subjects; and most of them were for piracies committed on foreign subjects and vessels. They were all framed as indictments at common law, or for general piracy without any reference to any British statute.[93]

Other Admiralty Courts have also applied this universal jurisdiction, as was in the case of *Rex v Green*.[94] In this case, the Scottish Admiralty Court, in an indictment for piracy, where neither the ship, the victims nor perpetrators were Scottish and the act was committed on the high seas, held that this was a crime against the law of nations, and as such, also against the law of Scotland.

This established doctrine of universal jurisdiction, as applied in these cases, has not been utilised to its full extent in the contemporary fight against piracy. It is significant to note, however, that the broad jurisdiction in *Rex v Dawson* discussed above did not limit the Admiralty Court to acts committed on the high seas, alternatively, the concept of 'high seas' as it is currently defined in UNLCOS is different from the understanding of early Admiralty Courts. The English Chief Justice Cockburn found that:

> [t]he jurisdiction, assumed in the Admiralty commissions, or exercised by the Court of the King's Bench in the time of the Edwards, was founded on

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92 *Ibid*.

93 See *United States v Smith* (1820) 18 US. 153. Also cited as: 1820 WL 2068 (US Va), 5 L Ed 57, 5 Wheat 153.

94 4 Anne, 1704. 5 State Trials, 573 edit. 1742 (cited in n 93 above).

> the King's alleged sovereignty over the whole of the narrow seas; it has no reference whatsoever to any notion of territorial sea. To English lawyers the idea of this limited jurisdiction was utterly unknown.[95]

The English common law asserted jurisdiction over acts of piracy up to the low water mark in foreign countries, including ports and rivers below the first bridge where the tide flows and great ships can go.[96] The English jurist, Dr Lushington, in the case of *The Magellan Pirates* in 1853[97] noted the older authorities in the works of writers on criminal law,[98] which suggests that piracy can be committed within the realm of what is now sovereign territorial waters:

> [i]f a robbery be committed in creeks, harbours, ports &c., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy.[99]

Another case cited therein found that:

> …[w]here A., standing on the shore of a harbour, fired a loaded musket at a revenue cutter which had struck upon a sand-bank in the sea, about 100 yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy.[100]

Lushington, having carefully considered the weight of these authorities, found that:

> …it is true that murder and robbery, done upon land, and not by persons notoriously pirates, would not be piracy… though I am not disposed to hold that the doctrine that the port, forming a part of the dominions of the State to which it belongs, ought in all cases to divest robbery and murder done in such port of the character of piracy…because we all know that pirates are not perpetually at sea, but under necessity of going in shore at various places; and, of course, they must be followed and taken there, or not at all … .[101]

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95 See *Regina v Keyn* [1876] Law Reports, 2 Exchequer Division, 63 cited in Scott *Cases on International Law: Selected decisions from English and Amercian Courts* (1902) at 158.

96 See *ALRC* n 39 above at 44

97 1 SP.EDD & AD 81

98 Namely *Russell on Crimes*, book ii, ch 8 s 1.

99 See n 97 above at 84.

100 *Ibid.*

101 *Id* at 86.

The question that arises is if universal jurisdiction over piracy extends not only over the high seas, but also to the ports of a foreign state, as can be interpreted from the above, would this not infringe the territorial sovereignty of that foreign state? In the 1804 American case of *Church v Hubbart*,[102] Chief Justice Marshall stated that 'the authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory and is a hostile act, which it is its duty to repel.'[103] The extent of a state's sovereign territory was investigated for the first time in the case of *Regina v Keyn* in 1876.[104] Although the case is not one of piracy, it contains a useful exposition of authorities relating to the realm of the high seas. In this case, a German vessel had collided with a British steamer approximately two and a half miles from the beach of the British town of Dover. In the collision a woman on board the British steamer drowned. The captain of the German vessel was convicted of manslaughter, but the issues below were reserved for decision by that court. The prisoner contended that inasmuch as he was a foreigner on a foreign vessel, on a foreign voyage, sailing upon the high seas, he was not subject to the jurisdiction of any court in England. The Crown contended, however, that at the time of the collision, both vessels were within a distance of three miles from the English shore and therefore the offence was committed within the realm of England and could be tried by an English court. The Lord Chief Justice Cockburn questioned how the ancient doctrine of sovereignty over the 'narrow seas' could be confined to a three mile zone. He noted how various writers had different views on the extent of the jurisdiction, ranging from 100 miles, sixty miles, two days sail, and even as far as can be seen from the shore.

However Cockburn CJ noted that, the work of Bynkershoek in his treatise *De Domino Maris* (1702) which suggested the formula: *potestas finitur ubi finitur armorum vis*, or territorial domination over the sea would extend as far as a cannon shot would reach, which succeeding writers had fixed at a distance of three miles from the shore.[105] However he cautioned that succeeding publicists simply adopted and repeated this rule without

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102 2 Cranch, 187 cited in Scott n 95 above at 343.

103 *Ibid*.

104 See n 95 above.

105 For the contemporary position with regard to the breadth of the territorial sea, see Shaw n 24 above at 505 fn. 75 where he discusses that art 3 of UNCLOS, which provides that states have the right to establish the breadth of the territorial sea up to a limit not exceeding 12 nautical miles from the baselines, clearly accords with the evolving practice of states.

ascertaining or inquiring whether it had been recognised and adopted by the maritime nations affected by it. He states that:

> the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the state shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in the ships of other nations, has never been made the subject matter of any treaty…it has been entirely the creation of the writers of international law.[106]

He further pointed out that the treaties relied upon by writers in support of this doctrine relate to two subjects only, namely the rights and obligations of neutrality, and the exclusive right of fishing. He found that:

> [i]t is scarcely logical to infer, from such treaties alone, that, because nations have agreed to treat the littoral sea as belonging to the country it adjoins, for certain specified objects, they have therefore assented to forego all other rights previously enjoyed in common and have submitted themselves, even to the extent of the right of navigation on a portion of the high seas, and the liability of their subjects therein to the criminal law, to the will of the local sovereign, and the jurisdiction of the local state.[107]

There was also no finding on an established usage governing the application of the general penal law of the coastal state to foreigners within the littoral sea. The only usages which the Lord Chief Justice Cockburn found related to navigation, revenue laws, local fisheries, and neutrality. In the result, because there had been no assertion of legislative authority in the general application of the penal law to foreigners within the three mile zone, the court held that it could not be justified to hold that the offence, committed under those circumstances, should be punishable by the laws of England.

This case is significant because it illustrates the historic position relating to the rights of the sovereign state in territorial waters as being limited to certain instances. Therefore, universal jurisdiction over piratical acts can be applied within the waters of a sovereign state. It also shows that the extent of the territorial sea has been entirely a creation of writers of international law.[108]

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106 *Id* at 160.

107 *Id* at 162.

108 See *Regina v Keyn* n 95 above at 160 where Cockburn CJ states: 'the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the state shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in ships of other nations, has never been made the subject of any treaty, or, as a matter of acknowledged right, has formed the basis of a treaty, or has ever been the subject of diplomatic discussion. It has been entirely the

What was then the realm of the high seas, differs from the realm of the high seas today under UNCLOS.

In the case of *People v Lol-Loand Saraw* in 1922[109] the Supreme Court of the Philippines held that 'the jurisdiction of piracy unlike all other crimes has no territorial limits. As it is against all so may it be punished by all. Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign State.' White is critical of this judgment.[110] He is of the view that piracy is an exception to the principle of the freedom of the high seas, and that this exception must be restrictively interpreted. Relying on the *Lotus* case[111] which stated that 'failing the existence of a permissive rule to the contrary [a state] may not exercise its power in any form in the territory of another state', he states that there is not sufficient evidence that the doctrine of piracy constitutes a rule such as would contradict the normal principle of the exclusive jurisdiction of a state over (and responsibility for) acts performed within its own territory.[112]

It is with this line of jurisprudence that Conventions on the Law of the Sea were developed which, as discussed above, did not do much for the development of piracy provisions that could have been decisive of many of the problems faced by modern navies in the combatting and suppression of pirate activities.

Special measures

In June 2008, the United Nations Security Council passed a resolution dealing with the piracy situation in Somalia, pursuant to Chapter VII of the UN Charter.[113] Whilst the resolution reaffirms its respect for the sovereignty, territorial integrity, political independence, and unity of Somalia, it notes 'the lack of capacity of Somalia's Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somali or Somalia's territorial waters'. The resolution stipulates that:

> …for a period of six months from the date of this resolution, States cooperating with the TFG, in the fight against piracy and armed robbery at

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creation of the writers on International Law'.

109 Annual Digest of Public International Law Cases, 1919–1922. Case 112 cited in n 86 above.

110 See Johnson n 86 above at 76.

111 PCIJ Series A no 10 at 18 cited in n 86 above at 76.

112 See n 109 above.

113 S/RES/1816 (2008). The provisions created by this resolution were extended by resolution 1846 (2008) for a further twelve months from 2 December 2008.

> sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:
> (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
> (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery… .

This provision is a marked departure from the provisions of UNCLOS. However, paragraph 9 of the resolution stresses that this authorisation was granted with the consent of the TFG and is therefore consistent with the principle in UNCLOS that foreign intervention in the territorial sea requires the permission of the coastal state concerned. Although the crisis created by the situation in Somalia is unique to the region, in the past it has been necessary to amend jurisdictional authority to combat piracy. An example has been provided by Menefee relating to the Straits of Malacca in South-east Asia, which was the scene of some 200 pirate attacks in 1991.[114] The waters of these straits are divided between Malaysia, Singapore and Indonesia. Menefee notes that the pirates manipulated the maritime boundaries to their advantage, in some cases avoiding pursuit by fleeing into foreign waters.[115] In July 1991, Singapore and Indonesia entered into a bilateral agreement in terms of which:

> … Indonesia and Singapore…will allow their navies and marine police the right of hot pursuit of pirates into each other's territorial waters..[V]essels from the two countries would inform each other and come to the assistance of the other when pursuit is likely to cross territorial boundaries.[116]

What is envisaged by these special measures is that in combatting piracy, the realm of sovereign territorial waters ought not to bar international cooperation. These measures would not have been necessary had UNCLOS incorporated the regime of territorial waters and the EEZ into the existing piracy provisions discussed above.

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[114] See Menefee n 74 above at 60.
[115] *Ibid*.
[116] *Id* at 61.

Concluding remarks

In the case of *In re Piracy Jure Gentium* in 1934,[117] The Lord Chancellor, Viscount Sankey, remarked '…we are not now in the year 1696; we are now in the year 1934. International law was not crystallised in the 17th century, but is a living and expanding code'.[118] This paper has analysed the provisions of UNCLOS in relation to piracy. It has shown that there is a shortcoming in the contemporary application of this convention as it does not deal with piracy in territorial waters and in the EEZ, where many perpetrators lurk. One Rapporteur remarks that 'piracy has always been in need of at least one safe port, from where it can seek refuge, refit, and most importantly, unload and trade the loot'.[119] States that capture suspected pirates continue to use their own *ad hoc* approach in their prosecution, leading to what is termed 'arbitrary justice'. UNLCOS has been the product of a long history of uncertainty and inconsistency in the doctrines of piracy law, which did not really develop the law, thus necessitating special measures, like UN Security Council resolutions to deal with piracy epidemics, as and when they occur.

Viscount Sankey further remarked in the *In re Piracy Jure Gentium* case that:

> …a careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.[120]

A Rapporteur to the ILC remarked that the drafting of the piracy provisions were based on a methodological error in defining piracy by reference to jurisdiction and not to the nature of the act.[121] It is clear that the line of jurisprudence from which the definitions of piracy were drawn in UNLCOS, has a different perspective on the high seas and jurisdiction. This paper suggests that a review of the ambit and scope of application thereof, having considered the nature of the inconsistencies discussed above, is necessary to enable the international community to combat piracy successfully in the 21st century.

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117 [1934] Vol. 49 Lloyds List at 411 (PC).

118 *Id* at 417.

119 K Sorenson 'State of failure on the High Seas – Reviewing the Somali Piracy' (2008) *FOI-R-2610-SE Somalia Papers: Report 3* (Swedish Defence Research Agency) at 4.

120 See n 117 above at 420: this was in relation to the examination of the concept of "private ends" in the definition of piracy.

121 See Menefee n 74 above at 18.