

# PIRACY

## INTERNATIONAL COOPERATION ON COMBATTING MARITIME PIRACY

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# INTERNATIONAL COOPERATION ON COMBATTING MARITIME PIRACY

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## I. INTRODUCTION

Maritime piracy is the oldest international crime. In Ancient Rome around 60-70 BCE Cicero declared pirates “*hostis humani generis*”, meaning “*enemy of all mankind*”. Though times have changed, piracy still exists, posing a threat in a large scale. It is estimated that for the last decade between € 340 million and € 420 million were claimed in ransom of pirate acts in the Horn of Africa. The expenses on guarding ships and involvement of military personnel are extremely high, amounting up to € 1.300 Billion per year. The existence of these activities and the numbers above show that piracy might have appeared to be a rather odd and even amateur crime of the modern era, but it is now a well-developed and a well-organized scheme. As 80 % of the world’s cargo is shipped by sea, this criminal network poses a great threat to the world’s stock exchange relations. The overall estimates of the World Bank show that only the piracy activity in Somalia costs about € 16 Billion yearly loss of the world trade.

Nowadays piracy is a well-structured system, aiming at investing its income and proceeds with further money laundering. Pirate leaders invest money in their own militia, political influence, but also in criminal areas such as kidnapping, human trafficking, migrant smuggling and drug trafficking. Furthermore, intense connections with Al Shaabab and Al Qaeda prove that the proceeds from piracy are used for funding terrorist groups, while money are laundered through legitimate businesses such as *khat* and real estate.

This vast system affects international relations and maritime stock as a whole. Without **international cooperation**, such a problem cannot be tackled efficiently and successfully.

## II. CHAPTER ONE

### 1. Legal Frame and Definitions

Until 1958 no definition of piracy existed in International Law. The first important International Treaty, related to thereto is the 1958 Geneva Convention, known as the United Nations High Seas Convention (HSC). It is based on the 1932 Harvard Draft and generally declares established principles and customs in maritime law. Although as a text, it does not create new legislation or norms, HSC is significantly important as it includes the first modern definition of maritime piracy.

The same definition was later adopted by the 1982 United Nations Convention on Law of the Sea (UNCLOS), currently ratified by 166 countries. UNCLOS gives a detailed legal framework on nearly all nautical activity of significant importance, including maritime piracy.

Piracy acts are spreading not only in the Gulf of Aden, but also in the Indian Ocean, the Malacca Strait and even in the North Sea. The widespread of maritime piracy led to the necessity of adopting a number of International Treaties, related to the matter, such as the 1988 Convention for the suppression of unlawful acts against the safety of maritime navigation (SUA Convention), the Regional Cooperation Agreement on Combating Piracy and Armed Robbery at Sea (ReCAAP) and a number of UN Resolutions on Somalia’s

inability to tackle the problem, some of which provide crucial measures on the acceptable means of **international cooperation** for dealing with the piracy.

Currently, Article 101 of UNCLOS provides the **definition** of piracy, namely:

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

As article 309 of UNCLOS strictly forbids making reservations unless explicitly allowed, no country has made a reservation to article 101 making the definition unified.

Article 101 reveals that piracy has **four main characteristics**:

- ***The use of unlawful violence, detention, depredation***

Usually a subject of discussion is whether the use of firearms is significant to classifying an act as a pirate activity. A closer look to Article 101 reveals that the use of firearms is by no means defining whether an activity is of pirate character or not, but the use of violence itself is what is significant. As the unlawful use of firearms is always an act of unlawful violence, such acts will be classified as pirate activity.

- ***Committed for private ends***

No definition of the term “*private ends*” is given either by the HSC, or by the UNCLOS. The term has been subject to discussion and two standpoints are mostly reasoned. Some authors claim that the term “*private ends*” should be viewed as the motivation of the actor of crime to receive financial gain from his or her activity. This view collaborates with the traditional doctrine for personal benefit, adopted by nearly every State’s Criminal Law.

The other view on the term “*private ends*” is more suited to the nature of maritime piracy as an international crime – an act cannot be piratical if it is done under the authority of a state.

- ***On the high seas***

As noted in the definition, piratical acts must occur in the high seas or within the Exclusive Economic Zone of a State (EEZ). Any attack within territorial waters of a state cannot be classed as piracy. In accordance with Article 1 of the HSC the term “*high seas*” means all parts of the sea that are not included in the territorial sea or in the internal waters of a State. Article 86 of UNCLOS gives a further detail to this definition, providing that the term “*high seas*” applies 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 and does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone.

- *Against another ship or aircraft, or against persons or property on board such ship or aircraft. Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.*

As this text is dedicated only to the matter of maritime piracy, acts against aircraft will not be a subject to discussion.

Article 101 clearly states what many critics of the provision define as the “*two-vessel requirement*”. The text states that the piracy act should be committed against another ship. This means that a minimum of two ships ought to be involved in an act, in order to be classified as one of a pirate nature – a ship that attacks and a ship, a subject to attack. Though it is argued that the mentioning of aircraft means that not just aircraft to aircraft and ship to ship attacks are possible to be classified as pirate crimes, the fact that there is a discussion on the matter proves that better legal framework is possible, therefore necessary. Furthermore the progress of technology allows more options for committing a pirate crime, including remote control activity and navigation disturbance. Thus an **international effort** in making the provision more clear is required.

It seems that the 1988 SUA Convention dealt with the problem originated from the so called “*two-vessel requirement*” by removing it. Under Article 3 of the SUA Convention any offence aiming to seize control over a ship, endanger the safe of navigation, destroy the ship, destroy the maritime navigational facilities or seriously interferes with their operation is criminalized. The communication of information which is known by the author to be false is also considered a crime. An advantage of the 1988 SUA Convention is its applicability anywhere at sea, which makes it a very effective instrument against violent acts in the sea.

## 2. Distinction from similar activities

As no definition of piracy existed until the mid 20<sup>th</sup> century, it was often mistaken with other activities, such as **privateering**. The latter occurs when a state authorizes a private vessel to attack and capture enemy vessels during wartime. In such cases the state should mark these ships and provide them with a written authorization called “*letter of marque and reprisal*”. A **privateer** is not a pirate if his/her actions are limited to enemy vessels.

In order to be classified as pirate, an act ought to be committed in high seas or within the EEZ of a State. Otherwise, the act should be considered an **armed robbery at sea**. International law does not provide any definition for the latter term. Generally, the difference between piracy and armed robbery at sea lies in the geographical location of the acts. Attacks on ships within the territorial jurisdiction of a state, including its territorial waters are not considered piracy but are generally termed ‘*armed robbery at sea*’. There is an exception to this general definition. If an act of aggression is performed within the state’s jurisdiction, it could be classified as piracy if the state’s legislation criminalizes it as such. Unfortunately, despite the international efforts, many states have not included the maritime piracy in their penal codes.

Maritime piracy and naval **terrorism** could be hardly distinguished from each other. Nevertheless, maritime terrorism is a relatively newer phenomenon than piracy. The Council for Security Cooperation in the

Asia Pacific (CSCAP) Working Group defines maritime terrorism as: “...*the undertaking of terrorist acts and activities within the maritime environment, using or against vessels or fixed platforms at sea or in port, or against any one of their passengers or personnel, against coastal facilities or settlements, including tourist resorts, port areas and port towns or cities...*”. This definition however does not clarify the nature of naval terrorism. It does not provide an answer to important questions as whether terrorism includes attacks against only civil or military targets or against both of them. Moreover, such a definition does not provide a **borderline between terrorism and piracy** - some national judicial courts and publicists have repeatedly pursued terrorist acts as piracy due to the lack of legal framework on the matter. The hijacking of the *Achille Lauro Liner* on October 7th, 1985 was the cause of adoption of rules on maritime terrorism. The specific instrument for that purpose is the 1988 SUA Convention. As it was mentioned above, the SUA Convention is often used as a legal instrument to cover the loophole, created by the “*two-vessel requirement*”. This additionally tightens the very thin line between piracy and maritime terrorism, making the distinction of the two terms even more complicated.

However, we could make some efforts to establish a line – piracy is traditionally related to financial gain whilst terrorism targets certain political gains. Furthermore piracy is often very simple in the means of achieving the given aim – tactics include boarding a vessel and establishing control over it. On the contrary, terrorism is aimed at a more strategic result – capturing media and international attention.

### 3. Jurisdiction

Article 105 of UNCLOS outlines the competent jurisdiction, stating that: “*On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith*”.

Some scholars derive universal jurisdiction from the abovementioned notion of pirates as “*hostis humani generis*”. Back in 2002, over the Arrest Warrant Case before the International Court of Justice, experts shared the view that universal jurisdiction may “*be exercised only over those crimes regarded as the most heinous by the international community. Piracy is the classical example.*” Though this belief has its roots in the historical development of the legal term, we think that the **universal jurisdiction is due to the geographical location where pirate acts are done**. According to UNCLOS the high seas are beyond the territorial sovereignty of any state and out there all sovereigns have concurrent municipal jurisdiction. These provisions also apply to the EEZ and the contiguous zone.

Furthermore the argument which derives universal jurisdiction over piracy due to the significance of the violation of law is insolvent. Scholars sometimes outline that jurisdiction over piracy tends to reveal similarity to crimes against humanity. On the contrary, acts of piracy are not prosecuted by the International Criminal Court,



according to the Rome Statute of 1998. This example reveals that there is a strict line between crimes against humanity and piracy. *Jus cogens* crimes are prosecuted due to the heinous nature of the breach of international law, whilst jurisdiction over piracy is due to where the violations are performed. Universal jurisdiction exists because acts of piracy are performed where all states have interests to protect the safety, but none has explicit jurisdiction.

Nevertheless, we think there is a similarity between the abovementioned crimes – all of them prove to be extremely difficult to prosecute. That is why international cooperation in the area of prosecution of all these violations is equally crucial to the application of the law. That is why we believe that the used wording in the provision of Article 105 of UNCLOS should be interpreted in accordance with Article 100 of UNCLOS. According to Article 105 “*states may seize a pirate ship*”. In our opinion in the light of the “*duty*” of all states to cooperate as mentioned in Article 100 of UNCLOS, if the state has the opportunity to act it is also obliged to do so and with the best effort possible. We think that such understanding of UNCLOS is a cornerstone not only for international cooperation in prosecuting maritime piracy, but for successful tackling of the problem as a whole.

The occurrence of maritime piracy in international waters does not mean that these acts are done in a “*jurisdictional void*”. **Flag state jurisdiction** applies in international waters. If there happens to be no ship to seize the pirates as defined in UNCLOS, the state under whose flag the attacked ship sails could prosecute all crimes attempted and done on the vessel.

There is another issue in the area of jurisdiction. The strict interpretation of Article 105, made by some scholars, leads to the understanding that whichever state seizes pirates is the competent one to prosecute them. Such a standpoint is not illogical, but is often in conflict with flag state jurisdiction. While some states have provisions defining how international cooperation in such cases should be done, the importance of this effort is underestimated by many states. We believe that legislative measures ought to be adopted immediately as to clarify how states should cooperate in such cases.

In regard to the above, we would like to emphasise that states are sovereign to criminalize piracy in their penal codes as they interpret the term. Therefore, **the principle of universality cannot be invoked beyond the internationally agreed definition of piracy**. If an act is criminalized as piracy only in accordance with a nation’s law, but not with the international one, all abovementioned jurisdiction opportunities are irrelevant and the crime should be prosecuted by means of the standard ways, provided by the legislation of the state.

Attempts of international cooperation to clarify jurisdiction over pirate acts have been done through the years. The SUA Convention, for example, provides for State parties, as reiterated by the UN Security Council (UNSC): “*to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation*”.

Discussing international cooperation in the fight against maritime piracy, we should outline UNSC Resolutions 1816 (2008) and 1851 (2008). In 2008 the UNSC noted the aggravating situation in Somalia and reaffirming its respect for the sovereignty, territorial integrity, political independence and unity of Somalia, adopted Resolution 1816 (2008). Point 7 of its text, states that, for a period of six months from the date of the resolution, States cooperating with the Transitional Federal Government (TFG) in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may: *(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, (...) 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 authorization is an example how **international cooperation can be of such importance as to temporarily limit a state's sovereignty**. In the case of Somalia, the jurisdiction over the crime of piracy was later on extended even further with UNSC Resolution 1851 (2008), stating that *“States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.”*

### III. CHAPTER TWO

#### 1. The General Duty to Cooperate

International cooperation is crucial for fighting maritime piracy. Therefore, Article 100 of UNCLOS, titled *“Duty to cooperate in the repression of piracy”* proclaims that *“all States shall 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”*, making it the core of the piracy part of UNCLOS. Through using the strongest wording found in it, UNCLOS emphasizes that all states should cooperate *“to the fullest possible extent.”* Though Article 100 does not specify the particular obligations within the general duty to cooperate, its explicit phrasing involves the subsistence of a presumption of cooperation in the fight against maritime piracy. This presumption can be derived from the general principle of good faith in fulfilling treaty obligations.

#### 2. Sharing information and cooperation in the criminal investigation of maritime piracy

Information exchange is vital to secure successful **international cooperation** in combating maritime piracy. Moreover, the duty to share information can be identified as a particular obligation within the **general duty to cooperate**. For example, the SUA Convention proclaims that *“States Parties shall co-operate in the prevention of the offences set forth in article 3, particularly by ... exchanging information in accordance with their national law...”* In most cases, maritime piracy affects several different nations. Firstly, vessels may be under the flag of one state, owned by second one, operated by third and at last – with crew consisting of many



nationalities. Secondly, the pirates, the navy, which catches them and the nation prone to investigate and prosecute the case, are also likely to be different. This makes it crucial to share information between military, law enforcement and judicial bodies in multiple countries. In this regard, INTERPOL provides its secure global police communications system, known as I-24/7 which is the foundation of information exchange between the world's police.

Although the importance of sharing relevant data among states and international organizations in combating piracy, the precise scope of the duty to share information is not set by international instruments. States are left to choose which data to share, how to forward it and when. Furthermore, restrictions are often imposed on the grounds of national security, sovereignty, or commercial confidentiality. Nonetheless, there is no arguing that the execution of laws and regulations restricting the exchange of information should be done only as an exception to the general obligation to share information deriving from Article 100 and the due diligence principle. In maintenance of this opinion, Article 302 of UNCLOS allows non-disclosure of information only for purposes of protecting “*essential interests of state security*”.

The type of information of significant importance for combating maritime piracy is usually related to the identification of suspects, modus operandi, etc. Thus, in general, the sharing of such data between the entities which took part in counter-piracy operations is unlikely to endanger national security. Such assertion is based on the fact that among law enforcement agencies and based on INTERPOL's practice following the creation of its Global Maritime Piracy Database, very few restrictions have been imposed by INTERPOL members' countries on information exchanged via the INTERPOL information system.

Due to the fact that piracy usually takes place on the high seas, combating it requires **more than the typical police-prosecution cooperation**. Notably, prosecution ought to be facilitated by the involvement of navies as the front-line entities that both prevent attacks and gather relevant information. Moreover, in such counter-piracy operations, the navies exercise activities of law enforcement nature and turn to be of leading role. This has led the international community to set aside the role of law enforcement agencies, especially in the early stages of combating piracy off the coast of Somalia. It was not until its eleventh resolution related to piracy in Somalia that the UNSC made a clear reference to organizations such as INTERPOL and Europol operating in the counter-piracy field.

Neglecting the engagement of the law enforcement community various difficulties have emerged. For example, navies do not necessarily have the tools or the expertise to gather and preserve the relevant evidence needed for criminal proceedings. In addition, they usually do not have criminal databases for storing important data such as personal information about suspects, fingerprints, and DNA, thus hindering the comparison with existing data. Such expertise and tools are at the core of law enforcement activities and international police cooperation. The scarce involvement of competent law enforcement agencies in those early stages therefore led to a hiatus between the navies operating off the coast of Somalia and the prosecution services.

Having acknowledged the problem, in its Resolution 1976 (2011), the UNSC invited states, individually or in cooperation with regional organizations, United Nations Office on Drugs and Crime (UNODC), and INTERPOL, to examine domestic procedures for the preservation of evidence and assist Somalia and other states in the region in strengthening their counter-piracy law enforcement capacities. Moreover, it underlined the importance of continuing to enhance the collection, preservation, and transmission of evidence to competent authorities and urged states and international organizations to share evidence and information for anti-piracy law enforcement purposes with a view to ensure effective prosecution. UNSC Resolution 2020 (2011) further highlighted the importance of sharing information with INTERPOL and Europol, including for the purposes of investigating those responsible for illicit financing and facilitation and urged again States and international organizations to share evidence and information for anti-piracy law enforcement purposes with a view to ensuring effective prosecution of suspected, and imprisonment of convicted pirates.

Another example for the acknowledgement of the abovementioned problem is the amendment to the 2008 European Union Council Decision on *EUNAVFOR*, also known as *Operation ATALANTA*. The EU military operation off the coast of Somalia in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the UNSC contributes to the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UNSC Resolution 1816 (2008). *Operation ATALANTA* is explicitly instructed to: (1) *collect data including characteristics likely to assist in identification of piracy suspects such as fingerprints; and (2) circulate, via INTERPOL's channels, and check against INTERPOL's databases, personal data concerning suspects, including fingerprints and other identifiers (e.g., name, DOB, etc.).*

Sharing information from law enforcement agencies to the navies raises certain obstacles. For example, a question arose whether INTERPOL may cooperate with navies considering Article 3 of its Constitution, according to which “*it is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character.*” At first sight, the provision seems to forbid INTERPOL from sharing any information with the navies or organizations operating off the coast of Somalia, such as NATO. INTERPOL nonetheless reached to the conclusion that as long as the purpose and nature of the cooperation is limited to promoting international police co-partnership, Article 3 does not prevent it from doing so. Based on this functional interpretation of Article 3, INTERPOL provided information to the navies deployed in the Indian Ocean, such as a photo album of suspected pirates.

In order to assist with the crime scene investigation and evidence collection and after acknowledging the usual lack of involvement of the police in the early stages of the investigation, when a captured vessel is released by pirates, INTERPOL can send a team of experts, known as an Incident Response Team (IRT). IRTs provide specific expertise and investigative support to police. A single team can be briefed, equipped and deployed anywhere in the world within 12 to 24 hours of an incident. Typically composed of expert police and support

staff IRTs can provide a range of investigative and analytical support at the incident site in coordination with the General Secretariat, such as:

- *Database queries of fingerprints to quickly identify suspects;*
- *Access to the database of lost or stolen travel documents;*
- *Money laundering expertise.*

In April 2011, the first ever piracy IRT was sent to Durban, South Africa, to assist national police with the investigation of a Greek vessel released by Somali pirates. The team collected physical evidence, recovered digital data from the vessel's satellite phone, collected fingerprints and DNA, and gathered testimony from the crew. The evidence was forwarded to the South African authorities to conduct a formal investigation.

Understanding that the maritime environment poses unique difficulties in the collection of evidence INTERPOL launched Project EVEXI (Evidence Exploitation Initiative). The project in question assists member countries investigating piracy cases by providing regional investigators with an INTERPOL-supported procedure for intelligence gathering, evidence collection and information sharing. This ensures that all information and evidence collected is effectively used in the prosecution of pirates. Moreover, INTERPOL continues to provide advice, training and equipment to its member countries worldwide in order to improve the quality and quantity of the collected data, and to make sure it is properly preserved and analyzed.

Due to the global scope of the maritime piracy, the EU is vigorously supporting the establishment of a **collaboration mechanism among the prosecutors** of the countries concerned in order to bring together admissible evidence for legal action against major piracy financiers, negotiators and organizers. A German-Dutch Joint Investigation Team, hosted by Europol, started its work in January 2012 under the legal framework of Eurojust providing a unique model for international police cooperation. Moreover, Europol and INTERPOL are closely cooperating in collecting and analyzing data on piracy cases and modalities are in place to allow them to receive relevant information from the abovementioned *Operation ATALANTA*. Further, since 2009, Eurojust has hosted regular coordination meetings dedicated to the phenomenon of maritime piracy and its consequences for affected Member States. In support of these coordination meetings, which provide a platform for practitioners involved in ongoing investigations and prosecutions, the project to develop a Maritime Piracy Judicial Monitor (MPJM), initiated by Eurojust in 2012, culminated in September 2013 with the publication of the first issue of the MPJM. The same was established for the purpose of fostering the exchange of information between prosecutors dealing with maritime piracy cases and is to be updated every 18 months.

Investigations and prosecutions of piracy suspects are currently ongoing in a number of EU Member States. So far the biggest success in the work of prosecutors and law enforcement is the arrest of the piracy kingpin *Afweyne* on arrival in Brussels on October 12<sup>th</sup>, 2013. *Afweyne* was arrested in Belgium for having allegedly masterminded the 2009 hijacking of the Belgian dredge vessel *Pompei*. Through one of his associates, *Afweyne* had been invited to participate as a consultant on a documentary about his piracy exploits. After months

of talks, he flew to Brussels to take part in what he believed was a film project. The documentary turned out to be part of a sting operation by Belgian undercover agents, which had been set up after prosecutors resolved to try the masterminds behind the 2009 *Pompei* hijacking. According to prosecutors, it took months to lure *Afweyne* into coming to Brussels, though they did not elaborate on how exactly the plot was executed.

### 3. Transfer of piracy suspects

The term “*transfer*” is commonly used to describe an institute regulating the handover of a person from one jurisdiction to another. The **transfer of piracy suspects has many differences** compared with the main characteristics of the extradition. Firstly, the transfer request does not come from the State to which the accused criminal shall be handed over. Usually, it is the State or International organization having arrested the individual that requests a third state to take over the alleged offender for purposes of criminal prosecution. Secondly, the transfer decisions, contrary to the extradition ones, are commonly not reached through a two-part procedure, consisting of an admissibility proceedings and a decision of the executive. For example, an *ad hoc* body consisting of representatives of various federal ministries took the decision to transfer the pirates suspected of having attacked the German flagged vessel *Courier* to Kenya instead of bringing them before German criminal court. Moreover, **pirate suspects cannot be transferred under the proceedings regulated by national immigration law**, namely the deportation and expulsion. If deportation is used with the purpose to prosecute the individual, this is usually referred to as “*disguised extradition*”. Shortly, the transfer of piracy suspects can be described as a change of custody by means other than extradition or deportation. Another specific characteristic is that these transfers usually take place on **compulsory base**, i.e. they amount to a forced movement of individuals from the custody of one State or international organization to the custody of a State willing to initiate criminal proceedings against the suspected pirates.

The phase between the capture of pirate suspects at sea and their release, respectively their transfer to a State willing to bring charges against them, is often referred to as “*disposition*”. After acknowledging the same as a crucial for the prosecution of the pirate suspects, the UNSC in its Resolution 1846 (2008) called upon all States to cooperate during this phase. The decision whether to transfer the captured persons during that phase varies depending on who carried out the seizure.

The abovementioned *EUNAVFOR* is one of the entities constantly transferring piracy suspects to third States in order to face justice. Since the start of *Operation ATALANTA* in 2008, more than 154 pirates were handed over to the competent authorities with a view to their prosecution. In the area of operations, *EUNAVFOR* units can arrest, detain and transfer persons suspected of intending to commit, committing, or having committed acts of piracy or armed robbery at sea. According to Article 12 of the EU Council Joint Action 851 – the legal basis of *Operation ATALANTA*: “*persons having committed or suspected of having committed, acts of piracy or armed robbery in Somali territorial waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred:(a) to the competent authorities*

*of the flag Member State or of the third State participating in the operation, of the vessel which took them captive, or (b) if this State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.”*

It is worth noting, that currently every transfer of piracy suspects features a national component and is thus at least partly governed by national legislation or practices. Due to the fact that these national frameworks vary considerably, it is reported that there are even **transfers of a purely factual nature**, i.e. piracy suspects are handed over to coast guards of a third State without any legal proceedings held before the transfer. For example, Italy brought piracy suspects apprehended by its frigate *Maestrale*, which was part of the *EUNAVFOR*, before an Italian investigating judge in order to determine to which State the arrested individuals should be brought to face justice.

Although the public international law does not generally oppose transfer to third States, it however, contains certain rules governing the **conditions and modalities of such transfers**. There are, on the one hand, the rules specifically drafted with regard to transfers occurring in the Somali counter-piracy operation context, such as the various transfer agreements. On the other hand, there are rules that flow from the general human rights law, specifically from the principle of *non-refoulement*. For example, the EU Council Joint Action 851 strictly forbids the transfer of pirate suspects to a third State unless the conditions for the transfer are in accordance with relevant international law on human rights, in order to guarantee that no one shall be subjected to death penalty, to torture or to any cruel, inhuman or degrading treatment. Several States as well as the EU have concluded such transfer agreements with regional States in which the latter agree to receive piracy suspects for criminal prosecution. Only those concluded by the EU are publicly available and they are based on Article 12 of the abovementioned EU Council Joint Action 851 – the legal basis of *Operation ATALANTA*. The provision in question requires such agreements in order to transfer piracy suspects to third States not participating in *EUNAVFOR*. The legal consequences of such agreement were affected by the decision of the European Court of Justice in its Case C-658/11. With the judgment provided by the Court, the Parliament succeeded in having annulled a Council decision on the signing and the conclusion of a treaty between the EU 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 Mauritius, and on the conditions of suspected pirates after transfer. In its judgment, as requested by both the Council and the Parliament, the Court maintained the effects of the treaty so as not “*to hamper the conduct of operations carried out on the basis of the EU-Mauritius Agreement and, in particular, the full effectiveness of the prosecutions and trials of suspected pirates arrested by EUNAVFOR.*”

#### **4. Legal obstacles of prosecuting pirate suspects**

**Prosecution and detention** of piracy suspects are a key component of the overall fight against piracy. Over 1200 suspects are currently being prosecuted in an overall of 21 countries, some of which are EU Member

States. Due to the fact that universal jurisdiction applies only to pirates, captured Somalis usually insist in court that they are ordinary fishermen, mistakenly captured by a foreign navy. As many pirates are in fact fishermen, their statement is actually somewhat credible. Furthermore, establishing the identity or even the nationality of captured individuals proves to be difficult, as they are unlikely to possess identification documents. In a recent case held in German court the pirate suspect replied to the question “*Where were you born?*” with “*Under a tree.*” Such problems and evidentiary difficulties have already forced the U.S. Navy to release many of the seized pirates in the wake of its January 2009 agreement with Kenya. Other nations also release pirates at a high rate because of such concerns.

Ensuring that suspected pirates have the normal rights of a defendant in a trial would be particularly difficult given the remote location and the nature of the alleged crime. Transporting the prosecution, defendants, witnesses, and evidence to a foreign court would be burdensome and impede ongoing interdiction efforts. Identification by victims can be difficult, as the multinational crews of foreign-flagged vessels would have to be either detained or returned from their homes around the world. For example, in the one SUA prosecution on record, the *Shi case*, the vessel was brought into a U.S. port and the entire crew held for months as material witnesses. In addition to the problem, domestic courts struggle to provide counsel and translation services in the defendants’ Somali dialect, even in neighbouring Kenya. Providing translation services for testifying witnesses also turn to be problematic, as it is further complicated by the fact that they often hail from a variety of distant countries. Another problem is the necessity of naval officers in active service to testify, often repeatedly, in proceedings.

Despite the financial advantages and the fact that criminal proceedings in countries like Kenya and Seychelles are relatively speedy they often raise certain issues with regards to the upholding of the right of fair trial and other fundamental rights. Due to the fact that the trials in Kenya proceed without the expansive protections of the European Convention on Human Rights (ECHR), it is not surprising that Kenyan judges once brushed away Somali defendants’ complaints of torture by observing that “*They do not appear to be bleeding.*”

#### **IV. CHAPTER THREE**

##### **1. European Convention on Human Rights**

Alongside the legal instruments supporting counter-piracy operations there is also an international human rights system which was developed to protect the rights of all individuals. All European nations participating in naval operations off the shores of Somalia and the high seas are bound not only by international law but also by the ECHR. All performed actions aiming to deal with maritime piracy raise issues under several provisions of the ECHR.

It is well known that some suspected pirates have not been treated in accordance with applicable norms. For instance, US forces have been accused of holding suspects naked, blindfolded, handcuffed, and without access to an interpreter for days. Russian forces have been accused of setting adrift suspected pirates without



navigational equipment in a small vessel in the Gulf of Aden. As a result of this the suspects are considered to have died.

The human rights obligations contained in the European Convention on Human Rights are those that Contracting Parties similarly owe to individuals who fall within their jurisdiction.

## 2. Jurisdiction under ECHR

Article 1 of the ECHR provides that “*contracting parties shall secure to everyone within their jurisdiction the rights and freedom defined in Section I*” of the Convention. The European Court of Human Rights (the Court) has accepted that **in exceptional cases** the acts of Contracting States performed, or producing effects, outside their territories can also constitute an exercise of jurisdiction by them. Extraterritorial jurisdiction proves to be of significant importance while dealing with anti-piracy operations on the high seas or on the territory of third states. If a member-state takes suspected pirates on board its own vessel, it is obliged to follow the Convention. However, obligations are less clear regarding operations on board (or against) a pirate skiff. Up to this moment the Court has focused on two criteria to establish extraterritorial jurisdiction: *1) effective control of an area and; 2) authority and control over a person*. It is accepted that if a State Party to the Convention exercises coercive law-enforcement jurisdiction over a foreign vessel on the high seas, then the vessel, and its occupants, come under ECHR jurisdiction. The European Court of Human Rights considered the question of jurisdiction on the high seas in *Medvedyev and Others v. France (Application no. 3394/03)*. The Court stated that the Convention extends to situations in which a state exercises full and exclusive control over persons outside its territory. In the *Medvedyev* case, it ruled that the French authorities, who managed to board on Cambodia's ship supposed to be loaded with narcotics, were under the jurisdiction of the ECHR because they had full and exclusive control over those they had arrested and detained, using force. The Court accepted that instances of extra-territorial jurisdiction included also activities on board aircraft and ships registered in, or flying the flag of a state.

To conclude, we can outline the **three established hypothesis of jurisdiction** under the Convention:

*a) Jurisdiction under State party territory; b) Jurisdiction established through the exercise of authority or control over a particular individual; and c) Jurisdiction based on the exercise of effective control by the authorities over an area outside its State's territory.*

## 3. Issues under Article 5 (3) of the Convention

According to article 5(3) of the Convention, relevant international human rights treaties require that once detained the suspected pirate must be brought “*promptly*” before a judge or other officer authorised by law to rule on the legality of the detentions. Considering that pirates are usually captured hundreds of nautical miles out in the sea, the same poses a real problem for the states. The European Court of Human Rights considered this issue in *Medvedyev and Others v. France*.

On June 13<sup>th</sup>, 2002, a French warship spotted the vessel *Winner*, a Cambodia-registered cargo ship supposed to be loaded with narcotics. France had obtained an authorization from the Cambodian Government to stop and search the ship, but its crew refused to stop, forcing the French commandos to board the vessel. The crew was detained for 13 days during the voyage to Brest, a French port, due to the poor condition of the vessel captured and the weather conditions. Upon their arrival, the suspects were immediately handed over to the police. Before the French Court of Cassation and later before the Strasbourg Court the crew members claimed that they had not been “promptly” brought before a judge, but instead spent 13 days on the vessels.

Actually a period of 13 days is considered to be in contradiction with the principle of “promptness”. As an example we can point out the case of *Öcalan v. Turkey (Application no. 46221/99)*. In its judgement the Court stated that a period of seven days was incompatible with the Convention requirements. However, in the case similar to *Medvedyev – Rigopoulos v. Spain (Application no. 37388/97)*, the Spanish Navy vessel intercepted one ship suspected of drug-trafficking. Subsequent all crew of the intercepted ship was transferred to Spain by sea. The Court stated that a period of 16 days was not incompatible with Article 5(3). The Court’s decision was based on the fact that “wholly exceptional circumstances” due to the distance to be covered and the resistance of the ship’s crew made it “materially impossible to bring the suspects promptly before the relevant judicial authorities”. In *Medvedyev*, the Grand Chamber took a similar approach and considered that despite the weather conditions and the poor state of repair of the ship, the transfer of the *Winner’s* crew to France did not take longer than necessary. The Grand Chamber stated that it was not in a position to assess whether the applicants could have been taken to France by boarding them on the faster French warship, or by transferring them with a plane. The conclusion was that France was not in violation of article 5 (3), because when the applicants were on French soil, they were brought before the investigating judge only about eight hours after their arrival.

As far as anti-piracy operations are concerned, we can infer that Article 5 (3) does not oblige European states to transfer by air pirates that are captured thousands of miles away from where the competent judicial authority is located. Also Article 5 (3) does not require EU states to provide for the presence of the competent judicial authority in the operational area, neither in nearest military base or on the board of a warship.

In the case of *Hassan and Other v. France (Application no. 46695/10 and 54588/10)* the Court held that there had been a violation of Article 5(3) of the ECHR. The applicants are three Somali nationals prosecuted in France for committing acts of piracy in September 2008 by intercepting the French yacht *Carré d’As*. On September 16<sup>th</sup> the pirates were arrested by French naval and were brought before an investigating judge on September 25<sup>th</sup>, 2008. The applicants complained that they had not been “brought promptly” before a judge after their arrest by the French. The Court was prepared to admit that “exceptional circumstances” explained the length of the applicants’ detention between their arrest at high sea and their arrival in France. The Court noted, however, that on their arrival in France the applicants had been taken into police custody for 48 hours rather than being brought immediately before an investigating judge. There was nothing to justify that additional delay in

this case. The Court stated that France had to pay to each of the applicants € 5 000 in respect of non-pecuniary damage.

In some cases, detention has been prolonged by disputes over whether to prosecute, and in which state. In 2009, five suspected pirates were held on board a Danish warship for over a month while Danish and Dutch authorities decided whether to transfer the suspects in Dutch custody. The legality of their detention on board the Danish vessel was not challenged in court. It is unclear whether a member state would be in violation of Article 5 (3) in a case like this, when the delay was not due to the length of the voyage but rather the international community's confusion regarding where to prosecute – in our opinion the answer would be positive.

#### 4. Issues connected with the surveillance

Before intercepting suspected pirates, the military usually puts them under surveillance. All sorts of vessels are subject to radar, video, photo, and audio monitoring. Assuming that state jurisdiction can be established, all these actions might fall within the scope of Article 8 of the Convention, which protects the right to respect for private life. The Court considers the interception of people's conversations as a violation of their **right to privacy**. The same holds valid for secret video surveillance.

The Court considers that powers to impose secret surveillance are tolerated under Article 8 if they are subject to adequate and effective guarantees against abuse. These guarantees against abuse depend on the assessment of the circumstances of the case – such as the nature, scope, and duration of the measures; the grounds required for ordering them; the authorities competent to authorize, carry out, and supervise them. It is right to assume that the fight against maritime piracy would be considered by the Court as a legitimate aim. The Court considers that interception of communications is an area where abuse is potentially very easy. Therefore, there should be strict control of a judge or, exceptionally, of another independent authority. In compliance with Article 8, such an authority must be independent of the Executive Power and be given sufficient powers and competence to exercise effective and continuous control.

#### 5. Fair trial

When the pirates have been brought before the judiciary, they enjoy a right to a "*fair trial*" like other offenders. States or regional organizations that capture alleged pirates on the high seas usually transfer them to another state in the region for prosecution. States are clearly **prohibited from transferring back suspects to states where their right to a fair trial may be violated**. We will focus on only a couple of issues connected with the fair trial that may create a particular problem in piracy cases: the right to be informed in a language that they understand and access to legal assistance while in custody.

##### 5.1. Article 5(2) of the Convention

One of the main problems occurred in the context of anti-piracy operations is the right of any arrested person to be "*informed promptly*" in a language that he understands, of the reasons of his arrest and of any charges against him – Article 5(2) of the Convention. The Court states that this provision contains "*the elementary*

*safeguard that any person arrested should know why he is being deprived of his liberty".* Undoubtedly, the Somali pirates must be informed in a language that they understand. The only question is when. It is reasonable for EU navies who fight Somali pirates to embark Somali and Arabic speaking personnel. This is a necessary thing to do because failure to provide intelligible information under Article 5 (2) may have long-term effects on the fairness of any subsequent trial.

## 5.2. Issues under Article 6 of the Convention

The right to, and requirements of a **fair trial** are set out in numerous conventions and declarations. Pursuant to Article 6 of the ECHR, the main requirements of a fair trial include the presumption of innocence until proven guilty according to law; the entitlement of a fair and public hearing by an independent and impartial tribunal established by law; the right to defend oneself or to have legal assistance; to have the assistance of an interpreter; and to be clear and promptly informed of the nature and cause of the charge.

The Court considered, there is a violation of Article 6 because of the lack of legal assistance, while in police custody, even if there are extraordinary circumstances that justify the denial of access to a lawyer. Such restriction, whatever its justification, must not have unduly prejudiced the rights of the accused. After *Medvedyev*, where the Court discusses the problem with the "*exceptional circumstances*" of an arrest on the high seas, we can assume that the same would be applied in the context of Article 6. If exceptional circumstances may justify delays in bringing pirates before a judge or another officer authorized to exercise judicial powers, it makes sense that the same reasoning to legal assistance should be applied.

## 6. Non-refoulement principle

Article 3 of the Convention, preserves individuals from being returned to a country where they are at risk of torture, inhuman or degrading treatment, or punishment, based on the principle of *non-refoulement*. The possibility of extradition or deportation is one of the main problems connected with pirates detained in a state party to the Convention. The Court has considered that transferring to countries where an individual's life and safety would be at "*real risk*" would violate Articles 2 and 3 of the Convention. There are numerous cases in this meaning – the case of *Soering v. United Kingdom (Application no. 14038/88)*, and a series of recent Italian and British cases concerning the transfer of suspected terrorists to Tunisia, Algeria, or Iraq.

This issue is very sensitive as far as Somali pirates, since Somalia is among the countries which the Court considers unsafe. There have been a few cases, like *Salah Sheek v. Netherlands (Application no. 1948/04)*, where the Court ruled that transferring an individual to Somalia, given the dangerous situation in certain areas and the risks incurred by certain categories of people, would breach Article 3.

In regards to the right to life, the prohibition on the death penalty contained in Optional Protocols No. 6 and No. 13 to the Convention has been interpreted to proscribe the transfer of an individual to face execution. The European Court of Human Rights affirms that: Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where there are substantial grounds for believing that he or she would face a real risk of being subjected to the death penalty there. States engaging in

counter-piracy operations want to find a regional solution to prosecute pirates. The EU, the UK, Denmark, and the US have signed agreements to transfer suspected pirates to Kenya for trial, and both the US and the EU have agreements with the Seychelles. The agreements reportedly contain assurances regarding the protection of human Rights.

The UNODC Maritime Crime Programme (MCP) was launched in 2009 as the Counter-Piracy Programme to enhance criminal justice capacity among Somalia's neighbours and ensure that the trial and imprisonment of suspected pirates passed to them is humane and efficient and takes place within a sound rule of law framework. In a result of the Counter-Piracy activities the construction of a state-of-the-art correctional facility to house 380 inmates in Hargeisa, Somaliland has been completed. Five prisons in Kenya have been subject to extensive refurbishment work. In the Seychelles, the program has built a 60-bed high security block and undertaken reconstruction work on the main prison, including an exercise yard and vocational training area.

#### **7. State responsibility under the Convention in the context of anti-piracy operations carried out by International organizations**

We will consider this issue using as an example the abovementioned *Operation ATALANTA*. Several European states participate in *EUNAVFOR* under an integrated EU command. Although negotiations between the EU and the Council of Europe on the EU's accession to the ECHR have officially begun, the EU is not yet party to it. The question whether EU Member States might be liable for any breach of the Convention resulting from the actions of their military personnel deployed in the context of *Operation ATALANTA* is a difficult one. The Court has not yet examined this issue. In our opinion the answer would be the same as in *Saramati v. France, Germany and Norway*. The Court held that the applicants' complaints for alleged violations of the Convention resulting from the actions of French, German, and Norwegian military personnel belonging to KFOR40 and UNMIK41 forces operating in Kosovo were incompatible persons with the Convention, because these personnel were not acting on behalf of their respective states but on the basis of powers belonging to the UNSC under Chapter VII of the UN Charter. Therefore the acts in question were in principle attributable to the UN. It is reasonable to believe that the Court would follow *Saramati*: not only is the operation conducted by the EU and not by individual EU Member States, but it is conducted by the EU pursuant to a series of UNSC Resolutions adopted under Chapter VII of the UN Charter. The whole reasoning of the *Saramati* decision is that the military personnel involved did not act as "agents of their respective states" but as agents of the international organization liable for the operation. In general, the ECtHR is reluctant to establish jurisdiction over the actions of multi-national forces. The ECtHR's admissibility decision in the joined cases of *Saramati v. France, Germany, and Norway* (2007), which was widely criticized, stated that the actions of state armed forces operating under UNSC authorizations are connected to the UN. The International organizations cannot be responsible under the Convention, because they are not party to it. Liable for every single violation under the Convention would be each state party participating in the organization.

## V. CONCLUSION

A key component for the successful counter-piracy undertakings is the international cooperation among the States, the international and regional organizations, and the private sector. Due to the fact that the main participants – the navies, the law enforcement agencies, and the private sector are not accustomed to working together, the execution of a strategic partnership between them is vital for combating the maritime piracy. Such an effort should begin with a more clarified legal framework on the matter. States should cooperate to provide a more detailed legislative basis not only on terms, but also on jurisdiction and on means of prosecution. A better definition of piracy, avoiding the ‘two – vessel requirement’ as well as a clearer framework of territorial, flag state jurisdiction, and right of hot pursuit are vital for the efficient prosecution of crimes of pirate character. We also believe that the states should cooperate and implement piracy acts as crimes in their Penal Codes in the unified definition of the term.

Another problem is the existence of a large number of parallel functioning piracy databases which are not connected together. One possible solution is the centralization of the information streams and avoidance of the creation of new close-circuit information networks.

Successful prosecution of piracy suspects requires detailed evidence collection. There is an urgent need for specially trained evidence collection teams, knowledgeable in the maritime domain to be available to conduct forensic investigations promptly after the ships have been released by the pirates. Moreover, the participation of a person, representing the potential prosecuting authority, as a member of the crew would facilitate sufficiently eventual criminal proceedings and would serve as a guarantee for the protection of the fundamental human rights.

Another main problem related to the piracy is the absence of international tribunal dealing with the cases of maritime piracy. Therefore, we support the proposal of UNSC Resolution 1976 (2011) urging the States to consider the establishment of an international tribunal to prosecute pirates. According to the Resolution, this is the only feasible decision to deal with the increasing number of cases of maritime piracy.

As mentioned above, due to the fact that all Contracting parties to the ECHR are bound by its provisions, they owe to the suspected pirates within their jurisdiction all the rights that the Convention provides, including the right to a fair trial. This issue is discussed by Prof. Alexander Yankov – a former judge at the International Tribunal for the Law of the Sea. He suggests that the application of universal jurisdiction over piracy violates the right to a fair trial of the suspected pirates. The same do not know which country would investigate and prosecute them, as well as the applicable national legislation. Moreover, the suspected pirates are totally ignorant of the possible penalties to be imposed, ranging from three years to life imprisonment. Therefore, we think that the application of universal jurisdiction in some cases can lead to a violation of the ECHR in particular – the right to a fair trial.



In conclusion, there has been piracy for as long as people and commodities have traversed the oceans. The belief that it had entered a period of terminal decline in the twenty-first century has been proved incorrect. Indeed, the recrudescence of piratical attacks has been rapidly over the past ten years. In order to successfully deal with maritime piracy, international efforts are required. The main among them are codified in the national legislations, improvement of the international cooperation in regards to the prosecution of piracy suspects and establishment of a united international criminal tribunal specialized in dealing with the cases of maritime piracy.



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