ISSN 2464-9724

Maritime Safety and Security Law Journal

2016 - 17
Issue 3

Maritime Safety and Security Law Journal

Issue Editors

Gemma Andreone
Institute for International Legal Studies, National Research Council, Italy

Anna Petrig
University of Basel, Switzerland

Managing Editor

Maria Orchard
University of Bristol, United Kingdom

COST is supported by EU Framework Programme Horizon 2020

cost EUROPEAN COOPERATION IN SCIENCE AND TECHNOLOGY

marsafenet

University of Basel

Maritime Safety and Security Law Journal

Advisory Board

Maritime Safety and Security Law Journal

Table of Contents

ISSN 2464-9724

Maritime Safety and Security Law Journal

2016
Issue 3

Maritime Safety and Security Law Journal

Against a Uniform Definition of Maritime Piracy

M. Bob KAO[1]

Abstract

Many scholars argue that a major obstacle to eradicating the global problem of maritime piracy is the lack of a uniform definition of piracy. Their chief concern is that without a uniform definition, it is difficult to formulate responses on a systemic and global level. This article contends that having multiple definitions of piracy for different purposes is conducive to combating piracy and addressing the ensuing legal issues. While uniformity between certain definitions should be pursued, complete uniformity should not be adopted due to the multiple purposes the definition of piracy serves. This article categorises the definition of maritime piracy according to four respective purposes: public international law, domestic criminal law, commercial law, and piracy prevention. It demonstrates that uniformity is important between the first two purposes due to the need to uphold rule of law principles. However, this definition should not be uniform with regard to the definitions for the last two purposes due to the need for flexible and expansive definitions in commercial law and piracy prevention.

1. Introduction

Maritime piracy has been a growing international plague in recent years.[2] Many scholars lament that a major obstacle to eradicating piracy is the lack of a uniform definition of the phenomenon. Their chief concern is that without a uniform definition, it is difficult to formulate uniform responses on a systemic and global level.[3] This article argues that having multiple definitions of piracy is, in fact, conducive to combating piracy and addressing the ensuing legal issues. While uniformity between certain definitions should be pursued, complete uniformity should not be adopted due to the multiple purposes the definition of piracy serves.

---

1 PhD Candidate, Centre for Commercial Law Studies, Queen Mary University of London; LLM (Distinction), University College London; JD, University of California, Berkeley School of Law. The author would like to thank Dr Tina Loverdou, Dr Miriam Goldby, and multiple classmates for feedback on an earlier draft of this article, and the anonymous reviewers and editorial board for their tireless efforts.

2 The International Maritime Bureau (IMB) reported 239 cases of actual and attempted incidents of piracy and armed robbery against ships worldwide in 2006. The figure rose to a high of 445 incidents in 2010 in large part due to the 219 cases attributed to Somali pirates that year compared to 22 cases in 2006. There are signs of a global downturn though, as the total number of reported cases in 2015 was 246, with no cases attributed to Somali pirates. However, piracy in Southeast Asia rose from 83 cases in 2006 to 147 cases in 2015. International Chamber of Commerce, International Maritime Bureau (ICC-IMB), *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2010* (2010) 5-6; International Chamber of Commerce, International Maritime Bureau (ICC-IMB), *Piracy and Armed Robbery Against Ships: Report for the Period 1 January – 31 December 2015* (2016) 5.

3 This will be discussed below in section 2.

This article categorises the definitions of maritime piracy according to four respective purposes: public international law, domestic criminal law, commercial law and piracy prevention. It demonstrates that uniformity between definitions is important as regards the first two purposes - public international law and domestic criminal law - due to the need to uphold rule of law principles, including legality, legal certainty, predictability and non-arbitrariness when dealing with suspected pirates.[4] However, these definitions should not be harmonised with those for the last two purposes - commercial law and piracy prevention - due to the need for flexibility and expansiveness. In commercial law, the definition of piracy only impacts private interests and the allocation of liability in the aftermath of pirate attacks; an expansive definition is therefore justified, as long as the parties are in agreement.[5] Finally, for the purpose of piracy prevention, an over-inclusive definition that can capture all forms of piracy is essential because the objective is to reduce or eliminate attacks regardless of whether they meet the traditional, narrow definition of piracy.

The article first examines the existing debate on whether there should be a uniform definition of piracy. It then discusses the four different definitions of piracy and their respective purposes and explains why uniformity is desirable only between the definitions of piracy in public international law and domestic criminal law and not for the definitions in commercial law and prevention, as complete uniformity would make the definition overly restrictive and consequently frustrate the latter two purposes. The article concludes that despite cautioning against complete uniformity, partial uniformity is still a worthwhile goal.

2. Debate on uniformity

Scholars have long debated the various definitions of maritime piracy and the lack of uniformity.[6] This lack of a uniform definition of piracy raises the issue that an act may be defined as piracy using one definition but not under another because many modern forms of piracy fall outside certain existing definitions. This is especially concerning because the most widely accepted definition of piracy,

4 See James R Maxeiner, 'Some Realism about Legal Certainty in the Globalization of the Rule of Law' (2008) 31 Houston Journal of International Law 27. The UN defines rule of law as: 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616.

5 Douglas Guilfoyle, 'Policy Tensions and the Legal Regime Governing Piracy' in Douglas Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing 2013) 327.

6 Michael H Passman, 'Interpreting Sea Piracy Clauses in Marine Insurance Contracts' (2009) 40 Journal of Maritime Law & Commerce 59, 61-62; see also James J Lenoir, 'Piracy Cases in the Supreme Court' (1934) 25 Journal of Criminal Law & Criminology 532, 534-38; Niclas Dahlvang, 'Thieves, Robbers & Terrorists: Piracy in the 21st Century' (2006) 4 Regent Journal of International Law 17, 19-21; Tullio Treves, 'Piracy and the International Law of the Sea' in Douglas Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing 2013) 119-23.

found in the United Nations Convention on the Law of the Sea[7] (UNCLOS), uses a narrow definition that excludes many acts of modern piracy.[8]

A short introduction on the scope of 'modern piracy' is thus in order. Modern piracy, unlike classical piracy on the high seas,[9] manifests itself in various forms depending on the region and 'adapt[s] to modern technical, political, economic, and social developments'.[10] It ranges from 'petty larcenies in territorial waters to sophisticated criminal syndicates whose goal is to capture the vessel itself'.[11] Today, there are three major hotspots of piracy: East Africa, West Africa, and Southeast Asia. One characteristic generally present across the board is the use of modern technology to plan and execute the attacks.[12]

In East Africa, the use of sophisticated weapons to hijack ships and hold the crew hostage has been the prevalent mode of operation.[13] Operating off the coast of Somalia, in the Gulf of Aden and in the Horn of Africa, piracy attacks often involve the launching of small skiffs from larger 'mother ships', which are usually vessels they previously hijacked.[14] Harm to the crew has been relatively minimal because the primary motivation has been to extort ransom payments in exchange for the hostages.[15] For now, Somali piracy is largely contained due to international responses to the problem, including United Nations and European Union naval convoys, UN Security Council resolutions allowing ships to enter Somali territorial waters, effective prosecution, and vigilance by the shipping industry in

7 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

8 The definition of piracy in the UNCLOS cannot capture, for instance, attacks in territorial waters prevalent in Southeast Asia and Nigeria that fall under the definition of armed robbery at sea. The IMB's reporting of piracy and armed robbery at sea as a combined statistic may indicate that the need for distinction between the two is largely necessitated by the inability of instruments like the UNCLOS to capture both forms of attacks at sea and not due to any fundamental differences between the threats. Furthermore, the possible political motive of the Nigerian pirates, discussed in this section, may mean that the private ends element of the UNCLOS cannot be met. The *Achille Lauro* hijacking in 1985 was also outside the scope of the UNCLOS definition of piracy because it was an internal seizure that did not meet its two-ship and private ends requirements; see below (n 29).

9 The definition of classical piracy as codified in public international law will be discussed in the next section. For an in-depth analysis of classical piracy, see Barry Hart Dubner, 'Piracy in Contemporary National and International Law' (1990) 21 California Western International Law Journal 139; see also Anna Petrig, 'Piracy' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015).

10 Lucas Bento, 'Toward an International Law of Piracy *Sui Generis*: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) 29 Berkeley Journal of International Law 101, 107.

11 George D Gabel, Jr, 'Smoother Seas Ahead: The Draft Guidelines as an International Solution to Piracy' (2007) 81 Tulane Law Review 1433, 1435.

12 Scott Davidson, 'Dangerous Waters: Combating Maritime Piracy in Asia' (2000) 9 Asian Yearbook of International Law 3, 5-6.

13 Costas Lambrou, 'The Implications of Piracy on Marine Insurance: Some Considerations for the Shipowner' (2012) 11 WMU Journal of Maritime Affairs 129, 130-31.

14 Milena Sterio, 'Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed' (2009) 33 Fordham International Law Journal 372, 383.

15 Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 The European Journal of International Law 399, 400.

hiring armed security personnel and following safety protocols.[16]

Nigerian piracy - occurring in the region spreading from the inland waters of Nigeria to the waters off the coasts of Benin and Togo in the Gulf of Guinea in West Africa[17] - has been characterised by greater incidents of violence, with the highest number killings compared to other regions.[18] The attacks centre on armed robbery[19] and theft of cargo, particularly oil.[20] There is evidence that the tanker oil thefts are being facilitated by corrupt officials, and the pirates often claim to be redistributing the wealth generated by the oil trade, which adds a political dimension to the attacks.[21]

Piracy in Southeast Asia has long differed from the traditional Western, classical notion of piracy that has dominated the international dialogue.[22] The two most common types of attacks historically were night-time theft of property on board ships berthed in port and the stealing and selling of 'phantom ships' after repainting and reflagging them,[23] but oil theft is also a growing concern.[24] The attacks occur in the South China Sea[25] and the territorial waters of Singapore, Malaysia and Indonesia in the Strait of Malacca.[26] Some industry experts have claimed that many acts of purported piracy in this region are actually inside jobs designed to perpetrate insurance fraud.[27]

In response to the inability of the traditional definition of piracy as embodied in the UNCLOS to

16 Tim Hart, 'Somali Piracy: Redrawing the Boundaries' (*Forbes*, 8 December 2015) <www.forbes.com/sites/riskmap/2015/12/08/somali-piracy-redrawing-the-boundaries> accessed 27 February 2016.

17 Martin N Murphy, 'Petro-Piracy: Oil and Troubled Waters' (2013) 57 Orbis 424, 433.

18 Anamika A Twyman-Ghoshal and Glenn Pierce, 'The Changing Nature of Contemporary Maritime Piracy: Results from the Contemporary Maritime Piracy Database 2001-10' (2014) 54 British Journal of Criminology 652, 663.

19 Tina Loverdou, *Piracy in the Gulf of Guinea and Beyond: Time for an International Maritime Piracy Treaty* (New Voices in Commercial Law Working Paper, 2015) 4-5. For an overview of the definitions of armed robbery at sea and how it differs from piracy, see Petrig, 'Piracy' (n 9) 850-51.

20 Lisa Otto, 'Westward Ho! The Evolution of Maritime Piracy in Nigeria' (2014) 13 Portuguese Journal of Social Science 313, 322.

21 Christina Katsouris and Aaron Sayne, *Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil* (Chatham House 2013) 5; Joseph M Isanga, 'Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes' (2010) 59 American University Law Review 1267, 1313.

22 Adam J Young, 'Roots of Contemporary Maritime Piracy in Southeast Asia' in Derek Johnson and Mark J Valencia (eds), *Piracy in Southeast Asia: Status, Issues, and Responses* (ISEAS Publications 2005).

23 Ahmad Almaududy Amri, 'Southeast Asia's Maritime Piracy: Challenges, Legal Instruments and a Way Forward' (2014) 6 Australian Journal of Maritime & Ocean Affairs 154, 155-57; Davidson (n 12) 10.

24 Samul Oakford, 'Pirates Are Running Wild and Hijacking Oil Tankers in Southeast Asia' (*Vice*, 16 June 2015) <http://news.vice.com/article/pirates-are-running-wild-and-hijacking-oil-tankers-in-southeast-asia> accessed 27 February 2016.

25 Keyuan Zou, 'Enforcing the Law of Piracy in the South China Sea' (2000) 31 Journal of Maritime Law and Commerce 107, 107-09.

26 Tammy M Sittnickt, 'State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait' (2005) 14 Pacific Rim Law & Policy Journal 743, 745.

27 Jonathan Edward, '"Insider" Piracy on the Rise' (*Malay Mail Online*, 21 June 2015) <www.themalaymailonline.com/malaysia/article/insider-piracy-on-the-rise> accessed 27 February 2016.

capture all forms of modern piracy that do not occur on the high seas or have non-private motives, as described above, many scholars advocate for a uniform definition that is more holistic, expansive and able to respond to all iterations of modern piracy.[28] Though modern piracy may fall under one of the other definitions in public international law devised in response to the shortcomings of the UNCLOS, such as that of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)[29] or the International Maritime Organization's (IMO) definition of armed robbery,[30] the hodgepodge of definitions could potentially yield a hodgepodge of uncoordinated responses.

Loverdou notes that a uniform definition would provide a general framework to address piracy globally,[31] while Bento warns that 'the fact that an identical act may be piracy or not depending on factual circumstances indirectly related to the act … inhibits the effective and consistent prosecution of pirates'.[32] Bento advocates for 'a more precise, principled definition … to empower the international, and especially the commercial, community with a legal tool that is certain, coherent and uniform in both its interpretation and implementation'.[33] Naturally, there are opponents to this proposition. Guilfoyle, for instance, warns against delimitating piracy to one precise definition, as acts of piracy are fluid and dependent on the particular circumstances.[34] What may be construed as piracy in one geographic region may not be considered so in other areas.[35] He suggests that 'piracies' is a more apt designation than the singular 'piracy'.[36] Crockett also warns that '[a]ttempts to define piracy by enumerating specific acts which qualify as piracy have proven to be unsuccessful since circumstances continue to change.'[37] Churchill's argument against a uniform definition rests on his proposition that the various existing definitions of piracy can be complementary, with domestic laws and the SUA

28 See eg Douglas R Burgess, 'Hostis Humani Generi: Piracy, Terrorism and a New International Law' (2005) 13 University of Miami International & Comparative Law Review 292, 327-32; George R Constantinople, 'Towards a New Definition of Piracy: The Achille Lauro Incident' (1985) 26 Virginia Journal of International Law 723, 750-51; Loverdou (n 19) 14-16.

29 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201 (SUA Convention). The SUA Convention was meant to combat terrorism due to the inability of states to prosecute the offenders in the 1985 *Achille Lauro* internal seizure case under the UNCLOS and does not mention piracy or armed robbery. However, its language is purposefully broad and may be used to capture piratical acts that do not meet the UNCLOS definition.

30 Armed robbery is defined as 'any illegal act of violence or detention, or any act of depredation, or threat thereof, other than an act of "piracy", committed for private ends and directed against a ship, or against persons or property on board such ship, within a State's internal waters, archipelagic waters and territorial sea.' IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships (18 January 2010) IMO Doc A 22/Res/1025.

31 Loverdou (n 19) 15.

32 Bento (n 10) 116.

33 ibid.

34 Douglas Guilfoyle, 'Policy Tensions and the Legal Regime Governing Piracy' in Douglas Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing 2013) 328.

35 ibid.

36 ibid.

37 Clyde H Crockett, 'Toward a Revision of the International Law of Piracy' (1976) 26 DePaul Law Review 78, 82.

Convention filling the lacuna left by the UNCLOS.[38] Lastly, Paige cautions against any new definition that would eliminate the high seas requirement in the UNCLOS, as this would jeopardise universal jurisdiction, which currently allows states with no nexus to the suspected piratical acts to arrest and prosecute the suspects.[39]

3. Definitions of piracy

Even though both proponents and opponents present persuasive arguments, there appears to be the possibility of a compromise between the two camps, in which a uniform definition can be established for certain purposes but eschewed for others. This solution requires examining the purpose of the definition of piracy by category.

3.1 Public international law

Piracy in public international law is defined by the UNCLOS and aims to establish the jurisdiction to seize and prosecute suspected pirates.[40] However, it is important to first briefly discuss the history of UNCLOS, as it has contributed to the current deficiencies. The UNCLOS was concluded in 1982 but did not take effect until 1994. Articles 100 to 107 are the provisions that address piracy and the definition is listed in Article 101(a), according to which piracy consists of (1) an illegal act of violence or detention, (2) committed for private ends, (3) on the high seas, and (4) by one ship on another ship. The language from these sections has not changed substantially from its predecessors, the Convention on the High Seas of 1958,[41] which entered into force in 1962, and the Harvard Draft Convention on Piracy of 1932.[42]

The UNCLOS is the accepted international legal framework for piracy[43] and is considered the

38 Robin Churchill, 'The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Kindle edn, Hart Publishing 2014).

39 Tamsin Paige, 'Piracy and Universal Jurisdiction' (2013) 12 Macquarie Law Journal 131, 147. The concept of universal jurisdiction is discussed below in section 3.1.

40 This is enforcement jurisdiction and adjudicative jurisdiction respectively.

41 Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 (Geneva Convention).

42 Harvard Research in International Law, 'Draft Convention on Piracy, with Comment' (1932) 26 American Journal of International Law Supplement 739 (Harvard Draft).

43 UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846.

black-letter law codification of customary international law.[44] However, there is much criticism that the codification privileged certain provisions over others since customary international law on piracy was much more expansive and often conflicting at the time of the Harvard Draft.[45] The drafters themselves were aware of the challenges of trying to reconcile such wide opinions on the definition of piracy.[46] The Harvard Draft must also be placed in a temporal context. By the time it was drafted in the early 20th century, the problem of piracy was widely, but most likely erroneously, seen as resolved.[47] Likewise, piracy was also not considered to be a problem when the UNCLOS was adopted, so the existing provisions were incorporated verbatim without serious deliberation of whether the law was a proper reflection of reality.[48] The language that resulted from this limited attempt to understand modern piracy not only fails to accommodate modern forms of piracy textually, but the interpretation of the text has caused considerable debate. Commentators have been unable to agree on the parameters and limitations of the four elements despite their straightforward appearance at first glance.[49]

In order for states to have the jurisdiction to capture and prosecute under the powers enumerated in

44 Michael Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations' (2007) 40 Vanderbilt Journal of Transnational Law 1, 17 (citing Restatement (Third) of Foreign Relations Law of the United States part V, introductory notes: 'Where the Convention reflects customary law, this Restatement generally uses the language of the Convention as a "blackletter" statement of international law'); Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 30; James Anderson, 'A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea Piracy' (2013) 44 Journal of Maritime Law and Commerce 47, 51; Ved P Nanda, 'Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace' (2011) 39 Denver Journal of International Law and Policy 177, 181.

45 Alfred P Rubin, *The Law of Piracy* (2nd edn, Transnational Publisher Inc 1998) 341; see L Oppenheim, *International Law* (Longmans, Green and Co 1912) 341, for a survey of the conflicting definitions of piracy under customary international law.

46 Harvard Draft (n 42) 769.

47 HE Joséluis Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 The International Journal of Marine and Coastal Law 363, 364; Davidson (n 12) 5 (calling it a 'negligible problem'); Philip Gosse, *The History of Piracy* (Tudor Publishing Company 1934) 297-98 (arguing that it has been permanently resolved); Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books 2009) 24 (arguing it was purely academic).

48 Barry Hart Dubner, *The Law of International Sea Piracy* (Springer 1980) 3, 6; Eugene Kantorovich, 'International Legal Response to Piracy of the Coast of Somalia' (2009) 13(2) ASIL Insights <www.asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia> accessed 27 June 2016. See also Davidson (n 12) 5.

49 See generally Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea* (OUP 2011); John E Noyes, 'An Introduction to the International Law of Piracy' (1990) 21 California Western International Law Journal 105; Samuel Pyeatt Menefee, 'The New "Jamaica Discipline": Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea' (1990) 6 Connecticut Journal of International Law 127; Yvonne M Dutton, 'Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?' (2012) 86 Tulane Law Review 1111; see generally Malvina Halberstam, 'Terrorism on the High Seas : The Achille Lauro , Piracy and the IMO Convention on Maritime Safety' (1988) 82 The American Journal of International Law 269; Bahar (n 44); Jesus (n 47); Samuel Pyeatt Menefee, 'The Case of the Castle John, or Greenbeard the Pirates?: Environmentalism, Piracy, and the Development of International Law' (1993) 24 California Western International Law Journal 1; Jonathan Bellish, 'A High Seas Requirement for Inciters and Intentional Facilitators of Piracy Jure Gentium and Its (Lack of) Implications for Impunity' (2013) 15 San Diego International Law Journal 115. These debates, except whether piracy can be committed on land, have not been relevant to the recent Somali pirate attacks because they fall squarely within the definition of the UNCLOS. Douglas Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options' (2012) 10 Journal of International Criminal Justice 767, 772-73.

Article 105 UNCLOS, each element in Article 101 - the provision that defines the conditions under which states can capture and prosecute suspected pirates and not the substantive criminal law for adjudication - must be satisfied.[50] This jurisdictional purpose was clear in the predecessor Harvard Draft, in which Article 14(2) states that 'the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.'[51] A textual analysis also shows that the UNCLOS defines piracy but does not expressly prohibit it or specify any punishment, suggesting that it is not a substantive criminal statute.[52] The jurisdictional power in Article 105 UNCLOS is derived from the concept of universal jurisdiction. Piracy has historically been treated as a crime against humanity and pirates were considered *hostis humani generis*, which justifies universal jurisdiction to prosecute regardless of any direct connection between the prosecuting state and the attack.[53] As universal jurisdiction is an exceptional power, it is important that the definition of piracy under public international law is clear and systematic so as to uphold the rule of law principle of legality under criminal law, according to which suspects can only be tried for clearly defined crimes and punishment.[54]

As it stands, there is no consensus on the various elements of Article 101 UNCLOS because of the historical lack of due consideration as well as the development of new forms of piracy that it never contemplated. The potential exists for states to use the contested UNCLOS definition to determine whether they have jurisdiction, which can lead to accusations of arbitrariness due to the possible use of disparate interpretations by different states.[55] A uniform interpretation would resolve some of the disagreements. State interests in protecting sovereignty would be met because there would be agreement as to when universal jurisdiction can be claimed, and potential pirates would also be on notice as to the specific conditions under which they would subject themselves to universal jurisdiction,

50 Geiss and Petrig (n 49) 141-42.

51 Harvard Draft (n 42) 852. Cf Roger L Phillips, 'Pirate Accessory Liability: Developing a Modern Legal Regime Governing Incitement and Intentional Facilitation of Maritime Piracy' (2013) 25 Florida Journal of International Law 271, 290, citing M Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff 2003) 122, 149, which states: 'Piracy has been recognised as an international crime under customary international law since the 1600s, and has continued to be deemed a customary as well as a conventional international crime.'

52 Geiss and Petrig (n 49) 140.

53 See eg Bento (n 10) 122; Lawrence J Kahn, 'Pirates, Rovers, and Thieves: New Problems with an Old Enemy' (1996) 20 Tulane Maritime Law Journal 293, 322-23; Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (n 15) 402; Dutton, 'Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?' (n 49) 1119-21. Jill Harrelson, 'Blackbeard Meets Blackwater: An Analysis of International Conventions That Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry' (2010) 25 American University International Law Review 283, 291. In addition, Goodwin gives other rationales traditionally put forth for universal jurisdiction: statelessness of the pirates, heinousness of the acts, need for uniform punishment, narrowly-defined offence, and that piracy directly threatens or harms many nations: Joshua Michael Goodwin, 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part' (2006) 39 Vanderbilt Journal of Transnational Law 973, 987-1002.

54 This is the maxim of *nullum crimen sine lege stricta.* Paola Gaeta, 'The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 602.

55 Madeline H Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks' (2001) 35 New England Law Review 337, 352.

satisfying the need for non-arbitrariness and respect for the principle of legality. Thus, having a uniform definition of piracy in the realm of public international law to delimit jurisdiction is important to protect the interests of both states and suspects.

3.2 Domestic criminal law

The definition of piracy in domestic criminal law is the substantive provision applied to the prosecution of suspects. As a general rule, piracy suspects are not prosecuted by the arresting state, instead they are often transferred to third states for investigation and prosecution under that state's domestic criminal law. This is because there are no international or regional tribunals with jurisdiction over piracy[56] and the UNCLOS cannot serve as the substantive law unless a state has explicitly incorporated it into its domestic legislation.[57]

It is impossible to examine all domestic criminal laws on piracy in the confines of this article, so this section limits the discussion to the relevant laws of Kenya, the Seychelles and Mauritius, which have all been at the forefront of domestic piracy jurisprudence in recent years due to recent amendments to their piracy statutes and the heavy caseloads of their courts. The majority of prosecutions for piracy have taken place in these jurisdictions because they have signed memoranda of understanding with Western naval powers, including the United States, the United Kingdom and the EU, which sanction the transfer of piracy suspects for prosecution, funded by the transferring states in exchange.[58] Discussing these three jurisdictions together is also appropriate because their geographic

56 The African Court of Justice and Human Rights established by the African Union has been conferred jurisdiction over piracy but the protocol is not in force yet, so it is unclear whether it will be able to effectively prosecute pirates in practice: Art 14 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014). Dutton argues that the ICC should have jurisdiction over piracy: Yvonne M Dutton, 'Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court' (2010) 11 Chicago Journal of International Law 197, 229-35. Loverdou advocates for a special international tribunal with jurisdiction over piracy: Loverdou (n 19) 16. Boren proposes that the International Tribunal for the Law of the Sea, established by the UNCLOS but currently without criminal jurisdiction, be granted jursidiction over piracy: Justin Boren, 'Negligent Prosecution: Why Pirates Are Wreaking Havoc on International Trade and How to Stop It' (2014) 16 European Journal of Law Reform 19. Guilfoyle argues that such international tribunals are unworkable and advocates for prosecution in national courts with possible dedicated piracy chambers: Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options' (n 49) 794-96. For an overview of different approaches to the prosecution of Somali-based piracy, see Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects*, (Brill Nijhoff 2014) 24-28.

57 Both the US (18 US Code § 1651) and UK (Merchant Shipping and Maritime Security Act 1997 s 26) define piracy in domestic criminal law as that of the 'law of nations' so the definitions are identical to that of the UNCLOS, which reflects customary international law.

58 Milena Sterio, 'Piracy off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius' (2012) 4 Amsterdam Law Forum 104, 112, 115, 117; Dutton, 'Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court' (n 56) 231; Stephen Spark, 'Maritime Court Opens in Seychelles (*IHS Fairplay*, 13 April 2015) <http://fairplay.ihs.com/article/17468/maritime-court-opens-seychelles> accessed 27 February 2016; Frederick Lorenz and Laura Eshback, 'Transfer of Suspected and Convicted Pirates' in Michael P Scharf, Michael Newton and Milena Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015) 163. For an extensive discussion of transfer and transfer agreements, see generally Petrig, *Human Rights and Law Enforcement at Sea* (n 56).

proximity to Somalia disproportionately subjects them to the consequences of Somali piracy, such as the increase in the cost of trade[59] and adverse effects on the tourism and fishing industries.[60]

In Kenya, the law on piracy was amended by the 2009 Merchant Shipping Act, which offers a definition of piracy that is closely aligned with the definition in the UNCLOS.[61] Significantly, the Kenyan statute not only forbids *illegal* acts of violence or detention as the UNCLOS does, but it goes one step further and condemns *all* acts of violence or detention.[62] Although this language is not without precedent it is unclear why the Kenyan government decided to stray from the UNCLOS definition by removing the modifier for violence and detention.[63] Commentators have also largely failed to speculate on this difference.[64]

The domestic law of the Seychelles was also recently amended. In 2010, section 65 of the Penal Code was updated to define piracy similarly to the UNCLOS, yet one major difference is that Article 101 UNCLOS begins with 'Piracy consists of any of the following acts…' whereas as the Seychellois pro-

59 The World Bank Regional Vice-Presidency for Africa, 'The Pirates of Somalia: Ending the Threat, Rebuilding a Nation' (International Bank for Reconstruction and Development/The World Bank 2013) 22-27.

60 ibid 35-47.

61 Section 369(1) states: 'piracy' means—

(a) any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed—

(i) against another ship or aircraft, or against persons or property on board such ship or aircraft; or

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State

Sections (b) and (c) are identical to the UNCLOS provision.

62 However, this distinction is retained in the statute's definition of armed robbery against ships, also in Section 369(1), which states: '"armed robbery against ships" means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against persons or property on board such a ship, within territorial waters or waters under Kenyan's jurisdiction.'

63 Eg, Australia's Crimes Act 1914, as amended in 1992, also defines piracy as an act of violence without the 'illegal' descriptor. On the descriptor 'illegal', see Petrig, 'Piracy' (n 7) 846.

64 See James Thuo Gathii, 'Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law' (2009) 31 Loyola of Los Angeles Journal of International and Comparative Law 363, 382; Emmanuel Obuah, 'Outsourcing the Prosecution of Somali Pirates to Kenya: A Failure of International Law, or a Response to Domestic Politics of Stats?' (2012) 21 African Security Review 40; J Ashley Roach, 'Agora: Piracy Prosecutions: Countering Piracy off Somalia: International Law and International Institution' (2010) 104 The American Journal of International Law 397, 429 (stating that 'Section 369 of the Merchant Shipping Act adopts the definition of piracy contained in Article 101 of the LOS Convention'). On Kenyan Law, see also Paul Musili Wambua, 'The Legal Framework for Adjudication of Piracy Cases in Kenya: Review of the Jurisdictional and Procedural Challenges and the Institutional Capacity' in Anna Petrig (ed), *Sea Piracy Law: Selected National Legal Frameworks and Regional Legislative Approaches* (Duncker & Humblot 2010).

vision uses the language '"Piracy" includes…'.[65] Though not yet addressed by the courts, it is arguable that using the term 'includes' gives the code a more expansive definition and may be interpreted to encompass additional offences that are yet to be defined since the list is not exhaustive.[66]

In Mauritius, the Piracy and Maritime Violence Act 2011, which took effect in 2012, has a definition of piracy that is also only slightly different from that of the UNCLOS.[67] However, a 2013 case from the Intermediate Court of Mauritius shows that it is possible for domestic courts to deviate from the internationally accepted interpretation even when ruling on a provision with nearly identical wording.[68] The court acquitted the suspects because the attack did not meet the Mauritian high seas requirement in its definition of piracy.[69] Although Article 2 of the Act states that the high seas 'has the same meaning as in UNCLOS; and … includes the EEZ [exclusive economic zone]', the judge strayed from the plain language of the law and found that the EEZ in Mauritian law only refers to the EEZ of Mauritius and not that of any other state, including the EEZ of Somalia where the attack took place. Hence, the attack did not occur on the high seas and was therefore not piracy per the court's own unusual and limiting definition of the EEZ, which clearly contradicts the definition in the UNCLOS and international understanding. Fortunately, the Supreme Court overturned this decision in December 2015 and found the EEZ of all states, not just the Mauritian EEZ, to be part of the high seas.[70]

The Mauritian case suggests that jurisdictions that have recently adjudicated piracy cases have modified their domestic criminal laws to conform with the UNCLOS in order to achieve uniformity. However, the lack of complete uniformity due to slight disparities raises potential problems in other jurisdictions. In Kenya, for example, the difference in wording may not be of concern because even though the piracy legislation omits the 'illegal' modifier, a suspect can still argue that the act of violence was justified and therefore not illegal per the self-defence provision in Kenya's criminal law.[71]

---

65 Penal Code s 65(4): For the purposes of this section 'piracy' includes-

(a) any illegal act 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 a ship or aircraft;

(ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; or

(c) any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.

66 Public International Law & Policy Group, 'Piracy Definitions in Domestic and Regional Systems: Legal Memorandum' (March 2013) 17.

67 Piracy and Maritime Violence Act 2011 s 3(3). This section begins with the words '"act of piracy" means…', which is different from the wording in the UNCLOS and the Seychellois law. As the word 'means' suggests a set definition, piracy has a narrower conception under Mauritian law compared to the other jurisdictions.

68 *Police v Mohamed Ali Abdeoulkader and Ors,* Cause No 850/2013 [2014] INT 311.

69 ibid paras 93-100.

70 *Director of Public Prosecutions v Ali Abeoulkader Mohamed & Ors* [2015] SCJ 452.

71 Laws of Kenya, The Penal Code Cap 63 s 17.

While in the Seychelles, there is the possibility that acts not considered piracy under the UNCLOS could be considered piracy under domestic legislation due to the use of 'includes' in the latter. The risk of outlier opinions was momentarily realised in Mauritius, where the Intermediate Court's interpretation deviated from international consensus despite the domestic law's nearly identical wording with the UNCLOS. Had the same case been tried in Kenya or the Seychelles, the suspects most likely would have been convicted at the lower court.[72]

This lack of uniformity raises the possibility that an attack at sea would be considered piracy in one jurisdiction but not in another, despite the fact that the wordings of the criminal statutes are substantially similar. This unequal treatment could potentially jeopardise the procedural rights of suspected pirates[73] because the likelihood of conviction largely depends on the legislation of the state to which the suspects are sent. This element of arbitrariness[74] is a threat to the rule of law because the potential criminal exposure of the suspects is not well-defined until after their capture, at which point the location of prosecution and the corresponding substantive criminal laws to be used are determined.[75] The arbitrariness here lies not in the laws of each particular jurisdiction but in the fact that the repercussions faced by the suspects are unclear, as the decision of where to prosecute may be directly linked to the likelihood of conviction.

When the definition of piracy varies between states, this could potentially lead to the problem of forum shopping, where, in theory, seizing states would choose a jurisdiction that has more favourable laws in terms of the prospect of conviction for a particular case.[76] At the same time, suspects may also try to seek a jurisdiction that would be more beneficial to them, which would most likely be a different jurisdiction due to the conflicting interests between the state and the individual.[77] The problem is further complicated by the issue of sentencing, as the location of prosecution is directly related to the severity of the sentence, with Seychellois sentences being on average 50 per cent longer than

72 Milena Sterio, 'Mauritius Court Acquits Twelve Somali Piracy Suspects' (*Communis Hostis Omnium: Navigating the Murky Legal Waters of Maritime Piracy*, 12 November 2014) <http://piracy-law.com/2014/11/12/mauritius-court-acquits-twelve-somali-piracy-suspects/> accessed 27 February 2016.

73 Maggie Gardner, 'Piracy Prosecutions in National Courts' (2012) 10 Journal of International Criminal Justice 797, 798.

74 See W Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006) 222-23.

75 Goodwin (n 53) 1005. Luban disagrees and argues that the principle of legality is 'peripheral' in international criminal law: David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 581-87.

76 Mathilda Twomey, 'Muddying the Waters of Maritime Piracy or Developing the Customary Law of Piracy? Somali Piracy and Seychelles' [2006] CLJP 137, 172.

77 In practice, there are no reports that seizing states explicitly take into account the domestic laws for prosecution and sentencing when deciding where to send suspects or that suspects have any input on where they would like to be prosecuted. Furthermore, states have not been vying to prosecute suspects, which led to the practice of catch-and-release by seizing states due to their inability to find a proper forum. For a discussion of the practice of catch-and-release, see Petrig, *Human Rights and Law Enforcement at Sea* (n 56) 32-39.

those in Kenya.[78] Having a uniform definition of piracy and consistency in sentencing in the domestic criminal law of states, or horizontal uniformity, would alleviate the problem to a certain extent.[79]

A uniform definition between domestic criminal law and the UNCLOS, or vertical uniformity, is also important. This way, the scope of jurisdiction would be the same as the scope of the applicable substantive criminal law, making the law precise and avoiding the situation where a suspect is arrested based on a more expansive definition of piracy but is easily acquitted based on a narrower definition in domestic criminal law. Conversely, it would also avoid the situation where an act can clearly lead to conviction under domestic law but cannot be prosecuted because of the lack of universal jurisdiction due to a narrower definition in public international law. This uniformity would uphold due process for the suspects, which in this case is the avoidance of arbitrary arrests that could never lead to conviction, and also ensure that piratical acts can be punished.

3.3 Commercial law

Defining maritime piracy in commercial law is necessary to allocate liability amongst private parties in the aftermath of pirate attacks. More specifically, the definition of maritime piracy in commercial law can be divided into two purposes. First, it is used in carriage contracts, which includes charterparties and bills of lading, to apportion the rights and responsibilities of commercial parties - charterers, shipowners and cargo owners - in cases of loss resulting from piracy attacks. Second, in marine insurance law, it is used to determine whether an event is an insured peril that would be covered by an insurance policy. These definitions are generally broader than those under the UNCLOS and domestic criminal law, and according to at least one commentator, '[a]nything that falls within the UNCLOS definition of piracy also falls within the contractual definition.'[80]

Piracy is not expressly defined for the purposes of charterparties and bills of lading. Charterparties are contracts between the shipowner and the charterer for the hiring of ships. Piracy is included as a

78 Eugene Kontorovich, 'The Penalties for Piracy: An Empirical Study of National Prosecution of International Crime' (2012) 11. Kontorovich also notes that the average sentence is 10.8 years in Europe, 12.8 years in Asia, and a mandatory life sentence in the US with an average of 34 years for plea bargains, which have been rare. Eugene Kontorovich, 'The Problem of Pirate Punishment' in Michael P Scharf, Michael Newton and Milena Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015).

79 Fletcher raises the possibility of successive states prosecuting suspects when earlier prosecutions lead to acquittals for crimes with universal jurisdiction because no concept of double jeopardy exists in international law. With a uniform definition, this potential problem would be minimised because the law in every jurisdiction would be identical, which means that in general, there would be more consistency. See George P Fletcher, 'Against Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 580, 582.

80 Paul Todd, *Maritime Fraud and Piracy* (Lloyd's List 2010) 20. There may be exceptions. Zou argues that the level of violence needed for UNCLOS is minimal, while it is well-established by case law that piracy in commercial law requires force. Keyuan Zou, 'New Developments in the International Law of Piracy' (2009) 8 Chinese Journal of International Law 323, 325.

war risk in the standard charterparty clauses CONWARTIME 1993[81] and VOYWAR 1993[82] drafted by the Baltic and International Maritime Council (BIMCO). It was not until the second update in 2013 that piracy was expressly defined as including 'violent robbery' and 'capture/seizure'.[83] BIMCO and the International Association of Independent Tanker Owners (INTERTANKO) also introduced specific piracy model clauses for time and voyage charters in 2009, which were updated in 2013.[84] While INTERTANKO did not define the term, the BIMCO clauses define piracy as including 'acts of violent robbery' to expressly include politically-motivated acts occurring in Nigerian waters.[85] Bill of lading contracts, which are issued by the carrier as receipts for the received cargo, serve as the 'prima facie evidence of the terms of the contract of carriage' and negotiable instruments of title of the goods.[86] While piracy is mentioned as an exception to the liability of the carrier in the Rotterdam Rules, a recent international convention governing bill of lading contracts, it is undefined in the treaty.[87]

Case law does not offer assistance in defining piracy in carriage contracts, as courts have not expressly defined piracy.[88] In a recent charterparty case, the court noted that the parties considered a seizure, or forcible possession that is not carried out by an authority, a piracy event.[89] However, the court did not consider promulgating an overarching definition of piracy as the parties agreed that a pirate attack occurred in this case.[90] It has been suggested that the dearth of case law on the definition of piracy is due to the fact that 'a piracy event will normally in any case fall within a wider exception' so it would be unnecessary to determine whether an act is in fact piracy if the resulting effect would

81 BIMCO Standard War Risks Clause for Time Charters, 1993 <www.bimco.org/~/media/Chartering/Special_Circulars/SC1993_07_28.ashx> accessed 29 May 2016.

82 ibid.

83 See eg BIMCO War Risks Clause for Time Chartering (CONWARTIME 2013) <www.bimco.org/en/Chartering/Clauses_and_Documents/Clauses/War_Risks_Clause_for_Time_Charters.aspx> accessed 29 May 2016.

84 The amendments incorporated the ruling in *Pacific Basin IHX Limited v Bulkhandling Handymax AS (the 'Triton Lark')* [2011] EWHC 2862 (Comm) in relation to gauging the risk of piracy.

85 BIMCO Special Circular No 2, 'BIMCO Piracy Clause for Single Voyage Charter Parties' (2009) 2.

86 John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 5-6.

87 Art 17(3)(c) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008) UN Doc A/RES/64/122. The Convention was signed in 2009 but is not yet in force. Piracy was not mentioned in its predecessor conventions.

88 Todd (n 80) 11. See also Aref Fakhry, 'Piracy Across Maritime Law: Is There a Problem of Definition?' in Aldo Chircop and others (eds), *The Regulation of International Shipping: International and Comparative Perspectives: Essays in Honor of Edgar Gold* (Martinus Nijhoff Publishers 2012) 114.

89 *Osmium Shipping Corporation v Cargill international SA (the 'Captain Stefanos') [2012]* EWHC 571.

90 See eg *Trafigura Beheer BV v Navigazione Montanari S.p.A.* [2015] EWCA Civ 91, which ruled that cargo theft by pirates is not an in-transit loss; *Taokas Navigation SA v Komrowski Bulk Shipping KG (GmbH & Co) (the 'Paiwan Wisdom')* [2012] EWHC 1888, which ruled that the shipowner could rely on the CONWARTIME 2004 clause to refuse to proceed on a voyage to a high piracy risk area; *Osmium Shipping Corp v Cargill International SA (the 'Captain Stefanos')* [2012] EWHC 571 (Comm) which found that seizure of the vessel by pirates is an off-hire event. The definition of piracy was not in dispute in these cases.

be the same.[91] Nonetheless, guidance from academia on the definition exists, as Carver defines piracy as 'forcible robbery at sea, whether committed by marauders from outside the ship, or by mariners or passengers within it'.[92]

In the context of marine insurance, whether an event can be considered piracy is central to the determination of whether a loss suffered by the insured will be covered under the insurance policy. Legislation and case law offer some guidance on the definition. For instance, Schedule 1 of the Marine Insurance Act 1906 (MIA) defines piracy as follows: '"pirates" includes passengers who mutiny and rioters who attack the ship from the shore.' This is consistent with the case law decided prior to the enactment of MIA. Unlike under the UNCLOS,[93] passenger mutinies have been considered piracy under marine insurance law,[94] as has crew mutiny in at least one case.[95] Moreover, an English case stands for the assertion that piratical attacks can come from the shore, which differs from the two-ship and high seas requirements found in the UNCLOS. A New York State court, however, came to a different decision in regard to attacks not taking place on the high seas and found that a tugboat stolen from a pier was not considered piracy because of its location in a harbour.[96] This has been contradicted by more recent English case law finding that there is no high seas requirement as acts in a port could constitute piracy.[97]

Rather than formulating an exact definition that must be met strictly, piracy in marine insurance law retains a more flexible position. In *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited*,[98] Judge Pickford stated:

> I am not at all sure that what might be piracy in international law is necessarily piracy within the meaning of the term in a policy of insurance. One has to look at what is the natural and clear meaning of the word 'pirate' in a document used by business men for business purposes; and I think that, looking at it in that way, one must attach to it a more popular meaning, the meaning that would be given to it by ordinary persons, rather than the meaning to which it may be extended by writers on

91 Todd (n 80) 11.

92 Raoul Colinvaux (ed), *Carver's Carriage by Sea: British Shipping Laws* (13th edn, Stevens & Sons 1982) para 235. This definition, which appeared verbatim in earlier versions of the text, was adopted by Lord Justice Kennedy in *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited* [1909] 1 KB 785. It should be noted that *Carver's Carriage by Sea* has not been updated since 1982, so it is unclear whether recent developments would have any effect on the definition of piracy used in this authoritative text.

93 See above (n 29).

94 *Palmer v Naylor* (1854) 10 Exch 382, 388; *Kleinwort v Shepard* (1859) 1 El & El 447 supports the same assertion.

95 *Brown v Smith,* 1 Dow 349.

96 *Nesbitt v Lushington* (1792) 4 TR 783; *Brittania Shipping Corp v Globe & Rutgers Fire Insurance Co*, 244 NYS 720 (NY Sup Ct 1930).

97 *Bayswater Carriers Ptd Ltd v QBE Insurance (International) Ptd* [2005] 1 SLR 69; see also *Andreas Lemos* [1982] 2 Lloyd's Rep 483.

98 [1909] 1 KB 785.

international law.[99]

Thus, there is no fixed definition of piracy but rather one that is contextual and dependent on the business understanding in the industry, which has been found to require force at the time the act was committed.[100]

Another contentious issue is whether piracy is similarly defined in carriage contracts and marine insurance. Todd argues that it is reasonable to assume that the definition of piracy in the MIA would also apply to carriage cases because 'the 1906 Act was intended merely as a codification of the pre-existing contractual position, which may well have been the same for carriage as for insurance'.[101] It has, however, been suggested that due to the nature of marine insurance contracts, the definition it uses is narrower than in carriage cases because whether a loss is covered by an insurance policy rests on a strict determination of 'whether a particular activity is piratical, war-like, terrorist, malicious, or merely violent'.[102] Nevertheless, it can generally be said that piracy is defined by the meaning attributed to it by the ordinary businessperson using regular contract interpretation doctrines, namely reasonable expectations, usage of trade and *contra proferentem*.[103]

As the above shows, unlike piracy in public international law or domestic criminal law, piracy in commercial law is defined with a degree of flexibility. Though it appears that the definition is not often expressly stated, there is a general understanding of the term within the shipping and marine insurance industries, which is evidenced in part by the lack of legal disputes on the definition.[104] The current definition of piracy in commercial law serves its purpose of adjudicating the rights of commercial parties. The concerns regarding arbitrariness that could affect procedural fairness or issues concerning state sovereignty that exist with regard to the definitions in public international law and domestic criminal law do not exist under commercial law where the issue of whether a specific event qualifies as piracy only affects the rights of the contractual parties. There is no justification to harmonise the commercial law definition with the international and criminal law definitions, as narrowing the definition for the sake of uniformity would be contrary to the ordinary business understanding of piracy in the industry and would require an overhaul of industry practices.

---

99 ibid 790.

100 *Andreas Lemos* [1982] 2 Lloyd's Rep 483, 491; see also *Shell International Petroleum Co Ltd v Caryl Antony Vaughan Gibbs* [1982] 1 Lloyd's Rep 369.

101 Todd (n 80) 12. See also Keith Michel, 'Piracy and Carriage of Goods by Sea' in Douglas Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing 2013) 299.

102 Richard Williams, 'The Effect of Maritime Violence on Contracts of Carriage by Sea' (2004) 10 Journal of International Maritime Law 343, 344.

103 Passman (n 6) 62-66.

104 It is conceded that it is possible that commercial arbitral tribunals have considered the definition of piracy in marine insurance and carriage contract cases, but as they are confidential, there is no empirical method to determine the number and frequency of such disputes.

3.4 Piracy prevention

In recent years, in addition to updating marine insurance and charterparty clauses to include piracy, the shipping industry has developed other responses to the growing problem of piracy.[105] These include participating in the Working Groups of the Contact Group on Piracy off the Coast of Somalia (*CGPCS*), the increased use of private armed security guards and the establishment of guidelines regulating their use. Unlike the purposes of the piracy laws in public international law, domestic criminal law and commercial law, these efforts are intended to prevent piracy from happening instead of addressing the consequences of attacks.

One of the most widely used instruments of piracy prevention developed by the shipping industry is the 2011 Best Management Practices for Protection Against Somalia Based Piracy, version 4 (BMP4).[106] BMP4 follows three previous versions, which were all developed through cooperation between the public and private sectors, where the drafts by shipping industry stakeholders were finalised and endorsed by the IMO as well as the *CGPCS*.[107] The main purpose of BMP4 is 'to assist ships to avoid, deter or delay piracy attacks' in the High Risk Area associated with Somali piracy.[108]

BMP4 can be considered soft law, which, like maritime piracy, has multiple definitions.[109] Bonell defines soft law as 'instruments of a normative nature with no legally binding force, and which are applied only through voluntary acceptance'.[110] Similarly, Guzman and Meyer define it as 'those non-binding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct'.[111] Positivist scholars view the difference between hard law and soft law as a binary and some do not consider the latter law at all.[112] Guzman and Meyer posit that it is better to view soft law on a continuum that ranges from the purely political to binding treaties.[113] Another way to define soft law is through the three dimensions

105 Other responses, such as UN Security Council Resolutions 1816 and 1838 passed in 2008, which increased naval control in East Africa, have also been devised, but the focus here is on responses by the shipping industry and not by the UN or other governmental or intergovernmental actors.

106 BMP4: Best Management Practices for Protection Against Somalia Based Piracy: Suggested Planning and Operational Practices for Ship Operators, and Masters of Ships Transiting the High Risk Area <www.imo.org/en/MediaCentre/HotTopics/piracy/Documents/1339.pdf> accessed 15 June 2016 (BMP4).

107 Christian Bueger, 'Learning from Piracy: Future Challenges of Maritime Security Governance' (2015) 1 Global Affairs 37, 40.

108 'BMP4: Best Management Practices for Protection against Somalia Based Piracy' (2011) 1. 'For the purpose of BMP the High Risk Area is an area bounded by Suez and the Strait of Hormuz to the North, 10°S and 78°E. (Note - the UKMTO Voluntary Reporting Area is slightly larger as it includes the Arabian Gulf):' ibid 4.

109 Anthony Aust, *Handbook of International Law* (2nd edn, CUP 2010) 11.

110 Michael Joachim Bonell, 'Soft Law and Party Autonomy: The Case of the UNIDROIT Principles' (2005) 51 Loyola Law Review 229, 229 (citing Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 111-13).

111 Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2 Journal of Legal Analysis 171, 174.

112 See eg Prosper Weil, 'Towards a Relative Normativity in International Law' (1983) 77 American Journal of International Law 413.

113 Guzman and Meyer (n 111) 173.

of obligation, precision, and delegation where 'each of these dimensions is a matter of degree and gradation, not a rigid dichotomy, and each can vary independently'.[114] In any event, soft law has no legal enforcement mechanism in and of itself, but 'may acquire a force equivalent to legally-binding rules through acceptance as market requirements'.[115] BMP4 is followed by the shipping industry though self-compliance or mandated through insurance policies.[116] As governmental or state involvement in drafting and mandating the use of BMP4 has been minimal and indirect (or entirely absent) and compliance is dependent on the commitment of the shipping industry, it is clearly not law at all or very soft law depending on whether one recognises the existence of soft law.

The definition of piracy in BMP4 is expansive and 'includes all acts of violence against ships, her crew and cargo'.[117] In addition to noting that the definition in Article 101 UNCLOS is insufficient, BMP4 also lists multipronged guidelines as to what should be considered piracy attacks and suspicious activities 'to provide clear, practical, working guidance to the Industry to enable accurate and consistent assessment of suspicious activity and piracy attacks'.[118] Along with this expansive definition of piracy, it contains expansive prevention recommendations for shipowners that include registering with the Maritime Security Centre Horn of Africa (MSCHOA),[119] reporting the ship position to the United Kingdom Maritime Trade Operations (UKMTO) when entering piracy-prone waters designated as the High Risk Area,[120] planning by the company and shipmaster before and during transit through the High Risk Area[121] and implementing the Ship Protection Measures, which include strengthening the ship's defence through physical barriers and vigilant watchkeeping.[122]

BMP4 has retained a flexible definition of piracy as a response to the inflexibility of its predecessors, which had the problems of overgeneralising the operations of pirates and failing to understand that the tactics employed by pirates evolve in response to counter anti-piracy efforts.[123] Significantly, neither BMP1 nor BMP2 contained an express definition of piracy. Starting with BMP2, however, more

114 Kenneth W Abbott and others, 'The Concept of Legalization' (2000) 54 International Organization 401, 401-02.

115 Naomi Roht-Arriaza, "Soft Law' in a 'Hybrid' Organization: The International Organization for Standardization' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 263-64.

116 Bueger (n 107) 40. In *Suez Fortune Investments Ltd v Talbot Underwriting Ltd (the 'Brillante Virtuoso')* [2015] EWHC 42 (Comm), the insurer claimed that the insured breached its warranty by not following the BMP, an accusation the insured denied. This is the only mention of the BMP in English case law so far.

117 BMP4 (n 106) 1: 'This includes armed robbery and attempts to board and take control of the ship, wherever this may take place. Somali pirates have, to date, sought to hijack a vessel, her cargo and crew and hold them until a ransom demand is paid.'

118 ibid 57.

119 ibid v.

120 ibid.

121 ibid 13-22.

122 ibid 23-24, 27-31.

123 Stig Jarle Hansen, 'The Evolution of Best Management Practices in the Civil Maritime Sector' (2012) 35 Studies in Conflict & Terrorism 562, 566.

detailed protocols and recommendations were included.[124] There have been no successful hijackings of ships off the coast of Somalia since 2012,[125] yet it is impossible to determine whether this can be attributed to shipmasters adhering to BMP4 or other measures, such as the hiring of armed security personnel. Though there is no empirical research on the efficacy of BMP4, one of the reasons it may be effective is the combination of its breadth and depth. The breadth is demonstrated by its recommendations of a wide range of preventive mechanisms, while the depth is revealed by the details of each recommendation. The depth is important because it prevents the breadth of the instrument from making it too vague to be useful in practice. Together, they address the inefficacy of the previous BMP versions.

To achieve this breadth and depth, the definition of the problem to which it responds must be equally expansive. Here, a precise or narrow definition is counterproductive for the purposes of prevention. A ship moving at 18 knots, a BMP4 recommendation,[126] would potentially prevent an attack regardless of whether it were for private ends or public ends. Similarly, a ship equipped with razor wire, one of the BMP4 ship-hardening recommendations, would potentially thwart intruders from boarding regardless of whether the ship were in territorial waters or on the high seas.[127] The recommendations must be able to thwart various forms of attacks, and if the definition were narrow, the recommendations in response would also be narrow and unable to serve its purpose. As long as the recommendations do not jeopardise the rights of the suspects, an expansive definition of the problem better serves the purpose of piracy prevention.[128]

For piracy prevention, the risk of jeopardising the rule of law does not exist as it does for jurisdictional and prosecutorial purposes. From the perspective of prevention, a thwarted attack is a thwarted attack, and it would be counterproductive to limit prevention to some forms of attacks and exclude others.[129] Being over-inclusive in defining piracy would lead to being over-inclusive in devising precautionary measures, which is desired. In short, to achieve the purposes of piracy prevention, the definition of piracy to which it responds must be expansive and flexible.

---

124 ibid.

125 Gerry Northwood, 'Industry Viewpoint: Somali Piracy Suppressed But Not Eradicated' (*Lloyd's List*, 1 December 2015) <www.lloydslist.com/ll/sector/ship-operations/article514827.ece> accessed 29 May 2016.

126 BMP4 (n 106) 7.

127 ibid 28.

128 There is soft law governing the use of privately contracted armed security personnel and their rules of engagement with suspected pirates such as 'The 100 Series Rules: International Model Set of Maritime Rules for the Use of Force (RUF)' <http://100seriesrules.com/uploads/20130503-100_Series_Rules_for_the_Use_of_Force.pdf> accessed 29 May 2016. As the provisions of this instrument do potentially infringe upon the rights of others, it is submitted that the piracy definition needs to be narrower in this context. This, however, is outside the scope of this article.

129 In the same vein, Zou suggests that it may be unimportant to differentiate between piracy and terrorism at sea because they are both international crimes in the maritime domain that can be addressed by a single regime. Zou, 'New Developments in the International Law of Piracy' (n 80) 344.

4. Conclusion

This article has presented the varying definitions of piracy for the different areas of law. It has also shown that because of the different purposes the definitions serve, it is undesirable to formulate a uniform definition across the board. For the purposes of jurisdiction and prosecution, a uniform definition should be sought to create predictability, ensure the principle of legality and maintain the rule of law. This definition would be narrower than what businesspersons contemplate when entering into commercial contracts, and this disparity is acceptable because commercial contracts do not trigger rule of law concerns. Likewise, for the purpose of prevention, there is no risk to the rights of third parties, so an over-inclusive definition that deters all attacks is advantageous for the safety of individual ships and the stability of the shipping industry.

For the respective purposes to be achieved, it is imperative that no overarching uniform definition of piracy replaces the multitude of piracies, but this is not to say that some definitions of piracy should not be modified. Indeed, there is a strong argument to be made that the definition in public international law should be expanded to address the various forms of modern piracy that the drafters of the Harvard Draft and UNCLOS never contemplated.[130] If this were to happen, domestic criminal law must also be updated to ensure consistency between the laws conferring jurisdiction and substantive criminal law. Nevertheless, care should be taken to ensure that this convergence of definitions does not lead to complete uniformity, which would be counterproductive to the purposes of the definitions in commercial law and prevention. Even though advocating for a uniform definition of piracy may be a laudable goal, any attempt at uniformity should carefully consider the different purposes of the definitions and this goal should not be sought purely for its own sake.

130 Bento suggests removing the attacker's motivation and the two-ship requirement from consideration and recognising acts in territorial waters, at least under certain circumstances. He also advocates for the criminalisation of inchoate offenses. Bento (n 10) 143.

ISSN 2464-9724

Maritime Safety and Security Law Journal

2017
Issue 3

Maritime Safety and Security Law Journal

The Human Rights and Maritime Law Implications of a Piracy Ransom Ban for International Shipping

*Sofia GALANI**

Abstract

Piracy for ransom remains a significant maritime security threat adversely affecting the interests of the shipping industry, maritime trade and the welfare of seafarers. The profits made by pirates through ransoms have led to several states, including the United Kingdom, to argue in favour of an absolute ban on ransom payments to pirates. These proposals are heavily influenced by similar policies adopted in the context of terrorist hostage-taking, in which it is often argued that ransoms sustain terrorism and an absolute ban on terrorist financing must therefore be imposed in an effort to eliminate terrorist attacks. However, this article argues that maritime piracy for ransom operates in a strictly commercial environment that is fundamentally different from terrorism, and therefore a ransom ban could cause more loopholes and practical problems than it would resolve. An examination of the current policies on ransom payments shows that there is no universal ban on piracy ransoms and that such payments remain legal and compatible with public policy in the UK. It is also explained that a ban on ransom payments to pirates could have significant human rights implications for the protection of seafarers, who are the targets of the piracy for ransom model, and it is debatable whether an absolute ransom ban can be reconciled with the human rights obligations flag states have towards those held hostage on board their vessels. The economic cost of a ransom ban is also discussed, and it is explained that a ban could increase industry costs instead of reducing them. It is also argued that such a ban is not compatible with the current interpretation of the Marine Insurance Act 1906, reinforcing the overall conclusion that an absolute ban on ransom payments to pirates is not fit for purpose.

Keywords: piracy, seafarers, ransom ban, flag states, Marine Insurance Act 1906

First published online: June 2017

* Corresponding author details: Dr. Sofia Galani is a Lecturer in Law at the University of Bristol Law School (Sofia.Galani@bristol.ac.uk). Sofia would like to thank Dr Anna Petrig (University of Basel), Maria Orchard (University of Bristol) and the anonymous reviewers for their helpful comments. This article reflects figures available as of April 2017.

1. Introduction

Piracy remains a major maritime security threat adversely affecting the interests of the shipping industry, maritime trade and the welfare of seafarers.[1] The sharp decline in successful vessel hijackings in the Gulf of Aden in 2014 sparked hope that piracy had come to an end, but nothing could be further from the truth.[2] The widespread concern that large-scale piracy for ransom might re-emerge due to that the withdrawal of naval forces, relaxed self-protection measures, and a failure to tackle the underlying causes of piracy - such as poverty, corruption and unemployment - were vindicated by renewed attacks in the Gulf of Aden.[3] Between January and June 2016 alone, 17 vessels were boarded and two were hijacked in Africa, while 24 vessels were boarded and three were hijacked in Southeast Asia.[4] During these incidents, 118 seafarers were subjected to violence and 108 of them were taken hostage.[5] In October 2016, the crew of the *FV Naham 3*, a Taiwan-owned fishing vessel, was released after spending five years in captivity, bringing back to the forefront the dangers of hostage-taking and the suffering of remaining hostages. While precise figures are lacking, following the release of the *FV Naham 3* crew, it was reported that several pirate attacks had taken place against fishing vessels and a number of hostages remained in captivity in Somalia.[6]

---

1 Piracy is defined in Art 101 of the 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), according to which piracy takes place on the high seas (Art 101(a)(i)) and therefore certain attacks against ships within the territorial or archipelagic waters of African and Southeast Asian States do not qualify as piracy. However, this gap has been filled by the International Maritime Organization (IMO), which defines as armed robbery 'any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea' (IMO, 'Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships' (18 January 2010) Resolution A.1025(26) Annex, para 2.2). In this article, the term 'piracy' is used to cover both acts of piracy and armed robbery, and the term 'pirates' refers to both those being suspected and convicted of being involved in acts of piracy and armed robbery.

2 UNSC 'Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' (7 October 2016) UN Doc S/2016/843, paras 5-8; Christian Bueger, 'Learning from Piracy: Future Challenges of Maritime Security Governance' (2015) 1 Global Affairs 33, 37-38; CHP Post Online, 'Denmark pulling out of the fight against Somali pirates' (21 November 2016) <http://cphpost.dk/news/denmark-pulling-out-of-the-fight-against-somali-pirates.html> accessed 19 February 2017.

3 Reuters, 'Somali pirates hijack Indian commercial ship in second attack in weeks' (*The Telegraph*, 3 April 2017) <www.telegraph.co.uk/news/2017/04/03/somali-pirates-hijack-indian-commercial-ship-second-attack-weeks/> accessed 16 April 2017; Report of the Secretary-General (n 2). For the root causes of piracy in Somalia, Nigeria and Southeast Asia, see Andrew Palmer, *The New Pirates: Modern Global Piracy from Somalia to South China Sea* (I.B. Tauris 2014) 7-16; David Ong, 'Alternative Approaches to Piracy and Armed Robbery in Southeast Asian Waters and off the Horn of Africa: A Comparative Perspective' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing 2014) 269-76; and Martin Murphy, 'Petro-Piracy: Predation and Counter-Predation in Nigerian Waters' in Douglas Guilfoyle (ed), *Modern Piracy – Legal Challenges and Responses* (Edward Elgar 2013) 61-90.

4 ICC International Maritime Bureau, 'Piracy and Armed Robbery against Ships' (1 January – 30 June 2016) 8 <www.icc.se/wp-content/uploads/2016/07/2016-Q2-IMB-Piracy-Report-Abridged.pdf> accessed 17 February 2017.

5 ibid 10. For 2015, see ICC International Maritime Bureau, 'Piracy and Armed Robbery against Ships' (1 January – 31 January 2015) <www.icc.se/wp-content/uploads/2016/07/2016-Q2-IMB-Piracy-Report-Abridged.pdf > accessed 17 February 2017; Oceans Beyond Piracy (OBP), 'The State of Maritime Piracy 2014' (2015) <http://oceansbeyondpiracy.org/reports/sop2015/summary> accessed 19 February 2017.

6 Saeed Kamali Dehghan, 'We had to eat rats, say sailors held by Somali pirates for four years' (*The Guardian*, 24 October 2016) <www.theguardian.com/world/2016/oct/24/we-had-to-eat-rats-say-sailors-held-by-somali-pirates-for-four-years> accessed 17 February 2017; Report of the Secretary-General (n 2) paras 3, 9-10.

The figures show that despite the efforts of the international community to eliminate piracy, the 'kidnap for ransom' model of piracy - the hijacking of a vessel and its crew for the purpose of extracting a ransom - remains a widespread technique employed by pirates around the world.[7] The reason is that pirates make significant profits from ransom payments. In 2015 alone, it was reported that a total of $1.6 million (USD) was paid in ransom to pirates operating in the Gulf of Guinea, while it is estimated that between $340 million and $435 million was paid in ransom for ships and/or seafarers kidnapped by Somali pirates between 2005 and 2015.[8]

Concern has been raised that ransom payments to pirates fund more pirate attacks, motivate more people to get involved in the lucrative business of piracy, and thus fuel more kidnappings for ransom, putting the welfare of more seafarers at risk.[9] These fears have prompted some, including the former UK Prime Minister David Cameron, to advocate in favour of an absolute ban on ransom payments to pirates.[10] The rationale of banning ransom payments as a means of preventing hostage-taking is not new. It originates from the fight against terrorist hostage-taking and the non-concession policies of a number of states that firmly believe that ransom payments sustain terrorism.[11] Therefore, they have opted to let their nationals taken hostage die instead of paying a ransom to terrorists who may

7 For a definition of the 'kidnap for ransom' model, see the FAFT Report, 'Organised Maritime Piracy and Related Kidnapping for Ransom' (2011) 5-6 <www.fatf-gafi.org/media/fatf/documents/reports/organised%20maritime%20piracy%20and%20related%20kidnapping%20for%20ransom.pdf> accessed 19 February 2017.

8 World Bank, 'Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa' (2013) 27-28; OPB (2015) (n 5) 20; OBP, 'The State of Maritime Piracy 2013' (2014) 10 <http://oceansbeyondpiracy.org/sites/default/files/attachments/SoP2013-Digital.pdf> accessed 19 February 2017. Unless otherwise stated, all sums listed are in US dollars (USD).

9 Secretary Clinton's Remarks at London Conference on Somalia (2012) <http://iipdigital.usembassy.gov/st/english/texttrans/2012/02/201202231439 01su0.5437062.html> accessed 19 February 2017; Nick Hopkins, 'Judith Tebbutt case puts spotlight on government's ransom policy' (*The Guardian*, 21 March 2012) <www.theguardian.com/uk/2012/mar/21/judith-tebbutt-spotlight-ransom-policy> accessed 19 February 2017; Robert Rotberg, 'Combating Maritime Piracy: A Policy Brief with Recommendations for Action' (World Peace Foundation, Policy Brief #11, 26 January 2010) <www.somalilandpress.com/wp-content/uploads/2010/02/Combating-Maritime-Piracy.pdf> accessed 19 February 2017.

10 Prime Minister's Speech at Somalia Conference (2012) <www.gov.uk/government/speeches/prime-ministers-speech-at-somalia-conference> accessed 19 February 2017.

11 BBC, 'UN urges end to ransom payments to terrorist groups' (28 January 2014) <www.bbc.co.uk/news/world-25923084> accessed 19 February 2017; UNSC 'Letter dated 27 October 2014 from the Chair of the Security Council Committee pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and Associated Individuals and Entities Addressed to the President of the Security Council' (29 October 2014) UN Doc S/2014/770, paras 49-59.

use it for further propaganda and other terrorist activities.[12] Arguably, a ban on ransom payments to terrorists and pirates has a deterrent effect. However, in this article, it is argued that an absolute ban on ransom payments to pirates as the solution to piracy is a rather simplistic approach.

Terrorist and pirate hostage-taking appear to have some common characteristics, such as the seizure of hostages for the purposes of extracting a ransom, but they also have fundamental asymmetries that are ignored by those advocating against ransom payments to pirates.[13] While terrorist hostage-taking involves a spread of political and religious beliefs that lead to ideological conflicts and are too controversial to address and too elusive to regulate,[14] maritime piracy for ransom in the Africa and Southeast Asia regions operates in a strictly commercial environment that allows for some regulation. Therefore, it is argued that an absolute ban on ransom payments to pirates would have an adverse and multifaceted impact on the shipping industry – especially UK shipping interests.

This article starts with an analysis of the commonalities and differences between terrorist and pirate hostage-taking. This is followed by an examination of the existing international and national policies on ransom payments to terrorists and pirates, which will lead to the conclusion that ransom payments to pirates are not illegal. This article then analyses the human rights implications of a potential ban on ransom payments. It will be argued that piracy for ransom targets seafarers, and therefore more emphasis should be placed on their protection. Flag states have human rights obligations towards those abducted on board their vessels and a ban on ransom payments cannot be reconciled with these obligations.[15] The discussion continues by assessing the financial implications for the shipping industry, since the likelihood of securing the release of vessels, cargos and crews would decrease, but the evolving pirate activities would not. Furthermore, it explains the uncertainty surrounding how the Marine Insurance Act 1906 (MIA 1906) and its current interpretation by UK

12 The US has a long-standing non-negotiation policy which dates back to the Carter and Reagan presidencies and was confirmed by the Bush and Obama governments. See Jonathan Powell, *Talking to Terrorists: How to End Armed Conflicts* (London 2014) 15-18. See also the Press Statement by Richard Boucher, 'International Terrorism: American Hostages' (*U.S. Department of State Archive*, 20 February 2002) <https://2001-2009.state.gov/r/pa/prs/ps/2002/8190.htm> accessed 19 February 2017. See also Meadow Clendenin, 'No Concessions with No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy' (2006) 56(3) Emory Law Journal 741. For the UK approach see Counter-Terrorism and Security Bill Factsheet <www.gov.uk/government/uploads/system/uploads/attachment_data/file/540539/CTS_Bill_-_Factsheet_9_-_Kidnap_and_Ransom.pdf> accessed 19 February 2017; and Keith Bloomfield, 'Hostage-taking and Government Response' (2001) 146 Defence and International Security 23. See also the discussion in Yvonne Dutton and Jon Bellish, 'Refusing to Negotiate: Analysing the Legality and Practicality of a Piracy Ransom Ban' (2014) 47 Cornell International Law Journal 299, 309-12.

13 Douglas Guilfoyle, 'Piracy and Terrorism' in Koutrakos (n 3) 44-52; Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 147-48; Anna Petrig and Robin Geiss, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 42-44.

14 A clear example is the lack of a definition of terrorism. For the working definition of terrorism see UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566 at 3. See also Jean-Marc Sorel, 'Some Questions about the Definition of Terrorism and the Fight against its Financing' (2003) 14 EJIL 365, 366-71.

15 Sofia Galani, 'Somali Piracy and the Human Rights of Seafarers' (2016) 34 Netherlands Quarterly of Human Rights 71, 81-82; Malcolm Evans and Sofia Galani, 'Piracy and the Development of International Law' in Koutrakos (n 3) 356; Urfan Khaliq, 'Jurisdiction, Ships and Human Rights Treaties' in Henrik Ringbom (ed), *Jurisdiction over Ships – Post-UNCLOS Developments on the Law of the Sea* (Brill 2015) 337.

courts would protect the losses sustained by ship and cargo owners.[16] In light of these considerations, this article concludes that an absolute ban on ransom payments to pirates could cause more loopholes and practical problems than it could potentially resolve. In light of the recent attacks in the Gulf of Aden, and the widespread concern that large-scale piracy for ransom might return and thus exorbitant ransom payments might resurface, it is important to reinforce the position that an absolute ban on ransom payments is not the solution to the problem of maritime piracy for ransom.

2. International and national policies on ransom payments

Before assessing the adverse impact that a possible ban on ransom payments could have on seafarers and the shipping industry, it is worth comparing terrorist and pirate hostage-taking and presenting the current policies on ransom payments to terrorists and pirates. This discussion will end by reference to the latest initiatives by some of the states that oppose ransom payments to pirates and terrorists.

2.1 Terrorist and pirate hostage-taking

Distinguishing between terrorist and pirate hostage-taking is not an easy task and various overlaps can be identified. First and foremost, the taking of hostages both by terrorists and pirates can fall within the Article 1 definition of hostage-taking under the 1979 International Convention against the Taking of Hostages.[17] The reason is that pirates seize and detain hostages for the purposes of compelling a third party, usually a state or a shipping company, to do an act (pay a ransom) as an explicit condition for the release of the hostages.[18] Pirate hostage-taking could also fall under Article 3 of the 1988 Convention for the Suppression of Unlawful Acts at Sea (SUA Convention) as pirates unlawfully and intentionally seize and exercise control over a ship by force or threat of force.[19] Stateless territories, failed states and corruption are also seen as the common denominator in the creation of terrorist groups and pirate gangs.[20] However, labelling pirates as terrorists and prosecuting them on the basis of the anti-terrorism conventions is going a step too far.[21] Pirate hostage-taking takes place

16 See Robert Soady, 'A Critical Analysis of Piracy, Hijacking, Ransom Payments, and Whether Modern London Insurance Market Clauses Provide Sufficient Protection for Parties Involved in Piracy for Ransom' (2013) 44 Journal of Maritime Law and Commerce 1.

17 International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostages Convention).

18 Petrig and Geiss (n 13) 43-44.

19 The SUA Convention (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201 was adopted in response to the seizure of the *Achille Lauro* by Palestinian fighters, who sought the release of fellow fighters in exchange for the hostages, and in an effort to establish criminal jurisdiction over unlawful acts at sea that do not fall within the definition of piracy under Art 101 UNCLOS. See Malvina Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety' (1988) 82 The American Journal of International Law 269, 276-91.

20 Palmer (n 3) 71-91.

21 Guilfoyle (n 13) 47.

solely for private ends, and pirates have shown in practice that they are willing both to negotiate and release their hostages once their ransom demands are met. In contrast, terrorist hostage-taking takes place for ideological beliefs, and political demands, such as the release of fellow fighters or the recognition of independence of a disputed territory, are almost impossible to meet as a condition of release of the hostages.[22] Terrorists also take hostages for the purposes of drawing media attention and promoting their political manifesto, which can be achieved by murdering hostages if their demands are not met.[23] In addition, pirates hold their hostages in unknown locations, which makes a rescue mission difficult, and therefore negotiations and ransom payments might be the only available tools for the rescue of seafarers.[24] Terrorists, on the other hand, do not hesitate to seize hostages in public places, such as schools or shopping malls, and therefore a rescue mission can be a viable alternative to ransom payments.[25]

For all the reasons set out above, this article argues that terrorist and pirate hostage-taking are fundamentally different, and therefore the responses to pirate hostage-taking should not be premised on the rationale employed by states in the fight against terrorism. Terrorist and pirate hostage-taking require tailored responses capable of safeguarding the lives of hostages primarily, as well as the political and financial interests at stake, and therefore transposing counter-terrorism policies to acts of piracy cannot be the way forward.

2.2 Ransom payments to terrorist groups

The prevention of direct or indirect financing of terrorist acts is considered an effective tool in the fight against terrorism, and has been incorporated into a number of counter-terrorism responses adopted over the years. One of the earliest collective responses against the financing of terrorism is the International Convention for the Suppression of the Financing of Terrorism, which criminalises any act of a person that 'by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part' for committing any act of terrorism including hostage-taking, aircraft hijacking and the seizure of vessels.[26] The international community further demonstrated its commitment to suppress the funding of terrorism when it established the UN Security Council Committee pur-

22 See, for example, the seizure of the Moscow Theatre by Chechen fighters demanding that the Russian government recognise the independence of Chechnya in exchange for the release of hostages discussed in *Finogenov and Others v Russia* App nos 18299/03 and 27311/03 (ECtHR, 4 June 2012). See also Section 3.2 below.

23 See, for example, the scenes of the beheadings of hostages held by the Islamic State, which were widely circulated online by the terrorists. BBC, 'Islamic State "beheads US hostage Steven Sotloff"' (3 September 2014) <www.bbc.co.uk/news/world-middle-east-29038217> accessed 19 February 2017.

24 For the definition of kidnapping see A. Hunsicker, *Understanding International Counter Terrorism: A Professional's Guide to the Operational Art* (Universal Publishers 2006) 202-03.

25 For the Beslan School siege see Section 3.2 below. See also Daniel Howden, 'Terror in Nairobi: the full story behind al-Shabaab's mall attack' (*The Guardian*, 4 October 2013) <www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya> accessed 19 February 2017.

26 Art 2(a) and Annex of the International Convention for the Suppression of the Financing of Terrorism (signed 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

suant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaeda and associated individuals and entities.[27] The Committee assumed the task of overseeing the implementation by Member States of the sanctions imposed against targeted individuals and entities associated with Al-Qaeda, including an assets freeze, travel ban and arms embargo.[28]

The plague of hostage-taking by the Islamic State (IS) gave momentum to the international community to adopt harsher measures against the financing of terrorism through ransom payments. In 2014, the UK Ambassador to the UN Mark Lyall Grant announced that Al-Qaeda and its affiliated groups made at least $105 million in ransom payments for hostages between 2011 and 2013.[29] On the basis that ransom payments fuel terrorist activities, the Ambassador drafted and put before the United Nations Security Council (UNSC) a resolution urging states to end ransom payments to terrorist groups. The resolution, which was adopted unanimously, requires states to stop providing directly or indirectly any funds, including ransom payments, to individuals, groups or entities on the Al-Qaeda sanctions list.[30] The resolution also calls upon states 'to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages.'[31] The commitment of states to end ransom payments to terrorist groups was reinforced in UNSC Resolution 2253 (2015). The UNSC unanimously reiterated their commitment to securing the release of hostages without ransom payments and expanded the Al-Qaeda sanctions framework to include the IS in an effort to end the financing of terrorism.[32] It is now well-established that financing terrorism through ransom payments is not permitted either by paying a sum directly to a terrorist group or indirectly through intermediaries.[33]

In line with its international efforts, the UK also amended the Terrorist Act 2000 to fill then-existing gaps in relation to ransom payments at the national level. Section 15(3) of the Act criminalised direct and indirect financing of terrorist acts, but did not explicitly refer to ransom payments paid by insurance companies. Section 15(3) was amended by Section 42 of the Counter-Terrorism and Security Act 2015, which makes payment by an insurer in response to a terrorist demand an offence punishable by imprisonment or forfeiture of the amount paid under the insurance contract, but arguably this provision is inapplicable to acts of piracy.[34] The UN has taken a clear stance against

27 UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989.

28 The latest version of the Al-Qaeda Sanctions List established and maintained by the 1267/1989 Committee (2015) is <www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list> accessed 19 February 2017.

29 BBC (n 11).

30 UNSC Res 2133 (27 January 2014) UN Doc S/RES/2133, para 2.

31 ibid para 3.

32 UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253, paras 3 and 5.

33 UNSC Res 2161 (17 June 2014) UN Doc S/RES/2161, para 7. See also the FAFT Report, 'Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)' (2015) 18 <www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf> accessed 26 February 2017.

34 Ince & Co, 'UK Counter Terrorism and Security Bill – does it affect ransom payments to pirates?' (2014) <www.incelaw.com/en/knowledge-bank/publications/uk-counter-terrorism-and-security-bill-does-it-affect-ransom-payments-to-pirates> accessed 19 February 2017.

the payment of ransoms to terrorists, and the UK has allied itself with this approach and appears determined to supress the financing of terrorism, even if banning ransom payments means that UK nationals are left to be murdered by terrorist groups.[35] Despite the emerging consensus on the matter, the enforcement of such a ban remains extremely challenging with some states agreeing with it in theory, while continuing to make ransom payments to secure the release their nationals taken hostage by terrorist groups.[36]

2.3 Ransom payments to pirates

While the UK appears determined to ban ransom payments to terrorists, its stance on ransom payments to pirates has not always been so straightforward. The UN Monitoring Group on Somalia and Eritrea has repeatedly criticised the inadequacy of the UK responses to Somali piracy, including the UK's opposition to US proposals on piracy ransoms.[37] In April 2010, US Executive Order 13536 concerning Somalia blocked the property of those persons that contribute to Somali piracy, and any flows of assets, in the form of transfer, payment, export or withdrawal, to those persons involved in piracy.[38] The US aimed to further expand this restriction and lobbied the UNSC to list persons and entities that pose a threat to the stability in Somalia under UNSC Resolution 1844 (2008).[39] Amongst others, the US suggested the listing of Abshir Abdillahi and Mohamed Abdi Garaad, known as the leaders of Somali piracy. However, the UK deviated from these recommendations and objected to the adoption of the resolution.[40] Contrary to its stance on ransom payments to terrorists, the UK government opposed the resolution arguing that the UK legal system lacks a defence of duress, which could lead to the prosecution of families making ransom payments to save the lives of seafarers.[41] Beyond this humanitarian approach, it has also been argued that the UK, as a hegemonic state of maritime business, opposed the proposals restricting ransom payments to pirates in an effort to safeguard the interests of UK shipping and marine insurance companies.[42]

Ransom payments to pirates have also been examined by UK courts, which concluded that this type of payment is neither illegal under UK law nor incompatible with public policy. In the case

35 Karen Yourish, 'The Fates of 23 ISIS Hostages in Syria' (*The New York Times*, 10 February 2015) <www.nytimes.com/interactive/2014/10/24/world/middleeast/the-fate-of-23-hostages-in-syria.html> accessed 19 February 2017.

36 Kashmira Gander, 'Isis hostage threat: Which countries pay ransoms to release their citizens?' (*Independent*, 3 September 2014) <www.independent.co.uk/news/world/politics/isis-hostage-threat-which-countries-pay-ransoms-to-release-their-citizens-9710129.html> accessed 26 February 2017; Timothy McGrath, 'These are the countries that have (probably) paid hostage ransom to the Islamic State' (*Global Post*, 28 January 2015) <www.globalpost.com/dispatch/news/war/150121/these-are-the-countries-have-probably-paid-ransom-the-islamic-state> accessed 26 February 2017.

37 UNSC 'Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2002' (13 July 2012) UN Doc S/2012/545, paras 30-31. See also the discussion in Achilles Skordas, 'The Dark Side of Counter-Piracy Policies' in Koutrakos (n 3) 318-20.

38 Executive Order 13536 concerning Somalia – Blocking Property of Certain Persons Contributing to the Conflict in Somalia (2010) <www.presidency.ucsb.edu/ws/?pid=87737> accessed 19 February 2017. For the Order, and other relevant US legislation on ransoms, see Lawrence Rutkowski, Bruce Paulsen and Jonathan Stoian, 'Mugged Twice?: Payment of Ransom on the High Seas' (2010) 59 American University Law Review 1425.

39 UNSC Res 1844 (20 November 2008) UN Doc S/RES/1844, para 8.

40 House of Commons - Foreign Affairs Committee, 'Piracy off the coast of Somalia - Tenth Report of Session 2010–12' (2012) <www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/1318.pdf> para 114.

41 ibid; for a discussion on the defence of duress in US criminal law, see Dutton and Bellish (n 12) 316-20.

42 Report of the Monitoring Group (n 37) Annex 4, 34, 211.

of *Royal Boskalis*, the Court of Appeal examined an appeal brought by five Dutch companies that owned and operated a dredging fleet, which was insured against war risks by the defendants under an insurance contract in the Ship and Goods (SG) form set out in Schedule 1 to the MIA 1906 containing a 'sue and labour' clause.[43] The dredging fleet was operating in an Iraqi port, but, following Iraq's invasion of Kuwait, the UN imposed sanctions on Iraq, which responded by seizing all the assets of companies operating on its land, including the plaintiffs' dredging fleet and employees. The plaintiffs had to pay large amounts of money for the demobilisation of the fleet and the release of their employees and sought to recover their losses under the 'sue and labour' clause. The legality of the ransom payment was examined by Lord Justice Phillips who argued that pursuant to Section 78(4) MIA 1906, the assured has a duty to take reasonable steps to mitigate the loss, which includes the payment of a reasonable ransom that has regard to the value of the property at risk. More specifically, Lord Justice Phillips argued that:

> [t]he terms in which the duty under section 78(4) is expressed are wide enough on their natural meaning to embrace expenditure necessary to procure the release of a vessel that has been seized and I see no reason of policy or practice why they should not do so. If that is right, then it would be strange indeed if such expenditure did not fall within the sue and labour clause. In my judgment the assumption […] that payment of a ransom, if not itself illegal, is recoverable as an expense of suing and labouring is well founded.[44]

Lord Justice Phillips' reasoning touched upon the compatibility of ransom payments with public policy, but he did not elaborate further on this issue. This does not mean that UK courts have left any doubts regarding this issue, as is evidenced by the *Bunga Melati Dua* case.[45] The case concerned the seizure of a vessel by Somali pirates and the appellant's appeal against a decision that the capture of a vessel by pirates did not create an immediate total loss of the cargo. The appellant argued that regardless of the prospects of recovery of a vessel, the payment of a ransom should not be taken into account for calculating the possibilities of recovery, as there was no duty of an insured under Section 78(4) MIA 1906 to pay the ransom. The appellant further argued that, in any case, ransom payments were contrary to public policy.[46] The latter claim was rejected by the Court of Appeal and Lord Justice Rix reasoned that:

> [t]here is thus something of an unexpressed complicity: between the pirates, who threaten the liberty but by and large not the lives of crews and maintain their ransom demands at levels which industry can tolerate; the world of commerce, which has introduced precautions but advocates the freedom to meet the realities of the situation by the use of ransom payments; and the world of government, which stops short of deploring the payment of ransom but stands aloof, participates in protective na-

43 *Royal Boskalis Westminster N.V. and Others v Mountain and Others* [1999] QB 674.

44 ibid 720. Ransom payments to pirates used to be an offence in 1782 under the Ransom Act (22 Geo. III c. 25) which has been repealed. For this act and subsequent legislation banning ransom payments to pirates, see Peter MacDonald Eggers QC, 'The Insurance Protection against Piracy' in Guilfoyle (n 3) 289.

45 *Masefield AG v Amlin Corporate Member Ltd* [2011] 1 WLR 2012. See also the discussion in MacDonald Eggers QC, ibid 290-95.

46 *Masefield AG* (2011) para 2.

> val operations but on the whole is unwilling positively to combat the pirates with force. Mr Williams described it as a 'fragile status quo'. In these morally muddied waters, there is no universally recognised principle of morality, no clearly identified public policy, no substantially incontestable public interest, which could lead the courts, as matters stand at present, to state that the payment of ransom should be regarded as a matter which stands beyond the pale, without any legitimate recognition. There are only elements of conflicting public interests, which push and pull in different directions, and have yet to be resolved in any legal enactments or international consensus as to a solution, save that of wary watchfulness, the deployment of naval resources as a form of law enforcement or policing operation, and a regard for 'a comprehensive approach, seeking to address political, economic and security aspects of the crisis in a holistic way'.[47]

The excerpt summarises in an eloquent manner the complexities of the fight against piracy and the practical benefits of ransom payments to shipping interests. The decision of the Court of Appeal not to bar or otherwise hinder ransom payments to pirates has been well-received by the shipping industry because it gives shipowners room to manoeuvre as regards how to negotiate and secure the release of the crew, vessel and cargo.[48]

In contrast, the efforts of the UK government to ban ransom payments to pirates found no support by states nor the shipping industry. In February 2012, David Cameron told the London Conference on Somalia that ransom payments to pirates should be banned.[49] To that end, Cameron established the International Piracy Ransoms Task Force, the objective of which is:

> to develop a greater understanding of the payment of ransoms in cases of piracy, in order to put forward policy recommendations to the international community as to how to avoid, reduce or prevent the payment of ransoms. The ultimate goal of this effort is to reach a point where pirates are no longer able to profit from ransom payments and thus abandon the practice of kidnapping for ransom.[50]

Despite the justifications provided for banning piracy ransom payments, only 14 states participated in the Task Force and some of the largest flag and ship register states, such as the Marshall Islands,

---

47 ibid para 71.

48 Philip Roche and Peter Glover, 'Public policy and the payment of ransoms - Masefield AG v Amlin Corporate Member [2011] EWCA Civ 24' (2011) <www.nortonrosefulbright.com/knowledge/publications/48452/public-policy-and-the-payment-of-ransoms-masefield-ag-v-amlin-corporate-member-ewca-civ-24> accessed 26 February 2017; John Knott, 'Somali Piracy: The Effect of Ship Hijacking on Marine Insurance Policies' (2010) <www.idaratmaritime.com/wordpress/?p=246> accessed 26 February 2017; James Gosling and Richard Neylon, 'Banning ransom payments to Somali pirates would outlaw the only method a shipowner has to remove his crew from harm's way and rescue his vessel and cargo' (*Lloyd's List*, 1 November 2011) <www.hfw.com/Banning-ransom-payments-to-somali-pirates> accessed 26 February 2017.

49 Prime Minister's Speech (n 10).

50 London Conference on Somalia: Communique (23 February 2012) <www.gov.uk/government/news/london-conference-on-somalia-communique--2> accessed 19 February 2017; Final Report of the International Piracy Ransoms Task Force (11 December 2012) excerpts available at <https://piracy-law.com/2013/01/20/the-report-of-the-international-piracy-ransoms-task-force-is-available/> accessed 1 April 2017.

the Bahamas and Greece, are missing from the list of participants.[51] At the same time, the shipping industry expressed its concern over the suggested ban on humanitarian, financial and environmental grounds.[52] The lack of support possibly justifies the constrained recommendations published by the Task Force in its final report to the Contact Group on Piracy off the Coast of Somalia in 2012, which are not reflective of Cameron's ambitions to eliminate ransom payments.

The Task Force recommended the development of strategic partnerships between flag states, the private sector, law enforcement agencies and military responders in an effort to break the piracy business model and prepare for potential hostage situations, better coordination of information-sharing to provide evidence to pursue and prosecute all involved in piracy, and implementation of anti-piracy measures, including better compliance with Best Management Practices.[53] Missing from the report are clear-cut policy recommendations that could lead to an absolute ban on ransom payments. In other words, the recommendations were tailored to accommodate the UK government's interest restricting the profits made by pirates from ransom payments, as well as the needs of the shipping industry to retain flexibility in handling hostage-taking situations. The latest UK policy paper on piracy off the coast of Somalia also shows that the government did not push forward a ban on ransom payments made to pirates.[54] On the contrary, according to unofficial reports, the UK government confirmed that ransom payments to pirates will remain legal, and the UK Shipping Minister John Hayes stated that '[i]t is already an offence to make ransom payments to terrorists, [but] the situation is different in piracy cases. Whilst the government strongly advises against making ransom payments to pirates, doing so is not illegal under UK law.'[55]

The indecisiveness of the UK government in relation to piracy ransoms suggests that it is aware of the implications an absolute ban on piracy ransom payments could have for shipping interests. The shipping industry has firmly opposed a ban and the following discussion explains that the concerns expressed by the maritime world are not baseless. As explained below, outlawing ransom payments to pirates could have serious human rights implications for seafarers, especially those taken hostage, and could cause detrimental inconsistencies in the way the current marine insurance framework operates in the UK.[56]

---

51 The task force was constituted of 14 members: Australia, Denmark, France, Germany, Italy, Liberia, Malaysia, Norway, Panama, Spain, Ukraine, the United Arab Emirates, the United Kingdom and the United States: House of Commons Hansard, 'International Piracy Ransoms Task Force' (Written Statements Vol 555, 12 December 2012) <https://hansard.parliament.uk/Commons/2012-12-12/debates/12121236000016/InternationalPiracyRansomsTaskForce> accessed 26 February 2017.

52 See the letter of the Round Table of International Shipping Association (14 March 2012) <www.intertanko.com/Global/Prime%20Minister%20David%20Cameron%20140312.pdf> accessed 19 February 2017.

53 Piracy Ransoms Task Force publishes recommendations (11 December 2012) <www.gov.uk/government/news/piracy-ransoms-task-force-publishes-recommendations> accessed 19 February 2017.

54 2010 to 2015 government policy: piracy off the coast of Somalia (Policy paper, 8 May 2015) <www.gov.uk/government/publications/2010-to-2015-government-policy-piracy-off-the-coast-of-somalia/2010-to-2015-government-policy-piracy-off-the-coast-of-somalia> accessed 19 February 2017.

55 World Maritime News, 'UK Keeps Piracy Ransom Payment Legal' (21 January 2015) <http://worldmaritimenews.com/archives/150000/uk-keeps-piracy-ransom-payment-legal/> accessed 19 February 2017.

56 See Sections 3.2 and 4.1 below.

3. Ransom payments and the human rights of seafarers

The protection of the human rights of seafarers has been one of the main arguments by shipping companies against the ban on piracy ransoms. The Round Table of International Shipping Associations has clearly stated that banning ransoms is equal to leaving seafarers to the 'mercy of violent organised crime in a society where life has little value.'[57] Other maritime analysts suggest that paying a ransom is the 'only hope' a shipowner has for securing the release of crew and vessel in practice.[58] Courts have also stressed how important negotiations and ransom payments are for safeguarding the human rights of hostages. While there is no clear-cut obligation imposed on flag states to pay ransoms to secure the release of hijacked vessels and crews, it is argued here that flag states bear human rights obligations towards those on board seized vessels and questioned how flag states will be able to respond to these obligations if ransom payments are banned.[59]

3.1 The nature of piracy for ransom

Piracy for ransom, by definition, has a specific aim: the taking of hostages for the purpose of extracting a ransom payment. Given that seafarers are the target of pirates, the human cost of piracy should be the focal point. However, as the author has highlighted elsewhere, counter-piracy measures lack a victim's perspective, which could enhance protection of the human rights of seafarers, and the decision to push for an absolute ban on ransom payments further fails to consider the human cost of piracy as seafarers could suffer and die as a result.[60]

Empirical data shows that, between 2010 and 2015, almost 9,705 seafarers were attacked in the Indian Ocean and 2,060 were taken hostage, 78 of whom remained in captivity in 2015.[61] While Somali piracy was declining, West African pirates became more active and 2,949 seafarers were attacked and 493 were taken hostage between 2013 and 2015.[62] In addition, almost 7,328 seafarers were subjected to attacks in the Southeast Asia region in 2014-15 and 167 were detained on board hijacked vessels in 2015 alone.[63] The accounts of released hostages also revealed the increasing threats

57 Letter of the International Shipping Associations (2012) (n 52).

58 Charles Marts, 'Piracy Ransoms - Conflicting Perspectives' (One Earth Future Foundation Working Paper, 2010) 8-13 <http://oceansbeyondpiracy.org/sites/default/files/ransom-_charlie_marts.pdf> accessed 19 February 2017; Gosling and Neylon (n 48); Ioannis Chapsos, 'UK banning paying ransoms to terrorists, pirates?' (*Maritime Executive*, 5 December 2014) <www.maritime-executive.com/article/UK-banning-paying-ransoms-to-terrorists-pirates-2014-12-05> accessed 26 February 2017; Ince & Co, 'Paying Ransoms – Could the US make this more difficult?' (2011) <incelaw.com/en/documents/pdf_library/strands/shipping/article/paying-ransoms-could-the-us-make-this-more-difficult.pdf> accessed 26 February 2017.

59 See (n 15) above.

60 Galani (n 15) 71-98.

61 ICC (n 4) 10. For an analysis of the human cost of piracy see OBP 'The State of Maritime Piracy 2015' (6 June 2016) 13-14 <http://oceansbeyondpiracy.org/sites/default/files/State_of_Maritime_Piracy_2015.pdf> accessed 8 May 2017; OBP (2015) (n 5) 27-28; OBP (2014) (n 8) 2.

62 OBP (2016) ibid 30-31; OBP (2015) ibid 67-68; OBP (2014) ibid 4-5.

63 OBP (2016) ibid 42; OBP (2015) ibid 78-79.

and violence that seafarers have to deal with on a regular basis. Whether detained while pirates seek to secure a ransom or loot the cargo, seafarers are subjected to cruelties and indignities.[64] Hostages are detained in cramped and squalid conditions, suffer from malnutrition and a lack of drinkable water, do not have access to any medical support, are punched, pushed or slapped, and are often used as human shields.[65] Captain Krzystof Kozlowski, who was taken hostage aboard the *MV Szafir* while sailing in the Gulf of Guinea, described his ordeal stating that '[the pirates] were aiming at us with machine guns. Right between the eyes. There was not any possibility to do anything. We had to adjust to them, it was the only chance to survive.'[66] The psychological impact on seafarers of hostage-taking as well as of crossing sea routes contaminated with piracy is also irreversible.[67] Almost all seafarers who transited the Western Indian Ocean Region High Risk Area (HRA),[68] were attacked by pirates and taken hostage have suffered from various forms of depression and post-trauma disorders.[69] The psychological abuses hostages undergo cause further difficulties in them reintegrating into their families and communities. Chirag Bahri, one of the hostages released from the *Marida Marguerite*, commented on the difficulties he encountered after his release:

> [s]ome men return to find their marriages broken off; mothers have died or fathers have died because they couldn't take the stress. When they come back it's to a totally new life. It's totally different to the life they left behind. Often a seafarer's own behaviour has changed from spending so long with pirates. He has become more bad-tempered, more aggressive.[70]

Maritime piracy for ransom poses a significant threat to seafarers. The abuses seafarers are subjected to show that pirates use them as their 'bargaining chips' and the accounts of released seafarers confirm that pirates do not hesitate to subject them to physical and/or psychological abuse if it will enable a ransom payment. The analysis of the human cost of piracy shows that hostage-taking could

---

64 Detention of the crew while seafarers loot the cargo and other valuables is mostly common in Southeast Asia. OBP (2016) ibid. See Ong (n 3) 267-98 and Robert Beckman, 'Piracy and armed robbery against ships in Southeast Asia' in Guilfoyle (n 3) 13-34.

65 UNSC 'Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' (12 October 2015) UN Doc S/2015/776) para 8; UNODC, 'Hostage Support Programme (Project 045) (Part of the Maritime Crime Programme) - Lessons Learned After Action Review Improvement Plan' (2014) 7-8, 19. See also Galani (n 15) 76-77, and Barry Hart Dubner and Kimberly Chavers, 'The Dilemma of Piratical Ransoms: Should They be Paid or Not? On the Human Rights of Kidnapped Seamen and Their Families' (2013) 18 Barry Law Review 297, 309-13.

66 OBP (2016) (n 61).

67 Michael Garfinkle, Craig Katz and Janaka Saratchandra, 'The psychological impact of piracy on Seafarers' (2012) 8 <http://seamenschurch.org/sites/default/files/sci-piracy-study-report-web_1.pdf> accessed 17 February 2017; OBP (2015) (n 5) 32-33, 87-90; Conor Seyle, 'After the Release: The Long-Term Behavioural Impact of Piracy on Seafarers and Families' (2016) 16-19 <http://oceansbeyondpiracy.org/sites/default/files/attachments/after-release-impact-seafarers.pdf> accessed 19 February 2017.

68 According to the definition given by the IMO, the HRA 'defines itself by where pirate activity and/or attacks have taken place. See IMO, 'Piracy and Armed Robbery against ships in waters off Somalia' (MSC.1/Circ.1339) (2011) 4.

69 Garfinkle, Katz and Saratchandra (n 67) 8; OBP (2015) (n 5) 32-33, 87-90; Seyle (n 67) 16-19.

70 Ben Farmer, 'The human cost of piracy: broken victims of violence' (*The Telegraph*, 10 February 2014) <www.telegraph.co.uk/sponsored/culture/captain-phillips-film/10388296/somali-piracy-victims.html> accessed 26 February 2017.

violate the human rights of seafarers as their right to life is constantly threatened, they are detained, they are physically and psychologically abused, and they are deprived of any form of privacy.[71] A possible ban on ransom payments could further aggravate the suffering of seafarers as flag states would miss the opportunity to secure the release of crew members from the hands of armed and violent pirate gangs.

3.2 Ransom payments from a victim's perspective

As explained, at least for the time being, there is no universal ban on ransom payments to pirates and the practice remains both legal and compatible with public policy in the UK. What has not been discussed is the emphasis the European Court of Human Rights (ECtHR) has placed on negotiations and concessions and the importance of ransom payments discussed in the jurisprudence of UK courts as a means of safeguarding the human rights of hostages.

The ECtHR has only examined the issue of negotiations and concessions in the context of terrorism, but the emphasis it has placed on them for the safe release of hostages echoes that of the shipping industry and UK courts in underlining the importance of ransom payments for seafarers. Regarding negotiations, states retain wide sovereign powers in the fight against terrorism and there is no uniform policy requiring states to either negotiate or not to negotiate. In the landmark case of *Finogenov and Others v Russia*, the Russian government's response to the Moscow theatre siege, namely its compliance with the right to life, was examined. The victims and their families filed a complaint against Russia with the Strasbourg Court arguing, *inter alia*, that the lack of professional negotiations with the hostage-takers constituted a breach of the right to life.[72] However, the ECtHR deferred when asked to adjudicate on negotiation policies. The Court offered a wide margin of appreciation to states and concluded that it is:

> far beyond the competence of this Court, which is not in a position to indicate to member States the best policy in dealing with a crisis of this kind: whether to negotiate with terrorists and make concessions or to remain firm and require unconditional surrender. Formulating rigid rules in this area may seriously affect the authorities' bargaining power in negotiations with terrorists.[73]

Nevertheless, the ECtHR has repeatedly highlighted the significance of negotiations and has never fully released states from an obligation to negotiate for the sake of the hostages lives, since negotiations can be a prerequisite to human rights compliant rescue operations. In *Tagayeva v Russia*, in which the Court was asked to examine the legality of the Russian rescue operation during the Beslan school siege that claimed the lives of more than 300 people, the Court stated that 'in a situation

71 Galani (n 15) 73-77; UNGA 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson' (4 June 2012) UN Doc A/HRC/20/14, paras 11-14; UNGA 'Report of the Human Rights Council Advisory Committee - Human rights and issues related to terrorist hostage-taking' (4 July 2013) UN Doc A/HRC/24/47, paras 23-24.

72 *Finogenov and Others v Russia* (2012) para 167.

73 ibid para 223.

which involves a real and immediate risk to life and demands the planning of a police and rescue operation, one of the primary tasks of the competent authorities should be to set up a clear distribution of lines of responsibility and communication' amongst the responsible agencies, which are tasked with, *inter alia*, 'choosing negotiation strategies'.[74] The Court's case law on military operations and rescue missions has also established that military operations aimed at rescuing hostages must be planned with accuracy in advance so as to ensure that lethal force is only used as a last resort and only if it is strictly necessary to save innocent lives.[75] It has also stated that the primary aim of a rescue operation should be the protection of hostages from unlawful violence.[76]

In light of this jurisprudence, this article concludes that a failure of authorities to negotiate before conducting a rescue mission might breach Convention rights. During the negotiation stage, authorities have the opportunity to evaluate the situation and gather invaluable information about the number of hostages and their conditions, the number of hostage-takers, their equipment, their motives and the location.[77] Authorities can also influence hostage-takers to shift their unrealistic demands into more feasible requests, such as food and water.[78] This can also tire and defeat the confidence of hostage-takers and pave the way for their surrender or a successful rescue operation.[79] Skipping this stage means that states may miss the opportunity to properly plan a rescue mission. Probing into the hostage-taking situation allows authorities to assess the volatile factors that can adversely affect the outcome of a rescue mission and ensure the protection of the lives of hostages.[80] Negotiations with pirates seem to be vital for naval forces too, as the latter often have to operate in unfriendly waters, under extremely unfavourable weather conditions and unable to deal with the unpredictable reactions of pirates.[81] This shows that prior negotiations could assist them in planning and conducting a human rights compliant rescue mission for the release of seafarers.

---

74 *Tagayeva and Others v Russia* Apps nos 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, and 37096/11 (ECtHR, 13 April 2017) para 570.

75 *McCann v UK* App no 18984/91 (ECtHR, 27 September 1995) paras 150, 200; *Andronicou and Constantinou v Cyprus* App no 86/1996/705/897 (ECtHR, 9 October 1997) paras 183-85, 213.

76 *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00 and 57949/00 (ECtHR, 24 February 2005) para 171.

77 Guy Olivier Faure, 'Negotiating with Terrorists: A Discrete Form of Diplomacy' (2008) 3 The Hague Journal of Diplomacy 179, 185.

78 See Adam Dolnik and Keith Fitzgerald, 'Negotiating Hostage Crises with the New Terrorists' (2011) 34 Studies in Conflict & Terrorism 267, 267-68.

79 William Zartman, 'Negotiating with Terrorists' (2003) 8 International Negotiations 443, 447-48; Dolnik and Fitzgerald, ibid 274-75; Richard Hayes, Stacey Kaminski and Steven Beres, 'Negotiating the Non-Negotiable: Dealing with Absolutist Terrorists' (2003) 8 International Negotiations 451, 454.

80 Adam Dolnik, 'Negotiating the Impossible? The Beslan Hostage Crisis' (The Royal United States Services Institute for Defence and Security Studies Whitehall Report 2-07, 2007) 22-24.

81 For example, Somali pirates have used seafarers as human shields during rescue operations or have murdered hostages in response to rescue efforts, see UN News Centre, 'UN agency deplores pirates' use of seafarers as human shields' (19 April 2011) <www.un.org/apps/news/story.asp?NewsID=38147#.WLMNyjuLTIU> accessed 26 February 2017, and The Telegraph, 'Somali pirates sentenced to life in prison for killing four Americans' (3 August 2013) <www.telegraph.co.uk/news/worldnews/northamerica/usa/10220279/Somali-pirates-sentenced-to-life-in-prison-for-killing-four-Americans.html> accessed 26 February 2017. See also the discussion in Galani (n 15) 88-89.

The approach of the European Union Committee of the House of Lords further strengthens this point. When the Committee examined the EU's Operation Atalanta, and more specifically issues of 'hostage taking and ransoms' in the region, it concluded that:

> [w]e understand that skilled ransom negotiators can help to keep risk to life and vessels, as well as ransom payments, to a minimum. Where ship owners intend to pay a ransom to recover their vessel and crew, we recommend that they use experienced and effective ransom negotiators. Where insurance policies do not already insist on experienced negotiators, they should do so.[82]

In addition to the importance of negotiations, UK courts have also stressed the vitality of ransom payments for the protection of seafarers in the *Royal Boskalis* and *Bunga Melati Dua* cases. In *Royal Boskalis*, the issue was discussed by Lord Justice Phillips, who argued that:

> [p]reservation of life cannot be equated with preservation of property. Provided that the expenses can reasonably be said to have been incurred for the preservation of the property, it does not seem to me either sound in principle or desirable that the assured should be penalised if they were sufficiently concerned for lives at risk to have been concerned to save not only their property but those lives.

Although there is not a direct reference to the human rights of seafarers, the quote suggests that seafarers do have a right to life – a right that should be protected and prioritised even over the right of shipowners to protect their property. The issue was also discussed by High Court Justice Steel in *Bunga Melati Dua*.[83] The judge relied on the current state of Somalia, as a failed state, and the nature of Somali piracy and found that:

> [t]he absence of any national administration means that any attempt to intervene by diplomatic means is fraught with difficulty. Equally any concept of military intervention involves legal and technical difficulties, leaving aside the risk to captured crews. In short the only realistic and effective manner of obtaining the release of a vessel is the negotiation and payment of a ransom.

From a victim's perspective, the reasoning is significant as it not only highlights that ransom payments are the 'only' realistic method of protecting seafarers, but it also explicitly states that diplomatic and military interventions can be useful alternatives, albeit not the most effective ones for securing the release of hostages. On appeal, Lord Justice Rix also acknowledged that piracy threatens the liberty and lives of seafarers, further indicating that the human rights of seafarers are constantly at risk.[84] The Court relied on the aforementioned report of the European Union Committee of the House of Lords, and especially on excerpts that focus on the vitality of ransom payments for the protection of the lives of seafarers, before concluding that ransom payments are compatible with public policy.[85]

---

82 House of Lords - European Union Committee, 'Combating Somali Piracy: the EU's Naval Operation Atalanta - 12th Report of Session 2009–10' (2010) 58.

83 *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280.

84 ibid para 71.

85 ibid paras 67-70.

3.3 Flag state human rights obligations and ransom payments

The ECtHR and UK courts have discussed the importance of negotiations and ransom payments respectively, while the shipping industry has insisted on the payment of ransoms for securing the release of seafarers taken hostage. However, ransom payments have not been recognised as a binding obligation imposed on flag states. It is, however, worth questioning how flag states will respond to the positive obligations they have towards those seized on board vessels flying their flags if ransom payments are banned.

The International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR) have been interpreted to apply on board vessels. Article 2(1) ICCPR stipulates that '[e]ach state Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant' and therefore states have the obligation to respect and ensure the rights laid down in the Covenant to anyone under their effective control, even if not situated within the territory of the State Party.[86] In light of these obligations, it has been argued that 'for the Covenant purposes, a flag state may have obligations towards those on board a registered ship even though he or she is outside the territory of the state party because the victim is still subject to the state's jurisdiction due to being on a registered vessel.'[87] In *Bankovic*, the ECtHR addressed the application of the ECHR to vessels and the human rights obligations towards those on board vessels flying the flags of the Council of Europe member states. Despite the notoriously restrictive approach taken by the Court in *Bankovic*, it confirmed that a state has jurisdiction over a vessel flying its flag.[88] In its later jurisprudence, the Court developed the extraterritorial application of the Convention arguing that a state has jurisdiction for the purposes of Article 1 ECHR when it exercises effective spatial or personal control beyond its borders.[89] With regards to the protection of human rights at sea, the Court has found that states have to comply with their Convention obligations when their state agents intercept persons at sea.[90]

---

86 HRC 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 10. See also HRC 'Concluding Observations: Israel' (21 August 2003) UN Doc CCPR/CO/78/ISR. The International Court of Justice (ICJ) has also concluded that the ICCPR applies to occupied territories, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ 136, 179; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Uganda*) (Judgment) 2005 ICJ 168.

87 Khaliq (n 15) 337.

88 *Banković and Others v Belgium and other 16 Contracting States* App no 52207/99 (ECtHR, 12 December 2001) paras 67, 73.

89 For the spatial control test see *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) para 78; *Al-Skeini and Others v UK* App no 55721/07 (ECtHR, 7 July 2011) para 114. For the personal control test see Öcalan *v Turkey* App no 46221/99 (ECtHR, 12 May 2005) para 91; *Hassan v UK* App no 29750/09 (ECtHR, 16 September 2014) para 76.

90 *Medvedyev and Others v France* App no 3394/03 (ECtHR, 10 July 2008) paras 65-69; *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999); *Hirsi Jamaa and Others v Italy* App no 7765/09 (ECtHR, 23 February 2012) para 81. See also Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill 2014) 139-45.

Given that flag states have jurisdiction on board vessels for the purposes of the ICCPR and the ECHR, the next question that should be addressed is the nature of the flag states' obligations. That is to say, it should be determined whether the extraterritorial obligations of flag states extend to respecting human rights on board a vessel (to refrain from breaching human rights) or to protecting human rights on board a vessel (to prevent or put an end to inferences with the enjoyment of human rights caused by third parties) or both. General Comment 31 clearly indicates that states have both negative (to respect human rights) and positive (to protect human rights) obligations when they exercise jurisdiction extraterritorially.[91] Under the ECHR, states also have both negative and positive extraterritorial human rights obligations.[92] However, there are two important qualifications that apply to positive human rights obligations. The first is that states do not have to secure the whole range of rights protected under the Convention, but the protection they offer depends on the jurisdiction states exercise extraterritorially. As the ECtHR put it, 'the Convention rights can be tailored and divided.'[93] The other qualification is that states are expected to prevent or put an end to inferences with human rights by third parties only when they 'know or ought to have known' that individuals are at risk.[94]

So how can these human rights obligations be translated in the context of piracy? It is now widely accepted that seafarers transiting the HRA are at risk.[95] It has therefore been argued that flag states might be in breach of their human rights obligations if they fail to take appropriate preventive measures against the seizure of the vessel and crew or fail to put an end to hostage-taking of seafarers.[96] While flag states are not expected to protect the full spectrum of human rights on board vessels, they still have to prevent or put an end to breaches of the right to life and freedom from torture, in addition to conducting independent and effective investigations into breaches of these rights.[97] If a blanket ban on ransom payments is introduced, it is hard to see how flag states will be able to comply with their positive human rights obligations towards seafarers. As discussed above, diplomatic means or rescue missions can be used, but ransom payments remain the only effective tool flag states have to secure the release of seafarers taken hostage.

---

91 HRC 'General Comment No. 31' (n 86) para 10.

92 *A and Others v UK* App no 3455/05 (ECtHR, 19 February 2009) para 22; *Z and Others v UK* App no 29392/95 (ECtHR, 10 May 2001) paras 73-74. See also Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004).

93 *Al-Skeini* (2011) para 137.

94 *Osman v UK* EHRR 1998-VIII (ECtHR, 28 October 1998) para 115; *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009) para 148; *A and Others v UK* (2009) para 22; *Z and Others v UK* (2001) paras 73-74; *E and Others v UK* App no33218/96 (ECtHR, 26 November 2002) para 22.

95 Evans and Galani (n 15) 356; Galani (n 15) 81-82.

96 Stefano Piedimonte Bodini, 'Fighting Maritime Piracy under the European Convention on Human Rights' (2011) EJIL 829, 839; Efthymios Papastavridis, 'European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?' in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the ECHR – Legal and Practical Implications* (Martinus Nijhoff Publishers 2013) 129-30; Tom Obokata, 'Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression?' (2013) 17 The International Journal of Human Rights 18, 27.

97 *Jaloud v Netherlands* App no 47708/08 (ECtHR, 20 November 2014) paras 154, 183-228.

Flag states bound by the ECHR bear another human rights obligation relevant to piracy: not to expose individuals to ill-treatment or other human rights violations, even if such treatment is imposed by non-state actors.[98] A ban on ransom payments could lead to two different, but both unwanted, outcomes. First, states would not be able to continue sending their vessels to seas contaminated by piracy, as it would expose individuals to risk without being able to offer them any adequate safeguards if they are taken hostage. Second, seafarers could also refuse to transit areas affected by piracy, as they would know that shipowners and states will be barred from securing their release through a ransom payment. Such a restriction would cause unprecedented financial damage to the shipping industry, as the bulk of world trade is carried by sea through straits and seas prone to pirate attacks.[99] Seafarers sent to transit areas affected by piracy and taken hostage might be destined to perish, as the most effective method of release - ransom payments - would be banned.

It cannot be said that extending the human rights obligations of states on ships flying their flag is uncontroversial. To begin, the operation and manning of vessels by private ship companies suggests that flag states do not have effective control over what occurs on board a vessel.[100] It is also hard to argue that the drafters of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) had human rights obligations in mind when they agreed that vessels are subjected to the exclusive jurisdiction of their flag state on the high seas (Article 92) and the latter has to effectively exercise this jurisdiction (Article 94) by ensuring respect for international rules and standards.[101] However, piracy has been an illuminative example of the challenges that human rights face in the 21st century and it is therefore imperative that human rights be protected in the maritime domain. There is an emerging consensus that the UNCLOS is a living instrument and should be interpreted to address human rights challenges at sea.[102] At the same time, it has been argued that the ICCPR and the ECHR should not be interpreted in a legal vacuum.[103] In light of these developments, combined with the increasing threats faced by seafarers, this article submits that an absolute ban on piracy ransom payments cannot be reconciled with the human rights obligations of flag states towards seafarers seized on board vessels flying their flags, and flag states should carefully consider the welfare of seafarers in the fight against piracy.

---

98 *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989) para 91; *Chahal v UK* App no 22414/93 (ECtHR, 15 November 1996) para 80, *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) para 138. On this analogy, see also Galani (n 15) 81-82.

99 More than 90% of the world's trade is transported by sea, and more specifically through the Gulf of Aden, Malacca Straits, Singapore Straits and South China Sea that remain the most dangerous waters around the globe, see the ICC figures <https://icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings> accessed 27 February 2017.

100 Khaliq (n 15) 339-43.

101 For the duties of flag states see Richard Barnes, 'Flag States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 304-24.

102 Khaliq (n 15) 339-40. See also Tulio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley Journal of International Law 1, and Irini Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons? (2012) 27 The International Journal of Marine and Coastal Law 867.

103 *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D829/1998 (2003) para 10.3; *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) para 137; see also George Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 EJIL 279. See also the developing approaches of the HRC in relation to death row and extradition in Amrita Mukhrejee, 'The ICCPR as a 'Living Instrument': The Death Penalty as Cruel, Inhuman and Degrading Treatment' (2004) 68 The Journal of Criminal Law 507.

4. Ransom ban: ending piracy or shipping interests?

A ban on ransom payments to pirates would not only affect the protection of seafarers, but also the financial interests of shipowners and the international shipping industry as a whole. Shipowners and insurers will not be allowed to pay ransoms to secure the release of vessels, cargos or crews. It is doubtful whether the UK could justify such a move on either financial or legal grounds. As will be explained, if a ban on ransoms is implemented, the economic cost of piracy could be much higher than it is now. It is also questioned how such a ban will comply with the MIA 1906 - as it currently stands and is being interpreted by UK courts – meaning that the UK might have to reform its statutory provisions if a ban is implemented.

4.1 The economic cost of piracy before and after a ban on ransoms

Admittedly, the economic cost of piracy has increased over the last decade and has adversely affected international shipping interests. A decade ago, when pirate attacks began increasing, the shipping industry faced reproach for failing to effectively respond to piracy.[104] However, over the years these allegations proved to be untrue by the costly counter-piracy measures implemented by the shipping industry and its intense efforts to protect their vessels and crews against piracy. For example, the economic cost of African piracy between 2010 and 2015 was estimated to be about $21.1 billion, of which almost $15.5 million was covered by the shipping industry itself.[105] These costs included marine insurance, labour expenses, security equipment, guards and increased speed costs.[106] The addition of ransom payments further demonstrate the astronomical expenses that the shipping industry has assumed to protect its interests against piracy. It is estimated that between $340 million and $435 million was paid in the form of ransoms for ships and/or seafarers kidnapped by Somali pirates between 2005 and 2015.[107] Oceans Beyond Piracy (OBP) also estimated that $1.6 million was paid in ransoms to recover hostages abducted by pirates in West Africa in 2015.[108] An estimated total of $8.5 million is the reported loss the shipping industry sustained in stolen goods and cargo by pirates in the West Africa and Southeast Asia regions in 2016.[109]

The reported costs of maritime piracy make it undeniable that piracy, and especially the criminal business of hostage-taking, has yielded huge profits for pirate gangs and caused significant financial damages to the shipping industry. It is these costs, and especially the ransom payments, that have compelled the US and UK to advocate in favour of an absolute ban on ransom payments.[110] Howev-

104 House of Commons - Foreign Affairs Committee (n 40) at 111.

105 OBP (2016) (n 61) 15-22, 31-37; OBP (2014) (n 8) 7-37, 54-64; OBP, The Economic Cost of Somali Piracy 2012 (2013) 1-72; OBP, The Economic Cost of Somali Piracy 2011 (2012) 1-61.

106 ibid.

107 See (n 8).

108 OBP (2016) (n 61) 32.

109 ibid 36, 49.

110 See Section 2.3 above.

er, what has not been reported is an estimate of the cost of piracy had the ransom ban been in place. For example, the value of the *Bunga Melati Dua* and her cargo was $80 million, but the vessel was released in exchange for a $2 million ransom, which is only a small fraction of the actual value of the vessel.[111] The last commercial vessel, *MT Smyrni*, seized by Somalis was released in 2013 for a ransom that reportedly totalled $13 million.[112] While the exorbitant ransom was extensively reported, what failed to receive equal attention was the fact that the vessel was carrying 135,000 metric tonnes of Azerbaijan crude oil with a market value of approximately $130 million.[113] Unfortunately, there does not appear to be any collected information on the actual value of the seized vessels and the market value of cargos. Although it can still be argued that, had a ban been in place, the financial damage caused by the seizures of the *Bunga Melati Dua* and the *MT Smyrni* alone would have amounted to $210 million, without calculating the actual value of the *MT Smyrni*. This amount equals over half of the total sum paid to Somali pirates for the release of 152 vessels hijacked between 2005 and 2012.[114] This suggests that while the ransoms demanded by pirates seem extortionate, they remain a manageable cost for the shipping industry.

In addition, the claim of those who advocate for a ransom ban that the economic cost of piracy will decrease when ransom payments end is speculative at best. There is no guarantee that pirates who currently employ the 'kidnap for ransom' model will not turn to other models of piracy, such as those in West Africa, where pirates seize oil tankers for their cargo,[115] or in Southeast Asia, where the crews are murdered and vessels are being renamed, registered as new and sold.[116] This means that pirates will carry on making profits from seizing vessels, while shipowners will be unable to secure the release of their crews and vessels. Whereas shipowners could save the costs of ransom payments, they would sustain greater costs by the loss of their vessels and cargos. At the same time, the costs of counter-piracy measures would likely remain high or could increase even further, as the shipping industry would have to take all possible precautions to protect their vessels knowing that hijacked vessels will be irretrievably lost following a ban on ransoms.

Given the financial crisis that hit the maritime sector at the beginning of 2016, a discussion of the financial implications of a ransom ban for the shipping industry is highly topical.[117] The Baltic Dry Index, which measures the cost of shipping raw materials such as iron ore, coal and grains, plummeted to all-time lows during the first two months of 2016.[118] The shipping crisis coincided with the economic slowdown in China, the world's largest consumer of commodities, which is therefore con-

111 *Masefield AG* (2011) para 11.

112 UNSC 'Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' (21 October 2013) UN Doc S/2013/623, para 6.

113 OceanusLive.org, 'Tankers Royal Grace and Smyrni Released by Somali Pirates' (9 March 2013) <www.oceanuslive.org/main/viewnews.aspx?uid=00000660> accessed 26 February 2017. For more case studies, see the FAFT Report (n 7) 11-12, 14-16.

114 World Bank (n 8) 41.

115 For piracy in the coasts of West Africa see Marts (n 58) 9-11, Murphy (n 3) 61-90.

116 Ong (n 3) 270-75; Beckman (n 64) 14-16.

117 Palmer (n 3) 210-21.

118 DryShips Inc. <www.dryships.com/pages/report.php> accessed 26 February 2017.

sidered to be the main cause of the crisis.[119] The rapid expansion of more efficient and energy-saving fleets that followed the increase in oil prices resulted in a number of vessels failing to make any profits and struggling to repay interest on their debts.[120] This has put banks' lending portfolios under huge pressure without excluding the possibility of distressed sales or seizure of vessels, as happened with Hanjin Shipping's bankruptcy.[121] Maritime analysts have not linked the 2016 shipping crisis with counter-piracy related costs or the premiums that shipowners have been paying to insure the vessels and crews against pirate attacks. However, it is difficult to ignore that the shipping industry was already under huge financial pressure due to piracy just before the crisis hit. In 2015 alone, the economic cost of African piracy was almost $1.7 billion of which $1.2 billion was industry, labour and insurance costs.[122] It is therefore argued that an absolute ban on ransom payments could cause further needless financial uncertainty and turmoil to the maritime sector by, *inter alia*, increasing the likelihood that brand new vessels will be irretrievably lost - despite not having turned a profit due to the remaining interest or capital debts.

It is also hard to see how the UK government would justify such a ban and the resulting consequential losses to the UK marine insurance industry. While the UK might no longer be one of the big international fleet owners, UK banks remain huge players in shipping finance. For example, in 2015, the Royal Bank of Scotland had total loan exposures of £8.3 billion (GBP) and Lloyd's gross written premium for marine liability was £2.2 million.[123] An absolute ban would restrict Kidnap & Ransom (K&R) policies or other policies that cover ransom payments either in the UK or abroad, which would make it extremely difficult for lenders to be repaid for hijacked vessels that cannot be retrieved.[124] This is not to say that foreign marine insurance businesses would face the same problems, as it is unclear how, if at all, an international ransom ban would be enforced.[125] Thus, while the financial interests of the UK shipping industry would steadily decline, other states that have proven themselves to be more flexible in maritime business and where open registries and flag of conveniences operate - such as Liberia and Panama - could transform into marine insurance hubs.

---

119 Berenberg Aspekte, 'Causes of the Shipping Crisis' (2016) <www.berenberg.de/fileadmin/user_upload/berenberg2013/01_Private_Banking/Kompetenzzentren/20160321_aspekte_Maritime_2_Shipping_Crisis.pdf> accessed 19 February 2017.

120 John Ficenec, 'Zombie ships send maritime freight into worst crisis in living memory' (*The Telegraph*, 22 January 2016) <www.telegraph.co.uk/finance/12108453/Zombie-ships-send-maritime-freight-into-worst-crisis-in-living-memory.html> accessed 19 February 2017.

121 The Guardian, 'Hanjin Shipping bankruptcy causes turmoil in global sea freight' (2 September 2016) <www.theguardian.com/business/2016/sep/02/hanjin-shipping-bankruptcy-causes-turmoil-in-global-sea-freight> accessed 19 February 2017.

122 OBP (2016) (n 61) 21-2, 36-37.

123 Ficenec (n 120); Lloyd's 'Aggregate Accounts 2015' 16. <www.lloyds.com/~/media/files/lloyds/investor%20relations/2015/annual%20results/lloyds_aggregate_accounts_2015.pdf> accessed 19 February 2017.

124 Christopher Douse, 'Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry' (2010) 35 Tulane Maritime Law Journal 276, 276-77.

125 For the challenges of implementing an absolute ban on ransom payments, see Dutton and Bellish (n 12) 324-25.

In light of these considerations, the argument that a ban on ransom payments could minimise the profits of piracy, yet increase the financial benefits of the shipping industry, are ill-founded. The nature of modern piracy is continuously evolving and highly adaptive, which means that pirates will remain a threat to maritime commerce even after an absolute ban is agreed. At the same time, the ban could have severe financial implications for an already financially unstable maritime industry, which have received no consideration by the advocates of a ransom ban.

4.2 The MIA 1906 and a ban on ransom payments

In addition to the weak arguments that a ban on ransom payments could reduce the costs of piracy for international shipping and eliminate piracy, further legal questions arise as to how the ban would fit within the current interpretation of the MIA 1906.[126] In the *Bunga Melati Dua* case, legal issues arising from the capture of a vessel by pirates were examined. The UK court interpreted the policies under the MIA 1906 and concluded that the seizure of a vessel by pirates is not an actual total loss, as the insured vessel is not destroyed nor so damaged as to cease to be a thing of the kind insured, or an asset irretrievably lost.[127] The seizure was neither a constructive total loss, which happens only in cases in which 'the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred'.[128] Both conclusions were justified on the basis that pirates seize vessels with the intention of extracting a ransom and, once the ransom is paid, the vessel, cargo and crew return to the shipowners.[129] At the same time, it has been concluded that when a sue and labour clause exists in a policy, 'it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss'.[130] In the context of piracy, the term 'reasonable' has been interpreted to include the payment of a ransom with due regard to the value of the vessel and cargo.[131]

In light of the proposed ban, it remains questionable how the MIA 1906 will be implemented and interpreted if the ban is realised. Would the seizure of the vessel be treated as an actual total loss? Such an interpretation would cause premiums to increase sharply resulting in even higher costs for ship and cargo owners. Additionally, how would the term 'reasonable' be defined? If ransoms are forbidden, would the shipowners be expected to take alternative forms of *reasonable* actions to mitigate losses? And what would these actions be: negotiations, rescue missions, or compromises other

126 For the development of piracy as a peril insured under the MIA 1906 see Gotthard Gauci, 'Piracy and its Legal Problems: With Specific Reference to the English Law of Marine Insurance' (2010) 41 Journal of Maritime Law and Commerce 541, 544-52; Douse (n 124) 278-86; Soady (n 16) 1-4.

127 Section 57(1) MIA 1906; *Masefield AG* (2011) para 56.

128 Section 60(1) MIA 1906; *Masefield AG* (2010) para 66.

129 See also the relevant commentary in Gauci (n 126) 552-58; Kate Lewins and Robert Merkin, '*Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua* - Piracy, Ransom and Marine Insurance' (2011) 35 Melbourne University Law Review 717, 726-33; Paul Todd, 'Maritime Fraud and Piracy' (London, Lloyd's List, 2010) 22-24; Soady (n 16) 16-25.

130 Section 78(4) MIA 1906.

131 See Section 2.3 above.

than monetary concessions? Despite the criticism that the MIA 1906 might not be consistent with modern commercial law practices, it remains one of the most influential pieces of marine insurance law worldwide as it has been in force for more than a century and has had all its provisions judicially tested.[132] It is therefore difficult to see how a ban on ransom payments could fit within the provisions of the MIA 1906 and the judicial interpretation of these provisions by the UK courts without affecting commercial certainty.[133]

It has also been established that the crew cannot be insured under a hull or cargo policy, and while a ransom paid for the crew might be recovered, the best way for a shipowner to secure their release without sustaining financial damage is through K&R policies.[134] Nevertheless, if the UK were to implement a ban similar to that imposed on terrorists, K&R policies would be criminalised. As a result, shipowners will not be able to rescue their crews nor could they recover losses sustained by having to compensate the victims.[135] The adverse impact of the lack of a K&R policy on seafarers taken hostage has been confirmed in the grimmest of ways as the hostages who have spent the longest time in captivity were those on whom there was no K&R policy and the shipowners refused to assume the financial burden of paying a ransom for their release.[136] On top of all this, the severe human rights violations, discussed above, that seafarers would suffer cannot be overlooked as a ransom ban would lessen the likelihood of securing the release of those taken hostage.

5. Conclusion

In an era when terrorist hostage-taking poses a significant threat to innocent victims and generates a considerable profit for terrorist groups, a ban on ransom payments to terrorists is an expected reaction. This is not to say that the same approach should be applied to the seizure of vessels and crew members by pirates. Maritime piracy operates in a commercial environment and a ban on ransom payments would likely have an adverse impact on international shipping. This article examined the existing international and national policies on ransom payments and clarified that, for the time being, there has been no universal ban on ransom payments to pirates and such payments remain legal and compatible with public policy in the UK. It was also explained that ransom payments are vital for the protection of seafarers, who have become targets of modern piracy.

---

132 Howard Bennett, 'The Marine Insurance Act: Reflections on a Centenary' (2006) 18 Singapore Academy of Law Journal 669, 691.

133 ibid 673-77.

134 *Royal Boskalis Westminster N.V.* (1999) 739. See also the discussion in Douse (n 124) 286-87 and Todd (n 129) 24-25, 29-30.

135 For example, the Filipino Government requires all maritime employers to compensate Filipino seafarers, who are estimated to be up to 670,000 of the world's 1.37 million seafarers, by entitling them to 200% of wages and benefits while transiting the HRA. The entry into force of the International Labour Organisation's (ILO) 2006 Maritime Labour Convention (MLC) in 2013 also ensures that all seafarers who are eligible for hazard pay receive the extra compensation for transiting the HRA. See OBP (2014) (n 8) 22.

136 UNODC, 'Maritime Crime Programme' (March 2014) 1 <www.unodc.org/documents/easternafrica/UNODC_MCP_Brochure_March_2014.pdf> accessed 26 February 2017.

An examination of the evolving human rights framework, and more specifically the positive human rights obligations of flag states, demonstrated that it will be challenging for flag states to comply with their human rights obligations if a ransom ban is implemented. In addition to the human rights implications for the protection of seafarers, the discussion on the adverse commercial impact of a ransom ban on the international shipping industry concluded that a ban could increase costs for the shipping industry, as vessels and crews would be irretrievably lost. The issue would become even more complicated in the UK, given that the current interpretation of the MIA 1906 not only permits ransom payments, but it also requires the shipowner to negotiate the release of the vessel and crew by agreeing to a ransom before relying on insurance. A universal ban on ransom payments seems utopian, and the UK plan to restrict ransom payments to pirates, similar to the restrictions imposed in the context of terrorism, would only give rise to more inconsistencies and put the interests of the UK marine industry at risk. It is therefore concluded that the arguments that an absolute ban on ransom payments to pirates could eliminate piracy and protect the interests of the international shipping industry are ill-founded and this policy is not fit for purpose.

ISSN 2464-9724

Maritime Safety and Security Law Journal

2017
Issue 3

Maritime Safety and Security Law Journal

A Commentary on the Dispute Concerning *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*

*Nicholas A. IOANNIDES**

Abstract

In an era where hydrocarbon exploration and exploitation activities keep soaring, the law of maritime delimitation has a vital role to play. Even though the optimal result in a delimitation dispute would be the establishment of a definitive and permanent boundary, international law envisages rules for the regulation of offshore activities in undelimited/disputed maritime areas as well. In order to delimit their respective maritime areas and proceed with hydrocarbon operations, Ghana and Côte d'Ivoire submitted their maritime dispute to a Special Chamber of ITLOS. The Chamber had to address a series of issues, including the existence or not of a tacit delimitation agreement, the delimitation of the relevant maritime area both within and beyond 200M and the alleged international responsibility of Ghana. After resolving that there was no tacit delimitation agreement, the Chamber applied the three-stage method and designated a maritime boundary based on equidistance for the area both within and beyond 200M. Nonetheless, the Chamber's findings with respect to the 'constitutive nature' of a delimitation judgment, delimitation beyond 200M in the absence of recommendations issued by the CLCS and the performance of unilateral drillings in undelimited/disputed maritime areas appear to be controversial and precarious.

Keywords: tacit delimitation agreement, equidistance/relevant circumstances, three-stage method, delimitation beyond 200M, state responsibility, Article 83(3) UNCLOS

First published online: 9 December 2017

1. Introduction

On 23 September 2017, the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) handed down its judgment in the *Ghana/Côte d'Ivoire* maritime delimitation case. It should be noted that the Special Chamber had issued an Order (25 April 2015) prescribing provisional measures, which included, among others, prohibition of new drillings by Ghana in the undelimited/

* Corresponding author details: Nicholas A. Ioannides earned his Ph.D. in Public International Law from the University of Bristol. He is currently a Nippon Fellow at the ITLOS. He has also served as an external legal advisor to the Ministry of Foreign Affairs of the Republic of Cyprus and has represented Cyprus in the BBNJ Preparatory Committee. The views expressed in this commentary in no way represent the positions either of the Nippon Foundation or those of the Ministry of Foreign Affairs of the Republic of Cyprus.

disputed area. As the Parties lodged the case to the Special Chamber by way of a Special Agreement (initially, Ghana had instituted proceedings under Annex VII of the 1982 United Nation Convention on the Law of the Sea - UNCLOS) no serious jurisdictional issues occurred apart from the question whether the Chamber was competent to address the matter of state responsibility regarding alleged violations of Article 83 UNCLOS by Ghana. The Special Chamber did not accept the Ghanaian argument on the existence of a tacit delimitation agreement and utilised the three-stage process in order to draw a single maritime boundary according to the equidistance/relevant circumstances method delimiting the territorial sea, the exclusive economic zone (EEZ) and the continental shelf both within and beyond 200M. However, one of the most interesting aspects of the judgment is that the Chamber did not consider the unilateral drillings performed by Ghana in an undelimited/disputed maritime area as constituting a violation of the obligations imposed on the authority of Article 83(3) UNCLOS.

2. The Provisional Measures Order

In the aftermath of the institution of the Special Chamber, Côte d'Ivoire filed a request for provisional measures asking the Chamber to order the suspension of the ongoing oil activities and to prohibit the granting of additional hydrocarbon licences by Ghana; to prevent information regarding hydrocarbons attained by Ghana from being used to the detriment of Côte d'Ivoire; to take measures to preserve the continental shelf, superjacent waters and the seabed; to order Ghana to refrain from any unilateral activities that might entail a risk of prejudice to Côte d'Ivoire's rights and might aggravate the dispute.[1]

In its Order, the Special Chamber highlighted the great importance ascribed to the preservation of the marine environment by the UNCLOS, customary international law and international jurisprudence.[2] Additionally, the Chamber accentuated the risks Ghana's exploration and exploitation activities, including exploratory drillings, might bring about for the environment and noted that damage on the seabed and subsoil would not be possible to be remedied by means of compensation.[3] In the end, the Chamber concluded that Ghana's activities might cause an irreparable harm to the environment and therefore ordered Ghana not to commence any new drillings.[4] The Chamber also reiterated an important point, which could allay the fears of many states involved in a dispute and could contribute to the easement of tensions. In particular, it stated: 'any action or abstention by either party in

1 *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015,* p. 146, para 25.

2 ibid paras 68-73; Yoshifumi Tanaka, 'Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the Ghana/Côte d'Ivoire Order of 25 April 2015 before the Special Chamber of ITLOS' (2015) 46(4) ODIL 315; Andrés Sarmiento Lamus and Rodrigo González Quintero, 'Request for Provisional Measures in the *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*' (2016) 31(1) IJMCL 160.

3 *Ghana/Côte d'Ivoire* (n 1) paras 88-91.

4 ibid para 102, Dispositif para 1(a).

order to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute'.[5]

Another noteworthy aspect of the Order is that the Chamber took into consideration any financial losses Ghana was likely to suffer in case its ongoing hydrocarbon activities were to be terminated. With a view to striking a balance as to the protection of the rights of both parties and although it prohibited any future activities, the Chamber did not order cessation of those activities already underway, distancing itself from previous case law.[6] However, as Tanaka notes, the fact that the oil and gas activities of Ghana took place on its side of the equidistance line may have played a role in the Chamber's decision in this respect.[7]

An additional crucial point is the finding of the Chamber that access to information about resources falls within the ambit of a state's exclusive rights.[8] This suggests that even exploration for the attainment of seismic data may constitute a violation of sovereign rights and should be prohibited. Besides, that is what exclusivity of the coastal state's sovereign rights in respect of exploration over its continental shelf stipulates. The particular conclusion signalled a departure from previous cases where international courts and tribunals seemed to condone unilateral exploration activities in undelimited/disputed areas.[9]

3. The Merits Phase

3.1 Existence of a tacit delimitation agreement (paras 100-246)

One of the main arguments put forward by Ghana at the merits stage was that a tacit delimitation agreement existed as between the Parties and therefore asked the Chamber to endorse the purported 'customary equidistance boundary' instead of drawing another equidistant line. Ghana predicated its claim on 'consistent oil practice', namely the fact that both Parties carried out oil activities on their side of the alleged customary equidistance line and concessions granted by the Parties did not cross

5 ibid para 103; see also *M/V "SAIGA" (No 2) (Saint Vincent and the Grenadines v Guinea), Provisional Measures, Order of 11 March 1998*, *ITLOS Reports 1998*, p. 24, para 44; *M/V "Louisa" (Saint Vincent and the Grenadines v Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, para 79; *"Arctic Sunrise" (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, para 99; this point is significant and is connected to the obligation of states to abstain from any unilateral activities that might jeopardise or hamper the reaching of the final agreement on the authority of Articles 74(3) and 83(3) UNCLOS. See infra sections 3.3 and 4.

6 *Ghana/Côte d'Ivoire* (n 1) paras 98-100; these findings were criticised by Tanaka, who argues that any financial losses on the part of Ghana could be compensated, while there is a risk for other states to use the decision in order to justify drilling in a disputed area. Tanaka (n 2) 325, 327; that risk has been exacerbated by the judgment on the merits. See infra, section 4.

7 Tanaka (n 2) 325; this factor seems to have also influenced the Chamber's decision regarding the purported violation of Article 83(3) UNCLOS.

8 *Ghana/Côte d'Ivoire* (n 1) paras 94-95.

9 See infra, section 4.

that limit.[10] Nevertheless, the Chamber took into account that Côte d'Ivoire had in several instances objected to the Ghanaian activities in the undelimited/disputed area, hence it was not bound by estoppel in this regard.[11] Furthermore, the Special Chamber did not deem concession maps, domestic legislation and submissions to the Commission on the Limits of the Continental Shelf (CLCS) sufficient evidence supporting the existence of a tacit agreement.[12] It also emphasised that oil activities are being carried out on the seabed and thus do not have any bearing on a delimitation involving the superjacent water column.[13] In addition, the Chamber noted that the conduct of bilateral negotiations with respect to the appropriate delimitation method and the issuance of joint statements by the Presidents of Ghana and Côte d'Ivoire referring to a delimitation agreement to be reached in the future lead to the conclusion that there was no tacit agreement on the 'customary equidistance boundary'.[14]

3.2 Delimitation of the maritime boundary (paras 247-540)

The Special Chamber stressed from the outset that the delimitation methodology to be followed should be the same for the whole process, namely for the territorial sea, continental shelf (within and beyond 200M) and EEZ.[15] In the discussion on the preferred delimitation method, the Chamber rejected the position supported by Côte d'Ivoire in favour of the angle bisector method given that there were no peculiar circumstances justifying the use of the particular method. On the contrary, the Chamber underlined the overwhelming use of the equidistance/relevant circumstances method in delimitation cases over the last years and opted for the 'internationally established' three-stage procedure.[16]

Prior to drawing a provisional equidistance line, the Chamber had to identify the relevant coasts on which base points would be placed (relevant Ghanaian coast approximately 139 km and relevant

10 *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017,* to be published, paras 102, 104 <www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf> last accessed 24 November 2017.

11 ibid paras 229-46.

12 ibid paras 146-68, 217, 224.

13 ibid paras 149, 226; the ICJ set forth that an agreed limit concerning a particular maritime zone cannot automatically be extended to another zone and thus a new agreement is necessary to this effect. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Judgment) [2001] ICJ Rep 97, para 240; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61, para 69; Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing 2006) 296.

14 *Ghana/Côte d'Ivoire* (n 10) paras 191-92, 220-23, 228.

15 ibid paras 259-63; the same approach was taken in another two cases: *Barbados/Trinidad and Tobago Award* [2006] 27 RIAA 147; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* p. 4.

16 *Ghana/Côte d'Ivoire* (n 10) para 360; the three-stage approach was used for the first time by the ICJ in the 2009 *Black Sea* case and has ever since been used in most maritime delimitation cases. Before that, international courts and tribunals used to apply a two-stage method providing for the designation of a provisional boundary (based either on the median/equidistance line or equitable principles) and examining whether there were any special or relevant circumstances calling for a modification of the provisional line with a view to reaching an equitable result.

Ivorian coast 352 km) as well as the relevant maritime area to be delimited (198,723 km^2) **(Maps 1 and 2)**. Following the line of reasoning of the 2009 *Black Sea* and the 2012 *Bangladesh/Myanmar* judgments, the Chamber did not accept the base points identified by the Parties and selected its own on the low-water line.[17]

Having done that, the Chamber designated a provisional equidistance line (first stage) and examined whether there were any relevant circumstances requiring the modification of the provisional equidistance line (second stage). In dealing with the Côte d'Ivoire's argument that the use of an equidistance line would produce a cut-off effect due to the concavity of the Ivorian coast, the Special Chamber resolved that the cut-off is not so significant as to warrant adjustment of the provisional boundary.[18]

In line with the established international jurisprudence, the Chamber gave prominence to geographical factors and did not consider the location of mineral resources and the conduct of the parties -mostly relating to oil operations- as relevant circumstances calling for an amendment of the provisional line. It also proclaimed that the lack of recommendations by the CLCS did not pose a bar to the jurisdiction of the Chamber to draw a maritime boundary in the area beyond 200M. In light of the above, it was concluded that no relevant circumstances dictating alteration of the provisional equidistance line were present.[19]

At the final stage, the Chamber applied the disproportionality test with a view to ascertaining whether the result reached at the second stage was not disproportionate. Since the ratio of the relevant coastal lengths is 1:2.53 in favour of Côte d'Ivoire and the ratio of the allocated maritime areas is 1:2.02 in favour of Côte d'Ivoire, the Chamber found that there is no disproportionality **(Maps 3 and 4)**.[20]

3.3 International responsibility of Ghana (paras 541-659)

Even though the Special Agreement did not cover the matter of jurisdiction to decide on the international responsibility of Ghana, the Chamber found itself competent to do so because of the conduct of the Parties during the proceedings and by virtue of Article 293 UNCLOS providing for recourse to general international law in cases adjudicated within the framework of Part XV UNCLOS.[21]

The Special Chamber propounded that a delimitation judgment gives 'one entitlement priority over the other' and thus has a 'constitutive nature' in the sense that it determines which part of the disputed area falls within the jurisdiction of each of the Parties. Therefore, the Chamber stressed the following:

17 *Ghana/Côte d'Ivoire* (n 10) paras 387-400.

18 ibid paras 421-25.

19 ibid paras 450-80, 493, 495, 517-19.

20 ibid paras 536-38.

21 ibid paras 545-59.

> maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States.[22]

Further, the Chamber opined that Ghana did not violate the obligation (of conduct) to negotiate in good faith in compliance with Article 83(1) UNCLOS. It also held that Ghana's hydrocarbon activities in the undelimited/disputed area did not breach the obligation 'not to jeopardize or hamper the reaching of the final agreement' according to Article 83(3) UNCLOS given that Ghana had complied with the provisional measures Order and its activities were performed in an area ultimately allocated to it; consequently, Ghana was not found accountable for any violation of international law.[23]

4. Commentary

One of the conclusions inferred from the judgment is that it remains necessary for a state to manifest its objections to another state's activities that might prejudice the former's rights in order not to find itself later in a position where it would be debarred from voicing its protest (estoppel and acquiescence).[24]

What is more, the judgment under concern affirms the pivotal role of the equidistance/relevant circumstances method in maritime delimitation as well as the prevalence of the three-stage process. It reiterates that there is a high threshold in determining whether a tacit delimitation agreement exists[25] and upholds the predominance of geographical over non-geographical factors when it comes to the examination of any relevant circumstances calling for modification of the provisional equidistance line, even though it maintained that a cut-off effect due to concavity does not always call for an adjustment of the median/equidistance line.[26]

---

22 ibid paras 591-93.

23 ibid paras 594, 629-34.

24 *North Sea Continental Shelf Cases* (Judgment) [1969] ICJ Rep 3, para 30; *Bangladesh/Myanmar* (n 15) para 124; *The Chagos Marine Protected Area Award (Mauritius v United Kingdom)* [2015] paras 435-38 <www.pca-cpa.org/showpage.asp?pag_id=1429> last accessed 24 November 2017; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) [1984] ICJ Rep 246, paras 130, 145; *The Philippines v China Award on Jurisdiction and Admissibility* [2015] para 250 <www.pcacases.com/web/sendAttach/1506> last accessed 24 November 2017; Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (CUP 2015) 489-90; Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016) 241.

25 *Ghana/Côte d'Ivoire* (n 10) para 212; *Newfoundland and Labrador/Nova Scotia* (Awards of the Tribunal in the First and Second Phases of an Arbitration Concerning Portions of the Limits of the Parties' Respective Offshore Areas, 17 May 2001 and 26 March 2002 Respectively) 128 ILR 426; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, para 253; *Bangladesh/Myanmar* (n 15) paras 100-18; *Maritime Dispute (Peru v Chile)* (Judgment) [2014] ICJ Rep 3, para 91.

26 *North Sea cases* (n 24) para 91; *Bangladesh/Myanmar* (n 15) para 292; *Bangladesh v India Award* [2014] para 402 <www.pcacases.com/web/sendAttach/383> last accessed 24 November 2017.

With respect to non-geographical -especially economic- factors, albeit international courts and tribunals have not explicitly taken them into consideration in delimitation cases, it is argued that they underpin most maritime delimitation judgments and awards and they should be given additional weight. This is inevitable owing to the fact that the continental shelf and EEZ concepts were coined so as to serve states' economic interests.[27] As the ICJ put it: '[t]he natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation'.[28] In other words, economic factors are the *raison d'être* of both the continental shelf and the EEZ, which prompt states to pen delimitation agreements for the establishment of definitive and permanent maritime boundaries,[29] hence they should not be disregarded.

In addition, the judgment follows the stance taken by the Arbitral Tribunal in the 2006 *Barbados/Trinidad and Tobago Award*, the ITLOS *en banc* in the 2012 *Bangladesh/Myanmar* and the ICJ in the 2016 *Nicaragua v Colombia* (Preliminary Objections) cases, namely that there is no distinction between the 'inner' and 'outer' continental shelf in terms of the delimitation methodology and that the CLCS recommendations are not a prerequisite for the lateral delimitation of the continental shelf. Nonetheless, this approach might engender complications in the event the recommendations issued by the CLCS in a given case indicate that the natural prolongation of a state's continental shelf beyond 200M transcends the maritime boundary judicially established beforehand. In such an eventuality, if no other agreement between the parties is reached, the affected state could apply for a revision of the delimitation judgment with all the complexities something like that would generate.[30]

Perhaps a way to avert this kind of predicament could be a differentiation in the approach of courts and tribunals when it comes to delimitation beyond 200M. As it has already been consolidated in international jurisprudence, the distance criterion is the sole factor to be taken into consideration as to the determination of the width of a maritime zone at the expense of any geological or geomor-

---

27 *Case concerning the Delimitation of Maritime Areas between Canada and the French Republic* (1992) 21 RIAA 302, Dissenting Opinion of Judge Weil, para 34; David Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press 1987) 264-71; Derek W Bowett, 'The Economic Factor in Maritime Delimitation Cases' in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (Giuffrè Editore 1987) 45-63; Prosper Weil, *Perspectives du Droit de la Delimitation Maritime* (Pedone 1988) 274-82; Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (CUP 1989) 221-22; Barbara Kwiatkowska, 'Economic and Environmental Considerations in Maritime Boundary Delimitations' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries*, Vol I (Martinus Nijhoff 1993) 75, 78-81, 106; Masahiro Miyoshi, 'Some Thoughts on Maritime Boundary Delimitation' in Seoung-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009) 113; Malcolm D Evans, 'Maritime Boundary Delimitation' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 274-76.

28 *North Sea cases* (n 24) paras 97, 101(D)(2).

29 *Continental Shelf (Tunisia/Libyan Arab Jamahiriyia)* (Judgment) [1982] ICJ Rep 18, para 107; *Barbados/Trinidad and Tobago* (n 15) para 241; *Black Sea case* (n 13) para 198; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624, para 223; Committee on Rights to the Sea-bed and its Subsoil, 'Rights to the Sea-bed and its Subsoil' in International Law Association Report of the Forty-fourth Conference (Copenhagen 1950) (International Law Association, Copenhagen 1950) 87, 135, sub-paragraph (3).

30 Statute of the International Court of Justice, art 61; ITLOS Rules of the Tribunal, arts 127-129.

phological arguments; therefore, according to both conventional and customary international law, all states are entitled to a continental shelf and EEZ up to 200M.[31] However, in order for a state to assert continental shelf rights beyond 200M it is indispensable to prove that the natural prolongation of its landmass actually exceeds the 200M limit. Bearing in mind that the geological/geomorphological aspect unavoidably comes into play in respect of the area beyond 200M, it is argued that courts and tribunals should attach greater importance to it when drawing a maritime boundary in that area. Consequently, despite the fact that this position has not found support in jurisprudence thus far, in the absence of recommendations by the CLCS and with a view to precluding a stalemate,[32] international courts and tribunals could, at the first stage of delimitation, draw a provisional median/equidistance line up to 200M and then establish a different provisional line in the area beyond 200M based on the course of the natural prolongation.[33]

Moving now to another aspect of the judgment, what is utterly striking is the endorsement of unilateral drilling operations exercised in an undelimited/disputed maritime area. Even though Ghana carried out oil drillings in an area ultimately allocated to it, hence the Chamber found that no violation of the Ivorian sovereign rights occurred, this should not be accepted as a general rule. Nonetheless, it is necessary to point out that this finding affirms that maritime claims based on the median/equidistance line and activities -except for drillings, which appears to be the most extreme unilateral activity- performed within that limit tend to evidence good faith.[34]

In the 1976 *Aegean Sea Continental Shelf* case (Interim Measures of Protection), the ICJ held the following: 'in the event that the Court should uphold Greece's claims on the merits, Turkey's activity in seismic exploration might then be considered as such an infringement and invoked as a possible cause of prejudice to the exclusive rights of Greece in areas then found to appertain to Greece'.[35] In other words, the Court underscored that even seismic surveys in an undelimited/disputed area, which might later on be granted to Greece, might constitute a violation of Greece's exclusive sovereign rights to explore the natural resources of its continental shelf. In the case in hand, as seen above,

---

31 *Tunisia/Libya* (n 29) paras 42-43, 47, 70; *Continental Shelf (Libyan Arab Jamahiriyia/Malta)* (Judgment) [1985] ICJ Rep 13, paras 33-34, 39-40, 77; *Case concerning the Delimitation of Maritime Areas between Canada and the French Republic* (1992) 21 RIAA 265, para 47; *Gulf of Maine* (n 24) paras 193-95; *Barbados/Trinidad and Tobago* (n 15) paras 224-26; *Bangladesh/Myanmar* (n 15) para 322.

32 Occurring from the refrainment of the CLCS to issue recommendations because of the existence of a dispute and courts' desistance to designate a maritime boundary without the CLCS having issued recommendations. 'Rules of Procedure of the Commission on the Limits of the Continental Shelf', Rule 46 and Annex I; *Bangladesh/Myanmar* (n 15) paras 390-94; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 100, paras 105-14.

33 In his Dissenting Opinion in the *Libya/Malta* case, Judge Oda mentioned: 'the distance criterion has replaced that of geomorphology in all respects save in regard to the outer continental shelf between the 200-mile and 350-mile limits'. *Continental Shelf (Libyan Arab Jamahiriyia/Malta)* (Judgment) [1985] ICJ Rep 123, Dissenting Opinion of Judge Oda, para 61; Fietta and Cleverly (n 24) 295, 362, 508, 530, 571, 616-18; it would be extremely helpful if a cooperative scheme between international courts/tribunals and the CLCS was carved out; Judge Ndiaye submitted a proposal to establish a referral process. *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* p. 151, Separate Opinion of Judge Ndiaye, paras 87, 99, 107, 109-18.

34 Robert C Beckman and Clive H Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29(2) IJMCL 193, 211-12.

35 *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection) Order of 11 September 1976, ICJ Rep 3, paras 30-33.

the Special Chamber had also taken into account the risk of damage occurring from data gathering in its 2015 Order. Therefore, it would be logical to infer, *a minore ad maius*, that activities causing a permanent change to the seabed, like oil drillings, would most likely be an infringement of the coastal state's sovereign rights.

Nevertheless, the breach of a state's sovereign rights should be distinguished from a violation of the obligation stipulated in Articles 74(3) and 83(3) UNCLOS, namely 'not to jeopardize or hamper the reaching of the final agreement'.[36] It is worth mentioning that in the 2007 *Guyana v Suriname* case, the Arbitral Tribunal underlined the distinction between provisional measures for the protection of sovereign rights from activities in breach of Articles 74(3) and 83(3) UNCLOS:

> It should be noted that the regime of interim measures is far more circumscribed than that surrounding activities in disputed waters generally. As the Court in the Aegean Sea case noted, the power to indicate interim measures is an exceptional one, and it applies only to activities that can cause irreparable prejudice […] Activities that would meet the standard required for the indication of interim measures, in other words, activities that would justify the use of an exceptional power due to their potential to cause irreparable prejudice, would easily meet the lower threshold of hampering or jeopardising the reaching of a final agreement.[37]

Although the Tribunal did not consider unilateral seismic research as a breach of Articles 74(3) and 83(3) UNCLOS -because it did not entail an irreversible harm to the seabed- it resolved that unilateral drilling in an undelimited/disputed maritime area could be in contravention of the obligation envisaged in Articles 74(3) and 83(3) UNCLOS.[38] As a matter of fact, the Tribunal found that unilateral drilling activities undertaken by Guyana constituted a breach of the aforementioned obligations.[39]

Having said the above, it seems that the correct approach would have been to deem unilateral drilling activities in the undelimited/disputed area a breach of the obligation imposed by virtue of Article 83(3) UNCLOS, even if no violation of the sovereign rights of Côte d'Ivoire eventually materialised after the boundary was established. This is because the crux of the obligation is for states to show restraint and avoid unilateral activities that might trigger and/or exacerbate tensions. Of course, the

---

36 Myron H Nordquist, Shabtai Rosenne, Satya N Nandan (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol II (Martinus Nijhoff 1993) 815, 984; Rainer Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78(2) AJIL 345, 362.

37 *Guyana v Suriname Award* [2007] 30 RIAA 1, para 469.

38 ibid paras 466-70, 480-81.

39 ibid para 477.

finding on the 'constitutive nature' of the judgment is also controversial and contradicts the concept of sovereign rights a coastal state enjoys *ipso facto* and *ab initio* over its continental shelf, as expounded in the 1969 *North Sea Continental Shelf* cases.[40]

The way Côte d'Ivoire formulated its claim on this point (asserting that the activities in breach of Article 83(3) UNCLOS were undertaken in the Ivorian maritime area) might have played a role in the Chamber's judgment. At any rate, as mentioned above, a violation of Article 83(3) UNCLOS is not contingent on whether the activities are being carried out in a state's maritime area, but it merely suffices to prove that they are performed in an undelimited maritime area.

Judge Paik addressed the matter in his Separate Opinion noting that although the Ghanaian activities took place in an area finally allocated to Ghana, this does not preclude wrongfulness arising from the breach of the obligation provided for in Article 83(3) UNCLOS. As Judge Paik rightly remarked: 'to condone the unilateral activities of such a scale in the circumstances of the present case would certainly send a wrong signal to States pondering over their next move in a disputed area elsewhere'.[41]

A similar approach was taken by Judge Evensen in his Dissenting Opinion in the *Tunisia/Libya* case:

> Any acceptance by the Court that the drilling of oil-wells, in an area which was disputed, should have any relevance for the delimitation, would really be an invitation to Parties to violate certain basic trends laid down in the Fourth Geneva Convention of 1958 and the draft convention of 1981, and might invite aggressive attitudes, through the staking out of claims, instead of conciliatory approaches.[42]

By way of conclusion, it should be pointed out that as disputes in undelimited maritime areas will

---

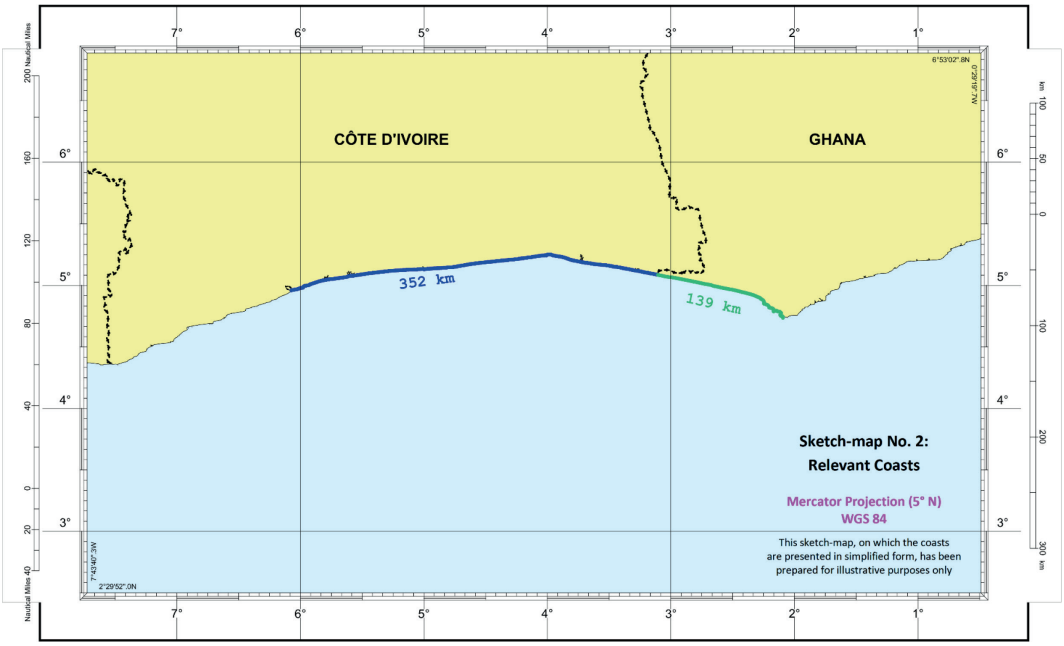
40 United States, Proclamation 2667, 'Policy of the United States with respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf' (28 September 1945); Convention on the Continental Shelf (signed 29 April 1958, entered into force 10 June 1964) 499 UNTS 311, art 2(2)(3); *North Sea cases* (n 24) paras 18-20, 63; *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, para 85; United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 77(2)(3); *Bangladesh/Myanmar* (n 15) paras 408-09; *Nicaragua v Colombia* (n 29) para 115; 'boundaries are found, not made'. M D Blecher, 'Equitable Delimitation of Continental Shelf' (1979) 73(1) AJIL 60, 63; 'It must be kept in mind that judges find entitlements; under no circumstances may they grant them.' Ndiaye (n 33) para 88; on the apportionment of the seabed see *North Sea Continental Shelf Cases* (Judgment) [1969] ICJ Rep 171, Dissenting Opinion of Judge Tanaka; *North Sea Continental Shelf Cases* (Judgment) [1969] ICJ Rep 197, Dissenting Opinion of Judge Morelli; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 157, Dissenting Opinion of Judge Oda, paras 153-154; Oda (n 33) para 64; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 130, Separate Opinion of Judge Shahabuddeen, pp. 159-61; *Anglo-French Continental Shelf Case (United Kingdom of Great Britain and Northern Ireland/France)* [1977] 18 RIAA 3, paras 78, 101; conversely, it can be accepted that without a delimitation agreement a coastal state's EEZ sovereign rights over the water column above the seabed should not be deemed duly established. BIICL, 'Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas' (2016) 20 <www.biicl.org/documents/1192_report_on_the_obligations_of_states_under_articles_743_and_833_of_unclos_in_respect_of_undelimited_maritime_areas.pdf?showdocument=1> last accessed 24 November 2017.

41 *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017,* to be published, Separate Opinion of Judge Paik, para 19.

42 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 278, Dissenting Opinion of Judge Evensen, para 26.

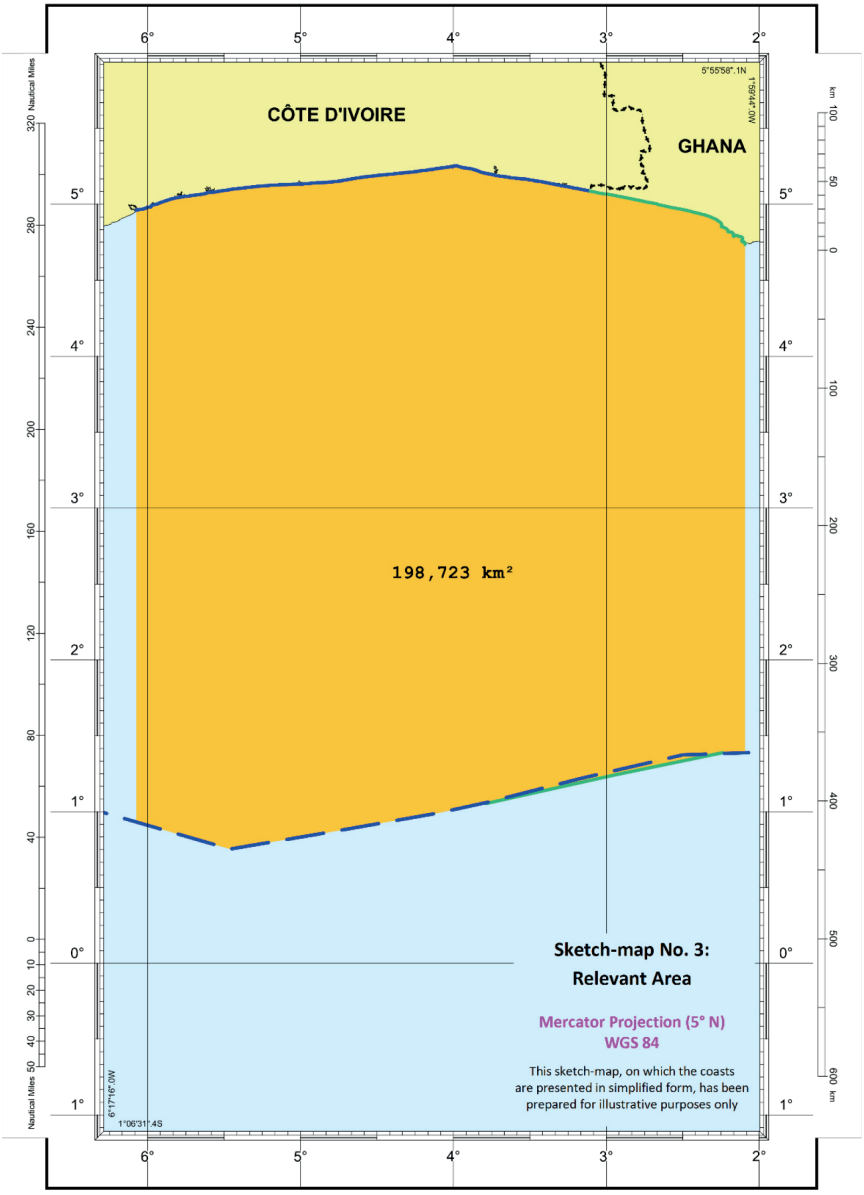
continue to emerge in the future, mainly owing to the performance of oil and gas activities, it remains to be seen whether the Special Chamber's interpretation of Article 83(3) UNCLOS will be upheld by international jurisprudence. As a similar case is in the ICJ's docket,[43] it will be interesting to see if the ICJ President, Ronny Abraham, who was a member of the Chamber, will play a role in instilling the Chamber's views in the Court's judgment.

On any account, the Chamber's views on the 'constitutive nature' of delimitation judgments and on non-violation of Article 83(3) UNCLOS by unilateral drillings are quite problematic. International jurisprudence should, for the sake of peace and stability, revisit these findings and follow the track designated by previous case law on the basis of both conventional and customary law of the sea.

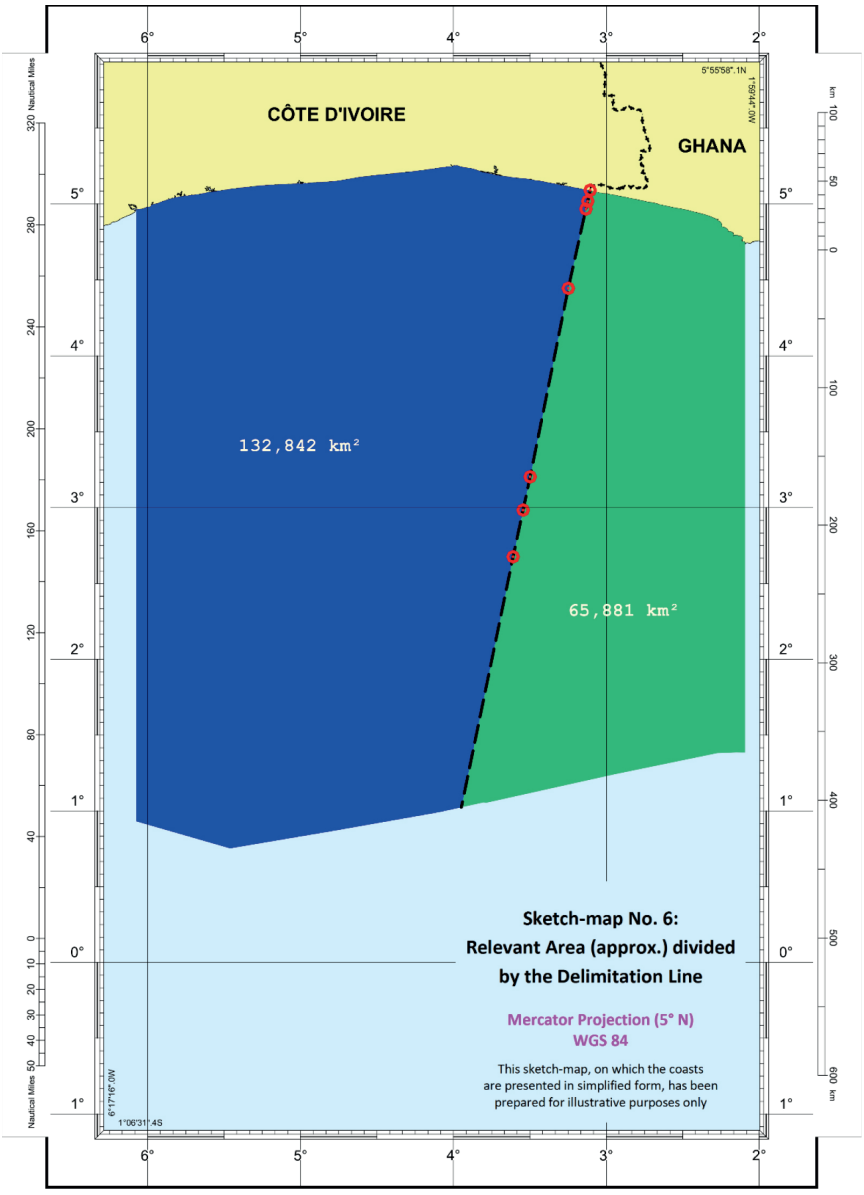


Map 1 – Relevant coasts (Source: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*)

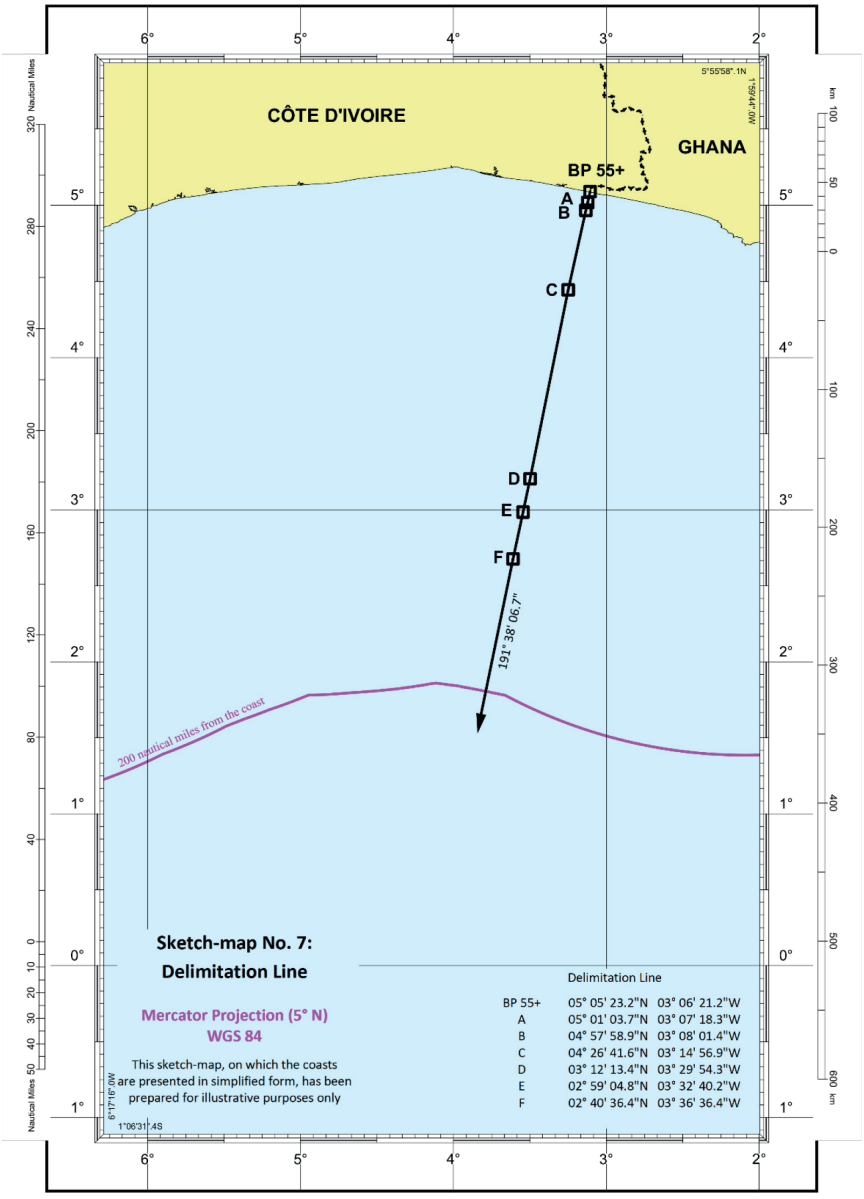
43 *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* <www.icj-cij.org/en/case/161> last accessed 24 November 2017.



Map 2 – Relevant area (Source: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*)



Map 3 – The delimited relevant area (Source: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*)



Map 4 – The final delimitation line (Source: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*)

ISSN 2464-9724

Maritime Safety and Security Law Journal

2017
Issue 3

Maritime Safety and Security Law Journal

Regulating private maritime security companies by standards: causes and legal consequences

*Marc-Antoine CARREIRA DA CRUZ**

Abstract

The quest for international legal instruments capable of regulating private maritime security companies (PMSCs) efficiently has been previously explored in-depth, but few scholars or practitioners have anticipated the rise of a new kind of regulation instrument coming from outside the traditional circles of regulators composed of states, international organizations and the maritime industry. Traditional international law instruments have been unable to create international solutions for the specific issue of PMSCs and the outcome is the rise of specialized private soft law instruments. This article focuses on one of these soft law instruments produced by an outsider: the ISO/PAS 28007-1:2015. The hypothesis is that arrival of the International Standardization Organization (ISO) on the private maritime security regulation field is the consequence of both the rise of ISO standard as a powerful regulation instrument in maritime matters and societal security matters, and the very specific configuration of international law on PMSC regulation. The contribution explores the logic by which the international regulation landscape opens the door to the ISO initiative, how the ISO came to invest the issue of PMSCs, and raise some of the potential legal implications of the ISO/PAS 28007-1:2015.

Keywords: standards, ISO, piracy, private maritime security companies, PMSC

First published online: 20 December 2017

1. Introduction

As numerous private maritime security companies (PMSC or PMSCs) have entered the game of maritime security, there have been debates on the kind of regulatory framework in which these actors must act, notably as regards the use of force and liability. The current regulatory framework related to PMSCs does not rest on classic hard law instruments of international law. Rather, it is complemented by soft law instruments, such as the four sets of guidelines issued by the Internation-

* Corresponding author details: Marc-Antoine Carreira da Cruz is an Assistant at the Brussels Parliament. He holds a Ph.D. in International Law from the University of Nice Sophia Antipolis and he holds certifications from UC Berkeley and Georgetown University in American Law and WTO Law.

al Maritime Organization (IMO) Maritime Safety Committee.[1] However, the IMO guidance is not sufficient to meet the concerns of the shipping industry and the insurance companies contracting PMSCs on the one hand and, on the other, those of well-established PMSCs faced with an increasing number of maverick competitors. This situation resulted in the rise of specialized *private* soft law instruments intended to overcome this problematic situation and to regulate this maritime category of the 'burgeoning transnational market for force' as described by Avant.[2] The rise of these instruments and the regulation of PMSC is a challenge, as explained by White and MacLeod, given the traditional focus on the state as principal right holder and duty bearer in international law, the use of PMSCs by international organizations does indeed raise complex issues of responsibility and accountability.[3] But, as noted by DeWinter-Schmitt and Elms, the international hard and soft law landscape seems to be relatively well articulated for the industry of PMSCs, notably with the recent developments in the ANSI/ASIS private security company (PSC) series and International Code of Conduct for Private Security Service Providers (ICoC) process that contributes to the further elaboration of soft law standards.[4]

This article focuses on one of these soft law instruments produced by a private actor: standard 28007-1:2015 (ISO 28007) issued by the International Standardization Organization (ISO). The hypothesis is that the ISO 28007 has the potential to emerge as the international regulation tool of reference for PMSCs for three reasons. First, because of the wide support coming from the IMO Maritime Safety Committee as well as the industry. Second, because in comparison to the Montreux Document and the ICoC, it seems to be the best tool for the situation of piracy, more directly relevant to the situation of piracy and armed robbery in the maritime domain.[5] Third, because it has the capacity to be articulated with other international hard law and soft law instruments on PMSCs and, more importantly, it can generate multiple legal consequences, beyond its role as a benchmark.

---

1 IMO Maritime Safety Committee, 'Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area'(25 May 2012) MSC.1/Circ.1443; IMO Maritime Safety Committee, 'Revised interim recommendations for flag states regarding the use of privately contracted armed security personnel on board ships in the High Risk Area' (12 June 2015) MSC.1/Circ.1406/Rev.3; IMO Maritime Safety Committee, 'Interim recommendations for port and coastal states regarding the use of privately contracted armed security personnel on board ships in the High Risk Area' (16 September 2011) MSC.1/Circ.1408; IMO Maritime Safety Committee, 'Revised interim recommendations for port and coastal states regarding the use of privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1408/Rev.1; IMO Maritime Safety Committee, 'Revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1405/Rev.2.

2 Deborah Avant, 'The Privatization of Security and Change in the Control of Force' (2004) 5 International Studies Perspectives 153, 153.

3 Nigel D White and Sorcha MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19 EJIL 966.

4 Rebecca DeWinter-Schmitt and Heather Elms, 'A Critical Analysis of Proliferation, Dynamic Interaction, and Evolution of Self-regulation within the Private Security Industry' (Working paper presented at the International Studies Association Annual Convention, San Francisco, 6 April 2013) 7.

5 IMO Maritime Safety Committee, 'Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1443, Annex, 2.1.

The arrival of the ISO on the private maritime security regulation field is not a mere coincidence; rather, it is a logical consequence of both the rise of the ISO standard as a powerful regulation instrument in maritime matters and societal security matters, and the very specific configuration of the international law on the PMSC regulation. This contribution explores the process by which the ISO came to invest in the issue of PMSCs, and it raises some of the potential legal implications of ISO 28007 with an assessment of this potential.

2. The regulation of PMSCs and the ISO standards

To understand how ISO standards have entered the regulation of PMSCs and its legal implications, it is necessary to first understand what standards are as a regulation instrument with legal implications (2.1) and then analyse PMSC regulation as a subject of the ISO standardization (2.2). This will allow us to fully explore the legal potential and implications of ISO 28007 (2.3).

2.1 Standards as regulation instruments in international law

To comprehend how standards are regulation instruments in international law, one must first and foremost define what is meant by standards and what function they fulfil (2.1.1) and how they can constitute sources of legal obligation and are legally used in various ways (2.1.2).

2.1.1 The definition and function of standards

The international reference when trying to define standards in the field of standardization is that established jointly by the ISO and the International Electrotechnical Commission (IEC) in the terminology guide of normalization activities periodically revised since 1976. Based on the guide, a standard is a document established by consensus, and approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.[6] The given definition may be completed with the definition supplied by the ISO outside of the guide. That particular definition remains close to the first one but sheds light on what is meant by 'common and repeated usages' for which rules and characteristics are provided. Indeed, it states that standards define demands, specifications and guiding principles or characteristics to be systematically used in order to ensure the suitability for use of products, processes and services.[7]

The creation of standards is driven by needs that are inherent to any international market that wishes to evolve towards optimal integration. Indeed, standards play an active role in the very organization of international trade under three angles: the harmonized transmission of information to consumers and between operators at different stages of production, the role of the organization

6 ISO – IEC, *Guide 2 – Standardization and related activities – General vocabulary* (8th edn, 2004) 12, para 3.2.

7 ISO, 'We're ISO: we develop and publish International Standards' (*International Standardization Organization*) <www.iso.org/standards.html> accessed 1 May 2017.

in network production, and the interface role to determine the interoperability and substitution of products on a market. From that point on, any integrated market requires standards in order to exist[8] as they act as a 'common grammar' between the actors of the market. It also enables all actors to agree on the 'how' and the 'what', which are key conditions of crucial steps such as conception, packaging and/or assembling, the closing of contracts and insurance.[9]

2.1.2 The legal nature and legal apprehension of standards

Standards are guarantee instruments that define criteria in order to reach an ideal model. One of the characteristics of the standards is that they are not binding as such from a legal standpoint; they are created with the intent of being an instrument of a voluntary nature.[10] Standards do not create legal obligations just by the mere fact of their existence. If they provide demands in the sense of provisions formulating criteria to be met, these demands are not mandatory – i.e. non-binding – unless induced by a legal norm.[11] Indeed, the application of the rules defined by standards is only made binding by virtue of a legal instrument or an exclusive reference to this legal instrument.[12] This *sui generis* non-binding aspect can clearly be deduced from the explanations given in the ISO and IEC common terminology guide. The latter specifies a different definition for 'mandatory standard', which states that the distinction with the standard can be found in the binding characteristic brought by the reference within the legal instrument.[13] Nevertheless, the legally non-binding characteristic of the standards is nonetheless insufficient to discern all the implications at the legal level of standards.

It seems important not to stop at the debate on the legal value of standards as such but to grasp the legal dimension of standardization.[14] To comprehend this legal dimension, one must remember the importance of the referent logic of the standard. The reference that they constitute creates the basis for accountability[15] between the recipient of the standard and other parties. This implies that in order to understand the legal dimension of standardization, the key element lies in the recognition of the standard, its referent characteristic and, most of all, the use of this matrix. As soon as a company decides to conform to a standard, it becomes accountable in terms of its conformity to the standard. From that point on, specific ties can appear in the various legal relations that this company has with a third party: the criteria developed by the standard will be used as explicit or implicit condition

8 Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005) 5.

9 ibid.

10 ibid 15.

11 ISO – IEC (n 6) 32, para 7.5.1.

12 ibid 44, para 11.4.

13 ibid.

14 Régis Bismuth, 'Une cartographie de la standardisation internationale privée: tentative d'identification de l'objet et de ses enjeux' in Régis Bismuth (ed), *La standardisation internationale privée* (Larcier 2014) 17.

15 Thomas Berns, 'Conclusion: Gouverner sans fin, ou quand le réel nous gouverne' in Benoit Frydman and Arnaud Van Waeyenberge (eds), *Gouverner par les standards et les indicateurs* (Bruylant 2013) 384.

by a company, a client, an administration or even a market. In this framework, the legal dimension manifests itself in the recognition that the standard will benefit from – either *de facto*, by becoming a market demand, or *de jure*, where it can assume different forms.[16]

We have identified numerous forms of *de jure* recognition of standards, such as their inclusion in the legal texts of international organizations for the purpose of presumption of conformity,[17] their inclusion in a contract as a requirement to comply,[18] their potential recognition as trade usage in international commercial arbitration,[19] their inclusion in the contract as drafting support,[20] the resort to standards as a check-list in the contract review process,[21] the compliance requirement based on a rule of substantive law,[22] their use as a scale to attest best standard practices,[23] or even their use as standard of care or as proof of due diligence[24]. There are also other forms of *de jure* recognition of standards, notably in United States law through their use in the domestic framework of self-audit privilege, in the fact that governmental agencies can take into account standards in self-policing incentives and through mitigating factors of the discretionary authority of prosecutors in the United States, and finally, through their use in the framework of a conviction.[25]

16 Bismuth (n 14) 17.

17 Erik Wijkström and Devin McDaniels, 'International standards and the WTO TBT Agreement: Improving Governance for Regulatory Alignment' (WTO Staff Working Paper, April 2013) ERSD-2013-06, 2, 3.

18 Richard Kemp, 'The growing role of standards in cloud contracts – some perspectives on ISO 27018' (*Lexology*, 26 October 2014) <www.lexology.com/library/detail.aspx?g=1ba0b154-346b-4c88-8ed3-ed1d2249ff87> accessed 1 May 2017. One case is that of the compliance requirement included in a set of specifications as part of an offer or while in a Service Level Agreement (SLA) in which the standard is a technical specification formalizing the expectations of the parties on the level of service.

19 Marc-Antoine Carreira da Cruz, 'International standards as trade usages in international arbitration' (2016) 22 Young Arbitration Review 34.

20 This is, e.g., the case in the field of contracts for construction and engineering work for which the standard ISO 6707-2:2014 specifies the contractual terms used. See ISO 6707-2:2014 - Buildings and civil engineering works – vocabulary – part 2: contract terms.

21 ISO 9001:2008 – Quality Management Systems – Requirements, 7.2.2 previously 4.3.

22 Schepel (n 8) 277, 350; Robert W Hamilton, 'The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health' (1978) 56 Texas Law Review 1329.

23 Burke Files and Asset, 'Due Diligence, Standards and The Law' (*International Due Diligence,* 2013) <www.international-due-diligence.org/due-diligence-standards-and-the-law/> accessed 1 May 2017.

24 Caroline G Hemenway, '10 Things You Should Know About ISO 14000: Get acquainted with the international environmental management system standard before it's too late' (*Quality Digest Magazine*, October 1995) <www.qualitydigest.com/oct/iso14000.html> accessed 1 May 2017; European Co-Operation for Accreditation, *Legal Compliance as a part of Accredited ISO 14001: 2004 certification* (EA-7/04 M: 2007) 13, para 5.5; *R. v Maple Leaf Metal Industries Ltd.* [2000] ABPC 95; *R. v Grant Forest Products Inc.* [2001] O.J. No. 3374; OHS Insider, 'Is Following an Industry Standard the Same Thing as Due Diligence?'(2012) <https://ohsinsider.com/search-by-index/due-diligence/is-following-an-industry-standard-the-same-thing-as-due-diligence-3> accessed 1 May 2017.

25 Marc-Antoine Carreira da Cruz, 'La contribution de la standardisation à la cohérence entre la responsabilité sociétale des entreprises et l'espace normatif de l'OMC en droit international' (IDPD Université de Nice Sophia Antipolis 2015) 214-20.

2.2 PMSC as a field of standardization

After comprehending the way in which standards are regulation instruments, one must explore how the PMSC has become a field of standardization for the ISO. This entails an understanding of the process of extension of standardization from technical to management and behavioural matters (2.2.1), which allows us to address the question of the standards on private security companies and dealing specifically with PMSCs (2.2.2).

2.2.1 The extension of standardization: from technical to management and behavioural matters

The recent ISO initiative to work on a standard on PMSCs is one of the last results from a long process of extending the ISO standardization field. From its creation in 1947 until approximately the 1980s, the ISO's policy of standardization covered almost exclusively technical disciplines (industrial metrology, component materials determination, and acceptability of products and materials); these disciplines have been the subject of purely technical assessments.[26] Beginning in the 1980s, the ISO started tackling new themes, including quality, safety and the environment.[27] The type of expertise expanded, stakeholder input was collected and, from that point on, standards were recognized through certifications based on management principles. At that time, standardization was based on a new approach that drew on the insurance industry,[28] the world of quality control and technical inspection processes inherited from the so-called quality movement and then the total quality management.[29]

As a result of this approach, a new generation of standards emerged in the late 1980s and early 1990s: the management system standards (MSS),[30] of which the ISO would be the flagship producer. In the late 1990s, a third model emerged in the ISO's standardization policy: the behavioural standardization, where validation is based on certifications of good practice.[31] The major evolution of this third model was the growing importance of the external orientation of standardization processes and the fact that the process itself became an evaluation object in its own right and was no longer

26 Vincent Helfrich, *La régulation des pratiques RSE par les normes: Le cas de la norme ISO 26000 sur la responsabilité sociale*, 5ème Congrès de l'Association pour le Développement de l'Enseignement et de la Recherche sur la Responsabilité d'Entreprise 'Transversalité de la Responsabilité Sociale de l'Entreprise: l'entreprise à l'aune de ses responsabilités vis-à-vis de l'homme, de l'environnement et du profit?' (2008 Grenoble) 9.

27 ibid.

28 Stepan Wood, 'The role of the International Organization of Standardisation (ISO) in governing environmental conflict and corporate social responsibility in developing countries: Questions for research' in Beatriz Londoño Toro (ed), *Propriedad, Conflicto y Medio Ambiente* (Universidad del Rosario 2004) 19.

29 Abby Ghobadian, David Gallear and Michael Hopkins, 'TQM and CSR nexus' (2007) 24 IJQRM 704; Su Mi Park Dahlgaard, 'The evolution patterns of quality management: Some reflections on the quality movement' (1999) 10 TQM 473, 480; ISO 9000, ISO 14001, and apart from the ISO, the OHSAS 18001 and SA 8000.

30 ISO 9000, ISO 14001, and apart from the ISO, the OHSAS 18001 and SA 8000.

31 Helfrich (n 26) 10.

only the final product/service.[32] This changeover where the process became central is seen as a major accomplishment and characteristic of the business world in the 1990s.[33] This third model led to a new generation of standards in new thematic fields far beyond their initial core business: notably corporate social responsibility, sustainability, risk assessment, and safety and resilience of the society.[34]

2.3 The ISO initiative on private security companies and PMSCs

Based on the evolution of standardization described, and when getting back to the issue of PMSCs, how did the idea of an ISO initiative of standardization related to PMSCs come to life? This process is a result of the match between the ISO policy and several external factors. One can observe bridges in the context of developing a standard on PMSCs and on private security companies in general, but it is important to observe that, even though these two ISO initiatives have connections and happened globally at the same time, they have distinct stakes, development and specificities.

First, on the matter of private security companies in general (and thus not the standard on PMSCs), one needs to understand that the ISO initiative that led to the creation of an ISO standard for the management system for private security operations – ISO 18788:2015[35] – is a consequence of a specific context and long process. As noted by MacLeod, there has been a global context of rapid and increasing outsourcing of security services by states to private security companies in recent years and associated human rights violations, which have served as the catalysts for long overdue regulation of the global private security company industry.[36] Avant describes this outsourcing trend as 'a burgeoning transnational market for force' with new trends: a strong evolution of the ratio of contractors to active-duty personnel during conflicts, the transnational nature of the market, and the fact that states are no longer the only organizations that finance security.[37] In this context, there have been some landmarks, notably the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to operations of Private Military and Security Companies during Armed Conflict. As noted by DeWinter-Schmitt, the Montreux Document set the stage for other regulatory efforts, such as the development of the multi-stakeholder ICoC.[38]

About the process, it was set off by a stakeholders' initiative mixing public and private actors and, initially, the US Department of Defense, ASIS International - a global company that develops educational programs and materials for security professionals - and the American National Standard

32 Gerard Zwetsloot and Marcel Van Marrewijk, 'From quality to sustainability' (2004) 55 JBE 80.

33 ibid.

34 ISO 26000, ISO 37101, ISO 31000, ISO 22316.

35 ISO, ISO 18788:2015 – Management system for private security operations – requirement with guidance for use.

36 Sorcha MacLeod, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-'Plus" (2015) 62 Neth Int Law Rev 119.

37 Avant (n 2) 153, 157.

38 Rebecca DeWinter-Schmitt (ed), 'Montreux Five Years On: An analysis of State efforts to implement Montreux Document legal obligations and good practices' (2013) 7 <www.wcl.american.edu/index.cfm?LinkServID=B1E626D9-095E-4A28-94A94551CEA3488E> accessed 1 December 2017.

Institute (ANSI).[39] At the very early stage, it all began with the general issue of regulating the behaviour of private security contractors in war zones. The US Department of Defense reached out to ASIS International in the summer of 2010 after the House of Representatives passed H.R. 5136, which called for standards and certification of private security service providers.[40] Subsequently, new legislation was enacted and passed by the Congress and, in January 2011, President Obama signed *P.L. 111-383, The Ike Skelton National Defense Authorization Act for Fiscal Year 2011*, which included a requirement for standards and third party certification for private security service providers.[41] Specifically, the legislation calls for guidance, first, to establish criteria for defining standard practices for the performance of private security functions, which shall reflect input from industry representatives as well as the Inspector General of the Department of Defense; and, second, to establish criteria for weapons training programs for contractors performing private security functions, including minimum requirements for weapons training programs of instruction and minimum qualifications for instructors for such programs.[42]

In March 2011, ASIS International was awarded a contract with the US Department of Defense to develop an ANSI standard that provides principles and requirements for a quality assurance management system for private sector security organizations to abide by and demonstrate their accountability to internationally recognized norms of civil and human rights while providing quality assurance in the provision(s) of their products and services.[43] In 2012 and 2013, the ANSI approved these two standards: the ANSI/ASIS PSC.1-2012 and the ANSI/ASIS PSC.3-2013.[44] As the ambition was to have a single, internationally agreed standard the PSC.1 standard co-developed by the ANSI and ASIS International was pushed in the pipeline of the ISO channel to feed the creation of a global standard – thus an ISO standard. Concretely, the PSC.1 was submitted to the ISO to be considered for adoption of an international standard for private security companies working in complex environments.[45]

On the specific initiative of the ISO on PMSCs, the process and stakes were different. First, one should remember that the ISO is not a novice in the standardization of maritime matters. The ISO has a long history of collaboration with the IMO in this field, as it has been in charge of more than

39 DeWinter-Schmitt and Elms (n 4) 5-6.

40 National Defense Authorization Act for Fiscal Year 2011 (USA).

41 ASIS International, 'ASIS Awarded Contract with US Department of Defense to Develop Standard to improve Performance and Accountability of Private Security Services Providers' (*Asis Online*, 16 March 2011) <www.asisonline.org/News/Press-Room/Press-Releases/2011/Pages/PSPProviderStandard.aspx News release> accessed 1 May 2017.

42 ibid.

43 ibid.

44 ASIS - ANSI/ASIS, PSC.1 -2012 American National Standard – Management System for Quality of Private Security Company Operations – Requirements with Guidance; ANSI/ASIS PSC.3 -2013 Maturity Model for the Phased Implementation of a Quality Assurance Management System for Private Security Service Providers.

45 Foreign & Commonwealth Office (U.K.), *Written Statement of Parliament – Private Security Companies* (17 December 2012) <www.gov.uk/government/speeches/private-security-companies > accessed 1 April 2017.

300 standards (plus more than 90 in progress) related to ships and marine technology, with standardization of design, construction, structural elements, outfitting parts, equipment, methods and technology, and marine environmental matters, used in shipbuilding and the operation of ships, comprising sea-going ships, vessels for inland navigation, offshore structures, ship-to-shore interface and all other marine structure subjects to IMO requirements.[46] The second point is that the ISO is the only international organization with massive experience not only in standardization of numerous maritime matters but also in the standardization of management processes, societal security[47] (amongst others, mass-evacuation, video-surveillance, organizational resilience), emergency management,[48] risk assessment processes[49] and especially supply chain security management,[50] which are all matters linked with the complex issue of PMSC behaviour and its regulation. Third, a crucial reminder is that, in 2007, the ISO had already produced a standard which collectively dealt with security assessment, competence of personnel and maritime facility issues: ISO 20858:2007. Indeed, this standard establishes a framework to assist marine port facilities in specifying the competence of personnel to conduct a marine port facility security assessment and to develop a security plan as required by the ISPS Code International Standard, conducting the marine port facility security assessment, and drafting/implementing a Port Facility Security Plan (PFSP).[51] Fourth, of course, the parallel process of working on the more general topic of private security companies, which led to ISO 18788, was an element that worked in the ISO's favour.

The field was therefore opportune, and the ISO could not only boast its unique and multidisciplinary expertise in a context where the IMO acknowledged the lack of standard to regulate PMSCs, but also its know-how in creating standards for the IMO requirements. Then, how did things happen exactly? The perspective of the IMO Maritime Safety Committee was that it did not support self-certification or self-regulation by the private maritime sector.[52] Also, the Maritime Safety Committee has specifically stated that other famous instruments, such as the Montreux Document and the ICoC, were not directly relevant to the situation of piracy and armed robbery in the maritime domain and

46 ISO, 'ISO/TC 8 Ships and marine technology – scope' (*International Standardization Organization*, 2017) <www.iso.org/committee/45776.html> accessed 1 March 2017.

47 ISO, 'ISO/TC 292 Security and Resilience – scope' (*International Standardization Organization*, 2017) <www.iso.org/committee/5259148.html> accessed 1 March 2017.

48 ISO, ISO 22320: 2011 - Societal Security – Emergency Management – Requirement for incident response; ISO 22322: 2015 - Societal Security – Emergency Management – Guidelines for public warning; ISO 22324: 2015 - Societal Security – Emergency Management – Guidelines for colour-coded alerts; ISO 22325: 2016 - Societal Security and resilience– Emergency Management – Guidelines for capability assessment; ISO/TR 22351:2015 – Societal Security – Emergency Management – Message structure for exchange of information.

49 ISO, ISO 31000: 2009, ISO 31000 – Risk management.

50 ISO, ISO 28000:2007 - Specification for security management systems for the supply chain.

51 ISO, ISO 20858: 2007 – Ships and marine technology – Maritime port facility security assessments and security plan development.

52 IMO, 'IMO's evolving position on PCASP' (*International Maritime Organization*, 2017) <www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx> accessed 1 April 2017.

did not provide sufficient guidance for PMSCs.[53] Following that standpoint, the interim guidance to PMSCs was agreed upon by the Maritime Safety Committee, when it met for its 90th session in May 2012. And it is on this very precise occasion that the Maritime Safety Committee formally agreed that the ISO would be in the best position to develop international standards for PMSCs based on the IMO-developed guidance and with relevant IMO liaison and participation in the ISO process for the development of standards.[54] Hence, the ISO – and more specifically, the ISO Technical Group TC 8 working on Ships and Marine Technology – was seen by the IMO as being in the best position to develop the standard with their guidance and participation.[55]

From that point, the process reached a first step in November 2012 with the publication of a specification:[56] the ISO/PAS 28007:2012. In November 2012, at its 91st session, the Maritime Safety Committee welcomed the news.[57] The new standard fits in the core ISO 28000 series related to security management.[58] In this context, the new-born ISO/PAS 28007:2012 set out the guidance for applying the existing ISO 28000, a certifiable security management systems standard for supply chain to PMSCs.[59] Three years later, in April 2015, the ISO 28007,[60] a full-grown standard, superseded the ISO/PAS 28007:2012.

3. The ISO 28007 and its potential legal implications

Now that we understand the way the ISO invested in a standard on PMSCs, we can analyse the ISO 28007 on PMSCs and its potential legal use. In order to achieve that, it is paramount to first understand what this standard is (3.1) and then explore the potential legal implications (3.2).

3.1 The content and addressee of the standard

Who is ISO 28007 aimed at? And what is its purpose? To answer this question, one must look at the content of the standard. ISO 28007 gives guidelines containing additional sector-specific recommendations which companies that comply with ISO 28000 can implement to demonstrate that

53 IMO Maritime Safety Committee, 'Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1443, Annex, 2.1.

54 IMO Maritime Safety Committee, 'Guidance for private maritime security companies agreed by IMO's Maritime Safety Committee Maritime Safety Committee (MSC)' MSC 90th session (16 to 25 May 2012).

55 Maria Lazarte, 'Fighting Piracy - ISO guidelines for armed maritime guards' (*ISO News*, 14 March 2013) <www.iso.org/news/2013/03/Ref1717.html> accessed 1 April 2017.

56 Foreign & Commonwealth Office (n 45).

57 IMO Maritime Safety Committee, *91st session, 26 to 30 November 2012*, briefing of November 30, 2012.

58 ISO, 'ISO/TC 292 Security and Resilience – scope' (*International Standardization Organization*, 2017) <www.iso.org/committee/5259148.html> accessed 1 March 2017.

59 ISO, ISO 28000:2007 - Specification for security management systems for the supply chain.

60 ISO, ISO 28007-1 – Ships and Marine Technology – Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract) – Part 1: general.

they provide privately contracted armed security personnel on board ships.[61] The standard is thus designed for PMSCs, yet it does not intend to solve the issue of overlapping competencies between flag states, coastal/port states and home states of the PMSC. It intends to delineate a comprehensive set of requirements that a PMSC must follow to be able to comply with a certain optimum on the legal, financial, management, risk and ethical perspectives in its internal organization, and for external purposes towards clients, authorities and insurances companies. The standard aimed to help the PMSC to comply with this optimum to prove it can be able to answer adequately to any due diligence process a shipowner can lead when selecting the PMSC and when contracting it, and to prove that it can answer effectively and suitably to any emergency or incident situation while in operation. The standard is composed of six sections: the scope, the normative references, the terms and definitions, the security management system elements for PMSCs and the operation guidance.

The first section deals with the scope of the standard and explains what was said previously: ISO 28007 gives guidelines containing additional sector-specific recommendations that companies who comply with ISO 28000 can implement to demonstrate that they provide privately contracted armed security personnel on board ships.[62] The scope section also states that the standard is subject to certification and ISO 28000 on security management systems for the supply chain is indispensable for its application. It is important to stress that if the standard is designed for PMSCs, it can nevertheless be used by shipowners in their relation to PMSCs as we will see further. The second section focuses on the normative references[63] – i.e. the way the standard is articulated with other standards. In this case, it says that ISO 28000 – specifications for security management systems for the supply chain, is indispensable for its application. The third section presents the terms and definitions used for the purposes of the standard,[64] which will allow us to avoid misunderstandings and conflicts of interpretation.

The fourth section is the heart of the standard. It presents general and specific requirements for the security management system for PMSCs.[65] It has six subsections, each divided in many sub-sub sections. Subsection 4.1 deals with general requirements: the understanding of the PMSC and its context; the understanding of the needs and expectations of interested parties; the determination of the scope of the security management system; the security management system itself; the issue of leadership and commitment; the question of competence, organizational roles, responsibilities and authorities; the structure of the organization; the financial stability of the organization, and the delicate and crucial question of the outsourcing and subcontracting and the insurance issues. The other subsections (4.2, 4.3, 4.4, 4.5 and 4.6) deal with more specific requirements: the planning, the resources, the training and awareness, the communication and the documentation and records. Globally, section 4 of the standard is composed of numerous requirements of various nature of which many of them overlap with recommendations made by the IMO in its guidance to PMSCs.[66]

61 ibid Part 1: general, 1. Scope.

62 ibid.

63 ibid Part 2: Normative references.

64 ibid Part 3: Terms and definitions.

65 ibid Part 4: Security management systems elements for Private Maritime Security Companies (PMSC).

66 IMO Maritime Safety Committee, 'Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1443.

The connection with other instruments of international law is also made by several requirements, notably that the PMSC should establish, implement and maintain procedures to ensure that all security operatives carrying out tasks on its behalf are aware of and receive training in the relevant and applicable provisions of international law and national law, and of SOLAS Convention, the ISPS Code, International Safety Management and any current best management practices.[67] Nevertheless, the ISO 28007 is not a copy of the IMO Maritime Safety Committee interim guidance, as the fifth section of the standard is quite rich in various requirements that go beyond the guidance. Indeed, the fifth section is of the utmost importance as it deals with the operation aspects.[68] It is composed of nine sub-sections including command and control of the security personnel questions and incident management, monitoring and investigation. When observing the standard carefully, one can note that the planning and control requirements encompass not only requirements on the command and control of security personnel, guidance on rules for the use of force and incident management, but also some categories of requirements on casualty management,[69] protection of evidence,[70] and client complaints, grievance procedures and whistle blowing.[71]

Another point is the massive emphasis on risk assessment for PMSCs. This point, already present in the IMO guidance is well developed here with a double necessity for a PMSC to conduct its own risk assessment and to be able to simultaneously expose how it responds to the risk assessment carried out by shipowner before contracting the PMSC.[72] A crucial point of the standard is the requirement related to outsourcing and subcontracting: not only should a PMSC have a clearly defined and documented process to explain to shipowners and state authorities the circumstances under which it outsources activities, functions and operations and its supply chain, but it should also take responsibility for activities outsourced to another entity and have legal enforceable agreements covering such arrangements.[73] In connection with this requirement, the standard ask to the company is that it should demonstrate that it has sufficient insurance to cover risks and associated liabilities from its operations and activities, consistent with contractual obligations.[74] A major point is that this requirement also applies to the outsourcing or subcontracting of services, activities and operations.[75] Finally, the sixth section of the standard focuses on performance evaluation[76] and is composed of requirements allowing the PMSC to evaluate how it accomplishes the previous requirements, through a monitoring system, internal audit, management review, nonconformity and corrective action, and systems of continual improvement.

67 ISO, ISO 28007-1– Part 1: general, 4.4.3.

68 ibid Part 1: general, 5. Operation.

69 ibid 5.7.

70 ibid 5.6.

71 ibid 5.9.

72 ibid 4.1.2.

73 ibid 4.1.10.

74 ibid 4.1.11.

75 ibid.

76 ibid 6 Performance evaluation.

3.2 The potential legal use and implications of ISO 28007

ISO 28007 includes a diverse range of requirements. But what are the potential legal implications of this tool? The articulation of this standard with legal instruments can take many forms with various legal uses and implications. We explore five of them.

3.2.1 Presumption of conformity to comply with substantive law

First, it can be included as a rule to comply with substantive law.[77] More precisely, it can act as a presumption of conformity rule in the provision of a law, international treaty or in an instrument of an international or regional organization.[78] The best example of this integration is the revised interim recommendations of the IMO Maritime Safety Committee for flag states regarding PMSCs, which says that when developing policies authorizing on board PMSC personnel, flag states are encouraged to establish a policy which may include: ensuring that PMSCs employing security personnel on board ships hold valid accredited certification to ISO 28007 or meet applicable national requirements.[79] In a similar fashion, the best illustration of the presumption of conformity would be the case where a national law or a regional instrument, such as a European directive or regulation, states that if a PMSC fulfils ISO 28007, then it would be automatically considered to fulfil the law, directive or regulation requirement.

3.2.2 Contractual inclusion

The contractual inclusion is, of course, the second most obvious possibility as it exists in other sectors.[80] The IMO guidance on PMSCs to shipowners, ship operators and shipmasters have prefigured a close - yet not exactly the same – possibility. Indeed, it indicate that PMSCs should be able to provide documentary evidence such as ISO certification for quality management to enable relevant interested parties to carry out due diligence.[81] The idea is that contractual obligations made by the shipowners could include a requirement to the PMSC of being ISO 28007 certified. Beyond this option we figure out other possibilities of legal use of the standard. In this way, it is possible to consider the use of ISO 28007 as a part of contract drafting support or to use it as a check-list in the contract review process.[82]

---

77 Schepel (n 8) 277, 350; Hamilton (n 22).

78 Wijkström and McDaniels (n 17) 2, 3.

79 IMO Maritime Safety Committee, 'Revised interim recommendations for flag states regarding the use of privately contracted armed security personnel on board ships in the High Risk Area' (12 June 2015) MSC.1/Circ.1406/Rev.3, Annex, 5.2.2.

80 Kemp (n 18). One case is that of the compliance requirement included in a set of specifications as part of an offer or while in a Service Level Agreement (SLA) in which the standard is a technical specification formalizing the expectations of the parties on the level of service.

81 IMO Maritime Safety Committee, 'Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1443, Annex 3.2.6; 'Revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1405/Rev.2, Annex, 4.1.6.

82 ISO, ISO 9001: 2008 – Quality Management Systems – Requirements, 7.2.2 previously 4.3.

3.2.3 Inclusion in insurance policy

A variant to the inclusion of the contractual clause is the inclusion in the insurance policy needed by the shipowners when contracting a PMSC for a protection mission. Insurance companies could, in the shipowner's insurance contract, use an ISO 28007 certification as one requirement the PMSC hired by the shipowner must fulfil. The insurance company would thereby only agree to cover the risks arising from a PMSC if the shipowner hires a PMSC that can prove its valid ISO 28007 certification.

3.2.4 Proof of due diligence and standard of care, and sentences

Another important potential legal application of the standard is related to tort law, civil law and criminal law. As explained in the next section, ISO 28007 was officially incepted by the IMO, plus numerous stakeholders of the PMSC sector and shipowner industry participated in the creation of the standard. Given that fact and considering the detailed requirements of the standard on risk assessment, training standards, competence assessment, reasonable steps to avoid and deter the use of force and incident management notably, one must think about the possibility to use the standard (or some specific set of provisions of the standard) as a 'standard of care' or as proof of 'due diligence',[83] notably in tort law and criminal litigation.

The following reasoning could be mobilized and supported in court decisions; it is of course hypothetical, but it allows us to develop the idea. Even though a national law does not require a PMSC to be ISO 28007 certified, it could perhaps be argued, when establishing if the defendant had a due diligence attitude, that one of the means is to demonstrate that the party has taken 'all reasonable steps' to prevent a violation and that 'reasonable measures' include, among other things, the ISO 28007 certification. More precisely, in a case of negligence in tort law or in a case of strict liability in criminal law, ISO 28007 could be used for two scenarios. Let us imagine the question of the potential liability of a PMSC vis-à-vis a guard or sailor who died on the ship as a result of a firearms accident. And let us imagine a flag state national law that only requires PMSCs to take 'necessary precautions' against firearms incidents on board, but does not define the term 'necessary precautions'. However, the defendant could argue that the 'necessary precautions' applied by the PMSC were in conformity with the requirements of ISO 28007, notably on firearms training, training procedures and protocols, and firearms use on board. Then one must consider that the PMSC has exercised due diligence to prevent a breach in the conditions of safe use of firearms. On the other hand, ISO 28007 could be used for the opposite reasoning: the lack of due diligence on the part of the defendant. Although the national law does not include or refer to this standard when defining 'necessary precautions', the court could refer to the fact that the PMSC did not follow requirements commonly accepted as the reference in the profession such as those of the ISO 28007 standard, in its decision to consider that the undertaking had failed to exercise due diligence in respect of the safe use of firearms on board.

83 See references above (n 24).

Finally, still hypothetical but again interesting, is the possibility that a court decision condemning a PMSC could include, among other things, the obligation to take steps to be certified to a standard, which happened in a criminal case dealing with environmental damages[84] in addition to the payment of fines or jail term. Thus, the company would be ordered to implement several measures and to be ISO 28007 certified.

3.2.5 Incorporation within the self-policing incentives of regulators and mitigating factors of the discretionary power of prosecutors

In the absence of an integration or articulation formally guaranteed by a government agency between the statutory provisions and the ISO 28007 standard, another bias exists on the issue of due diligence. This potential bias – quite hypothetical but very interesting - is that of 'self-policies incentives' and 'mitigating factors' in the regulatory framework. This scheme exists in the United States, notably in environmental law under the auspices of the Federal Environment agency (EPA) and the Department of Justice with respect to the register of environmental offenses.[85] Let us imagine a mirror scheme with PMSC prosecution or an administrative assessment made by the governmental agency in charge of PMSC regulation. The regulatory authority or the public prosecutor shall agree, after a thorough review of the policy put in place by the PMSC, to eliminate or substantially reduce the fines or prosecutions if the PMSC discloses on its own initiative offenses it has committed, and if it organizes its policy to manage (no self-regulation for that) and correct its offenses. In this context, the use of instruments such as ISO 28007 in the management of the problem could be assessed by the regulator or the prosecutor in the assessment leading to the reduction or elimination of the fines imposed.

4. Conclusion: Reception, impact and power assessment

Regulating PMSCs at the international level is a hard game to play because of the interlocking competencies between flag states, coastal/port states and home states of the PMSC. The IMO Maritime Safety Committee has pushed as far as possible in trying to propose a basic harmonized framework and has issued a set of four guidelines and recommendations related to the four dimensions (ship-

84 Robert Mims (AUSA), 'United States v. Leading Edge Aviation Services, Inc., No. 4:14-CR-00121 (N.D. Miss.)' (US Department of Justice, Environmental Crimes Section Monthly Bulletin, December 2014) 13 <www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/ECSBulletinDec2014.pdf> accessed 1 June 2017; EPA, 'Leading Edge Aviation Services Sentenced For Unlawful Handling Of Hazardous Waste At Greenville, Miss. Facility' (*United States Environmental Protection Agency*, 4 November 2014) <https://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/f5944771da7fa2c485257d8600699eb1!OpenDocument> accessed 1 March 2017.

85 United States Department of Justice, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (1991); United States Federal Register, *Environmental Protection Agency - Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60, 246 (22 December 1995) Part III Notice Fed. Reg. 66, 706; Patrick J Ennis, 'Environmental Audits: Protective Shields or Smoking Guns? How to Encourage the Private Sector to Perform Environmental Audits and Still Maintain Effective Enforcement' (1992) 42 Wash U J Urb & Contemp L 389, 408.

owners, PMSCs, flag states, coastal/port states) of the problematic[86] taking in account the architecture of competencies existing between states. In these circumstances, the IMO called for the creation of an international specialized standard capable of harmonizing management guidance and practices for PMSCs on all the aspects.[87] Thanks to the ISO's experience in maritime and management matters, its long story of collaboration with the IMO, and more recently its capacity to produce standards on complex societal security matters, it could easily engage with the private maritime security regulation field. Considering that it was built on a process involving stakeholders from PMSCs and shipowners, ISO 28007 was launched by the IMO and is anything but a powerless and disconnected soft law instrument.

But what is the power and the impact of this standard? One can observe several elements to answer this question when looking at industry position, national law, and international organizations statements. First, on the level of the power, it is important to note that besides the powerful endorsement of the IMO, the standard is backed by other important actors related to the fight against maritime piracy, notably INTERPOL, the European Commission and the Contact Group established by UN Security Council Resolution 1851.[88] This institutional support has been notably formalized by the Contact Group on Piracy off the Coast of Somalia 16th Plenary Session in 2014, when it noted the extant development of guidelines and advisories by the IMO and the ISO and declared a need to share these best practices, as articulated in the IMO guidelines and ISO 28007.[89] The support also came from important private stakeholders - not always directly related to the fight against piracy - such as the Security Association for the Maritime Industry (SAMI) and the Oil Companies International Maritime Forum (OCIMF).[90]

On the side of national law, the United Kingdom, one powerful country of origin of many PMSCs, and the Marshall Islands, one of the world's top ship register states,[91] have both included ISO 28007 as a component in their legislation on armed guards and firearms on board ships. For the Marshall

86 IMO Maritime Safety Committee, 'Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area'(25 May 2012) MSC.1/Circ.1443; IMO Maritime Safety Committee, 'Revised interim recommendations for flag states regarding the use of privately contracted armed security personnel on board ships in the High Risk Area' (12 June 2015) MSC.1/Circ.1406/Rev.3; IMO Maritime Safety Committee, 'Interim recommendations for port and coastal states regarding the use of privately contracted armed security personnel on board ships in the High Risk Area' (16 September 2011) MSC.1/Circ.1408; IMO Maritime Safety Committee, 'Revised interim recommendations for port and coastal states regarding the use of privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1408/Rev.1; IMO Maritime Safety Committee, 'Revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1405/Rev.2.

87 ibid.

88 Lazarte (n 55).

89 EEAS, 'Contact Group on Piracy off the Coast of Somalia Sixteenth Plenary Session' (14 May 2014) Communiqué, para 23.

90 Security News Desk, 'Key Maritime Security Stakeholders Welcome ISO Announcement' (*Security News Desk*, 2 June 2014) <www.securitynewsdesk.com/key-maritime-security-stakeholders-welcome-iso-announcement/> accessed 1 May 2017.

91 Lloyd's List Intelligence, 'Flag State 2015: Top 10 Ship registers' (2015) <www.lloydslist.com/ll/static/classified/article506818.ece/binary/Flag-worldfleet-final2.pdf> accessed 1 June 2017.

Islands law, should a PMSC be hired, companies need to seriously consider the exclusive use of PMSCs which have been certified to the ISO 28007 standard by an authorized accreditation body.[92] For the U.K., the Department of Transport issued an Interim Guidance to U.K.-flagged ships on the use of armed guards to defend against the threat of piracy in exceptional circumstances. In this guidance, the Government formally encouraged shipping companies to use accreditation to ISO 28000, incorporating the requirements of ISO 28007 as part of their selection criteria when choosing a PMSC.[93]

In addition to these valuable institutional acknowledgements, private support and inclusion in national public law, has ISO 28007 been endorsed by PMSCs and the shipowner's sector? As a matter of fact, the creation of an international standard dedicated to PMSCs has been globally welcomed by the sector: for shipowners and PMSCs that already fulfilled strict quality and compliance systems, there was a critical need[94] for an international compliance system that could guarantee professionalism as the market of PMSCs was infested by maverick companies.[95] The standard is seen as a step towards a more efficient international regulatory framework notably because, as expressed by some PMSC executives, its certification gives a clear benchmark for the whole shipping industry.[96] Thus, the standard was welcomed not only by major PMSCs but also by shipping actors, such as the Singapore Shipping Association.[97]

In the field, many PMSCs have embraced the standard and - more importantly - they have been certified ISO 28007 by external auditors. Here, it is important to note that world actors of maritime risk and assurance industry, such as Lloyd's Register Quality Assurance, have directly created certification offers[98] after the standard creation process. Having a notable certification body was fundamental for the empowerment of ISO 28007 in the international maritime security regulatory framework. As noted by the Security in Complex Environment Group, an interest group in ADS, the major U.K. trade organization for defence and security companies, some of the leading PMSCs quickly became certified, notably Ambrey Risk, Neptune Maritime Security, and MNG Maritime Ltd.[99]

---

92 International Chamber of Shipping and European Community Shipowners Associations (ECSA), *Comparison of Flag State Laws on Armed Guards and Arms on Board* (March 2015).

93 United Kingdom Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances* (2013) 18.

94 Lazarte (n 55).

95 Safety4Sea, 'BIMCO – ISO join forces to establish PMSC standards' (*Safety4Sea Major issues*, 8 May 2012) <www.safety4sea.com/bimco-iso-join-forces-to-establish-pmsc-standards/> accessed 1 May 2017.

96 Security News Desk (n 90).

97 Singapore Shipping Association, *Annual review 2012/2013 Global shipping & trade* (2012-2013).

98 Lloyd's Register Quality Assurance, *ISO/PAS 28007 Certification – Asset protection* (December 2013); Lloyd's Register Quality Assurance*, ISO/PAS 28007 Maritime Security Launch Seminar*.

99 As well as Black Pearl Maritime Security (a part of MS Security & Personal Ltd.), Orchid Risk Management Ltd, Solace Global Maritime Ltd, Ocean Protection Services, Securewest, Protection Vessels International, EOS Risk Management, Alphard Maritime Group. See Security in Complex Environment Group, 'SCEG Companies awarded accredited certification for ISO 28007 (maritime) <www.sceguk.org.uk/accredited-certification-psc1-and-iso-28007/sceg-companies-awarded-accredited-certification-for-iso-28007-maritime/> accessed 1 May 2017.

An extremely important matter is the fact that BIMCO, the world's largest international shipping association, with more than 2100 members in more than 120 countries, has implemented a strong policy of linking the associate membership and the ISO 28007 certification. BIMCO announced this measure in August 2013, during the creation of the standard[100] and the measure was requested by many PMSCs.[101] The principle is clear and powerful: BIMCO members must check whether any PMSC they are using is ISO 28007 certified; any PMSC which is a member of BIMCO, or wishes to join, is required to be and to remain ISO 28007 certified, and any revocation of the ISO 28007 certification would also incur revocation of BIMCO membership.[102] In July 2015, the powerful association insisted on reminding all its members of this rule as it had come to BIMCO's attention that some PMSCs may have had their certification withdrawn.[103] Thus, ISO 28007 certification acts as strong leverage to make the sector evolve in the new regulatory framework.

Another development is the way ISO 28007 could act as leverage when it is articulated in other soft law instruments. One example is the fact that the first version of ISO 28007, ISO/PAS 28007:2012 annexes the BIMCO GUARDCON as an example of a pro-forma contract,[104] one of the most famous standard contracts for the contracting of PMSCs. Another example is that, in parallel to the ISO 28007 creation process, the SAMI, ICS and other industry stakeholders have developed a '100 Series Rules for the Use of Force' by armed guards, directed at the PMSC team and there was a question whether it would be connected – as a part or in another way – to the standard.[105] Here, it is interesting to note the game of mutual support between these soft law instruments between 2012 and 2013. Indeed, at this time, the Rules were submitted to the ISO with a view to supporting ISO/PAS 28007:2012, and they were accepted as a work item to become, one year later, co-sponsored by the ISO when the Rules passed through the IMO at the Maritime Safety Committee 92nd session as an INF paper.[106] Eventually, the Rules state themselves that it was drafted with due diligence taking into account current IMO Maritime Safety Committee Circulars, and - interestingly – ISO 28007, as well as applicable and relevant national and international laws where practicable.[107]

---

100 Seatrade Maritime News, 'At last, an accepted international standard for maritime security' (29 August 2013) <www.seatrade-maritime.com/news/europe/at-last-an-accepted-global-standard-for-maritime-security.html> accessed 1 May 2017.

101 Safety4Sea (n 95).

102 Hellenic Shipping News, 'BIMCO Security Update on ISO and illegal PMSC's' (4 July 2015) <www.hellenicshipping-news.com/bimco-security-update-on-iso-and-illegal-pmscs/> accessed 1 May 2017.

103 Black Pearl Maritime Security Ltd., 'Bimco Security Update on ISO & illegal PMSC's' (*Black Pearl News*, 22 July 2015) <www.ms-bp.com/black-pearl-news/bimco-security-update-on-iso-illegal-pmscs/> accessed 1 May 2017.

104 Kyrikos Faraklas, 'ISO/PAS 28007 - Private Maritime Security Company Management System Certification' (4th Annual SAFETY4SEA Forum, 2 October 2013); Liz McMahon, 'BIMCO backs international guidance on rules for use of force' (*Lloyd's List Maritime Intelligence*, 3 April 2013) <https://lloydslist.maritimeintelligence.informa.com/LL039864/BIMCO-backs-international-guidance-on-rules-for-use-of-force accessed> accessed 1 May 2017.

105 Singapore Shipping Association, *Annual review 2012/2013 Global shipping & trade* (2012-2013).

106 David Hammond, 'The 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force – An Update' (*Communis Hostis Omnium*, 6 August 2013) <https://piracy-law.com/2013/08/06/the-100-series-rules-an-international-model-set-of-maritime-rules-for-the-use-of-force-an-update/> accessed 1 May 2017.

107 ibid.

Considering all the previous elements, ISO 28007 can be seen as a potential international regulation tool of reference for PMSCs. As underlined, it benefits from unprecedented support from the IMO and also from shipowners (notably BIMCO) and the PMSC industry. It has the capacity to connect with other international public (IMO Maritime Safety Committee guidance) and private instruments (the '100 Series Rules for the Use of Force', GUARDCON) on PMSCs and, more importantly, it generates multiple legal consequences, beyond its role as a benchmark (in contracts, law, insurance policies and courts).