

Against a Uniform Definition of Maritime Piracy

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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.

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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 Sea⁷ (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 Africa¹⁷ - has been characterised by greater incidents of violence, with the highest number killings compared to other regions.¹⁸ The attacks centre on armed robbery¹⁹ 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 Sea²⁵ 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 Sittnick, '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 piracy⁴³ 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 José Luis 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 piracy⁵⁶ 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 jurisdiction 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 trade⁵⁹ 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 Abdeoukader and Ors*, Cause No 850/2013 [2014] INT 311.

69 *ibid* paras 93-100.

70 *Director of Public Prosecutions v Ali Abeoukader 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 pirates⁷³ because the likelihood of conviction largely depends on the legislation of the state to which the suspects are sent. This element of arbitrariness⁷⁴ 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 1993⁸¹ and VOYWAR 1993⁸² 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 Area¹²¹ 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.