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Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia

Tullio Treves*

Abstract

Attacks against ships off the coast of Somalia have brought piracy to the forefront of international attention, including that of the Security Council. SC Resolution 1816 of 2008 and others broaden the scope of the existing narrow international law rules on piracy, especially authorizing certain states to enter the Somali territorial waters in a manner consistent with action permitted on the high seas. SC resolutions are framed very cautiously and, in particular, note that they 'shall not be considered as establishing customary law'. They are adopted on the basis of the Somali Transitional Government's (TFG) authorization. Although such authorization seems unnecessary for resolutions adopted under Chapter VII, there are various reasons for this, among which to avoid discussions concerning the width of the Somali territorial sea. Seizing states are reluctant to exercise the powers on captured pirates granted by UNCLOS and SC resolutions. Their main concern is the human rights of the captured individuals. Agreements with Kenya by the USA, the UK, and the EC seek to ensure respect for the human rights of these individuals surrendered to Kenya for prosecution. Action against pirates in many cases involves the use of force. Practice shows that the navies involved limit such use to self-defence. Use of force against pirates off the coast of Somalia seems authorized as an exception to the exclusive rights of the flag state, with the limitation that it be reasonable and necessary and that the human rights of the persons involved are safeguarded.

1 The Revival of Piracy and Other Violent Acts off the Coast of Somalia

Although never absent from the international scene – one may recall attacks on ships carrying 'boat people' off the coasts of South-East Asia – pirates seemed to have ceased

* Judge at the International Tribunal for the Law of the Sea; Professor at the University of Milan.

to be a general menace to the international community justifying the traditional qualification of *hostis humani generis*, until the massive development of their activities off the coasts of Somalia since 2000, and, especially, 2006.¹

Capturing ships and holding them and their crews for ransom since the 1990s has been carried out by armed groups acting mostly in the territorial sea and claiming to protect Somalia's fishing resources, which were in effect pillaged by foreign fishermen, and the coastal waters, which were used as a dumping ground for waste in the absence of a government able to enforce the law.² Taking advantage of the continuing lack of an effective government, and not without connection with terrorist groups and with the political and armed fights going on in Somalia, pirate activity then absorbed a growing number of people – including fishermen expert in handling boats – and became ever bolder. It now represents a very serious menace to navigation coming from the Suez Canal and going through the Gulf of Aden to the narrow area between the Horn of Africa and the Arabian peninsula. In these sea areas off the Somali coast, as well as in those south of the Horn of Africa, piracy has developed, attacking ships even at a great distance from the coast. The success in capturing ships and crews and in obtaining substantial amounts of money as ransom, as well as their efficient way of dealing with money so obtained, have again made pirates, *sub specie* of the Somali pirates, the *hostes humani generis*. The danger to navigation through a choke-point of international traffic, as well as the outrage aroused by pirate attacks on ships carrying humanitarian supplies to the Somali population, have been decisive in alarming states all over the world.

The Security Council has linked the activities of pirates off the coast of Somalia with the notion of a threat to international peace and security. Since Resolution 733/1992, the Security Council has routinely invoked Chapter VII as regards the

¹ The author wishes to thank Valentina Falco (doctoral candidate, European University Institute) and Maria Chiara Noto (doctoral candidate, University of Milan) for helping him with some documents and in discussing some of the questions covered in this article. Some legal discussions of the questions considered are examined in Voelckel, 'La piraterie entre Charte et Convention: à propos de la résolution 1816 du Conseil de Sécurité', 12 *Annuaire du droit de la mer* (2008) 479; Kontorovich, 'International Legal Responses to Piracy off the Coast of Somalia', 13 (2) *ASIL Insights*, 6 Feb. 2009; Guilfoyle, 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-piracy Efforts', 57 *ICLQ* (2008) 690; Tancredi, 'Di pirati e Stati "falliti": il Consiglio di Sicurezza autorizza il ricorso alla forza nelle acque territoriali della Somalia' [2008] *Rivista di diritto internazionale* 937. Very interesting legal and factual elements are in the report of the International Expert Group on Piracy off the Somali Coast, *Piracy off the Somali Coast, Workshop commissioned by the Special Representative of the Secretary-General of the UN in Somalia Ambassador Ahmedou Ould-Abdallah*, Nairobi, 10–21 Nov. 2008, *Final Report, Assessment and Recommendations*, with an appendix of *Detailed Recommendations*, Nairobi, 21 Nov. 2008. An accurate short general survey of international law concerning piracy is in Shearer, 'Piracy', in *Max-Planck Encyclopaedia of Public International Law* (2009), while an older, but extremely penetrating analysis is in M. Giuliano, *I diritti e gli obblighi degli Stati, I, L'ambiente dell'attività degli Stati* (1956), at 393–401. Studies of recent developments are in Khrška, 'Developing Piracy Policy for the National Strategy for Maritime Security and the International Maritime Organization', Menefee, 'An Overview of Piracy in the First Decade of the 21st Century' and Skaridov, 'Hostis Humani Generis', all in M.H. Nordquist, R. Wolfrum, J.N. Moore, and R. Long, *Legal Challenges in Maritime Security* (2008), respectively at 331, 441, and 479.

² Recently this aspect was mentioned at the Security Council by South Africa on 16 Dec. 2008 (S/PV.6046 at 15).

situation in Somalia,³ and stated that such situation constitutes or continues to constitute 'a threat to international peace and security',⁴ in its first resolution on piracy off the coasts of Somalia, 'determine[d]' that such piracy 'exacerbate[s] the situation in Somalia which continues to constitute a threat to international peace and security in the region'.⁵ The declaration made in approving Resolution 1851 by the Chinese Minister of Foreign Affairs at the Security Council meeting held at the level of Foreign Ministers on 16 December 2008 clearly shows this approach: '[t]he long-term delay in the settlement of the Somali issue is posing a serious threat to international peace and security, while the rampant piracy off the Somali coast has worsened the security situation in Somalia'.⁶ The link is made indirectly, avoiding the criticism which the Council often incurs when applying this notion to matters hitherto not considered to be covered by the notion of threat to international peace and security. It nonetheless achieves the objective that action against piracy off the Somali coasts be conducted within the framework of Chapter VII of the UN Charter.

2 The Law of the Sea Rules on Piracy and their Inadequacy to Cope with the Violent Activities off the Somali Coast

The international law of piracy is set out in Articles 100 to 107 and 110 of the UN Convention on the Law of the Sea (UNCLOS). The fact that these Articles repeat almost literally Articles 14 to 22 of the Geneva Convention on the High Seas of 1958, and that some states, including the United States as well as Israel, Switzerland and Venezuela, while not bound by UNCLOS, are bound by the Geneva Convention, entails that, as a matter either of customary or of conventional law, these Articles state the law as currently in force.

For present purposes it seems necessary and sufficient to recall the provisions concerning the definition of piracy and action against pirates.

As regards the definition, its essential aspect is that piracy consists of 'any illegal acts of violence or detention, committed for private ends by the crew or the passengers of a private ship or aircraft and directed ... on the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft'.⁷

As regards action which may be taken against a pirate ship, apart from the right of warships of all states to exercise the right to visit aimed at ascertaining whether a ship is engaged in piracy,⁸ the main provision is Article 105, which states:

On the high seas, or in any place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and

³ SC Res 733 of 23 Jan. 1992, at para. 5.

⁴ See, among many, SC Res 1814 of 15 May 2008, penultimate preambular para.

⁵ SC Res 1816 of 2 June 2008, penultimate preambular para., and thereafter in all the Council's resolutions on piracy off the Somali coast.

⁶ *Supra* note 2, at 5.

⁷ Art. 105 UNCLOS.

⁸ Art. 1101(a) UNCLOS.

arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

The definition of piracy is rather narrow, as it includes only action on the high seas and only action undertaken by one ship against another ship. So forms of violence conducted in the territorial sea as well as without the involvement of two ships, such as, for instance, the violent taking of control of a ship by members of its crew or passengers, even when the follow-up consists of holding to ransom the ship and its crew and passengers, are not included. Correctly, the taking of control by hijackers embarked as passengers on the Portuguese ship *Santa Maria* in 1961 and on the Italian cruise ship *Achille Lauro* in 1985, which had extensive press coverage, were not considered to be piracy. Violent activities against ships off the Somali coast sometimes take place in whole or in part in the territorial seas, thus often remaining outside the scope of the definition. More rarely they do not involve the presence of one or more other ships, as usually very fast skiffs are used, coming from bases on the mainland or from 'mother ships' at sea. It may be underlined that acts preparatory to piracy and other acts of violence not directly linked to piracy are not included in the definition.

As far as the action to be taken is concerned, under Article 105 the flag state of the seizing ship enjoys very broad powers. These consist of the right to arrest persons and to seize property, and, through the abovementioned rights, to decide upon penalties and on action to be taken with regard to the ship, aircraft and property, the right to submit the persons arrested and the property seized to judicial proceedings. In other words, the universal jurisdiction of the seizing state's courts is supported by international law. The language of Article 105 ('may') seems to indicate that the exercise of jurisdiction by the seizing state's courts is a possibility, not an obligation, notwithstanding the 'duty' to cooperate in the repression of piracy set out in Article 100. The rule in Article 105 does not, however, establish the exclusive jurisdiction of the seizing state's courts. Courts of other states are not precluded from exercising jurisdiction under conditions which they establish. Thus the international law rules on action to be taken against pirates permit action, but are far from ensuring that such action is effectively taken.

3 The Security Council Resolutions' Broadening of the Scope of International Law Rules on Piracy

With Resolution 1816 of 2 June 2008 and the others which followed it, especially Resolutions 1846 of 2 December 2008 and 1851 of 18 December 2008, the Security Council has endeavoured to cope with the growing alarm caused by pirate activities off the coast of Somalia. It has taken measures within the framework of Chapter VII which aim at remedying the limitations of the abovementioned rules of international law, as far as their application to the situation at hand is concerned.

These Resolutions, while using the term 'piracy', do not define it. References to the provisions of UNCLOS and the statement that these provisions 'provide guiding principles for cooperation to the fullest possible extent in the repression of piracy' indicate that the starting point is the above-recalled definition in the Convention. These Resolutions, however, always mention 'armed robbery' together with piracy. Armed robbery is not defined. It is a term routinely used within the framework of IMO, and may be understood to include all acts of violence the purposes of which are identical or similar to those of piracy but are not covered by the conventional definition of it, in particular because they may be perpetrated without using a ship against the target ship.⁹ In IMO parlance 'armed robbery', however, refers only to activities in waters under the jurisdiction of a state, so that it does not extend the scope of provisions on piracy to acts committed on the high seas unless two ships are present. This is what the Security Council Resolutions do, as they use the expression 'piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia'.¹⁰ As two or more ships are involved in most of the Somali cases, the mention of 'armed robbery' would seem not to be strictly dictated by the needs of existing practice, and rather inspired by the aim of including all acts connected with piracy (such as preparatory acts) and future possible acts involving only one ship.

The key element in the Resolutions is set out in paragraph 7 of Resolution 1816. It copes with the limitation of the definition of piracy to acts perpetrated on the high seas which, as mentioned, makes it inadequate to deal with acts which sometimes take place wholly in the territorial sea, and very often include an attack on the high seas followed by the pirated ship being brought by the pirates into the territorial sea and held for ransom in a port or near the coast, or by the attacking skiffs' retreat into the territorial and internal waters of Somalia.

This key element is that certain states (to which I will come later) are authorized to:

- (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law;

and

⁹ IMO Res A 922(22) of 29 Nov. 2001 adopting the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships: '[a]rmed 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 a ship or against persons or property on board such a ship within a State's jurisdiction over such offences'; the definition is almost literally repeated in Art. 1(2) of the Regional Cooperation Agreement on combating piracy and armed robbery against ships in Asia of 28 Apr. 2005, 44 ILM (2005) 829; and in Art. 1(2) of the IMO-sponsored Code of Conduct concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, adopted in Djubouti on 29 Jan. 2009, available at: www.imo.org/Newsroom/mainframe.asp?topic_id=1773&doc_id=10933 (visited on 20 Feb. 2009). A provisional text of this instrument, to which reference is made in this article, is set out in Annex 7 to IMO doc. C 100/7, of 25 Apr. 2008, Report on the Sub-regional meeting on piracy and armed robbery against ships in the Western Indian Ocean, Gulf of Aden and Red Sea area.

¹⁰ Res. 1816, penultimate preambular para.; res. 1846, penultimate preambular para.

- (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.

The basic effect of these provisions is to make the rules of international law concerning piracy on the high seas applicable also to territorial waters, *inter alia* permitting pursuit from the high seas into these waters, and clarifying that states acting under these rules within the territorial waters of Somalia may use 'all necessary means'.

It may be added that – following an episode in which French troops pursued pirates into the Somali mainland¹¹ – Resolution 1851 added on 16 December 2008 an authorization to conduct 'all necessary measures that are appropriate *in Somalia* for the purpose of suppressing acts of piracy and armed robbery at sea'.¹² The expression 'in Somalia', while not explained in the preambular paragraphs, clearly alludes to action undertaken on the mainland.¹³

4 The Limitations of the New Rules: *Ratione Temporis*, *Ratione Loci*; the Concern about Changing International Customary Law

Although the main effect of Resolution 1816 and the following ones is to extend both *ratione loci* and *ratione materiae* the scope of the international law rules concerning piracy, the Security Council has framed the relevant resolutions very cautiously. It has introduced a number of limitations which make the provisions adopted less revolutionary than they might appear, and seem aimed, in particular, at fending off possible criticism of the Council acting as a 'legislator'.

First, the authorization given is limited *ratione temporis*. Resolution 1816 limits to six months the validity of the authorization it introduces, while providing for a progress report and a more complete report on the application of the resolution to be submitted within, respectively, three and five months and stating the intention to review the situation and consider, 'if appropriate, renewing the authority provided in paragraph 7 for additional periods'.¹⁴ The authority has in fact been renewed for a period of 12

¹¹ This is the operation conducted on 11 Apr. 2008 in Somali territory which succeeded in capturing 6 of the pirates, and part of the ransom collected in a piracy operation against the passengers of the French cruise ship *Le Ponant*, freed at sea by the French forces. See facts and comments in *Sentinelles* Nr. 145 of 20 Apr. 2008, available at: www.sfdi.org. On 20 Apr. 2008, the Somali Prime Minister Nur Hassan Hussein declared to international media, 'The French forces arrested six Somali pirates and took them to France to face justice. We encourage such steps by the French. The Somali government asks the international community to take action against piracy' (*ibid.*). The uncertainty about the real meaning and scope of such declaration led France to propose the draft of what became SC Res. 1851.

¹² SC Res 1851, para 6 (emphasis added).

¹³ See the interventions by the British Minister for Foreign Affairs and by the US Secretary of State upon approval of Res. 1851 in SC/6046, at 4 and 9.

¹⁴ SC Res. 1816, at paras 12, 13, and 15.

months by Resolution 1846 of 2 December 2008.¹⁵ The authorization to undertake all necessary measures ‘in Somalia’ set out in Resolution 1851 is also limited to the 12 months starting with the adoption of Resolution 1846.

Second, the scope of the resolutions is clearly limited *ratione loci* as it is stated that the authorization provided ‘applies only with respect to the situation in Somalia’.¹⁶ This implies in particular that authorization to enter the territorial sea does not apply to the territorial sea of states other than Somalia (such as Yemen or Kenya).

Third, the resolutions request that activities undertaken pursuant to the authorizations they set out ‘do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State’.¹⁷ This provision seems consistent with the idea that, while the authorizations set out in the resolutions introduce a limitation to the sovereignty of the Somali coastal state on its territorial sea, they should not have any effect on the rights third states (states other than the coastal and authorized states) are entitled to exercise in the territorial sea, such as, especially, the right of innocent passage.

Fourth, the resolutions affirm that the authorization they contain ‘shall not affect the rights obligations or responsibilities of member States under international law, including any rights or obligations under the [Law of the Sea] Convention with respect to any other situation’ and underscore in particular that they ‘shall not be considered as establishing customary international law’.¹⁸ These provisions correspond to concerns firmly stated in the Security Council by representatives of developing states keen to maintain the integrity of the UN Law of the Sea Convention.¹⁹ Of course, it cannot be ruled out that, if authorizations similar to those granted as regards the Somali situation were to be routinely granted in other situations, the possible formation of a customary rule could be at least discussed. The provisions just quoted would provide, however, a strong, although perhaps not insurmountable, argument against.

A comparison between the Security Council resolutions and the non-binding Code of Conduct adopted on 29 January 2009 concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden shows how keen many states are not to go beyond what is provided in UNCLOS and how dangerous the provisions of the Security Council resolution may appear to them.²⁰ The Code provides different rules for piracy on the high seas and for armed robbery in internal, archipelagic, and territorial waters. On the high seas the UNCLOS regime applies, and in the territorial sea, including pursuit from the high seas, the authorization of the coastal state is necessary.

¹⁵ At para. 10.

¹⁶ SC Res. 1816, at para. 9; SC Res. 1846, at para. 11.

¹⁷ SC Res. 1816, at para. 8; SC Res. 1846, at para. 13.

¹⁸ SC Res. 1816, at para. 9; SC Res. 1846, at para. 11.

¹⁹ Before the unanimous vote of the Council adopting Res. 1816 Indonesia stated, ‘A burden of responsibility rests upon us all [parties to the LOS Convention] to maintain the Convention’s integrity and sanctity... it is our duty to voice strong reservations if there are actions envisaged by the Council or any other forum that could lead to modifying, rewriting or redefining UNCLOS of 1982’ (S/PV. 5902, at 2). See also the declarations after the vote by Viet Nam, Libya, South Africa, and China (*ibid.*, 4–5).

²⁰ See references at *supra* note 9.

5 The Requirement of the Consent of the TFG

The Security Council resolutions considered here are adopted on the basis of the authorization of the Somali Transitional Federal Government (TFG). Paragraph 9 of Resolution 1816 ‘affirms’ that the authorization set out in paragraph 7 ‘has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG’.²¹ Similar formulations, referring to further letters conveying the consent of the TFG, are in Resolution 1846²² and 1851.²³ From the tenor of a number of declarations made upon the adoption of the resolutions, it would seem that without such authorization, and notwithstanding the lack of control by the TFG of the waters off Somalia, unanimity in the Security Council would not have been reached.

The reference to the authorization of the coastal state takes away all, or much of, the revolutionary content of the resolutions. Indeed, the activities purportedly ‘authorized’ by the Security Council in light of the coastal state’s authorization could also be conducted in the absence of a Security Council resolution adopted within the framework of Chapter VII. Under international law, states are free to dispose of their rights in their territorial seas, for instance by allowing other states to conduct police activities in them. A precedent which may be quoted is the exchange of Notes of 25 March 1997 between Albania and Italy, in which Albania agreed that Italian naval forces could in Albanian territorial waters stop ships flying whatever flag and carrying Albanian citizens which had evaded controls exercised by the authorities of Albania in the latter’s territory.²⁴

The fact that no authorization by the Security Council under Chapter VII to exercise jurisdiction in the territorial sea of a state is needed if there is an authorization of the coastal state is confirmed by the language used by the EU Council’s Joint Action concerning ‘Operation Atalanta’ in the waters off Somalia. The provision concerning transfer, for the purpose of the prosecution of arrested pirates or armed robbers, is set out ‘on the basis of Somalia’s acceptance of the exercise of jurisdiction by Member States or by third State, on the one hand [namely, as regards the territorial sea], or of article 105 of the United Nations Convention on the Law of the Sea, on the other

²¹ This letter, not officially available, is quoted in the preamble to the Res. It is also quoted in doc. S/2008/323 containing a letter dated 12 May 2008 from the Permanent Representative of Somalia to the UN to the President of the Security Council, stating that the Somali Government ‘has granted a number of States authorizations to enter Somali territorial waters in order to deal with these threats’ (i.e. threats posed by pirates and armed robbers: paragraph 5 in relation to 2), and supporting the adoption of a res. under Chapter VII ‘to authorize States cooperating with the Transitional Federal Government to enter Somalia’s territorial sea and use all necessary means within the territorial sea to identify, deter, prevent and repress acts of piracy and armed robbery at sea’ (para. 6).

²² At para. 11.

²³ At para. 10.

²⁴ 163 *Gazzetta Ufficiale della Repubblica Italiana*, suppl. of 15 July 1997.

[namely, as regards the high seas]'.²⁵ To invoke Security Council resolutions as a basis has apparently (and correctly) been seen as superfluous.

The importance of the coastal state's consent seems highlighted by the fact that, contrary to the international law rules on piracy on the high seas which permit seizure of pirate ships by 'every State',²⁶ the Security Council resolutions limit the authorizations they provide to 'States cooperating with the TFG' for which 'advance notification has been provided by the TFG to the Secretary General'.²⁷ Thus, the coastal state maintains (in fact, is allowed to maintain) control as regards which states are authorized to enter its territorial sea and, indeed, territory, to fight pirates and armed robbers. At present it seems that the flotilla patrolling the waters off the coast of Somalia (not necessarily its territorial sea) includes naval forces of about 20 states, coordinated by the United States. For the first time China has deployed naval vessels outside the seas adjacent to it, and the European Union has formed and deployed a joint naval force within 'Operation Atalanta'.

The importance given to the coastal state's consent, unnecessary for action under Chapter VII, seems to pursue three objectives. The first is to pay homage to state sovereignty, meeting the abovementioned concerns that through these resolutions new customary international law rules could be 'established'. The second is to strengthen the TFG, which, while maintaining the Somali presence at the United Nations, does not exercise effective power in Somalia, and in particular lacks the capacity to fight pirate activities off its coasts.²⁸ The third, through the designation by the TFG of the states whose vessels are authorized to act in its territorial sea, would seem to consist in limiting the foreign fleets' presence in Somali waters to those of the states most involved, and to states ready to cooperate with each other.

The overlap between the Security Council's authorization and that of the coastal state as represented by the TFG may, however, serve, additionally, or perhaps especially, another purpose. It must be recalled that, by a law of 1972, Somalia adopted a territorial sea of 200 miles width²⁹ and that, although Somalia ratified UNCLOS on 24 July 1989, there is no record (at least available to the present writer) that that law has been revoked. In the situation of possible conflict between a domestic statute and the international obligation assumed under UNCLOS to have 12 miles as the maximum width for the territorial sea, compounded by the lack of effective authority in Somalia, the intent of the Security Council in ensuring the TFG's consent to action by other

²⁵ EU Council Joint Action 2008/851/CFSP of 10 Nov. 2008, OJ (2008) L301/33, Art. 13, para 1, chapeau.

²⁶ Under UNCLOS, Art. 105.

²⁷ Res. 1816, at para. 7, introduction; Res. 1846, at para. 10; Res. 1851, at para. 6.

²⁸ The letter of 12 May 2008 of the Somali Permanent Representative to the UN (UN doc. S/2008/323) clearly states that 'the Transitional Government does not have the capacity to interdict the pirates or patrol and secure the waters off the coast of Somalia'. This aspect is analysed by Tancredi, *supra* note 1, at 943.

²⁹ Available at: www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATESFILES/S (visited on 3 Mar. 2009) indicates that the UN has the same information. The same source is relied upon in the recent study by Chircop, Dżidzornu, Guerreiro, and Grilo, 'The Maritime Zones of East African States in the Law of the Sea: Benefits Gained, Opportunities Missed', 16 *African J Int'l and Comp L* (2008) 121, at n. 32 and accompanying text.

states against pirates and armed robbers within the territorial sea may be explained as to grant a legal basis for such action whatever the width of the Somali territorial sea. From the behaviour of states patrolling the waters off the coast of Somalia it would seem clear that they assume that the external limit of the Somali territorial sea is 12 miles. Whether this is also the assumption of the TFG is uncertain, and the permission to act against pirates and armed robbers in its territorial sea has the beneficial result of avoiding discussion on this question.

6 What to Do with Captured Pirates and Armed Robbers? Human Rights, Agreements with Neighbouring States, the SUA Convention

As mentioned, international law accords universal jurisdiction to the courts of the seizing state. This jurisdiction, applicable under Article 105 of UNCLOS for the seizure and arrest of pirates on the high seas, applies also to seizures and arrests in the territorial sea of Somalia under the Security Council resolutions referred to above.

The seizing states – in other words, the states fighting pirates and armed robbers in the waters off Somalia and having arrested them – are, however, reluctant to exercise such broad powers by prosecuting and submitting to criminal proceedings in their courts the pirates and armed robbers arrested.³⁰ They seem concerned by the expense involved, by legal complexities, relating for instance to evidence, inherent in criminal proceedings to be held far away from the place where the alleged crime was committed, and, perhaps especially, by the human rights implications of exercising jurisdiction.

A recent case highlights these difficulties. The Danish Navy ship *Absalon* on 17 September 2008 captured 10 pirates in the waters off Somalia. After six days' detention and the confiscation of their weapons, ladders, and other implements used to board ships, the Danish government decided to free the pirates by putting them ashore on a Somali beach. The Danish authorities had come to the conclusion that the pirates risked torture and the death penalty if surrendered to (whatever) Somali authorities. This was unacceptable, as Danish law prohibits the extradition of criminals when they may face the death penalty. Moreover, they were not ready to try them in Denmark as it would be difficult (in light of the possible abuses they would risk) to deport them back to Somalia after their sentences were served.³¹ It is clear that human rights

³⁰ US Secretary of State Rice observed in her declaration of 16 Dec. 2008 before the Security Council: 'the international community already has sufficient legal authority and available mechanisms to apprehend and prosecute pirates, but sometimes the political will and the coordination have not been there to do so' (S/PV.6046, at 10).

³¹ See the reports available at: www.lloydslist.com//ll/news/view/Article.htm?articleId (visited on 30 Oct. 2008); US Office of Naval Intelligence, Civil Maritime Analysis Department, Worldwide Threat to Shipping, Mariner Warning Information, 17 Oct. 2008, at para. 10; Combined Task Force 150, available at: http://en.wikipedia.org/wiki/Combined_Task_Force_150 (visited on 30 Oct. 2008). The last-quoted source states that the pirates were allowed to keep their ships, while the other two do not mention this aspect.

considerations, or perhaps reasons of expediency presented as human rights concerns, prevailed over considerations concerning the fight against piracy. In the same vein, the British Foreign Office reportedly warned the Royal Navy against detaining pirates since this might violate their human rights and could lead to claims to asylum in Britain.³²

The capture and detention at sea of criminals later brought to trial in far away courts of the state of the arresting vessel have been referred by those captured to the judgment of the European Court of Human Rights (ECtHR). This happened in the *Rigopoulos* and *Medveyev* cases decided on 12 January 1999 and 10 July 2008 respectively.³³ In these cases the applicants were arrested on the high seas on a ship boarded, with the authorization of the flag state, under suspicion, later proved to be well founded, of being engaged in smuggling narcotic drugs. The question submitted to the Court was whether detention on the arresting naval vessel for about two weeks was compatible with Article 5(3) of the European Convention on Human Rights according to which, *inter alia*, arrested or detained persons 'shall be brought promptly before a judge or other officer authorized by law to exercise judicial power'. The Court, even though in both cases it decided that the circumstances were exceptional enough to justify an affirmative answer, stated clearly that the principle was that such a long period of detention was not compatible with the provision in question. Consequently, states parties to the European Convention may, in different circumstances, be confronted by a decision finding a violation of the human rights of the detained criminal (be it a drug trafficker or a pirate). Moreover, in the 2008 *Medveyev* case the ECtHR found a violation of Article 5(1) of the European Convention, according to which *inter alia*, '[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law' on the basis of a strict interpretation of the agreement authorizing the boarding and arrest, but allegedly not sufficiently clear as to the right to submit the arrested person to trial. The possibility of a similar decision seems highly unlikely in the case of piracy, in light of the broad powers recognized by general international law and the Security Council resolutions. It shows, nevertheless, that a court like the ECtHR will tend to interpret the law of the sea and international law rules in such a way as to offer maximum protection to the individuals involved.

The reluctance of seizing states to prosecute and try pirates is implicitly taken into account in the resolutions of the Security Council. Resolutions 1816 and 1846 contain the following provision :

Calls upon all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international

³² See Rivkin Jr. and Casey, 'Pirates Exploit Confusion about International Law', *Wall Street Journal*, 19 Nov. 2008.

³³ Respectively requests 37388/97 and 3394/03, available only in French at: www.echr.coe.int/ECHR/English/Case-Law/HUDOC.

human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution.³⁴

This language is merely hortatory. However, most states involved as flag states of the ships which are victims of piracy or of the ships patrolling the waters off Somalia, or as neighbouring coastal states such as Djibouti, Kenya, and Yemen, but not Somalia, are bound by the precise obligations set out for parties to the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988 (the SUA Convention).³⁵ This Convention – adopted in the wake of the *Achille Lauro* affair – provides that states parties shall establish a number of criminal offences, most of which correspond in whole or in part with actions committed by pirates or armed robbers (notably, it does not require the presence of two ships and does not distinguish between maritime areas).³⁶ In particular, it makes it compulsory to ‘take such measures as may be necessary to establish jurisdiction’ over such offences for the flag state of the ship against or on board which the crime is committed, for the state in the territory of which, including the territorial sea, the crime is committed, and for the state the national of which committed the offence. It further authorizes other states to establish jurisdiction in additional cases; these include the state of which a person seized, threatened, injured, or killed is a national and the state which the criminal act is intended to compel to do or abstain from doing any act. In all cases it is compulsory for the state in the territory of which the alleged offender is present to establish jurisdiction, and it does not extradite such offender to one of the states which has established jurisdiction.³⁷

While the SUA Convention is not mentioned in Resolution 1816, Resolution 1846 recalls the obligations set out in it and urges states parties ‘to fully implement’ these obligations.

The reluctance of the seizing states is not the only cause of lack of efficiency in dealing with captured pirates and armed robbers. As was said in a preambular paragraph of Resolution 1846, ‘the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia and in some case led to the pirates being released without facing justice’.

³⁴ Res. 1816, at para. 11; Res. 1846, at para. 14.

³⁵ 1678 UNTS 221. Under Art. 4(1), the ‘Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States’. This means that only ships navigating between ports of the same state (cabotage) are excluded from the scope of the Convention. Even in this case, under para. (2) of Art. 4, the Convention applies if ‘the offender or alleged offender is found in the territory of a State party other than the State referred to in paragraph 1’. On the SUA Convention see, with further references, the present writer’s essays: ‘The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation’, in N. Ronzitti (ed.), *Maritime Terrorism and International Law* (1990), at 69, and ‘The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation’, 2 *Singapore J Int’l and Comp L* (1998) 541.

³⁶ SUA Convention, *supra* note 27, at Art. 3.

³⁷ *Ibid.*, at Art. 6.

In particular, the difficulties met in surrendering captured pirates to a neighbouring state and ensuring that such state will exercise jurisdiction and respect human rights have led to bilateral agreements, mentioned in the media but not made public, between the United Kingdom and the United States and Kenya.³⁸ According to a declaration of the Kenyan Foreign Minister, these are 'memoranda of understanding' which will not, however, 'be an open door for dumping pirates onto Kenyan soil'. They will function on a case-by-case basis.³⁹ These memoranda seem to be part of a practice, mentioned and encouraged by Resolution 1846, consisting in agreements between the states whose ships are patrolling the waters off the coast of Somalia and 'countries willing to take custody of pirates' to place on such ships law enforcement officers (called 'shipriders') 'from the latter countries, in particular countries of the region, to facilitate the investigation and prosecution of persons detained'.⁴⁰ These arrangements require the prior consent of the TFG 'for the exercise of third State jurisdiction by shipriders in Somali territorial waters' and provided they 'do not prejudice the effective implementation of the SUA Convention'.

While the practice of shipriders under these agreements permits the jurisdiction of Kenya (or of other states whose officers are on board the seizing vessels) to be based on the fiction that it is a seizing state, in other cases the connecting factor is the nationality of the victim ship or of the victims. So reportedly the Netherlands has signed an agreement with Denmark to extradite five Somali pirates who attacked a Netherlands-Antilles cargo vessel in the Gulf of Aden and were captured by Denmark.⁴¹

European Union Joint Action 2008/851/CSFP⁴² on the EU military operation against piracy and armed robbery off the Somali coast envisages the situation now considered. It provides that, if the competent authorities of the flag state of the ship 'which took them captive' 'cannot or do [] not wish to exercise its jurisdiction', the persons arrested during the operation with a view to their prosecution shall be transferred to a 'Member State or any third State which wishes to exercise its jurisdiction over the aforementioned persons'.⁴³ This provision does not rule out the use of 'shipriders', but adds possible transfer to other EU Member States or to other willing third states. In light of the abovementioned concerns, it seems relevant to quote a provision of the same Joint Action stating that:

³⁸ Meade, 'US to sign Kenya deal to prosecute Somali pirates', available at: www.lloydaliat.com/ll/us-to-sign-kenya-deal-to-prosecute-somilai-pirates (article dated 16 Jan. 2009).

³⁹ Butty, 'Kenyan Foreign Minister Shed Light on US-Kenya Piracy Agreement', available at: www.voanews.com/english/Africa/2009-01-28-voa4-cfm (article dated 28 Jan. 2009).

⁴⁰ Res. 1846, at para 3. 'Shipriders' are used in some bilateral agreements concluded by the US regarding drug trafficking, as, for instance, the Agreement concluded with Jamaica in 1997, Arts 7-9; they are mentioned also as 'Embarked Officers' in the above-quoted Code of Conduct of 2009 for the West Indian ocean and the Gulf of Aden (Art. 7).

⁴¹ Meade, *supra* note 30.

⁴² OJ (2008) L301/33.

⁴³ EU Council Joint Action 2008/851/CFSP of 10 Nov. 2008, OJ (2008) L301/33, Art. 12(1).

no person... may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law of human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.⁴⁴

Detailed provisions for the protection of the human rights of pirates and armed robbers captured by the European Union naval force and transferred to Kenya are set out in articles 3 and 4 of the exchange of letters made in Nairobi on 6 March 2009 on such transfer concluded between the European Union and Kenya.⁴⁵ It is to be noted that this agreement, though not ruling out their involvement, does not mention ‘shipriders’.

7 Use of Force in Operations at Sea against Pirates and Armed Robbers

Seizing a pirate ship under the power granted to all states by UNCLOS implies the possibility of the use of force. This is even clearer under the above resolutions of the Security Council which mention the use of ‘all necessary means for repressing acts of piracy and armed robbery’. It is well known that in the parlance of the Security Council ‘all necessary means’ means ‘use of force’. The above-quoted EU Council Joint Action makes this explicit in defining the mandate of ‘Operation Atalanta’ when it says that Atalanta shall take ‘all necessary measures, including use of force’.⁴⁶

This is not use of force against the enemy according to the law of armed conflict, because there is no armed conflict, international or internal. Pirates are not at war with the states whose flotillas protect merchant vessels in the waters off the coast of Somalia. It has been argued that pirates not being combatants are civilians who, under international humanitarian law, may not be specifically targeted except in immediate self-defence.⁴⁷ Whatever opinion one holds about the applicability of the law of armed conflict, it is a fact that practice in the waters off Somalia seems to indicate that warships patrolling these waters resort to the use of weapons only in response to the use of weapons against them. So in an incident in the Gulf of Aden reported on 14 November 2008, a British naval vessel having positively recognized a Yemeni cargo ship which had participated in a hijacking attempt on a Danish cargo ship on the same day, tried to stop it by ‘non forcible methods’. Only when these had failed, did ‘the Royal Navy launch [] small assault craft to encircle the vessel’. Once the pirates opened fire, ‘the Navy fired back in self-defence’. In another episode reported on 21 November 2008, the Indian Navy vessel *Tabar* patrolling the Gulf of Aden 285 miles off the coast of

⁴⁴ *Ibid.*, at para. 2.

⁴⁵ ‘Exchange of letters for the conditions and modalities for the transfer of persons having committed acts of piracy and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya’ in OJ (2009) L79/49, annex to EU Council decision 2009/293CFSP of 26 February 2009, in *ibid.*, at 47.

⁴⁶ EU Council Joint Action 2008/851, *supra* note 35, Art. 2(f).

⁴⁷ It must be noted that only in Res. 1851, authorizing action against pirates and armed robbers in the Somali mainland, does the Security Council specify that such action must be undertaken consistently not only with human rights but also ‘with applicable humanitarian law’.

Oman requested a vessel described as a pirate mother ship, the crew of which was seen 'with a full complement of modern weapons', to stop. When the pirate ship 'responded by threatening to "blow up the naval warship if it closed on her"' and fired at the Indian vessel, the *Tabar* responded and sank the vessel.⁴⁸

Thus, self-defence against an armed attack or the threat thereof, either in the questionable framework of the law of armed conflict or in the discussed framework of resort to it against non-state actors, or, more likely, as a self-imposed rule of engagement for police action, seems to be a guiding principle of states the navies of which are engaged in fighting pirates off the coast of Somalia and neighbouring states.

The question must, however, be raised whether force may be used in action against pirates and armed robbers independently of self-defence, and whether, if an affirmative answer is given, international law prescribes limits to such use. Action against pirates may, in my view, be assimilated to the exercise of the power to engage in police action on the high seas on foreign vessels which is permitted to other states by exceptions to the rule affirming the exclusive jurisdiction of the flag state. Such permission is rarely and reluctantly given by flag states unless upon request on a case-by-case basis. There are nonetheless examples of permission given in general terms in a few treaties on drug trafficking and fisheries. Among these, the 1995 UN Fish Stocks Agreement is the main multilateral instrument.⁴⁹ This agreement permits certain non-flag states to board and inspect fishing vessels on the high seas. In principle such action should not involve the use of force, as the flag state is, *inter alia*, bound to 'accept and facilitate prompt and safe boarding by the inspectors' and sanction the master if he refuses to agree to being boarded.⁵⁰ The possibility of the use of force after the boarding is nevertheless envisaged in Article 22(1)(f), which states that the inspecting state shall 'avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties'. General international law, in authorizing stopping and boarding for the purpose of exercising the right of visit under Article 110 of UNCLOS or the seizure of a pirate ship under Article 105, presupposes that force may be used to reach these objectives. In view of the fact that they have accepted the relevant instruments and are bound by the relevant customary rules and by the relevant resolutions taken by the Security Council under Chapter VII, states can be considered as consenting to, or as being obliged to accept, the use of force undertaken in order to undertake these police activities.

Limits to such use of force in the exercise of police action authorized by international law have been indicated in dispute-settlement and treaty practice. Repeating and developing points made in the *I'm Alone* arbitration award and in the report of the Commission of enquiry on the *Red Crusader* case, the International Tribunal for the

⁴⁸ These episodes are reported in bulletins of the (US) Office of Naval Intelligence, Civil Maritime Analysis Department, Worldwide threat to shipping, Mariner warning information, available at: www.icc-ccs.org/.

⁴⁹ Agreement for the Implementation of Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stock, opened to signature in New York on 4 Dec. 1995, 34 ILM (1995) 1547.

⁵⁰ UN Fish Stocks Agreement 1995, Art. 22(3) and (4).

Law of the Sea, in its *M/V Saiga No 2* judgment states: ‘international law ... requires that the use of force must be avoided as far as possible and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’⁵¹ The judgment further recalls the practice concerning visual and auditory signals to stop, firing shots across the bows, and a variety of other measures, normally followed before resorting to force.⁵² In the same vein, the UN Fish Stocks Agreement concludes Article 22(1)(f) by stating, ‘[t]he degree of force used shall not exceed that reasonably required in the circumstances’.

The *Saiga No 2* case was quoted in the 2007 Arbitral award deciding a maritime border dispute between Guyana and Suriname.⁵³ The question addressed was whether the order given by a Surinamese naval vessel to a Guyanese oil drilling platform situated on a disputed area of the continental shelf to leave the area together with the statement that ‘if they would not do so, the consequences would be theirs’ constituted an illegal threat of use of force under Article 2(4) of the UN Charter and under customary law. The Arbitral Tribunal considers *inter alia* the remarks set out in the ICJ judgment in 1986 in *Military and Paramilitary Activities in and against Nicaragua* distinguishing the gravest forms of use of force which constitute an armed attack from ‘other less grave forms’.⁵⁴ While not directly drawing consequences from this distinction, it ‘accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary’ but concludes that, ‘in the circumstances of the present case, ... the action mounted by Suriname on 3 June 2003 seemed more akin to a threat of military action rather than a mere law enforcement activity’, and that it contravened the UN Charter and general international law.⁵⁵ The Tribunal does not specify whether this conclusion is based on the characteristics of the threatened use of force (possible involvement of military means?) or on the fact that the use of force was illicit because it had taken place in an area the Award had determined to belong to Guyana and where consequently Suriname had no enforcement rights, and that it would have been considered a legal enforcement activity had the area been found to belong to Suriname. The latter seems to be the most reasonable explanation, but, admittedly, the Award is not clear on this key point.

As regards the use of force against pirates, the *Guyana v. Suriname* award seems to confirm the emerging trend that activities permitted by international law for the enforcement of rights may include the use of force, provided such force is unavoidable, reasonable, and necessary. The practice seen above clarifies these requirements by introducing the element of respect for the human rights of the persons involved which was implicit in the mention of ‘considerations of humanity’ in the *M/V Saiga No. 2* judgment of the International Tribunal for the Law of the Sea.

⁵¹ [1999] ITLOS Rep 10, at para. 155.

⁵² *Ibid.*, at para. 156.

⁵³ Award of 17 Sept. 2007, 47 ILM (2008) 66.

⁵⁴ Para. 445 of the Award referring to para. 191 of the ICJ Judgment of 27 June 1986 in *Nicaragua v United States* [1986] ICJ Rep 14.

⁵⁵ *Supra* note 53, at para. 445.