

# The Question of Pirate Trials in States Without a Crime of Piracy

ZOU Keyuan\* and JIN Jing\*\*

## Abstract

Many States in the world such as China have no specific domestic laws providing for the crime of piracy, leading to the question whether these States have the competence to punish piracy as required by international law. This paper argues that the lack of a crime of piracy within a domestic legal system should not become an insurmountable obstacle for States to prosecute pirates. Prosecution of pirates without a crime of piracy is feasible in a State that has domestic criminal laws that deal with illicit activities similar to piracy by indicting perpetrators with other criminal offences. While it would be an ideal solution for that State to establish a specific crime of piracy in its domestic legal system, it is important to consider the difficulties in setting the definition of piracy and the degree of punishment appropriately, and realize that the major deficiencies in punishing pirates under other existing domestic crimes can be basically addressed within an existing domestic legal system. The main purpose of universal jurisdiction over piracy to punish criminals to the maximum extent and the changing situation of piracy also require States to always be ready to deal with piracy. Therefore, prosecuting pirates as another crime is a realistic compromise. Furthermore, for a State without a crime of piracy, it is more urgent for it to build up legal grounds for exercising universal

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\* Distinguished Professor, Dalian Maritime University; Harris Professor of International Law, University of Central Lancashire. This paper was completed on 11 November 2020, and the websites cited were current as of this date unless otherwise noted.

\*\* PhD Candidate, Guanghua Law School, Zhejiang University. This article is part of a research project funded by China's National Social Sciences Foundation (18VHQ002).

jurisdiction over piracy and relevant procedural provisions on the exercise of extraterritorial jurisdiction over international crimes at sea.

## I. Introduction

1. Although Somali piracy is effectively suppressed, the threat still exists. It may revive easily if multilateral naval forces decrease and the international community is not careful enough.<sup>1</sup> Pirates in other places such as the Gulf of Guinea are rampant too. Southeast Asia and South America have also become hotspots of piracy. A recent report from the International Maritime Bureau (IMB) showed that during January-June 2020, the most piracy incidents were in Africa (38), followed by Southeast Asia (33) and the Americas (17).<sup>2</sup> Though the reported number of incidents (98) was significantly lower than that in the same period of 2018 (107), it exceeded that in 2017 (87) or 2019 (78), and was equal to that in 2016.<sup>3</sup> In order to prevent the resurgence of piracy, it is vital for the whole international community to remain focused on its prevention and punishment.

2. Prosecution is undoubtedly an essential tool for punishing and deterring piracy. There are generally three ways to prosecute pirates. The first is trial in the pirates' country of origin. Puntland and Somaliland in Somalia ruled by local authorities accepted and prosecuted pirates seized by multilateral naval forces.<sup>4</sup> However, the States where pirates originate often lack valid law, stable government, and financial capability to prosecute pirates effectively.

3. The second is trial in regional States. Kenya, Seychelles, and Mauritius have been the primary regional States where Somali pirates were sent and

1 Anti-piracy expert John Steed of Oceans Beyond Piracy has expressed a similar view. See Robyn Kriel and Briana Duggan, *Somali Pirates Seize Iranian, Thai ships*, CNN (24 November 2015) ([edition.cnn.com/2015/11/23/world/somalia-piracy/](http://edition.cnn.com/2015/11/23/world/somalia-piracy/)).

2 IMB, *Piracy and Armed Robbery Against Ships Report for the Period 1 January – 30 June 2020* ([www.icc-ccs.org/reports/2020\\_Q2\\_IMB\\_Piracy\\_Report.pdf](http://www.icc-ccs.org/reports/2020_Q2_IMB_Piracy_Report.pdf)).

3 Ibid.

4 Report of the UN Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chamber Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals and the Time and Resources Necessary to Achieve and Sustain Substantive Results, UN Doc. S/2010/394 (26 July 2010), para.19.

prosecuted. However, on a worldwide scale, few States are willing to accept pirates for prosecution. As hotspots of piracy exist across different regions, the model to accept Somali pirates in Africa may not be workable in other regions. Even those regional States mentioned above still face enormous difficulties such as inadequate prison facilities;<sup>5</sup> concerns of human rights of piracy suspects from the outside;<sup>6</sup> and insufficient funds received from the international community.<sup>7</sup> Also, the jurisdiction of the regional States is challenged, as until now only capturing States seemed to have the indisputable authority to prosecute pirates according to Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>8</sup> which is the foundation for universal jurisdiction over piracy.

4. The third way, which might be the most significant, is trial in the States that capture pirates. Universal jurisdiction over piracy in this way is explicit in international law, for UNCLOS clearly grants capturing States such right. Decentralizing pirate trials among different States like this can make full use of existing domestic legal resources and imprisonment capacity of more States, and distribute the pressure and burden, so as to substantially avoid the unfairness that only a small number of States bear the majority of responsibility for prosecuting pirates. Therefore, even if regional States are willing to accept pirates, capturing States may still need to be prepared to prosecute pirates by themselves.<sup>9</sup>

5. Nevertheless, States are often reluctant to bring pirates captured overseas to their own jurisdictional systems for prosecution. The rate of “catch and

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5 Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, annex to the Letter Dated 24 January 2011 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2011/30 (25 January 2011), para.69.

6 For example, UNSC Resolution 1918 (2010) has mentioned “to enhance the capacity of the judicial and the corrections systems in Somalia, Kenya, Seychelles and other States in the region to prosecute suspected, and imprison convicted, pirates consistent with applicable international human rights law”.

7 Jordan Wilson, *The Rise, the Fall, and the Eventual Return of Modern Piracy: Addressing an Age-Old Problem with Modern Solutions*, 47 *Journal of Maritime Law and Commerce* (2016), 297-340, at 325.

8 Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 *American University LR* (2010), 1449-1497, at 1469.

9 Jessica Piquet, *Changing Tides: An Adaptable Prosecution Approach to Piracy’s Shifting Problem*, 52 *Columbia Journal of Transnational Law* (2013), 238-274, at 254.

release” was more than 90%.<sup>10</sup> There are many reasons for it. For instance, States fear that pirates may seek asylum after their release.<sup>11</sup> Many States do not have domestic substantive and procedural law on piracy,<sup>12</sup> and some of them, such as China, do not even have a crime of piracy.

6. For the States without a crime of piracy, it is questionable whether they can undertake pirate trials in accordance with their domestic laws. While they can exercise universal jurisdiction as required by international law, they may be criticised on the ground that there is no domestic legal basis to prosecute pirates. It is a question whether those States should improve their domestic laws by introducing the crime of piracy so as to promote efficiency and effectiveness of international antipiracy cooperative operations.

## II. Can a State Without a Crime of Piracy Prosecute Pirates?

7. In State practice, the lack of a crime of piracy does not prevent States from prosecuting pirates and States have punished pirates under other relevant criminal charges, such as murder and robbery. Take China as an example. In December 1999, a court in Guangdong Province convicted Weng Siliang, Soni Wee and their accomplices, who robbed the ship *Cheung Son* and killed the crew, under the criminal charges of robbery and murder.<sup>13</sup> In February 2000, a court in Guangxi convicted 14 Burmese pirates of robbery, for they hijacked the Panamanian registered ship *Marine Fortuner*.<sup>14</sup> China also punished pirates under the criminal charges of robbery in the case of *Siam Xanxai*.<sup>15</sup> In Europe, Austria deemed that the existing crimes, such as murder

10 Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, above n.5, para.43.

11 Tom Syring, A Pirate and a Refugee: Reservations and Responses in the Fight against Piracy, 17 ILSA JICL (2011), 437-457, at 437.

12 UNSC Res 1918 (2010).

13 For details, see ZOU Keyuan, New Developments in the International Law of Piracy, 8 Chinese JIL (2009), 323-345, para.51. See also Guangdong High People’s Court, The Judicial Verdict of the Case of Cheung Son (8 January, 2000) (pkulaw.-com/pfnl/a25051f3312b07f36f2aabfcd71b40b617e4d37dd86b2741bdfb.html).

14 For details, see ZOU Keyuan, above n.13, para.52. See also Prosecuting Burmese Pirates in Guangxi, Lanzhou Morning News (22 August 2000) (lzcbs.gansudaily.-com.cn/system/2000/08/22/000292336.shtml).

15 For details, see ZOU Keyuan, above n.13, para.53. See also The Robbery Committed by Atan Naim and Others: The Application of Criminal Universal Jurisdiction, in: Supreme People’s Court of China (ed.), China’s Criminal Trial Guidance Case (Beijing: Law Press, 2017), 355-360 (in Chinese).

and deprivation of liberty, physical injury or trafficking in human beings, could cover most crimes related to piracy.<sup>16</sup> Likewise, Norway held that it could punish piracy pursuant to general robbery crimes, such as armed robbery and aggravated armed robbery.<sup>17</sup>

8. Piracy and existing traditional domestic crimes have something in common. According to Article 101 of UNCLOS, piracy is illegal acts involving violence or detention, depredation, voluntary participation, and inciting or intentionally facilitating the foregoing acts.<sup>18</sup> The so-called “violence or detention” and “depredation” usually embody murder, intentional injury, explosion, robbery, rape, kidnapping, assault, and illegal detention. Both ancient pirates and modern pirates “attack, loot, and hijack ships for ransom”.<sup>19</sup> If these offences are committed on land, they constitute corresponding existing crimes. Joseph Story, a Justice on the United States Supreme Court, made a similar point in *US v. Tully and Dalton* in 1812. He held that piracy consisted mainly of robbery and depredation on the high seas, which, if committed on land, were equivalent to felony crimes.<sup>20</sup>

9. However, some Chinese scholars believed that States without the crime of piracy should not prosecute pirates. They do not agree that piracy could be prosecuted under other criminal charges and have proposed the establishment of the crime of piracy in the Chinese domestic legal system. One reason is that prosecuting pirates under other traditional crimes would expand the scope of those crimes excessively.<sup>21</sup> However, the above concerns can be remedied by explicitly stipulating universal jurisdiction over piracy at the domestic level so that the State concerned can possess extraterritorial jurisdiction and apply its domestic criminal law to piracy which has even occurred outside its territory. Thus, if, according to the criminal law of the State without a crime

16 Letter from Permanent Mission of Austria to the United Nations to the Secretary-General of the United Nations (8 February 2010) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUT\\_criminal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUT_criminal_code.pdf)).

17 Letter from Norway to IMO (25 September 2009) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_piracy\\_summary.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_piracy_summary.pdf)).

18 UNCLOS, 1833 UNTS 397, art. 101.

19 Collin McCarthy, *Davey Jones's Lockup: Changing the US Approach to Prosecution and Punishment of Maritime Piracy in Universal Jurisdiction Cases*, 45 *Golden Gate University LR* (2015), 123-148, at 127.

20 Alfred P. Rubin, *The Law of Piracy* (Newport: Naval War College Press, 1988), at 135.

21 MA Chengyuan, *On Universal Jurisdiction in Chinese Criminal Law*, 3 *Zhengfa Luntan* [Tribune of Political Science and Law] (2013), 88-101, at 99 (in Chinese).

of piracy, the piratical acts meet the elements of relevant existing domestic crimes, the State has the legal basis to prosecute pirates under those criminal charges.

10. There inevitably follows another controversial question—can those crimes other than piracy have extraterritorial effect? Some Chinese scholars claim that pirates only can be prosecuted under the crime of piracy, as it is subjected to universal jurisdiction, while other crimes are not.<sup>22</sup> According to one of those scholars, the reason why all States should seize pirates is that they commit a “universal crime”; consequently, the capturing States must accuse pirates of the universal crime, rather than other criminal offences.<sup>23</sup> Even the International Maritime Organization (IMO) believes that prosecuting and punishing piracy under other criminal charges “can only take place in accordance with a jurisdiction scope that is inevitably more restricted than the scope of universal jurisdiction”.<sup>24</sup>

11. However, the name of a crime under the domestic law is not the only determining element of universal jurisdiction. UNCLOS does not explicitly require States to establish the crime of piracy in their domestic legal systems. Article 100 of UNCLOS only requires all States to “cooperate to the fullest possible extent in the repression of piracy”, but does not provide a detailed legal framework.<sup>25</sup> It can be understood that all measures conducive to suppressing piracy should be appreciated, regardless of the formality. Similarly, Article 105 only stipulates that the courts of capturing States can “decide upon the penalties to be imposed”, but there is no explicit command or even request for convicting pirates under the crime of piracy.<sup>26</sup> As Viscount Sankey LC held in *re the Piracy Jure Gentium v. State*, in terms of crimes defined by international law, they could be tried and punished under domestic law.<sup>27</sup>

22 Ibid. See also YAO Chunyan, Thoughts on Adding a Crime of Piracy to Criminal Law, 2 *Shehui Kexuejia* [Social Scientist] (2009), 84-87, at 85 (in Chinese).

23 DENG Daming, On the Relay of the Legislation of Piracy in China’s Criminal Law and International Law, 5 *Zhengzhou Daxue Xuebao* (Zhaxue Shehui Kexue ban) [Journal of Zhengzhou University (Philosophy and Social Sciences)] (2010), 42-45, at 42 (in Chinese).

24 Piracy: Review of National Legislation, note by the Secretariat, IMO Doc. LEG 96/7 (20 August 2009), para.3.

25 Yaron Gottlieb, The Security Council’s Maritime Piracy Resolutions: A Critical Assessment, 24 *Minnesota JIL* (2015), 1-72, at 40.

26 UNCLOS, above n.18, art. 105.

27 *Re the Piracy Jure Gentium* [1934] AC 586, as quoted in Robert Jennings and Arthur Watts (eds.), *Oppenheim’s International Law*, Vol. 1, Peace, (9th ed., Essex: Longman, 1992), at 746.

Therefore, domestic trials and punishment of piracy are consistent with UNCLOS, no matter what name of the offence is used.

12. In fact, it has been recognized to some extent that accusing pirates of other crimes is a form of exercising universal jurisdiction over piracy. Again take China as an example. Kontorovich and Art considered that there were several universal jurisdiction prosecutions in China, such as the case of *Marine Fortuner* and the case of *Siam Xanxai*.<sup>28</sup> Dutton has also admitted that China is a State which has incorporated universal jurisdiction over piracy into its domestic law.<sup>29</sup> In China, the case of *Siam Xanxai* is also regarded by the Supreme People's Court of China as a typical case that guides the exercise of universal jurisdiction over piracy.<sup>30</sup>

### III. What are the Difficulties in Establishing a Crime of Piracy in Domestic Law?

13. The development of domestic legislation is usually a cumbersome process that requires complicated procedures and a long period of time. In addition, a crime in domestic law requires a detailed definition of prohibited conduct and an applicable penalty. Thus, a State will face enormous challenges in establishing a specific crime of piracy, in respect of whether working out the definition or the degree of punishment.

#### III.A. Difficulties in Establishing the Definition of Piracy

14. The meaning of piracy in domestic law inevitably needs to make reference to the definition in international law. The domestic one should be able to reflect the internationally recognized definition, since only in this way can it claim universal jurisdiction.<sup>31</sup> It is admitted that a State does have the right to define piracy differently in its domestic law, whether or not more extensive than that under UNCLOS. However, as has been argued, "only piracy as defined by international law allows for the assumption of jurisdiction on the

28 Eugene Kontorovich and Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 *American JIL* (2010), 436-453, at 448.

29 Yvonne M. Dutton, *Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?*, 86 *Tulane LR* (2012), 1111-1162, at 1141.

30 *The Robbery Committed by Atan Naim and Others: The Application of Criminal Universal Jurisdiction*, above n.15, at 355.

31 *US v. Hasan* (747 F.Supp.2d 599 (E.D.Va. 2010)), at 608 and 609.

basis of universality”.<sup>32</sup> As the definition of piracy under UNCLOS has become the most widely accepted one,<sup>33</sup> domestic offences of piracy should align with that provided for in Article 101 of UNCLOS. For example, the United States has several provisions on piracy. One of them is 18 U.S.C. § 1655, stipulating that a seaman who commits violence against the commander to prevent him from defending his ship or cargo is a pirate.<sup>34</sup> Since it does not meet the definition of piracy in international law, a jurisdictional nexus with the United States is required to ensure that the United States has jurisdiction over it,<sup>35</sup> and this jurisdiction is thus not universal jurisdiction. In contrast, another provision on piracy in the United States’ law is 18 U.S.C.A. § 1651, considering that “whoever, on the high seas, commits the crime of piracy as defined by the law of nations” is a pirate.<sup>36</sup> Prosecuting pirates under this provision may invoke universal jurisdiction.<sup>37</sup> Although the United States is not a party to UNCLOS, given that UNCLOS reflects customary international law and sets out the legal framework for anti-piracy, “piracy as defined by the law of nations” means that now it is under the regulation of UNCLOS.<sup>38</sup> In short, expanding the definition of piracy in domestic law wider than that under UNCLOS is not relevant to the exercise of universal jurisdiction, and the scope of universal jurisdiction will not be expanded accordingly.

15. However, the definition of piracy under UNCLOS is widely criticised because of its limitations and lack of clarity. It defines “piracy” as only for “private ends”, which generally excludes actions for political or other purposes. The two ships requirement leads to the conclusion that “internal seizure” within a ship does not constitute piracy.<sup>39</sup> Its geographic limitation could not “cover the whole picture of contemporary piracy”,<sup>40</sup> since some offences may happen within a State’s jurisdiction, in particular when an

32 Ivan Shearer, Piracy, para.4, Max Planck Encyclopedia of Public International Law ([opil-ouplaw-com.ezproxy.library.uwa.edu.au/view/10.1093/law:epil/9780199231690/law-9780199231690-e1206?rskey=BFhVzM&result=1&prd=EPIL](http://opil-ouplaw-com.ezproxy.library.uwa.edu.au/view/10.1093/law:epil/9780199231690/law-9780199231690-e1206?rskey=BFhVzM&result=1&prd=EPIL)).

33 Yaron Gottlieb, above n.25, at 4.

34 18 U.S.C.A. § 1655, Assault on Commander as Piracy.

35 Collin McCarthy, above n.19, at 134-135.

36 18 U.S.C.A. § 1651, Piracy under Law of Nations.

37 *US v. Ali* (718 F.3d 929 (D.C.Cir. 2013)).

38 See *ibid.* See also *US v. Dire* (680 F.3d 446, 469 (4th Cir.2012)).

39 ZOU Keyuan, above n.13, para.6.

40 *Ibid.*

exclusive economic zone has been created under UNCLOS. In addition, it is not clear whether it is piracy to simply cruise to find target vessels, threaten violence, attempt to commit piracy, commit a clandestine attack, or plan or prepare for piracy (except for actions which can be subsumed into incitement and facilitation).<sup>41</sup> UNCLOS does not give a clear answer to these questions.

16. To remedy the shortcomings of UNCLOS, there emerge other definitions relating to piracy, which makes the situation more complex. While recognizing piracy on the high seas as “piracy” under UNCLOS, IMO defines piratical acts in ports or national waters (internal waters and territorial sea) as “armed robbery against ships”.<sup>42</sup> The 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) first turned the non-legally binding IMO definition into a legal one.<sup>43</sup> The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and its 2005 Protocol also define many violent acts endangering maritime safety as maritime crimes. Though they do not use the word “piracy”, some of those acts overlap with piracy, especially Articles 3(1) (a) and (b).<sup>44</sup> Some scholars posit that the SUA has replaced the original crime of piracy with “illegal acts endangering the safety of navigation”.<sup>45</sup> Others believe that the SUA enlarges the scope of piracy.<sup>46</sup> There is yet a third view that SUA is a useful supplement to the definition of piracy

41 See Robert Jennings and Arthur Watts (eds.), above n.27, at 753; Yaron Gottlieb, above n.25, at 35-36; and Rosemary Collins and Daud Hassan, Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective, 40 *Journal of Maritime Law and Commerce* (2009), 89-113, at 101.

42 According to Article 101 of UNCLOS, piracy should occur on the high seas or in a place outside the jurisdiction of any State. If an attack occurs in a State’s territorial sea, internal waters, or archipelagic waters, according to IMO Code of Practice of the Investigation of Crimes of Piracy and Armed Robbery against Ships [The previous version is IMO Res A.922 (22) (29 November 2001), and the latest version is IMO Res A.1025(26) (18 January 2010)], it is called armed robbery.

43 See ReCAAP, 2398 UNTS 199, art. 1.

44 Uniform and Consistent Application of the Provisions of International Conventions Relating to Piracy, note by the Secretariat, IMO Doc. LEG 98/8 (18 February 2011), para.9-13.

45 SONG Yunxia, LI Chengyi, and WANG Tiegang, Research on Legal Issues of the Security Guarantee of the Maritime Silk Road, 2 *Zhongguo Haishangfa Yanjiu* [Chinese Journal of Maritime Law] (2015), 11-16, at 14 (in Chinese).

46 Joseph M. Isanga, Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes, 59 *American University LR* (2010), 1267-1319, at 1292.

under UNCLOS.<sup>47</sup> Also, several States believe that the SUA applies only to terrorist acts.<sup>48</sup> Consequently, the relationship between definitions of piracy and crimes under SUA is confusing.

17. Since there is no perfect definition of piracy in international law, if a crime of piracy in domestic law is established solely for the purpose of exercising universal jurisdiction, States may have to accept the definition under UNCLOS which has limitations and a relatively narrow scope. If the domestic law seeks to include a definition of piracy different from UNCLOS, it is necessary to address the relationship with the definition of piracy under UNCLOS, different components of municipal piratical acts, and other definitions of broader piracy-related crimes in international law. Otherwise, the crime of piracy may be insufficient or inefficient in the punishment of pirates. Article 340 of Korean Criminal Act defines “marine robbery”, which was considered by some scholars as piracy,<sup>49</sup> as a person, “through the threat of collective force in the sea, forcibly seizes a ship or forcibly takes another’s property after intruding upon a ship”.<sup>50</sup> It does not endorse the two ships requirement

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47 Observations on the Concept of “Private Ends” in the Definition of “Piracy” in the United Nations Convention on the Law of the Sea, submitted by the Islamic Republic of Iran, IMO Doc. LEG 97/9/4 (7 October 2010), para.3.

48 Report of the UN Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chamber Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals and the Time and Resources Necessary to Achieve and Sustain Substantive Results, above n.4, footnote 10, at 11.

49 There are also views that Article 340 does not provide for the crime of piracy. See LU Yongtun and CUI Yongchun, On the Enlightenment of South Korean Pirate Trial to China, 2 *Jin Ling Falv Pinglun [Jin Ling LR]* (2015), 275-288, at 277 and 278 (in Chinese). However, when the IMO, United Nations Division of Ocean Affairs and Law of Sea, and the United Nations Office on Drugs and Crime requested states to submit samples of national legislation on piracy and armed robbery at sea, Korea also used the word “piracy” for the crimes stipulated in Article 340 in its reply. See *Laws and Ordinances on Punishment of Acts of Piracy and Armed Robbery at Sea of Korea* ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR\\_legislation\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_legislation_piracy.pdf)).

50 For reference, the Article 340 of Korean Criminal Act is as follows:

(1) A person who, through the threat of collective force in the sea, forcibly seizes a ship or forcibly takes another’s property after intruding upon a ship, shall be punished by imprisonment for life or for not less than seven years.

and private ends, and the offence needs not to be committed on the high seas or in a place outside the jurisdiction of any State. It only includes seizing a ship or taking property and the injury, murder or rape during the process, not other forms of piracy. Meanwhile, South Korea has the Punishment of Damaging Ship and Sea Structures Act, which criminalizes several acts endangering the safety of ship and navigational facilities.<sup>51</sup> Therefore, in the first Korean piracy prosecution, *Republic of Korea v. Araye*, the four Somali pirates were charged with many crimes, not only attempted murder during commission of marine robbery and injury by marine robbery, but also attempted murder during commission of robbery, injury by robbery, injury during special obstruction of the performance of official duties, and violation of the Punishment of Damaging Ships and Sea Structures Act.<sup>52</sup>

18. The diversity of State practices may show the difficulties in reaching a consensus on a best definition of piracy in domestic law. IMO, United Nations Division of Ocean Affairs and Law of the Sea (UNDOALOS), and the United Nations Office on Drugs and Crime (UNODC) used to compile lists of national legislation on piracy, and requested States to submit samples of national legislation on piracy and armed robbery at sea.<sup>53</sup> The responses from States showed that the definition of piracy varied greatly. Australia partly adopted the definition under UNCLOS, which basically followed the contents of Article 101 (a) and (b), but the geography scope of piracy attacks included the coastal sea of Australia, and it did not stipulate inciting and facilitating in (c).<sup>54</sup> In several States, although some divergences may still

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(2) A person who commits the crime as referred to in (1), thereby causing injury to another, shall be punished by imprisonment for life or for not less than ten years.

(3) A person who commits the crime of paragraph (1), thereby killing another or causing another person's death or committing rape, shall be punished by death or imprisonment for life.

Laws and Ordinances on Punishment of Acts of Piracy and Armed Robbery at Sea of Korea ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR\\_legislation\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_legislation_piracy.pdf)).

51 Ibid.

52 Supreme Court of Korea, Decision 2011 Do 12927 (22 December 2011) ([library.scourt.go.kr/SCLIB\\_data/decision/24-2011Do12927.htm](http://library.scourt.go.kr/SCLIB_data/decision/24-2011Do12927.htm)).

53 UNDOALOS, National Legislation on Piracy (updated 26 October 2011) ([un.org/Depts/los/piracy/piracy\\_national\\_legislation.htm](http://un.org/Depts/los/piracy/piracy_national_legislation.htm)). See also Request for Information on National Legislation on Piracy, IMO Doc. Circular Letter No. 2933 (23 December 2008).

54 Australian Crimes Act 1914, Part IV, Piracy ([un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUS\\_1914\\_crimes\\_act.pdf](http://un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUS_1914_crimes_act.pdf)).

exist, the definitions of piracy were basically the same as or close to that under UNCLOS, and these included the Republic of Cyprus,<sup>55</sup> Kenya,<sup>56</sup> Malta,<sup>57</sup> and South Africa.<sup>58</sup> Some did not provide for piracy as a specific crime. For example, the Czech Republic proscribed crimes endangering an aircraft, civil vessel and fixed platform rather than piracy,<sup>59</sup> while Latvia punished piracy under murder, intentional serious bodily injury, threatening to commit murder and to inflict serious bodily injury, kidnapping, seizure of hostages, robbery, terrorism, and seizure of an air or water transport vehicle.<sup>60</sup> Poland did not provide a specific definition of piracy because it is believed that UNCLOS can be applied directly as its domestic law and it can integrate piracy into other crimes.<sup>61</sup> Finland,<sup>62</sup> Norway,<sup>63</sup> Zambia,<sup>64</sup> Brazil,<sup>65</sup> Bulgaria,<sup>66</sup>

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55 Information Submitted by the Republic of Cyprus on Piracy National Legislation ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CYP\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CYP_piracy.pdf)).

56 Kenyan Merchant Shipping Act 2009, art. 369 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN\\_merchant\\_shipping\\_act.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_merchant_shipping_act.pdf)).

57 Maltese Criminal Code (re: Act XI of 2009), art. 328N ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MLT\\_criminal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MLT_criminal_code.pdf)).

58 South African Act to Provide for the Defence of the Republic and for Matters Connected therewith (No. 42 of 2002), art. 24 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ZAF\\_defence\\_act\\_2002.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ZAF_defence_act_2002.pdf)).

59 Czech Republic Criminal Code (Law No. 40/2009), Section 290 and 291 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CZE\\_criminal\\_code\\_2010.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CZE_criminal_code_2010.pdf)).

60 The enclosure to the Note No. 41/121-714 of 16<sup>th</sup> February, 2010 of the Ministry of the Republic of Latvia to the Secretariat of the United Nations ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LVA\\_criminal\\_law.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LVA_criminal_law.pdf)). See also Latvian Criminal Law, Section 88, 176 and 268 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LVA\\_national\\_legislation.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LVA_national_legislation.pdf)).

61 Letter from Poland to UNDOALOS ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/POL\\_penal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/POL_penal_code.pdf)).

62 Verbal Note from Permanent Mission of Finland to the United Nations to Secretariat of the UNDOALOS (19 February 2010) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN\\_criminal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_criminal_code.pdf)).

63 Norwegian General Civil Penal Code, available at [un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_penal\\_code.pdf](http://un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf).

64 The Zambian Anti-Terrorism Act, 2007 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ZAM\\_anti\\_terrorism.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ZAM_anti_terrorism.pdf)).

65 Letter from Brazilian Permanent Representation to IMO ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BRA\\_National\\_Legislation.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BRA_National_Legislation.pdf)).

66 Letter from Bulgaria to UNDOALOS (16 February 2010) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BGR\\_penal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BGR_penal_code.pdf)).

Grenada,<sup>67</sup> and Iran<sup>68</sup> do not incorporate the definition of piracy into their domestic laws, either.

19. A significant number of States define piracy, but, at least literally, the definitions were obviously different from UNCLOS. For example, Greece defined piracy as an offence committed by “anyone aboard a ship who, by using corporal violence or threat thereof against persons, commits acts of depredation against another ship on the high seas with the intention to take possession of objects so obtained”.<sup>69</sup> Similar legislations are also from Italy,<sup>70</sup> the Philippines,<sup>71</sup> Sri Lanka,<sup>72</sup> Suriname,<sup>73</sup> Thailand,<sup>74</sup> Tanzania,<sup>75</sup> Argentina,<sup>76</sup> Denmark,<sup>77</sup>

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67 Letter from Permanent Mission of Grenada to the United Nations to UNDOALOS (07 July 2010) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRD\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRD_piracy.pdf)).

68 Letter from Iran ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN\\_national\\_legislation.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_national_legislation.pdf)).

69 Letter from Greek ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRC\\_penal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRC_penal_code.pdf)).

70 Italian Maritime Code (Approved with R. D.30<sup>th</sup> March 1942, n.327, as Subsequently Modified and Integrated until 2002), art. 1135 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA\\_maritime\\_law.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_maritime_law.pdf)).

71 The Revised Penal Code of the Philippines (Act No. 3815), art. 122 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL\\_revised\\_penal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_revised_penal_code.pdf)). See also Anti-Piracy and Anti-Highway Robbery Law of 1974, Section 2 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL\\_decre\\_1974.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_decre_1974.pdf)).

72 Piracy Act of Sri Lanka (No.9 of 2001) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LKA\\_national\\_%20legislation\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LKA_national_%20legislation_piracy.pdf)).

73 Shipping and aviation crimes of Suriname ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SUR\\_national\\_%20legislation\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SUR_national_%20legislation_piracy.pdf)).

74 Thailand's Act on Prevention and Suppression of Piracy B.E. 2534 (1991) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA_piracy.pdf)).

75 Tanzania Penal code, Chapter 16 of the Laws (revised) (principal legislation) (issued under Cap. 1, s. 18), art. 66 ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TZA\\_penal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TZA_penal_code.pdf)).

76 Note Verbale from the Embassy of the Republic of Argentina to the United Kingdom, Addressed to the Secretary-General (6 February 2009) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARG\\_national\\_legislation.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARG_national_legislation.pdf)).

77 Danish Note (17 April 2009) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK\\_national\\_legislation\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_national_legislation_piracy.pdf)).

Estonia,<sup>78</sup> Korea,<sup>79</sup> Russia,<sup>80</sup> and Ukraine.<sup>81</sup> Penal codes in Singapore and New Zealand provide for “piracy by the law of nations” and “piratical acts”.<sup>82</sup> The behaviour of “piracy by the law of nations” and “piratical acts” may be almost the same, while the latter were the acts which have nexus with these States, and the former did not need such a connection.<sup>83</sup> The Singapore Maritime Offences Act also prohibits other maritime acts, such as hijacking of ships, destroying or damaging ships, offences involving threats, and ancillary offences, which may overlap with the scope of piracy under UNCLOS.<sup>84</sup>

20. Even in the newly legislated piracy law of some States in the period of combating Somali piracy, the definition of piracy is not always consistent with UNCLOS. For example, the Japanese Law on Punishment of and Measures against Acts of Piracy, adopted in 2009, defines piracy as:

the following acts committed for private ends on the high seas (including exclusive economic zone defined in UNCLOS) or territorial sea as well

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78 Estonian Legislation on Piracy ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/EST\\_legislation\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/EST_legislation_piracy.pdf)).

79 Laws and Ordinances on Punishment of Acts of Piracy and Armed Robbery at Sea of Korea, above n.50.

80 Information concerning National Legislation on Piracy—Russian Federation ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS\\_national\\_legislation\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_national_legislation_piracy.pdf)).

81 Criminal Code of Ukraine 2001 (abstracts) ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR\\_criminal\\_code.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_criminal_code.pdf)).

82 Extract of “Penal Code” (CAP 224) of Singapore, Chapter VIA “Piracy”, and Extract of “Maritime Offences Act” (Cap 170B) of Singapore ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SGP\\_penal\\_code\\_maritime\\_offences.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SGP_penal_code_maritime_offences.pdf)). See also New Zealand Law on Piracy ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NZN\\_crimes\\_act\\_1961.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NZN_crimes_act_1961.pdf)).

83 For example, in light of Singapore Admiralty Offences (Colonial) Act 1849, “A person commits piracy who does any act that, by the law of nations, is piracy” (130B.); and, a person commits piratical acts is “whoever, while in or out of Singapore - (a) steals a Singapore ship; (b) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Singapore ship; (c) does or attempts to do a mutinous act on a Singapore ship; or (d) counsels or procures a person to do anything mentioned in paragraph (a), (b) or (c)” (130C). See Extract of “Penal Code” (CAP 224) of Singapore, Chapter VIA “Piracy”, and Extract of “Maritime Offences Act” (Cap 170B) of Singapore ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SGP\\_penal\\_code\\_maritime\\_offences.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SGP_penal_code_maritime_offences.pdf)).

84 *Ibid.*

as internal waters of Japan by the crew or the passengers of a ship (except for warships and other government ships) as “acts of piracy”:

- (a) seizing another ship in navigation or taking control of the operation of another ship by rendering persons irresistible by assault, intimidation or any other means;
- (b) robbing property on board another ship in navigation or obtaining or causing others to obtain an unlawful profit by rendering persons irresistible by assault, intimidation or any other means;
- (c) kidnapping a person on board another ship in navigation for the purpose of taking the person hostage to demand a third person to deliver any property or to take any other unobligated action or to waive that person’s right;
- (d) demanding a third person to deliver any property or to take any other unobligated action or to waive that person’s right by taking a person, on board a robbed ship or a ship whose control is taken or kidnapped on board another ship in navigation, hostage;
- (e) breaking into or damaging another ship in navigation for the purpose of committing the acts of piracy as referred to in subparagraphs (a), (b), (c) and (d) above;
- (f) operating a ship and approaching in close proximity of, beleaguering or obstructing the passage of another ship for the purpose of committing the acts of piracy as referred to in subparagraphs (a), (b), (c) and (d) above;
- (g) preparing weapons and operating a ship for the purpose of committing the acts of piracy as referred to in subparagraphs (a), (b), (c) and (d) above.<sup>85</sup>

21. Although the definition has made reference to the definition in UNCLOS, it obviously defines piracy in a different way. It breaks through the geographical limits, requires that the ship under attack must be “in navigation” and the persons under attack must become “irresistible”, and does not specify “operation of pirate ship” and “inciting and facilitating” as in Article

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85 See Outline of the Draft Anti-Piracy Measure Law of Japan ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN\\_anti\\_piracy.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_anti_piracy.pdf)). See also ZHUANG Yuyou (translated), the Japanese Law on Punishment of and Measures against Acts of Piracy (in Chinese), and the Act in Japanese, 2 *Zhongguo Haiyang Faxue Pinglun* [Chinese Oceans LR] (2009), 176-183, at 176, 180 and 181.

101 (b) and (c) of UNCLOS. Moreover, it seems that pure injury or killing without other purpose does not fall within the scope of the definition.

### III.B. Difficulties in Establishing the Degree of Punishment for Piracy

22. Since universal jurisdiction over piracy permits the same piratical act to be prosecuted by any State, it may lead to unfairness if the variance in sentences of similar offences between various States is too large.<sup>86</sup> Neither UNCLOS nor the related conventions, such as SUA, prescribe the specific penalties. There is also disunity among domestic laws in different States. According to Kontorovich, as of 2010, the maximum sentences in different States ranged from life in prison (e.g., in the US, UAE and Kenya) to shorter periods of imprisonment (e.g. 30 years in Seychelles; 15 years in Germany; 12 or 15 in Holland; 14 or 20 in Italy).<sup>87</sup> In practice, the sentences for similar piratical acts were up to life sentence in one State, and as low as 4.5 or five years in another.<sup>88</sup> This indicates that the degree of punishment may not be a decisive factor for a State to establish the crime of piracy in its domestic legal system.

23. The sentences for different kinds of piratical offences need to be distinguished. The act of piracy incorporates various criminal elements (from property damage to personal violence) which necessarily affect the measurement of sentencing. Piracy is a general term for the whole criminal phenomenon, but piratical acts may vary in the different places where they occur.<sup>89</sup> Somali pirates tend to hijack ships and crews for ransom,<sup>90</sup> while the Asian pirates, as well as the pirates in West Africa and South America, are more likely to focus on property, such as robbery or theft.<sup>91</sup> For example, West African pirates

86 Eugene Kontorovich, *The Penalties for Piracy: An Empirical Study of National Prosecution for International Crime*, Northwestern Public Law Research Paper No. 12-16 (10 July 2012) ([scholarlycommons.law.northwestern.edu/facultyworkingpapers/211](http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/211)).

87 *Ibid.*

88 *Ibid.*

89 Anna Petrig, Piracy, in Donald Rothwell, Alex Oude Elferink, Karen Scott, and Tim Stephens (eds.), *Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), 844-865, at 845.

90 The World Bank, *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation* (2013), at 92 ([hdl.handle.net/10986/16518](http://hdl.handle.net/10986/16518)).

91 See Report on the IMO regional Seminar and Workshop on Piracy and Armed Robbery against Ships, annex to Piracy and Armed Robbery against Ships, Regional Seminar and Workshop on Piracy and Armed Robbery against Ships held in Mumbai, India (March 2000), IMO Doc. MSC 73/14/1 (26 July 2000), para.28;

often hijack and sell refined oil for quick profits.<sup>92</sup> Also, sometimes the pirates in Southeast Asia hijack ships, and then repaint, rename and sell them.<sup>93</sup> In addition, the extent of violence varies from place to place. It is believed that the pirates in West Africa and South America are more violent than those in Asia.<sup>94</sup> In terms of the forms of piracy, they include murder, intentional injury, explosion, robbery, rape, kidnapping, assault, illegal detention, and so on. There are noticeable differences among these forms in conduct, consequence, circumstances, and degree of social danger. The mere act of robbery is obviously less severe than both robbery and kidnapping crews for ransom. Pure murder and robbery of goods also have significant distinctions between each other.<sup>95</sup> It is criticized that there is only one punishment—life imprisonment—for piracy under international law in the United States, as the offence may be extremely light.<sup>96</sup> Therefore, in order to meet the principle of “fitting punishment to crimes”, it is necessary to distinguish the specific acts, and set different sentencing standards and conditions affecting sentencing, even though all of these acts are included within one category, i.e., piracy.

24. Furthermore, if the crime of piracy is established in domestic law, the sentence for it must be coordinated with that of other existing traditional

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Robert Beckman, *Piracy and Armed Robbery Against Ships in Southeast Asia*, in: Douglas Guilfoyle (ed.), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing 2013), 13-34, at 13, 15–16 and 23–25; and Report of the United Nations Assessment Mission on Piracy in the Gulf of Guinea, annex to the Letter dated 18 January 2012 from the President of the Security Council, UN Doc. S/2012/45 (19 January 2012), para.35.

- 92 Alan Cowell, *West African Piracy Exceeds Somali Attacks, Report Says*, the New York Times (18 June 2013) ([nytimes.com/2013/06/19/world/africa/west-african-piracy-exceeds-somali-attacks-report-says.html?\\_r%20=0](http://nytimes.com/2013/06/19/world/africa/west-african-piracy-exceeds-somali-attacks-report-says.html?_r%20=0)).
- 93 See Report on the IMO regional Seminar and Workshop on Piracy and Armed Robbery against Ships, annex to Piracy and Armed Robbery against Ships, Regional Seminar and Workshop on Piracy and Armed Robbery against Ships held in Mumbai, India (March 2000), above n.91, para.28. See also Robert Beckman, above n.91.
- 94 See Report on the IMO regional Seminar and Workshop on Piracy and Armed Robbery against Ships, annex to Piracy and Armed Robbery against Ships, Regional Seminar and Workshop on Piracy and Armed Robbery against Ships held in Mumbai, India (March 2000), above n.91, para.28.
- 95 The motivation of a piracy attack is normally the pecuniary gain. However, in the light of the definition of piracy under UNCLOS, theoretically, a murder without an intention to seek a pecuniary advantage can also constitute piracy in some cases.
- 96 M. Bob Kao, *Assessing Maritime Piracy in American Law: A Century-old Punishment for an Evolving Crime*, 34 *IJ Marine & Coastal L* (2019), 755-777, at 775.

domestic crimes. Within each jurisdiction a State will fit the punishment into the overall scale of sentencing in that specific jurisdiction. As mentioned above, the forms of piracy are various, which can correspond to different existing domestic crimes. The sentences between them vary considerably. According to the Criminal Law of the People's Republic of China, whoever unlawfully detains another, or deprives him of his freedom by other means, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprivation of political rights.<sup>97</sup> Whoever commits this crime and causes a person's serious injury (without violence) is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment; when he causes a person's death (without violence), he is to be sentenced to not less than ten years of fixed-term imprisonment.<sup>98</sup> Contrarily, whoever intentionally kills another (including a death of detainees caused by violence in detention) is to be sentenced to death, life imprisonment or not less than ten years of fixed-term imprisonment; when the circumstances are less serious, the perpetrator is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment.<sup>99</sup> That means the punishment of piracy should take into account the sentencing of the relevant felonies, such as intentional murder, and relatively minor crimes, such as illegal detention. In order to make the punishment fit the crime, the sentencing of piracy should not be abnormally shorter or longer than that of these established crimes.

25. This is also reflected in the domestic piracy legislation of Japan. As for the Japanese Law on Punishment of and Measures against Acts of Piracy, since the punishment to be set up in the law was heavier than that of ordinary criminal crimes, in order to avoid the imbalance among the punishments for the high seas, territorial waters and internal waters, the offences committed in the territorial sea and internal waters were included in the definition of piracy.<sup>100</sup>

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97 Criminal Law of the People's Republic of China, art. 238 ([law.npc.gov.cn:8081/FLFG/flfgByID.action?flfgID=239&keyword=%E5%88%91%E6%B3%95&zlsid=01](http://law.npc.gov.cn:8081/FLFG/flfgByID.action?flfgID=239&keyword=%E5%88%91%E6%B3%95&zlsid=01)).

98 *Ibid.*, art. 238 and 232.

99 *Ibid.*, art. 232.

100 Law development as piracy measures in Somalia and Gulf of Aden: Outline of piracy law and discussion in Congress, at 21 ([sangiin.go.jp/japanese/annai/chousa/rip-pou\\_chousa/backnumber/2009pdf/20090801015.pdf](http://sangiin.go.jp/japanese/annai/chousa/rip-pou_chousa/backnumber/2009pdf/20090801015.pdf)) (in Japanese).

## IV. Is the Crime of Piracy Still Necessary for a State Currently Without It?

### IV.A. Deficiencies of Punishing Pirates under Other Crimes

26. Though a State can try pirates according to its domestic law as discussed above, this paper does not intend to deny the superiority of establishing the crime of piracy domestically in accordance with international law. First of all, an important reason to support the establishment of a crime of piracy rather than the use of other crimes is that other crimes do not cover all the connotations of piracy so that applying existing “similar” crimes will lead to a considerable number of pirates escaping from punishment.<sup>101</sup> Even robbery and kidnapping in the piracy attacks were deemed to have their own characteristics in many aspects, such as the way they are conducted, the intent of the crime and the interests infringed.<sup>102</sup> Though seldom discussed in detail in terms of which specific offences will be omitted, some Chinese scholars believe that “intentionally facilitating” in the crime of piracy does not have corresponding or similar concepts in Chinese criminal law, and is not illegal according to the principle of *nulla poena sine legein*.<sup>103</sup> In addition, because pirates are often captured during the process of threatening and chasing merchant ships before actual boarding, it is difficult for prosecutors to prove that the suspected pirates have accomplished the crime.<sup>104</sup> It is sometimes also difficult to prove

101 See ZHAO Bingzhi and HUANG Fang, On International Criminal Law Norms in Chinese Criminal Code, 9 Faxue [Law Science] (2003), 48-61, at 53 (in Chinese); HUANG Li, On Connection about China Penal Law and International Penal Law, 4 Faxue Zazhi [Law Science Magazine] (2009), 34-36, at 36 (in Chinese); HU Ming and XU Ying, Piratization of Terrorism: Three Models and Dual Regulation—Perspective on the Relationship between International Law and Domestic Law, 1 Zhongguo Gaoxiao Shehui Kexue [Social Sciences in Chinese Higher Education Institutions] (2016), 90-101, at 99 (in Chinese); and MA Jinghong, The Dual Attribute of the Law on Piracy and the Development Path of Coordination and Regulation, 5 Shehui Kexue Jikan [Social Science Journal] (2014), 85-88, at 88 (in Chinese).

102 WANG Pei, Present Tendency of Pirate and Suggestions on its Punishment, 2 Hebei Xuekan [Hebei Academic Journal] (2011), 157-159, at 159 (in Chinese).

103 See QIAN Fei, On Domestic Criminal Legislation of International Crime of Piracy, 7 Zhongguo Shuiyun: Xueshu Ban [China Water Transport (Academic Version)] (2007), 257-258, at 257-258 (in Chinese). See also YAO Chunyan, above n.22, at 85.

104 YU Fumin, System Construction and Improvement of Jurisdiction and Trial of International Crime, 3 Zhongguo Faxue [China Legal Science] (2018), 288-302, at 301 (in Chinese).

who began shooting first, although it is clear that collectively the pirates have committed murder.

27. Secondly, without a crime of piracy, the piracy attacks may constitute different crimes. On the one hand, there are different forms of violence, and a piracy attack may contain one or more of them. On the other hand, the social interests impaired by piracy include navigational safety, personal safety, property safety and so on. Therefore, one piracy attack may involve several crimes simultaneously. In the case of *Cheung Son* tried in China, among 38 defendants, some were convicted of murder and robbery (as well as other relevant crimes), while some were only convicted of robbery.<sup>105</sup> According to the Chinese Criminal Law, if a person commits several crimes before the court, the punishment shall be decided, upon the circumstances, within the total term of the sentence for all crimes and not less than the maximum term for any one of the crimes, except for those sentenced to death or life imprisonment.<sup>106</sup> The court needs to determine the specific crimes and the corresponding punishment for each crime according to the specific act of the suspect, and then calculate the final punishment. The method of conviction and sentencing here inevitably has many drawbacks, such as the failure to reflect the overall nature of piracy, the confusion with the nature of the act, and the cumbersome conviction and sentencing process.<sup>107</sup>

28. Thirdly, although punishment of piracy under other existing domestic traditional crimes is feasible, objectively there are still some controversies about it as discussed above. The existence of such controversies may lower the reputation of a State's legal system, leading to adverse effects on the authority of the law. Moreover, "piracy" as a recognized international crime is easier to be understood among States, and therefore can facilitate international criminal judicial cooperation.<sup>108</sup> If other crimes are used, the differences in legal systems and even ideological perspectives of various States may impede international cooperation combating piracy.<sup>109</sup>

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105 Guangdong High People's Court, above n.13.

106 For details, see Criminal Law of the People's Republic of China, above n.97, art. 69.

107 GUO Yuchuan, How to Stipulate the Crime of Piracy in Our Criminal Law, Procuratorate Daily (23 January 2009) (3) (newspaper.jcrb.com/html/2009-01/23/content\_10239.htm) (in Chinese).

108 LIU Renwen, Retrospect and Prospect of the Tree-dimensional Criminal Law, 5 Beijing Gongye Daxue Xuebao (Shehui Kexue Ban) [Journal of Beijing University of Technology (Social Sciences Edition)] (2017), 57-68, at 63 (in Chinese).

109 Ibid.

#### IV.B. Rational Choice

29. Ideally, a State could better exercise universal jurisdiction by establishing a specific crime of piracy in its domestic law, but in reality, it may not be easy. It is usually time and energy consuming to overcome the difficulties mentioned above. For States that have no law of piracy, and intend to exercise universal jurisdiction, they may encounter a dilemma: on the one hand, they need to overcome the obstacles in establishing a crime of piracy; on the other hand, they need to defuse the drawbacks in punishing pirates under other existing domestic crimes.

30. As a compromise, a State can achieve the effect of combating piracy by accusing pirates of other crimes as a temporary measure before adopting a law of piracy. In this process, they can accumulate more experiences in pirate trials and the exercise of universal jurisdiction, and find better solutions, which will help to establish a sound domestic law on piracy and promote international anti-piracy cooperation.

31. First, the major deficiencies in punishing pirates under other existing domestic crimes can be basically addressed within the current domestic legal system. As traditional domestic crimes have experienced long-term development and repeated practice, it is rarely possible to omit crimes relating to essential acts of violence. The main differences between an existing traditional domestic crime and piracy are concerning particular persons and localities. According to Article 101(a) of UNCLOS, the subject of piracy is restricted to the crew or the passengers of a private ship or a private aircraft, and the locality of piracy is limited to “the high seas” or “a place outside the jurisdiction of any state”.<sup>110</sup> In contrast, existing traditional domestic crimes usually have no such restrictions. As mentioned previously, if the same acts occur within a State’s jurisdiction, traditional domestic crimes are sufficiently invoked to punish them without special laws. As for the factor of different localities, it can be considered as an element affecting the sentencing.

32. Articles 101(b) and (c) of UNCLOS also provide for other kinds of piracy acts, including “any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft”, and “any act of inciting or of intentionally facilitating an act”.<sup>111</sup> Besides the “traditional principals who attack and plunder”, the translators,

110 UNCLOS, above n.18, art. 101.

111 *Ibid.*

negotiators, and other facilitators are pirates too.<sup>112</sup> They help to bring about the success of the “acts of violence or detention, or act of depredation”. Consequently, a suspect, whose conduct satisfies the definition of an accomplice, can be convicted under traditional domestic criminal charges. For instance, Turkey takes the general clauses of its criminal law as the basis to deal with conspiracy, including, among others, incitement and assistance.<sup>113</sup> Japan, a State with a crime of piracy, does not have the definition of piracy in its domestic law explicitly contain “inciting or of intentionally facilitating piracy”, either, because the legislator claims that the provisions on accomplice in the existing criminal law can be applied to such acts.<sup>114</sup>

33. Although the pirates captured in the stage of attempted attacks cannot be treated as accomplices, the attempted attacks can be treated as inchoate crimes. It may be difficult to prove them, because the offences corresponding to murder, robbery and other existing traditional domestic crimes have not yet been realised. However, this is mostly a matter of evidence. Even in a State with a crime of piracy in domestic law, it is still tricky to convict suspects if they throw weapons into the sea.

34. Second, a review of the emergence of universal jurisdiction over piracy may provide some reference. Piracy has long been reflected in practice as robbery, murder, plunder and other illegal acts.<sup>115</sup> The British Offences at Sea Act of 1536, the early legislation on piracy, mentioned the word pirates as well as traitors (“traitors”), thieves, robbers, murderers (“murderers”) and confederates in the preface, and stated that they “many times escaped unpunished”.<sup>116</sup> Then the Act provides that the Admirals are authorized to inquire, try, hear, determine and judge those offences “in like Form and Condition, as if any such Offence or Offences had been committed or done in or upon the Land”.<sup>117</sup> Subsequently, the jurisdiction of the Admirals gradually expanded internationally, forming a kind of universal

112 Collin McCarthy, above n.19, at 147.

113 Turkey’s National Legislation with Regard to Offences Related to Piracy and Armed Robbery at Sea ([un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR\\_penal\\_criminal\\_procedure.pdf](http://un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_penal_criminal_procedure.pdf)).

114 Law development as piracy measures in Somalia and Gulf of Aden: Outline of piracy law and discussion in Congress, above n.100, at 21.

115 Dubner Barry Hart, *The Law of International Sea Piracy* (The Hague: M. Nijhoff Publishers, 1980), at 1.

116 British Offences at Sea Act of 1536, 28 Henry VIII c. 15, the text is available in Alfred P. Rubin, above n.20, at 359.

117 Ibid.

jurisdiction.<sup>118</sup> Unlike other international crimes, such as genocide and crimes against humanity, which require specific intent, piracy's subjective element is the pecuniary gain or other private ends, which is more similar to many existing domestic crimes.<sup>119</sup> Compared with other international crimes, universal jurisdiction over piracy is more "a practical difficulty in protecting a community interest" than "a universal concern of a moral nature".<sup>120</sup> The International Law Commission's comment on the definition of piracy also stated that it regarded the conduct of aircraft in an unoccupied territory as piracy in order to "prevent such acts committed on ownerless territories from escaping all penal jurisdiction".<sup>121</sup> Therefore, the universal jurisdiction over piracy arose because it would occur on the high seas which did not belong to the sovereignty of any State,<sup>122</sup> not because piracy is an abnormal form of crime different from existing traditional crimes such as robbery and murder. The main purpose of universal jurisdiction over piracy is to punish criminals to the maximum extent,<sup>123</sup> with the ultimate goal to eliminate the crime. Even without a crime of piracy domestically, a State should exercise universal jurisdiction and punish piracy within the scope of its existing law.

35. Recently, the traditional view that universal jurisdiction is applicable to cases which have no connection with the State to protect the interest of the international community has been questioned, replaced by the novel insight that there is a close nexus between the State or its treaty partners and the case.<sup>124</sup> Such a debate is not within the scope of this paper. However, even if novel insight is true, it does not deny the intention of the States asserting jurisdiction over piracy to punish criminals. On the contrary, it shows that even

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118 See Alfred P. Rubin, above n.20, at 88.

119 Yaron Gottlieb, above n.25, at 7.

120 Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 21 *European JIL* (2010), 387-419, at 406.

121 Report of the International Law Commission on the Work of its Eighth Session, 23, 4 July 1956, *Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159)*, UN Doc. A/CN.4/104, at 282.

122 Sienho Yee, *Universal Jurisdiction: Concept, Logic, and Reality*, 10 *Chinese JIL* (2011), 503-530, para.4.

123 Huang Yao, *Universal Jurisdiction over Piracy and East Asian Practice*, 11 *Chinese JIL* (2012), 623-655, para.6.

124 Matthew Garrod, *The Emergence of "Universal Jurisdiction" in Response to Somali Piracy: An Empirically Informed Critique of International Law's "Paradigmatic" Universal Jurisdiction Crime*, 18 *Chinese JIL* (2019), 551-643, at 552.

a State without a crime of piracy may have the willingness to punish pirates when it has a close link to piracy. It is more in the State's interests to punish pirates under other crimes than giving up punishing pirates merely because there is no crime of piracy in its domestic law.

36. Third, the location of piracy outbreak is always changing, and piracy incidents often grow explosively. The place where piracy and armed robbery against ships occur most frequently was sometimes Asian waters (especially the Malacca Straits and the South China Sea),<sup>125</sup> and sometimes Somalian waters. Now West Africa is seriously impacted by piracy (see [Figure 1](#)). It also shows that the quantity of incidents often increases or declines sharply. Therefore, States, even those without a crime of piracy, should always be ready to deal with piracy, even though they may not be affected by piracy severely for the time being. However, for the same reason, the utilization rate of the crime of piracy subject to universal jurisdiction may not be high in a certain period. For instance, though the provision of maritime robbery was amended in 1995,<sup>126</sup> the first Korean piracy prosecution, the case of *Republic of Korea v. Araye*, was handled in 2011. The first Japanese piracy prosecution, the case of *M/V Guanabara*, started in 2011, too, around two years after the Law on Punishment of and Measures against Acts of Piracy was adopted in 2009. Actually, there are rarely other pirate prosecutions subject to universal jurisdiction that have been reported in either State.

37. Finally, it is possible that prosecuting pirates under existing domestic law can accelerate the process of establishing a crime of piracy. Without the process to prosecute pirates under domestic law, it might be hard to see that such a law is needed.

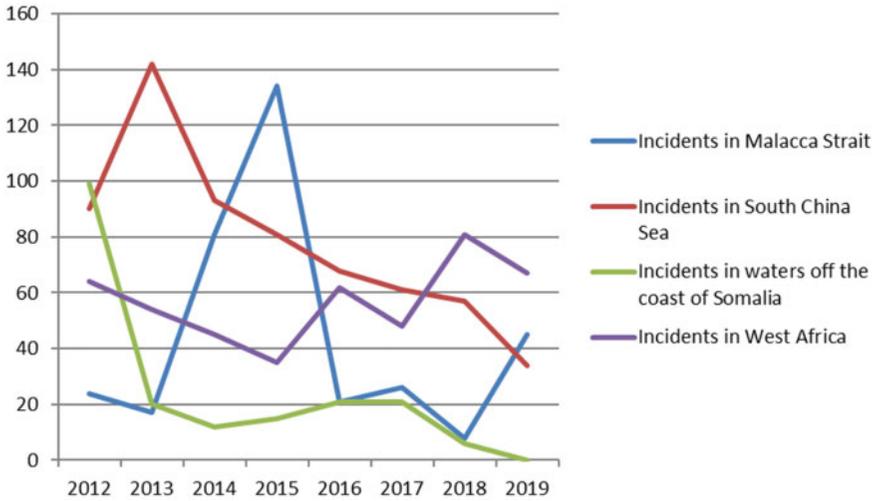
## V. Need of Other Domestic Laws Related to Piracy?

### V.A. The Domestic Legal Basis for the Exercise of Universal Jurisdiction over Piracy

38. Article 105 of UNCLOS has been considered as the foundation for universal jurisdiction over piracy, which reaffirms the rule of customary

125 See the record of the presentation of Mr. Sato (Director of the Ocean Division, Ministry of Foreign Affairs of Japan), in: Report on the Work of the United Nations Open-ended Informal Consultative Process Established by the General Assembly in Its Resolution 54/33 in order to Facilitate the Annual Review by the Assembly of Development in Ocean Affairs at Its Second Meeting, UN Doc. A/56/121 (22 June 2001), para.270.

126 See Laws and Ordinances on Punishment of Acts of Piracy and Armed Robbery at Sea of Korea, above n.50.



**Figure 1** Acts of Piracy and Armed Robbery against Ships in Four Regions from 2012 to 2019

**Source:** Drawn by the authors based on IMO data.<sup>127</sup>

international law.<sup>128</sup> As some scholars believe, without authorization by domestic law, any grant of jurisdiction by international law to arrest and

127 Data from IMO 2012-2019 Annual Report on Acts of Piracy and Armed Robbery Against Ships. See IMO, 2019 Annual Report on Acts of Piracy and Armed Robbery against Ships ([imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/MSC.4-Circ.264%20Annual%20Report%202019.pdf](https://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/MSC.4-Circ.264%20Annual%20Report%202019.pdf)); 2018 Annual Report on Acts of Piracy and Armed Robbery against Ships ([imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/271%20MSC.4-Circ.263%20Annual%202018.pdf](https://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/271%20MSC.4-Circ.263%20Annual%202018.pdf)); IMO, 2017 Annual Report on Acts of Piracy and Armed Robbery against Ships ([imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/258%20Annual%202017.pdf](https://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/258%20Annual%202017.pdf)); IMO, 2016 Annual Report on Acts of Piracy and Armed Robbery against Ships ([imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/245%20Annual%202016.pdf](https://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/245%20Annual%202016.pdf)); IMO, 2015 Annual Report on Acts of Piracy and Armed Robbery against Ships ([imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/232\\_Annual\\_2015.pdf](https://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/232_Annual_2015.pdf)); IMO, 2014 Annual Report on Acts of Piracy and Armed Robbery against Ships ([imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/219\\_Annual\\_2014.pdf](https://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/219_Annual_2014.pdf)); IMO, 2013 Annual Report on Acts of Piracy and Armed Robbery against Ships ([imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/208\\_Annual\\_2013.pdf](https://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/208_Annual_2013.pdf)); and IMO, 2012 Annual Report on Acts of Piracy and Armed Robbery against Ships ([imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/193\\_Annual2012.pdf](https://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/193_Annual2012.pdf)).

128 Rebecca M. M. Wallace, *International Law* (4th ed., Sweet & Maxwell, 2002), at 113.

prosecute pirates becomes meaningless.<sup>129</sup> The absence of the crime of piracy does not mean that other domestic laws related to piracy are not necessary. For instance, no matter whether a State has a crime of piracy or not, if it is without an explicit domestic legal basis for the exercise of universal jurisdiction over piracy, there may be disputes on the application of universal jurisdiction. In the case of *Siam Xanxai*, the defendants claimed that they had not violated Chinese criminal law so that China had no jurisdiction, or that China did not have universal jurisdiction over robbery which they were charged with.<sup>130</sup> In the case of *M/V Guanabara*, the defendants challenged Japan's universal jurisdiction by asserting that Article 105 of UNCLOS grants only the capturing State, rather than the State which receives pirates from the capturing state, to prosecute them.<sup>131</sup> The Mauritian Piracy and Maritime Violence Act, entry into force in 2012, does not expressly provide for the extraterritorial jurisdiction, and thus the court's jurisdiction was challenged by the defendants during the case of *Police v. Mohamed Ali Abdeoukader and Ors*.<sup>132</sup>

39. Turning to the relationship between international law and domestic law, there are two principal schools: monism and dualism. For the monists, they believe that international law and domestic law belong to an integrated system, and if international law conflicts with domestic law, the former should prevail.<sup>133</sup> The civil law jurisdictions often incorporate customary international law (sometimes as well as treaties) into the domestic law automatically,<sup>134</sup> which means that these States do not need to enact corresponding specific domestic law. Contrarily, the dualists regard international law and

129 Andrew Michael Bagley, You're a Crook, Captain Hook: Navigating a Way out of the Somali Piracy Problem with the Rule of Law, 40 *Georgia Journal of International and Comparative Law* (2012), 715-749, at 735-736.

130 The Robbery Committed by Atan Naim and Others: The Application of Criminal Universal Jurisdiction, above n.15, at 356-357.

131 Akio Morita, On the criminal jurisdiction over piracy in states other than arresting state, Supplement of Law Seminar: Quick report of cases, Vol.13 (30 August 2013), at 2 ([internationalcrimesdatabase.org/upload/icd/Prof-Akio-Morita-Piracy-Trial-in-Japan-2013.pdf](http://internationalcrimesdatabase.org/upload/icd/Prof-Akio-Morita-Piracy-Trial-in-Japan-2013.pdf)) (in Japanese).

132 Jamil Ddamulira Mujuzi, The Mauritian Piracy Act: A Comment on the Director of Public Prosecutions v. Ali Abeoukader Mohamed Decision, 48 *Ocean Development & International Law* (2017), 69-78, at 69 and 70. See also *Police v. Mohamed Ali Abdeoukader and Ors*, 2014 INT 312.

133 Rebecca M. M. Wallace, above n.128, at 35.

134 James Crawford, *Brownlie's Principle of Public International Law* (8th edn., Oxford: Oxford University Press, 2012), at 88 and 93.

domestic law as two independent systems. International law is applied within a dualist State only when that State expressly incorporates it into its domestic law.<sup>135</sup> Hence, theoretically, monist States can exercise universal jurisdiction over piracy even if there is no domestic law on piracy, whereas the dualists must enact a specific law if they want to exercise that jurisdiction.

40. This holds true in State practice. For instance, Bulgaria, which follows a monist tradition and has not proscribed a crime of piracy in its domestic law, stated that universal jurisdiction over piracy was available to it because it was a party to UNCLOS, and the terms of treaties had prevailed over domestic law.<sup>136</sup>

41. Notwithstanding the above, the courts in a monist State may consider to what extent to apply international law directly,<sup>137</sup> and several States also add more limitations to themselves in the case of exercising universal jurisdiction, such as raising higher requirements for the automatic incorporation of criminal rules than laws in other fields. A court in Senegal, in a case concerning the Chadian former dictator *H. Habré* who was alleged to have committed torture in Chad, stated that criminal law required more clarity and “formalism” than other laws, and refused to exercise universal jurisdiction over crimes without a specific domestic law even though the State had ratified relevant conventions allowing it to exercise universal jurisdiction.<sup>138</sup> A French court, in the case of *Javor*, also rejected an argument that the 1949 Geneva Conventions to which France was a party were directly incorporated into French domestic law, because the provisions were so general that they could not serve as the direct legal basis for the extraterritorial jurisdiction over criminal cases.<sup>139</sup>

42. These self-restrictions reflect the prudence of States or their domestic courts in extra-territorial criminal jurisdiction, and may, to some extent, be

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135 Rebecca M. M. Wallace, above n.128, at 35.

136 See Letter from Bulgaria to UNDOALOS, above n.66.

137 James Crawford, above n.134, at 58.

138 Reed Brody and Helen Duffy, Prosecuting Torture Universally: Hissène Habré, Africa’s Pinochet?, in Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (2001), 817-832, as quoted in Yvonne M. Dutton, above n.29, at 1154.

139 Brigitte Stern, *Universal Jurisdiction over Crimes against Humanity under French Law—Grave Breaches of the Geneva Conventions of 1949—Genocide—Torture—Human Rights Violations in Bosnia and Rwanda*, 93 *American JIL* (1999), 502-533, at 527.

inconsistent with what they are supposed to do according to the doctrine of monism. Even if a State without domestic law on piracy is a monist, its domestic court may still have the discretion to reject the direct application of specific international law in the cases concerned, like in Senegal and France.

43. For dualist States, undoubtedly they need domestic law to transform international law into force at the national level. But sometimes the domestic law is not clear enough. For instance, China looks more or less dualist in this respect. Article 9 of Chinese Criminal Law has been widely regarded as the ground for universal jurisdiction over piracy,<sup>140</sup> which stipulates that this law applies to the crimes specified in international treaties to which the PRC is a signatory State or with which it is a member, and the PRC exercises criminal jurisdiction over such crimes within its treaty obligations.<sup>141</sup>

44. However, words like “treaty obligations” lead to confusion—if prosecution of pirates is not an obligation, can those States still exercise universal jurisdiction? While some regard the exercise of universal jurisdiction as an obligation,<sup>142</sup> some hold the view that UNCLOS authorizing universal jurisdiction does not create an obligation for States.<sup>143</sup> Article 100 requires all States to cooperate “in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”, but does not mention the prosecution of pirates.<sup>144</sup> Article 105 provides that the courts of the capturing States may decide upon the penalties. The use of the word “may” rather than “shall” infers that this article intends to confer power on States to prosecute pirates, but not to impose such obligation on States.<sup>145</sup> Also, UNCLOS has not clarified what measures can be used to ensure States to take responsibility for

140 See ZOU Keyuan, *Enforcing the Law of Piracy in the South China Sea*, 31 *Journal of Maritime Law and Commerce* (2000), 107-117, at 115; Yvonne M. Dutton, above n.29, note No.162; and HUANG Li, above n.101, at 36.

141 *Criminal Law of the People’s Republic of China*, above n.97, art. 9.

142 See James Thuo Gathii, *Kenya’s Piracy Prosecutions*, 104 *American JIL* (2010), 416-436, at 425.

143 See Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address this Growing Global Menace?*, 39 *Denver JIL and Policy* (2011), 177-20, at 182. See also M. D. Saiful Karim, *Prosecution of Maritime Pirates: the National Court is Dead: Long Live the National Court?*, 32 *Wisconsin ILJ* (2014), 37-94, at 48.

144 UNCLOS, art. 100, above n.18.

145 Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 *European JIL* (2009), 399-414, at 402.

prosecuting piracy.<sup>146</sup> From this perspective, the provisions in UNCLOS do not constitute a sufficient and solid legal basis for the exercise of universal jurisdiction over piracy at the national level.

45. Above all, if a State intends to exercise universal jurisdiction, it would be better to explicitly stipulate this jurisdiction in its domestic law. Even for monist States, some of them take a more cautious and stricter attitude when they incorporate contents of international law into domestic criminal law. For dualistic States, it is more necessary to enact unambiguous domestic law to implement international law. Correspondingly, the best way is to prescribe the universal jurisdiction over piracy clearly in domestic law as the domestic legal basis for its exercise.

### V.B. Procedural Law for Exercising Extraterritorial Jurisdiction over International Crimes at Sea

46. On the premise of having the domestic legal basis to allow the exercise of universal jurisdiction over piracy, the need for procedural law of exercising extraterritorial jurisdiction over international crimes at sea seems more urgent than the establishment of a crime of piracy domestically. Universal jurisdiction includes prescriptive jurisdiction, enforcement jurisdiction and adjudicative jurisdiction, among which the enforcement jurisdiction is exercised outside a State's territory. In accordance with Article 105 of UNCLOS, the location where States may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest persons and seize the property on board is "the high seas", or "a place outside the jurisdiction of any State".<sup>147</sup> In the process of combating piracy in Somalia, United Nations Security Council resolutions have authorized UN member States to enter Somali territorial waters and even inland to combat piracy,<sup>148</sup> which can be seen as a significant precedent of the collective exercise of universal jurisdiction over piracy under exceptional circumstances. In either case, the action is outside the territory of the State which exercises universal jurisdiction.

47. Generally speaking, the absence or insufficiency of regulations on extra-territorial enforcement in domestic law may affect the implementation of universal jurisdiction over piracy. Whether a State already has a crime of piracy or not, it may suffer from the lack of necessary procedural law. For instance, in

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146 Jessica Piquet, above n.9, at 261.

147 UNCLOS, art. 105, above n.18.

148 See UNSC Res 1816(2008) and UNSC Res 1851(2008).

the case of *Republic of Korea v. Araye*, the pirates claimed that Korea lacked a proper procedural basis to transfer them to its territory, and their procedure rights, such as being arrested pursuant to a warrant, receiving legal assistance promptly, being protected from injury, and enjoying due process in detention, were violated.<sup>149</sup> Whether the Korean navy was the qualified subject to arrest pirates was also one of the concerns of the case.<sup>150</sup> In the case of *M/V Guanabara* in Japan, the pirates also believed that their rights related to arrest procedure, period of detention, and assistance of interpreter and counsel, were not guaranteed.<sup>151</sup> In the case of *Hassan and Others*, it was argued that as a matter of procedure, France did not promptly bring the pirates captured in Somali territorial waters before a legal authority after they arrived in France so that the extent of time for the detention of pirates was illegal.<sup>152</sup>

48. As a result, States need to address concerns in many perspectives. They may face considerable logistical challenges in transferring suspect pirates to their own judicial system. Also, they should consider the human rights implications of pirates in long-term detention and ensure prompt access to legal advice and judicial scrutiny at sea.<sup>153</sup> Furthermore, as the United Nations Open-ended Informal Consultative Process has suggested, the States concerned should take measures to provide appropriate training for personnel involved in all aspects of dealing with piracy, including arrest, investigation, prosecution and exchange of evidence.<sup>154</sup> All of these call for corresponding provisions in domestic procedural law.

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149 Seokwoo Lee and Young Kil Park, *Republic of Korea v. Araye*, 106 *American JIL* (2012), 630-636, at 631 and 632.

150 *Ibid.*

151 Akio Morita, above n.131, at 4.

152 Dubner Barry Hart and Otero Brian, *The Human Rights of Sea Pirates: Will the European Court of Human Rights Decisions Get More Killed?*, 15 *Washington U Global Studies LR* (2016), 215-254, at 219.

153 Report of the UN Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chamber Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals and the Time and Resources Necessary to Achieve and Sustain Substantive Results, above n.4, para.22.

154 Report on the Work of the United Nations Open-ended Informal Consultative Process Established by the General Assembly in Its Resolution 54/33 in order to

49. Another reason for the need for procedural provisions is that procedural law on exercising extraterritorial jurisdiction over international crimes at sea can be independent of substantive law on piracy. For one thing, the procedural law can work in the States either with or without a crime of piracy in their domestic laws. For the other, piracy is not the only international crime committed at sea subject to extraterritorial jurisdiction. Article 99 of UNCLOS requires every State to “take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose”.<sup>155</sup> Similarly, Article 109 calls on all States to “cooperate in the suppression of unauthorized broadcasting from the high seas”.<sup>156</sup> The flag State of the ship, the State of registry of the installation, the State of which the suspect is a national, any State where the transmissions can be received, or any State where authorized radio communication is suffering interference may arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.<sup>157</sup> Although such jurisdiction over unauthorized broadcasting from the high seas is not universal jurisdiction, it also requires extraterritorial enforcement by States. If a State wants to exercise extraterritorial jurisdiction over such crimes, corresponding procedural law is also needed. UNCLOS stipulates in Article 110 the right of boarding vessels engaged in piracy, slave trade, unauthorized broadcasting and other crimes.<sup>158</sup> Correspondingly, procedural provisions in domestic law can also be appropriately designed and applied to all the above-mentioned international crimes at sea.

## VI. Conclusion

50. Among the ways to prosecute pirates, pirate trials which take place in the country of origin and regional States mean that a small number of States bear the main responsibility of pirate trials. This is a sharp contrast to the effect of piracy trials benefiting the whole international community. In order to reduce this imbalance, burden-sharing within the international community should

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Facilitate the Annual Review by the Assembly of Development in Ocean Affairs at Its Second Meeting, UN Doc. A/56/121 (22 June 2001), part. A, para.68.

155 UNCLOS, art. 99, above n.18.

156 UNCLOS, art. 109, above n.18.

157 Ibid.

158 UNCLOS, art. 110, above n.18.

be strengthened.<sup>159</sup> It would be valuable to distribute the tasks of prosecuting pirates to capturing States, most of which are sea powers and more competent than regional States in dealing with complicated issues during prosecution. A regional State willing to accept and prosecute pirates seized by foreign naval forces, such as Kenya, the Seychelles, and Tanzania, usually needs substantial international financial and judicial support,<sup>160</sup> and the pirates' country of origin, e.g. Somalia, may not have sufficient resources to do so. Notwithstanding transport of suspects, witnesses, and evidence from further away may incur additional costs, the capturing States do not have to invest lots of money in infrastructure and capacity building. Their existing systems are more self-sustaining and "readily adaptable to prosecuting piracy in other regions".<sup>161</sup>

51. It is feasible for a State not having an existing crime of piracy to prosecute pirates in other relevant crimes, such as murder, robbery, and various existing domestic crimes, because the acts associated with piracy and existing traditional domestic crimes have much in common. If the State explicitly incorporates universal jurisdiction over piracy into its domestic law, it is more convenient for the State to exercise extraterritorial jurisdiction over piracy under Article 101 of UNCLOS. In that case, the domestic penal law can be applied to those piratical acts, and pirates can be punished as long as their offences meet the definition of a domestic crime, whether the crime is piracy, murder, robbery or otherwise. In addition, the crime of piracy in international law and that in domestic law may have their own characteristics. UNCLOS does not explicitly require States to prosecute pirates solely under a domestic crime of piracy. In this sense, the name of a crime under domestic law is not a decisive factor in the exercise of universal jurisdiction, and piracy is not the only crime that can be applied to pirates. Accusing pirates of other crimes is also a form of exercising universal jurisdiction over piracy, which has been reflected in States' judicial practice and recognized to some extent by many scholars and national authorities.

52. Although it would be ideal for a State to exercise universal jurisdiction over piracy by establishing a specific crime of piracy in domestic law, there are difficulties in both establishing suitable definitions and appropriate sentences as discussed above. To deal with this, long-term efforts are needed at both

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159 Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, above n.5, para.75.

160 Jade Lindley, *Somali Piracy: A Criminological Perspective* (Farnham: Ashgate Publishing Limited, 2015), at 124.

161 Jessica Piquet, above n.9, at 263.

national and international levels. In addition to legal obstacles, States may lack political will to exercise universal jurisdiction over piracy, especially when there is no imminent threat of piracy to them. Thus, it is impossible to expect that States sufficiently improve the law on piracy and establish sound substantive and procedural rules in a short time. Instead, the major deficiencies in punishing pirates under other existing domestic crimes can be basically addressed within the current domestic legal system, and the main purpose of universal jurisdiction over piracy to punish criminals to the maximum extent and the changing situation of piracy also require States to always be ready to deal with piracy. Therefore, prosecuting pirates under other crimes is a realistic compromise.

53. For a State without a crime of piracy, what it can do at the current stage is not to let pirates escape from punishment despite the deficiencies in its law. It is more urgent to improve domestic law on pirate trials than to establish a crime of piracy itself. In order to more smoothly use existing traditional domestic crimes to punish pirates at this stage, and also to prepare for the development of specific crime of piracy in the future, a State without a crime of piracy can build up legal grounds for exercising universal jurisdiction over piracy and relevant procedural laws on the exercise of extraterritorial jurisdiction over international crimes at sea.

54. In the light of Article 100 of UNCLOS, all States shall cooperate in the repression of piracy to the fullest possible extent.<sup>162</sup> Whether or not prosecuting pirates is obligatory, prosecution is a primary method to reduce maritime piracy.<sup>163</sup> In a sense, if it is feasible for a State to prosecute pirates even without a domestic crime of piracy but it fails to do so, this shows that a State does not fulfil its treaty obligation to the fullest extent as required by Article 100 of UNCLOS.

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162 UNCLOS, above n.18, art. 100.

163 Gregory Morrison, *Applying Lessons from the Golden Age of Piracy: How to Use Specialized U.S. Tribunal to Prosecute Pirates in the Modern Era*, 82 *George Washington LR* (2014), 1304-1341, at 1309.