Legal aspect of piracy

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Abstract

Piracy is an issue of today. The modern type of piracy, which started to rise in the area of the Gulf of Aden and the Horn of Africa, with a high degree of violence has spread further to the Indian Ocean, is a threat to the peace and the territorial sea. The legal framework was laid down at time when piracy was considered a crime of the past. It can be argued whether the legal framework is sufficient and can offer the necessary tools to meet the piracy of today.

This thesis will examine the legal aspects from the moment when pirates attack a ship to when pirates are captures on board a ship and in particular focus on what piracy is, the right to protect the crew and the ship and intervention by others. To examine this, it requires an examination of international law, customary law and sources in form of guidelines and recommendations which is mainly international material. In addition, a comparison to national legislation will be made and will be limited to Swedish law.

The conclusions drawn are that legal frameworks need to be further developed in order to combat and repress piracy from a legal perspective by initiating regional binding agreements, regulate the use of armed guards in international law and to regulate the use of force that goes beyond self-defence.
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1 Piracy - an issue of today

1.1 Introduction

Piracy has increased and taken forms and proportions which seriously threaten peace and security on the oceans and challenge sea trade. In 2008 the modern form of piracy with pirates being well organized, heavily armed and with the ability to take control of a ship and taking hostages increased drastically in the area of the Gulf of Aden and the Horn of Africa.\(^1\) This Gulf and the passage through the Suez Canal is one of the most important routes for ships trading between Europe and Asia and any disturbance on the use of this route has an impact on the shipping business worldwide.\(^2\)

The collapse of Somalia in the early 1990s created instability and lawlessness. This together with depletion of fish off the coast of Somalia turned piracy into a lucrative business which gradually grew and further developed into the modern type piracy. This particular kind of piracy involves a much higher degree of brutality and violence compared to piracy before 2008, which was mainly performed by simple fishermen close to the shore.\(^3\) The modern type of piracy has become a huge problem and is now a threat to the peace and security on the oceans and in the territorial sea.

The maritime legal environment has a challenging task combating crimes and enforcing the law since various jurisdictions are applicable and at the same time there are limited possibilities for police forces to intervene. This leaves it to the ship owners and the crew to protect themselves from piracy and take protection actions which are restricted to the power of a state. This is the situation on the high seas and can

\(^1\) The attacks increased from 60 to 134 in East Africa, IMO MSC.4/Circ.133, Reports on acts of piracy and armed robbery against ships, annual report 2008, 19 March 2009.

\(^2\) The closure of the Suez Canal from October 1956 until March 1957 is a good example of how it disturb the shipping business and the world trade.

become the case in the states’ territorial sea, which is currently the case in the territorial sea of Somalia. The state has collapsed and consequently neither legal systems nor a police force can give support in a piracy situation.

There is no doubt that piracy is a serious international crime and as proof of that, piracy on the high seas is defined as a crime by the United Nations Convention on the Law of the Sea, signed at Montego Bay, Jamaica on 10 December 1982 and of the Agreement relating to the Implementation of Part XI of the Convention, adopted by General Assembly of the United Nations on 28 July 1994 (UNCLOS) and which gives the states the right to exercise universal jurisdiction of the crime of piracy. Considering the piracy of today, not only on the high seas but also on the territorial sea, it can be argued whether the legal framework is sufficient and can offer the legal tools necessary to repress piracy, and to intervene when a ship is attacked by pirates.

This thesis will examine the legal aspects of piracy from the moment when pirates attack to when they are captured and I will focus in particular on the following:

- What is the crime of piracy?
- What jurisdictions apply over a ship in the various maritime zones and what are the effects of them when it comes to piracy?
- What legal rights do ship owners and crew have to protect themselves against piracy?
- When has a state the right to intervene in a pirate attack and who can intervene?
- What measures can be used to intervene against piracy?
- What are the legal possibilities to capture a pirate on board a ship?

The starting point will be an examination of the legal framework for piracy in UNCLOS.
1.2 Background

The convention UNCLOS defines the crime of piracy and gives the states a universal jurisdiction to combat piracy on the high seas but not in territorial sea. The kind of advanced and brutal piracy of today does not have any boundaries and is committed both on the high seas and in territorial sea. This raises questions regarding the applicability of the jurisdiction defined in UNCLOS.

One of the major obstacles in order to practice the jurisdiction of piracy defined in article 101 in UNCLOS is that this definition is broad and is geographically limited to the high seas. Other maritime zones than the high seas are according to this definition grey areas. An examination of the definition of piracy in UNCLOS in relation to the definition of the crime in territorial sea by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP agreement) and the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, Annex 1 to Resolution 1 adopted on January 29, 2009 (Djibouti Code of Conduct) will be required. Furthermore, the crime of piracy in UNCLOS will be compared to the Swedish legislation. Once an act is confirmed as piracy, the next step will be to decide the jurisdictional rights to intervene from a Swedish flagged ship’s perspective.

Over the last years, ship owners have equipped their ships with armed guards on board when sailing in high-risk areas. But what are the legal rights of a ship owner to protect and defend its crew and the ship? These questions are connected to whether others can intervene when a ship is under attack by pirates, and what are the legal grounds? Several states contribute with military presence in various operations in high-risk areas but how can they intervene, seize a ship and on whose authority? There have also been accidents with causalities where innocent persons
have been mistaken for pirates. This raises the question as to what extent military action can be legally justified. Further, how can the use of force in international operations which combat and repress piracy be in accordance with the prohibition against violence in the Charter of the UN? All these questions go back to one of the main questions for this thesis which is whether the legal framework suffices to combat and repress piracy from a legal perspective.

1.3 Method and material

1.3.1 Introduction

The material used is mainly international from the UN, IMO, the shipping industry, and various regional instruments but also national legislations as the Swedish law.

UNCLOS ratified by the majority of the states, is considered as the law of the sea for all states. The UN Security Council has issued resolutions with a limited time period of validity concerning piracy off the coast of Somalia. The earlier mentioned documents are binding for the states but in addition several recommendations have been issued. International Maritime Organization (IMO) has issued non-binding recommendations and circulars to support the states to combat and repress piracy. In addition to these recommendations, the shipping industry has taken initiatives and given out recommendations to ship owners in the form of Best Management Practices for Protection against Somalia Based Piracy (BMP). Regions have taken initiatives in the form of agreements and codes but they are only valid for the participating parties.

1.3.2 General

Questions regarding piracy require an examination of international law, customary law and also sources in the form of guidelines and

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4 This was the case with the Italy flagged oil tanker Enrica Lexie where Italian navy mariners on board the ship shot two Indian fishermen guarding a fishing ship in the territorial sea of India.
recommendations. UNCLOS will be the starting point to decipher the
definition of piracy. UNCLOS is only applicable for piracy committed
on the high seas and excludes crimes of piracy committed on the
territorial sea. In these cases UNCLOS will be used together with an
examination of regional sources as the ReCAAP agreement, the
Djibouti Code of Conduct, soft laws in the form of guidelines issued by
IMO and national legislation. The latter will in this case be limited to
Swedish law.

The maritime legal environment is a complex jurisdictional
environment with various jurisdictions that have an impact on the crime
piracy. These jurisdictions will be discussed from a ship’s perspective
and thus the jurisdiction of the flag state, the coastal state and the
criminal jurisdiction will be examined.

The ship owners take actions to protect the ship against piracy and the
shipping industry has issued recommendations for the ship owners.
These guidelines as for example the Best Management Practices for
Protection against Somalia Based Piracy (BMP), are neither based on
international law nor customary law. This leads to questions regarding
which regulations concerning protection measures a ship owner can
lean on without breaking the law and what kind of protection that can
be used, and who can take these measures. This will be done through
an analysis of international law but also through an analysis of the
earlier mentioned guidelines and recommendations by the shipping
industry.

As mentioned, above questions regarding piracy require an examination
of international law, customary law and other instruments, which have
various binding effects on the states on how to combat piracy from a
legal perspective. The most significant international instruments are
UNCLOS, IMO circulars, ReCAAP agreement and the Djibouti Code
of Conduct.
1.3.3 UNCLOS

UNCLOS defines the crime of piracy as an international crime in article 101 and through article 105 gives the states to exercise universal jurisdiction, combat and repress piracy. 165 states and organs have ratified UNCLOS. Even though there are some states such as the U.S. that has not ratified the convention, UNCLOS is considered to be the law of the sea which defines piracy as an international crime and that gives the states a universal jurisdiction to seize a pirate ship and to impose penalties for the crime.

UNCLOS was developed at a common conference, where delegates from different states were divided into interest groups, ending up in a final agreement. This deviated from the normal procedure to develop a treaty. The treaty is a convention of compromises, a result of many and various opinions that have been drawn together, something that can be seen in the convention by that the conditions are broad and not on a detailed level. This must be taken into consideration when examining for example the definition of piracy. It complicates the interpretation especially considering the guidance and rules in the Vienna Convention on the law of treaties (with annex), concluded at Vienna on 23 May 1969 (the Vienna Convention) which states in article 31 a treaty is to be interpreted in accordance with the terms of the treaty in its context. Other sources cannot be used to give additional meaning to a treaty. Even so, there are some documents such as the comments from the International Law Commission (ILC) and by the researchers who developed the Harvard Research in International Law: Draft Convention on Piracy, (1932) 26 AJIL Supp. 739-886 (Harvard Draft Convention on Piracy) which give guidance on the convention which can be used to understand the convention and the articles concerning piracy. The comments by ILC, comments by the states during the development phase of UNCLOS and the Harvard Draft Convention on Piracy, which was an attempt to codify piracy, have been used in this thesis to get this understanding.
1.3.4 IMO Circulars

In addition to UNCLOS, the UN organ IMO, has issued a number of recommendations in the form or circular letters regarding piracy. These circulars are non-binding documents but most states follow the recommendations in them and to some extent they could be considered as customary law. This could be seen as a development of UNCLOS. To issue recommendations is a faster way to give legal tools for a crime that rapidly changes forms, methods etc. compared to drafting a new convention which will take into consideration the modern kind of piracy which is in operation today.

1.3.5 Best Management Practices (BMP)

The shipping industry has taken initiatives and developed recommendations in the form of Best Management Practices for Protection against Somalia Based Piracy (BMP) regarding protection for ships trading in high-risk areas. These hands-on recommendations for ship owners are important tools for ship owners and are followed by them in high-risk areas of piracy. IMO supports these recommendations and has through the circular MSC.1/1339 issued on 14th September, 2014 encouraged the member states to use these recommendations. But even if IMO supports BMP, this document is neither binding for the ship owners nor for the flag states and cannot be considered as part of public international law. The flag states cannot use BMP as a legal defence to justify an act that could turn out to be an unlawful act as for example some acts taken by armed guards on board ships.

1.3.6 Regional instruments

Some regional instruments such as the ReCAAP agreement and the Djibouti Code of Conduct are used to examine piracy in territorial sea and to compare these definitions of crimes with the crime of piracy as defined in UNCLOS. Even though these instruments are the drivers to
define and to combat piracy in territorial sea, these documents are only applicable for the parties which are parts of the agreement.

1.4 Outline

Piracy is an international crime which in the last years has become a disturbance to the peace and security on the seas that the world needs to bring attention to from various perspectives. One of them is the legal aspect of piracy and whether the legal framework is sufficient to combat piracy and that requires an examination from the moment a ship is attacked until the pirates are captured and brought to trial. The latter part regarding legal proceedings including arrest, extradition, sentence etc. is an interesting area but the scope of this area is extensive and therefore will not be covered in this thesis. The outline of this thesis will follow the different phases of piracy and will start with the definition of what piracy is and ends when a pirate is captured on board a ship. The After this introductory chapter, the crime of piracy will be examined to define what piracy is and how it is regarded when it is committed in the various maritime zones.

The maritime environment is a complex jurisdictional environment. Different jurisdictions are applicable and depending on which jurisdiction being applied, the crime of piracy will be considered differently. This will be discussed in chapter 3.

Furthermore, the ship owners’ measures to protect the crew and the ship against piracy will be analysed from a legal perspective. One part of this is to if and to what extent self-defence can be used. These questions will be examined in chapter 4. The second part of this chapter examines the intervention phase. A pirate ship can be seized and that will require force. The legal grounds for this will be examined and also the authority and the responsibility of a seizure.

Finally, chapter 5 will summarize the discussions and the findings.
2 On piracy

2.1 Piracy – a international crime on the high seas

2.1.1 Introduction

Piracy is a serious crime and a proof of that, has a status as an international crime through both the convention UNCLOS and customary law. UNCLOS defines piracy as a crime, encourages the states to combat and repress piracy and gives the states the right to exercise universal jurisdiction when piracy is committed on the high seas. The definition in UNCLOS is broad and leaves room for interpretation of what kind of acts which are piracy when the crime is committed on the high seas and in territorial sea.

The crime of piracy has been considered as a crime against humanity for a long time. Even though it was not codified until 1958 in the Convention on the High seas 1958, customary law has given piracy the status of an international law through the *Lotus* case in which Judge Moore stated that piracy is “the enemy of all mankind”. The codification of piracy in 1958 is still valid today. UNCLOS use the same wording to define piracy in article 101 as in article 15 in 1958’s Convention on the High seas. In UNCLOS in article 101, piracy is defined as follows:

Piracy consist of any of the following acts:

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

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

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

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(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The definition of piracy consists of several elements and those can be divided into the following main elements: type of act, purpose, geographical location and number of ships involved. These elements will be examined.

2.1.2 Type of act

The type of act is the first element in the definition of piracy in article 101 (a) in UNCLOS and is defined as "any illegal act of violence or detention, or any act of depredation". The definition of type of act is broad and it does not give any details of what an act of violence would be. A pirate attack could consist of one or several acts such as murder, robbery, slavery, hijacking, theft etc. which probably would include an element of violence. These acts were included in article 3 in the Harvard Draft Convention of Piracy in the way that the intention of piracy was to rob, murder etc. It excluded other acts driven by other factors and the element of intention of the act were neither included in the Convention on the High seas 1958, nor in UNCLOS. International Law Commission (ILC) did not give any examples of what kind of act an "illegal act of violence" was in their comments to the Convention on the High Seas 1958 which could be used for understanding of this element.

The broad definition of acts of violence in UNCLOS opens up for any kind of illegal act of violence but it is limited by the other requirements in article 101 such as the condition that an act of violence must be directed against another ship. An example of an act of violence that would pass the requirements in article 101 (a) is a situation where a

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7 Article 3, paragraph 1 "Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property", Harvard Research in International Law: Draft Convention on Piracy, (1932) 26 AJIL Supp. 739-856 p 743.
crewmember kills another crewmember on the same ship, but reading further in this article in 101 (a) (ii) there is a condition that the act must be directed against another ship. It means the earlier mentioned situation will not pass this condition and consequently not be considered piracy. There is no obligation under international law to take legal measures against piracy, to exercise the universal jurisdiction. However, some states, such as Sweden claims to have universal jurisdiction anyway. It would be up to the flag state of the ship to deal with the act and the consequences. However, if the same act would be committed against another ship then the condition “against another ship” in article 101 (a) (ii) would be fulfilled and the situation would be considered as piracy and consequently universal jurisdiction will apply to such situation.

Further, an act of violence must be illegal according to article 101 (a) but the need and the function of the word illegal has been argued. During the UN Conference on the Law of the Sea in Geneva in 1958, the word illegal was discussed whether the word would narrow the definition and it was suggested to remove the word illegal to avoid confusion. One of the arguments in 1958 to keep the word illegal, was that a removal of the word would put a burden on the states to define that an act of violence is illegal. Acts in the various states’ national law which have an element of violent but are permitted as self-defence could be considered as piracy if the word illegal was removed in the definition in UNCLOS. It was hardly the intention to broaden the definition to that extent that any act of violence could be piracy given that the other requirements were met. Even if the word illegal was included in the Convention on the High seas 1958 and also in UNCLOS this element is broad. It opens up to include all types of unlawful acts

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9 UNCLOS article 101 (a) (ii): “against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.”
10 UNCLOS article 101 (a) (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.
as long as they include any violence, but there will be no scale of the violence or requirement of a threat with weapons that would narrow the act. On the other hand a broad definition, as any illegal act of violence is, leaves it to the courts in the states to define and interpret what “an illegal act of violence” is. It is a fact that large numbers of pirates have been released before they even are brought to court, but the root cause of that is not that the definition in article 101 (a) in UNCLOS is wide. The root cause is more likely how to bring them to justice. It is better that a definition is broad rather than narrow one. It leaves it to the states to discuss whether a more detailed definition is required and if so agree on a new definition.

2.1.3 Purpose

The purpose of the act is the second main element of the definition of piracy in article 101 in UNCLOS. It states that the act must be committed for private ends. This sets boundaries for what can be considered as piracy but what does the purpose of private ends entails? The element of a purpose of private ends was already included in the definition of piracy in the Harvard Draft on Piracy in 1932. The aim to include this element and this wording was to separate acts authorized by a state or acts by insurgents from acts performed by others. By the wording “committed by private ends”, acts committed by public ends were not piracy, while acts committed by the opposite to public ends, private ends, were considered as piracy. 13 By then the condition “committed by private ends” was a separation on whose behalf the act was committed and not a test of the actual motive behind the act such as a political motive. Does the motive play a role today especially considering the case with the ship Achille Lauro.

Is an examination of the motive required to test whether the condition “private ends” in article 101 (a) in UNCLOS is fulfilled? Going back to

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what piracy really is, it can be concluded that it is an act of theft. But what happens if a political motive is added to the act? Would the condition for “private ends” be fulfilled and consequently be piracy? If it is not piracy what is the act then? The purpose “private ends” was debated at the time of 1958’s Convention on the Law of the High seas.

The researchers who developed the Harvard Draft on Piracy were of the opinion that the motive is not the driver to define whether the act is piracy or not. The scholar Douglas Guilfoyle is of the same opinion as the researchers who developed the Harvard Draft Convention on Piracy that it is not the motive that is to be examined when examining what private ends are. The examination of private ends should be an examination whether the act is authorized by a state or someone else. According to Guilfoyle, to test a motive of private ends would be to interpret the definition in the wrong way. The scholar Malcolm N. Shaw has a slightly different approach regarding private ends compared to Guilfoyle. Shaw draws the conclusion that private ends should be interpreted as a gain for one’s own purpose. Shaw arguments that an act with political motive would not be for one’s own purpose, hence an act with a political motive would not be committed for private ends. This argumentation would include an examination of the motive and an interesting angle of this is when the motive is indirect. An example of a situation where an act could have an indirect motive could be to make money and then use the money to buy weapons with the purpose to use them in a war, conflict or in an act to manifest something. Looking at piracy off Somalia and the situation in Somalia, there are examples of where warlords make money through piracy with the purpose to support a political cause in Somalia. The direct cause is to gain money for own gain and that would pass the test to be an act “committed for private ends”. But if the money is transferred to warlords and for a political

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14 A wording excluding acts with a political motive was suggested but was not included in the final wording. It would be hard to differentiate acts with political end from acts with other motives, see Yearbook of the International Law Commission, Volume I – Summary Records of the Seventh session, 2 May-8 July 1955, A/CN.4/6SER.A/1955 p 266.


16 Shaw states that “The essence of piracy under international law is that it must be committed for private ends. In other words, any hijacking or takeover for political reasons is automatically excluded from the definition of piracy.” Shaw, Malcolm N., *International Law*, 6th edn, Cambridge University Press, Cambridge 2008 p 615.
cause, the purpose of the act would indirect be for a political cause, would it still then be piracy according to article 101 in UNCLOS? The scholar Shaw clearly takes a standpoint that an act of political purpose is not piracy but if the motive is indirect then the act might be considered as piracy.\textsuperscript{17} Going back to the Harvard Draft researcher and Guilfoyle, a political motive, direct or indirect, does not matter when evaluating if an act is of private ends or not and the motive should be disregarded when testing whether the criterion of private ends is met as long the main thing is to make money. In conclusion, to define private ends by a motive would narrow the definition of piracy which would not be the aim when piracy is considered to be of such nature that it has given a special status as an international crime with universal jurisdiction.

2.1.4 Location

Piracy is geographically limited to the high seas and the exclusive economic zone through article 101 and 58 in UNCLOS. It limits the universal jurisdiction for an international crime to an extent that differs from other international crimes, which have no geographical limitation.\textsuperscript{18}

Looking at piracy, this crime has always been related to the sea and given that it is natural that there is a reference to the maritime environment which limits the crime to the sea. This geographical limitation to the sea is hardly at question but the limitation to the high seas and the exclusive economic zone could be argued in the light of the type of piracy that is in operation in territorial sea off the coast of Somalia and in the area of the Gulf of Aden. It is an area which is more or less a lawlessness area where the universal jurisdiction does not apply and consequently a state cannot intervene, seize a pirate ship and

\textsuperscript{18} The universality principle applies for the international crimes war crimes and piracy. In addition to these crimes other crimes are defined in treaties as international crimes which is the case with the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. International Criminal Court in article 5 in the Rome Statute of the International Criminal Court, A/CONF.183/9, Shaw, Malcolm N., \textit{International Law}, 6th edn, Cambridge University Press, Cambridge, 2008 p 668.
exercise universal jurisdiction. Still, this is an area which belongs to a territory and a different geographical scope would intrude on the sovereignty of a state. Considering the development of piracy a solution could be to expand the geographical scope to intervene and the ability to exercise universal jurisdiction.

2.1.5 Requirement of two ships

There are two different requirements of number of ships\textsuperscript{19} in the definition of piracy in UNCLOS article 101 which are contradictory. The definition in article 101 UNCLOS reads as follows:

Piracy consist of any of the following acts:

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

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

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

The first subparagraph (i) has a requirement of two ships, the act must be directed towards another ship. This requirement excludes an act where the crew or the passengers direct an act against the ship which they are on board. The case with the \textit{Achille Lauro} could be used to examine the consequences of the requirement of two ships. In this case, persons of Palestinian origins boarded the ship as passengers and tourists but during the voyage they took the control of the ship and took the crew and passengers hostage. They demanded Israel to release Palestinian prisoners in exchange for the hostages. The act was directed towards the same ship the persons boarded and was not directed by another ship and hence this act would not pass the requirement in article 101 subparagraph (a) (ii) in which it is clear that the act must be directed against another ship. Another parameter discussed in the \textit{Achille Lauro} case whether this act which had political motive fulfilled the condition of that the act had a purpose of private ends. As earlier concluded it is

\textsuperscript{19} UNCLOS does not have a definition of a ship and neither for a vessel. Some states among Sweden is one of them, makes a difference between ship and vessel.
not the motive which is the driver for testing if the purpose of private ends is fulfilled. Going back to the requirement of two ships, the case with the ship *Achille Lauro* did not fulfil the requirement of two ships and consequently was not piracy in accordance with article 101 in UNCLOS. This case revealed a gap in international law which resulted in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, concluded at Rome on 10 March 1988 (SUA Convention)\(^{20}\) which would cover this kind of situation.\(^{21}\) The type of situation as in the case with *Achille Lauro* with acts involving one ship and with a political motive is covered by the SUA Convention. In a situation where the crew or the passengers on board rob the ship and have no political motive. This kind of act will not fall under the definition of piracy due to the requirement of two ships. It will be a matter for the flag state to deal with. The flag state has a duty to control and exercise jurisdiction over a ship flying its flag and can in addition to international regulations set the rules for who should be permitted to board the vessel, the rules for the order on board etc. which to some extent could limits the risk that passengers with other intentions then to be passengers who board a ship.\(^{22}\) The universal jurisdiction in article 105 in UNCLOS puts aside the flag state jurisdiction and a removal of the requirement of two ships would mean that other states would have an extensive right to intervene in situation where it might not be obvious if the situation is something that is really a matter for the flag state.

The second subparagraph (a) (ii) in article 101 contradicts the two ships requirement in (i) by only refer to a ship and towards another ship. The difference between these two subparagraphs is that subparagraph (i) refers to the high seas while subparagraph (ii) refers to a place outside the jurisdiction of any state. Could the location in itself be a parameter that leads to that it is sufficient with one ship? The International Law Commission (ILC) comments to the 1958's Convention on the High

\(^{20}\) 164 states have ratified the SUA convention as per 17 May, 2015. Somalia has not ratified this convention but is a party of the non-binding the Djibouti Code of Conduct.

\(^{21}\) For further reading regarding the SUA Convention, see the article "Terrorism on the High seas: The Achille Lauro, piracy and the IMO convention on maritime safety" by Malvina Halberstam, AJIL 82 (1988) p 269-310.

\(^{22}\) See article 94 in UNCLOS concerning the duties of the flag state.
seas were about the location “any other place outside the jurisdiction” but ILC did not go into details regarding the discrepancy of one and two ships.\textsuperscript{23} It can be concluded when the crime is committed on the high seas it is required that two ships are involved to fulfil the requirements in the article 101. The location “in a place outside the jurisdiction of any State” in article 101 (a) (ii) would be very hypothetic. What remains if territories, territorial sea, the exclusive economic zone and the high seas are excluded? A piracy situation in these areas only requires one ship but that situation must be rare and will not be investigated further. It can though be concluded that this contradiction in these two subparagraphs is a peculiarity.

### 2.2 Armed robbery at sea – piracy in territorial sea

#### 2.2.1 Introduction

Armed robbery at sea\textsuperscript{24} is a term used when piracy is committed in territorial sea. A crime in the territorial sea is not an international crime, it is a matter for the coastal states to criminalize this act. Hence, the definitions of armed robbery at sea differs from state to state and do not necessarily have the same wording and meaning as the crime of piracy defined in article 101 in UNCLOS. It raises questions regarding the effects and consequences of the term armed robbery at sea differs from the definition of piracy in UNCLOS article 101.

As mentioned in chapter 2, the definition of piracy in article 101 in UNCLOS is geographically limited to the high seas and a place outside the jurisdiction of any state. It excludes the same type of crime as piracy when committed in the territorial sea. Consequently, the international

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\textsuperscript{23} The International Law Commission developed the location criteria but the difference of the requirement of number of ships are not discussed, see Yearbook of the International Law Commission, 1956, vol. II, article 39, commentary (1) (iv) and (3) p 282; In addition Samuel Pyeatt Menefee concluded in an article that the wording with one ship in one subparagraph and two ships in another was poor drafting. He added it is not necessary with a requirement of two ships but did not developed it further in that is not further developed further in the article, see Menefee, Pyeatt, Samuel "Foreign Naval Intervention in Cases of Piracy: Problems and Strategies", The International Journal of Marine and Coastal Law, Vol. 14, No. 3, 1999 (p 353-371) p 358.

\textsuperscript{24} The terms armed robbery at sea and armed robbery against ships are commonly used for piracy committed in territorial sea.
legal framework in UNCLOS does not apply to these crimes in territorial sea. There was a need to distinguish piracy committed in territorial sea when the piratical acts grew in the territorial sea and the terms armed robbery at sea and the term armed robbery against ships started to be used for piracy committed in territorial sea. The question is what these terms embrace when it is up to the states to criminalize and define crime committed within a state’s territorial sea. A number of states in high-risk areas of piracy have initiated common actions to combat and repress piracy in territorial sea. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP agreement) and the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, Annex 1 to Resolution 1 adopted on January 29, 2009 (Djibouti Code of Conduct) are examples of such initiatives which define armed robbery at sea and give tools for the states to cooperate to combat and to repress piracy. An examination of the definitions of armed robbery at sea in the agreement and code in relation to article 101 will be required to see the effect and the consequences of the differences.

The term armed robbery at sea includes the word armed but does it necessarily mean that the robber must be armed to fulfil the requirement of the term commonly used? The definition of piracy in UNCLOS was used as a basis for the ReCAAP agreement and the Djibouti Code of Conduct and some elements are the same such as the element of illegal act while other differs. There is no requirement for that the perpetrator must be armed neither in UNCLOS nor in the ReCAAP agreement nor in the Djibouti Code of Conduct even though the title of the crime in the regional instruments include the word “armed”.

In addition to the earlier mentioned agreement and code, IMO has also defined armed robbery at sea in their recommendation the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, IMO Doc. A 22/Res.922 (Jan 22, 2009). There
are some differences compared to UNCLOS. The purpose of private ends is left out, only one ship is required and the jurisdiction is defined as the jurisdiction of a state.\textsuperscript{25}

2.2.2 Regional instruments

Armed robbery at sea\textsuperscript{26} in territorial sea is from a legal point of view a matter for each state but to solve the situation with armed robbery at sea in territorial sea requires the states to cooperate. States in high-risk area of piracy have taken initiatives to work together to combat and repress piracy which have resulted in codification of armed robbery at sea with various binding effects. These codifications in relation to the definition of piracy in UNCLOS will be examined.

One of these initiatives was the ReCAAP agreement, initiated by states in Asia to combat and repress armed robbery against ships in Southeast Asia.\textsuperscript{27} The agreement was adopted on 11\textsuperscript{th} November, 2004 and came into force 4\textsuperscript{th} September, 2006. Another initiative taken by states in the region of the Western Indian Ocean, the Gulf of Aden and in the Red Sea, is the Djibouti Code of Conduct.\textsuperscript{28} The ReCAAP agreement served as a model to this code and this code has about the same definition of armed robbery at sea as the ReCAAP agreement has. The Djibouti Code of Conduct is in contrast to the ReCAAP agreement non-binding for the parties. The starting point to examine the definition of armed robbery at sea will be to analyse the elements of the definition in the ReCAAP agreement in relation to the definition of piracy in UNCLOS and in addition, to point outpoint differences between the ReCAAP agreement and the Djibouti Code of Conduct.

\textsuperscript{25} IMO Doc. A22/Res. 922 (January 22, 2009).
\textsuperscript{26} Only the term armed robbery at sea is used throughout the text for simplicity reason.
\textsuperscript{27} The contracting states which have signed the ReCAAP agreement as 20 May 2015 are: Australia, Bangladesh, Brunei, Cambodia, China, Denmark, India, Japan, Laos, Myanmar, the Netherlands, Norway, Philippines, Singapore, South Korea, Sri Lanka, Thailand, the United Kingdom, and the U.S.A.
\textsuperscript{28} The Djibouti Code of Conduct is supported by the UN Security Council by the resolution S/RES/1872(2009).
The ReCAAP agreement defines armed robbery at sea in article 1(2) as follows:

“For the purposes of this Agreement, “armed robbery against ships” means any of the following acts:
(a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party’s jurisdiction over such offences;
(b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

The Djibouti Code of Conduct defines armed robbery at sea in article 1(2) as follows:

“Armed robbery against ships” consists of any of the following acts:
(a) unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;
(b) any act of inciting or of intentionally facilitating an act described in subparagraph (a).

The above definition or armed robbery at sea can be compared to the definition of piracy in article 101 in UNCLOS:

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

The definition or armed robbery at sea has about the same main elements of piracy as defined in UNCLOS in article 101 which are: type of act, purpose, location and number of ships involved. In addition to these main elements from which the ReCAAP agreement and the Djibouti Code of Conduct differ to some extent, there are two other elements, the perpetrator and aircrafts, which differ from UNCLOS and need an examination.

The first main element is the kind of act which is defined in the same way but where the Djibouti Code of Conduct uses the word unlawful instead of illegal as used in UNCLOS and in the ReCAAP agreement. The use of another synonym does not make a difference in the interpretation of the act. The Djibouti Code of Conduct has in addition to “unlawful act of violence, detention or any act of depredation” included “threat thereof” in the definition of the kind of act.\(^\text{29}\) It expands the crime of armed robbery sea in the Djibouti Code of Conduct compared to the ReCAAP agreement and UNCLOS, the added act is more subjective to its nature compared to the other acts and consequently be harder to interpret.

Furthermore, the second main element, the purpose of the act, committed for private ends, is the same for armed robbery on sea in the ReCAAP agreement, the Djibouti Code of Conduct and UNCLOS. The next element is the geographical area which in the ReCAAP agreement and the Djibouti Code of Conduct to territorial sea while piracy in UNCLOS is limited to the high seas.\(^\text{30}\) It is clearly expressed in the ReCAAP agreement and in the Djibouti Code of Conduct that the

\(^{29}\) See also the IMO document Code of practice for the investigation of crimes of piracy and armed robbery against ships, included as an annex to the IMO resolution A.26/Res.1025 18 January 2010.

\(^{30}\) It is interesting to note that Malaysia and Indonesia have not signed the ReCAAP agreement when the territorial sea of these two states are high risk area of armed robbery at sea.
territorial jurisdictions will apply in each states’ territorial sea. No universal jurisdiction applies and other states cannot exercise their jurisdiction in states outside their own territorial sea. The territorial jurisdiction is of course a limitation compared to the universal jurisdiction on the high seas, but applying universal jurisdiction in territorial sea would create a complex legal situation which would intrude on the states’ sovereignty. The ReCAAP agreement will though create a pattern of jurisdictions for armed robbery at seas together with the universal jurisdiction for piracy on the high seas and in that way covers a gap, at least in the area where the ReCAAP agreement is in place.

The third main element is the number of ships. The ReCAAP agreement as well as the Djibouti Code of Conduct only include a requirement for one ship, which differs from UNCLOS which have a requirement for two ships. What difference does the requirement of only one ship make? The state can intervene if the armed robbery at sea is committed by someone who is already on board the ship as in the case with the Achille Lauro. In this case, persons who boarded the ship as passengers hijacked the ship and took the crew and passengers hostage. One of the reason this act was not considered as piracy as defined in article 101 in UNCLOS was due to the requirement of two ships was not fulfilled.

In addition to the main elements, there is an element of a perpetrator. Neither the ReCAAP agreement nor the Djibouti Code of Conduct specify the perpetrator as crew or passenger which UNCLOS does. The question is what difference does it make? There are few categories of persons on board a ship. Besides the crew and passengers, there are not many other categories that can be on board a ship. Those would be tug boat personnel, officials such as custom etc. and these categories of persons would in UNCLOS disqualify the act as piracy but not in the earlier mentioned agreement and code. In the case with Achille Lauro,

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31 See art. 2(5) which states as follows: "5. Nothing in this Agreement entitles a Contracting Part to undertake in the territory of another Contracting Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Contracting Party by its national law."
the persons committing the act on board were terrorists but boarded the ship as passengers. Technically, they were registered as passengers and by that passed the requirement of the kind of perpetrator and by that the persons could fit into this category even if they were terrorists. Anyway, the terrorists/passengers who committed the act boarded the same ship as they attacked and by that this was not piracy according to article 101 in UNCLOS. There is no definition of the perpetrator neither in the ReCAAP agreement nor in the Djibouti Code of Conduct and situation as in the case *Achille Lauro* would fall under the definition of armed robbery at sea in the agreement and in the code. The case *Achille Lauro* was the cause of why the SUA Convention was developed. The last element in the ReCAAP agreement which differs from the definition of piracy in UNCLOS is that the agreement focus on ships and have excluded aircrafts but that will not be further analysed.

The comparison of armed robbery at seas and piracy shows similarities but the definition of armed robbery at sea in the earlier mentioned agreement and code comprise additional situations which piracy as defined in UNCLOS does not include. One example of such situation is when only one ship is involved. Another major difference is the geographic scope of the two crimes in which UNCLOS covers the high seas while the regional instruments focus on the territorial sea. To some extent the gap to combat and repress piracy in these regions have been closed but one must bear in mind that neither the agreement nor the code give the participating state to exercise its jurisdiction in another state’s territory. In addition, it is up to the states to criminalize the armed robbery at sea in their national law but to agree on a definition and to work jointly is the way forward to combat a serious crime menace to peace and security in territorial sea in parts of the world.

### 2.2.3 National legislation

As earlier mentioned armed robbery at sea in territorial sea is a crime for national states to criminalize and to define. The term armed robbery
at sea might not exist as such in a state’s law which is the case in Sweden. To examine how armed robbery in territorial sea is regarded, the Swedish law will be used as an example of how armed robbery would be regarded in national law. In Swedish law there is neither a crime defined as armed robbery at sea nor a crime defined as armed robbery. What kind of crime would then piratical act be in accordance with Swedish law? Firstly, it is to be established is that the crime of piracy is a crime in accordance with Swedish law and secondly, it is to be established whether the act robbery is criminalized in Swedish law. The starting point will be to examine the crime of piracy defined in chapter 13 section 5 a paragraph 1 subparagraph 2 in the Penal Code. According to this section a person can be prosecuted for hijacking if someone uses unlawful coercion and seize a ship or take over the manoeuvring of a ship which is used in commercial traffic. This definition excludes other ships for example sailing yachts etc. If a person is found guilty of charge then the penalty for hijacking is up to four years of imprisonment and if the crime is found to be considered as serious the penalty is from four to ten years of imprisonment. The definition of hijacking as defined in chapter 13 section 5 a paragraph 1 subparagraph 2 in the Penal Code will apply for a crime committed in the territorial sea in Sweden. But if Sweden seizes a pirate ship on the high seas in accordance with article 105 in UNCLOS then it is the definition of piracy as defined in UNCLOS which will be used in Swedish court but the imposed penalty will be as defined in Swedish law. Going back to the commonly used term armed robbery at sea, the definition uses the word “armed” but there is no requirement of arms involved in the crime of hijacking as defined in Swedish law.

One of the conditions as earlier mentioned is the condition of a ship in commercial traffic. What crime would it be if the armed robbery at sea is committed against a sailing yacht in the territorial sea of Sweden? A crime as such would fall under the act defined as robbery which is laid down in chapter 8 section 5 in the Penal Code which neither contains a condition of arms. Simply put, robbery is defined as an act of theft.
which contain an element of violence or threat. The penalty for this crime is imprisonment from one to six years. If the crime is considered as serious which could be the case if arms have been used at the robbery, then the penalty is imprisonment from four years to ten years.
3 Jurisdiction

3.1 Introduction

Piracy and armed robbery at sea are serious crimes and to combat and repress these crimes the states are required to intervene but the maritime environment is a complex legal environment. Firstly, the various maritime zones trigger different jurisdictions which affect the possibilities to combat and repress piracy on the high seas, in territorial sea etc. Secondly, there is no police force present on the high seas which can come to rescue, intervene and enforce international law. It is the same situation in territorial sea, which are high-risk areas of armed robbery such as Somali territorial sea. It raises questions regarding what jurisdictions apply over a ship in the various maritime zones and what the effect is of the jurisdictions when it comes to piracy and armed robbery at sea.

What is then jurisdiction? Jurisdiction defines who has the power to create laws, the mandate for a state’s court to exercise the law, who can execute the decision by the courts and enforce the law.\textsuperscript{32} The jurisdictional power concerns the power of a state which has the sovereignty of its territory since it has the jurisdictional powers of its territory. A state can criminalize an act, and decide that it has jurisdiction of the criminalized act but it does not automatically gives the state the right to try the criminalized action in court. A state’s jurisdiction can intrude upon other state’s jurisdictions and therefore the states need to agree on some jurisdictional principles which define how a crime is linked to a state and by that set the limits for a state’s jurisdiction. How and what defines the jurisdiction in a state varies between the states, but there are a number of jurisdiction principles that links the crime to a jurisdiction. These principles are: the territorial principle, the nationality principal, the flag state principle and the

universal jurisdictional principle. These jurisdiction principles could all apply in the maritime environment, but the applicability of them depends on in which of the maritime zones the crime is committed, which has an impact on whether or not a crime is regarded as piracy. This chapter will deal with the jurisdictions that have a bearing on the crimes of piracy and armed robbery at sea and examine in particular the following jurisdictions: the flag state jurisdiction, the coastal state’s jurisdiction and the criminal jurisdiction. The examination of the jurisdiction over a ship, of a coastal state and the criminal jurisdiction will be the bases to answer the questions how ship owners and crew can protect themselves, how other can intervene in a piracy situation and who can capture a pirate.

3.2 Jurisdiction over ships

The flag state principle is the fundamental jurisdictional principle applicable for a ship and this principle is laid down in article 94 in UNLCOS. The flag state principle links a ship to a state through registration of the ship in that state. It gives the flag state jurisdiction over the ship, equipment, crew and persons on board and the law of the state in which the ship is registered applies on board the ship. Further, the link must be a genuine link between the state and the ship and there is an on-going debate whether such a link exists in some cases and whether the requirement in article 91 in UNCLOS is fulfilled. The flag state has duties which are regulated in article 94 in UNCLOS as follows:

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34 UNCLOS divides the seas into the following maritime zones: the territorial sea (art. 2), the contiguous zone (art. 33), the exclusive economic zone (art. 55) and the high seas (art. 86).
35 The flag state principle is in Swedish law laid in chapter 2 section 3 in the Penal Code (1962:700).
36 UNCLOS art. 94: Nationality of ships.
1. Each State shall fix the requirements for the grant of its nationality to ships, for the registration of ships in its territory, and for their right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.
Duties of the flag state

1. Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every state shall:
   (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulation on account of their small size; and
   (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officer and crew in respect of administrative, technical and social matters concerning a ship.

The above mentioned duties are the duties of a flag state, but there is no international body which has the authority to control and punish flag states which do not fulfil their duties as defined in article 94 in UNCLOS. A part of the debate with the flag of convenience is that some flag states do not effectively exercise its jurisdiction etc. for ships flying its flag. The aim with the concept of controlling the high seas by linking the authority of a ship to a state will lose its credibility if the flag state do not exercise the control and the jurisdiction of ships flying the state’s flag. Part of the world’s fleet and actions on the high seas will be out of control and there is a risk to the environment, the crew etc. The requirement of a genuine link and the fulfilment of a genuine link between the flag state and the ship is a good basis for the flag state to exercise its duties.

3.3 Coastal state’s jurisdiction

The coastal state has territorial jurisdiction in its territorial sea which also apply for ships navigating in the territorial sea. A state has the sovereignty of its territory and consequently has the authority to legislate law that concerns its territory which is the fundament for the territorial principle. The principle means that a crime is linked to a location in a territory and though this it gives the state jurisdiction of the crime in its territory which is practical from many perspectives. The
crime can be investigated and enforcement measures can be used by the police force in the territory. It is convenient and falls natural that the police force can interrogate witnesses at the crime scene, conduct technical examination at the location etc. The degree of acceptance of the various jurisdiction principles such as the territorial principle, the nationality personality principle, the flag state principle etc. differs from state to state, but most states agree on the territorial principle.38 Sweden accepts the territorial principle which is laid down in chapter 2 section 4 in the Penal Code.

The territorial principle applies in the territorial sea which stretches 12 nautical miles from the baseline of a territory.39 Even though this principle applies in the territorial sea there are some limitations to the coastal state jurisdiction. One of these exceptions is that the flag state of a ship continues to have jurisdiction over a ship flying its flag. It means a ship continues to have jurisdiction on board the ship for crimes committed on board.40 Further, a condition for a foreign ship to navigate in territorial sea is that the ship performs an innocent passage as defined in the articles 18 and 19 in UNCLOS. Basically a ship’s passage is innocent as long as it does not disturb the peace and the good order in the territorial sea. If a crime is committed by the crew on board the ship and the crime only concerns the environment on board the ship, simply put if the crime is committed within the hull of a ship, then this is a matter for the flag state of the ship according to article 27 and 28 in UNCLOS.

Adjacent to the territorial sea is the contiguous zone which stretches 24 nautical miles from the baselines of a territory according to article 33 paragraph 1 in UNCLOS. The coastal state has some jurisdiction in this zone defined in the same article, article 33 as follows:

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39 The territorial sea is defined in article 3 in UNCLOS.
40 See article 27 in UNCLOS regarding criminal jurisdiction on board a foreign ship in territorial sea.
1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
   a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
   b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

This means that a state has limited territorial jurisdiction in the contiguous maritime zone. The crime of armed robbery at sea is not included in article 33 subparagraph 1 and consequently the state has not territorial jurisdiction of armed robbery in the contiguous zone. Another peculiarity worth mentioning is that “the coastal State may exercise the control to” which means that there is an option for a state to exercise jurisdiction in this zone. If the state wishes to use this right then the state needs to declare jurisdiction of the contiguous zone.

The Exclusive Economic Zone (EEZ) stretches 200 nautical miles from the baselines of the territorial sea\(^{41}\). The coastal state has some jurisdictional rights in this zone which are defined in article 56 paragraph 1. (b) as follows:

   Jurisdiction as provided for in the relevant provisions of this Convention with regard to:
   (i) the establishment and use of artificial islands, installations and structures;
   (ii) marine scientific research;
   (iii) the protection and preservation of the marine environment;

In addition to the above coastal state’s jurisdiction, the flag state principle applies and the universal jurisdiction for combatting and repressing piracy applies in this zone according to article 58 in UNCLOS.

\(^{41}\) Article 57 in UNCLOS.
3.4 Criminal jurisdiction

3.4.1 Universal jurisdiction under UNCLOS

Universal jurisdiction applies on the high seas and in the EEZ for the crime of piracy and sets aside the fundamental jurisdiction over a ship, which is the flag state principle. The universal jurisdiction for piracy is defined in article 105 in UNCLOS as follows:

“every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”

The universal jurisdiction gives a right for every state to exercise its jurisdiction of a crime anywhere in the world but there is no obligation for the states to exercise this right. It is up to the flag state of the ship, which carried out the seizure, to decide whether they would like to exercise the universal jurisdiction and by that process the case in national court and decide on a penalty.

As mentioned earlier, the universal jurisdiction for piracy is geographically limited to the high seas and the EEZ. Even though the act of the crime itself is the same, the location of the crime scene has an impact on how to regard this crime from a jurisdictional perspective. If armed robbery at sea, which is the commonly used definition of piracy in the territorial sea, is committed within a territory on the mainland, the coastal state’s jurisdiction will apply. Looking at armed robbery at sea in the territorial sea of Somalia this would be a crime that would fall under the jurisdiction of Somalia. The problem however is the state of Somalia has collapsed and consequently it can be argued what legal capacity the state has. There are no real resources to intervene against armed robbery at sea in Somali coastal waters and limited possibilities
to take legal proceedings against armed robbers at sea. Due to the severe situation with piracy in this area, the UN Security Council took steps in 2008 to intervene against armed robbery at sea in the territorial sea of Somalia and have issued resolutions with a reference to chapter VII in the Charter of the UN. These kinds of resolutions with acts based on chapter VII are peace creating operations which allow the use of force even though the Charter of the UN includes a prohibition of violence, view article 2(4) in this charter. The resolutions by the UN Security Council set aside the territorial jurisdiction in Somalia and intrude on the state’s sovereignty and give a legal framework for other states than Somalia to intervene against armed robbery at sea in Somali territorial sea and to use the tools available in article 105 in UNCLOS. It gave a legal framework for the world society to temporary deal with the serious situation. The last resolutions that gave this mandate was issued by the UN Security Council on 18th November, 2013 which prolonged the mandate set forward in earlier resolutions, but this was the last issued resolution that gave this mandate to intervene against armed robbery at sea in Somali territorial sea.

3.4.2 Criminal jurisdiction under the Swedish Penal Code

UNCLOS gives states right to exercise universal jurisdiction for the crime of piracy according to article 105 in UNCLOS. A state which seize a pirate ship has the right to prosecute a suspected pirate, sentence the person for piracy and apply the scale of the penalty as defined in national law. It requires that the state has criminalized piracy in national law and that the state has criminal jurisdiction to try the case. There are two scenarios of piracy to be examined and both from the perspective of Swedish warship seizes a ship. The first scenario is when a ship flying a Swedish flag is under a pirate attack and pirates have taken over the control. The second scenario is when a Swedish warship seize a ship flying a foreign flag which pirates have taken the control of.

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The first thing to establish is that piracy is a crime according to Swedish law. Piracy is criminalized in Sweden as hijacking in chapter 13 section 5 a in the Penal Code. The second thing is to establish that Sweden has the authority to try the case. This authority is laid down in Swedish law in chapter 2 in the Penal Code and can be divided into crimes committed within or outside the territory of Sweden. For the first mentioned scenario when a ship flying the Swedish flag of which pirates have taken the control, Sweden has jurisdiction of the ship according to the flag state principle which is a laid down in chapter 2 section 2 paragraph 1 in the Penal Code. There are some limitations which are defined in chapter 2 section 7 in the Penal Code and according to this section of the law, the jurisdiction is limited to international law and agreements with other states. Looking at international law and UNCLOS in particular, the flag state’s criminal jurisdiction is limited in the territorial sea in the coastal state according to article 27. Simply put, the flag state’s jurisdiction is limited to crimes committed on board the ship which has an effect within the hull of the ship. Consequently, the criminal jurisdiction in Swedish law is limited through article 27 and limits the broad jurisdiction laid down in chapter 2 section 7 in the Penal Code. Going back to the scenario when a Swedish flagged ship is attacked by pirates on the high seas and a Swedish warship relieves the attacked ship, Sweden has criminal jurisdiction to try this case in accordance with the flag state principle laid in chapter 2 section 3 paragraph 1 in the Penal Code and can try the case in accordance with Swedish law.

The second scenario is when a Swedish warship seizes a foreign ship that has been taken over by pirates or is operated by pirates. This is a case in which Sweden can use the right to exercise universal jurisdiction in accordance with article 105 in UNCLOS. As earlier mentioned, Sweden has criminalized piracy in national law which is the basis to exercise the universal jurisdiction. Secondly, the criminal jurisdiction to try a case where a crime is committed on a foreign ship must be
established. According to chapter 2 section 2 paragraph 6 in the Penal Code, Sweden has criminal jurisdiction when there is a crime of hijacking as which the crime of piracy is defined in Swedish law, but it requires an appointment by the government, when it concerns a foreign ship, to bring a prosecution according to chapter 2 section 5 second paragraph 1 in the Penal Code.
4 Protection and intervention against piracy

4.1 Introduction

The ship owners need to take protection measures on a high level in order to protect their crew and ships against the kind of piracy that operates today in the area of the Gulf of Aden and the Horn of Africa. The pirates are brutal, violent and heavily armed. On the mainland in a territory, it would be possible to call out for aid from a police force but that option is not available on the high seas and it could very well be the same in the territorial sea. This caused to ship owners to take various protection measures. Some of these measures go beyond what is permitted when being used in a state’s territory. An example is the use of armed guards with heavy weapons on board ships. It raises questions regarding what legal rights a ship owner and the crew have to protect themselves against piracy.

Furthermore, once a ship is under attack and pirates have boarded the ship, self-defence would be the next step in the protection phase. Considering the high degree of brutality and violence pirates use, the use of self-defence will include a high degree of force, but to what extent can force be used and by whom?

If the protection measures are not sufficient and pirates manage to take the control of the ship, UNCLOS gives the states the right to seize a pirate ship. The operation is most likely to be done by military rather than a police force and brings up questions regarding the authority to take actions on board a ship and in particular what amount of force can be used.
4.2 Ship’s legal rights to protection

4.2.1 Protection measures

Ship owners’ and crew’s possibilities to take protection measures against piracy consists primarily of self-defence which is laid down in the Charter of the UN. The use will also depends on which flag the ship flies and in which maritime zone the ship is located in. The maritime zones triggers different jurisdictions which limits the possibilities for the ship to protect the crew and the ship against pirates. What protection can be used in the various maritime zones? The flag state has exclusive jurisdiction over a ship on the high seas and the protection measures used in this maritime zone must be in accordance with the law of the flag state, but also in accordance with international law and customary law.

In the territorial sea, the protection measures are limited to the law of the coastal state which has criminal jurisdiction of crimes committed in the territorial sea on board a ship if the committed act disturbs the peace and good order. Further, a protection measure is limited by the requirements of an innocent passage in the territorial sea in article stipulated in 17 in UNCLOS. A ship’s passage in territorial sea must be innocent and is considered as such long as the ship does not perform any activities listed in article 19 in UNCLOS. A ship’s protection measures needs to be in accordance with these requirements. Thus the law of the flag state and international law sets the limits for protection measures on the high seas while in the territorial sea, the law of the coastal state and to some extent the law of the flag state set the limits for a ship’s protection measures.

What type of measures can be used in the various maritime zones at the seas? When piracy started to flourish in the Gulf of Aden, the IMO Maritime Safety Committee (MSC) issued circulars to the states in

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43 Article 27 paragraph 1 in UNCLOS.
which they recommended the states to prevent and suppress piracy and armed robbery against ships. These circulars also contained some concrete actions for the ships. Besides the work by IMO, the shipping industry took a private initiative and developed the guidelines Best Management Practices for Protection against Somalia Based Piracy (BMP) to be used in high-risk areas of this kind, BMP4 is the latest version of these guidelines. IMO support these BMP through a circular but, they are only just recommendations. The BMP4 guidelines cannot be used as a defence to justify a protection measure that could be found illegal by the law in the coastal state, the flag state, and international law or by customary law.

BMP4 provides concrete protection measures in section 8 on how to equip the ship on beforehand a voyage in a high-risk area and how to act during a pirate attack. Some of these measures are very basic, but efficient, such for example to have a proper lookout on board the ship, report the ships’ movement to The UK Maritime Trade Operations (UKMTO) and to equip the ship with physical barriers for example barbed wires along the rail, water cannons etc. These protection measures are not to be considered violent and they do not injure anyone. Consequently, the measures are neither a threat to a state’s sovereignty, nor would they fall under any of the prohibited activities in article 19, paragraph 2.(a) in UNCLOS that would make an innocent passage not innocent. It could however be the case that even if a protection measure would pass the test of an innocent passage in article 19 paragraph 2. (a), the coastal state might have further requirements that could prohibit protection measures. In general, the earlier mentioned physical barriers such as barbed wire would hardly be forbidden in a state’s national law.

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44 IMO MSC.1/Circ.1333 (26, June 2009), Piracy and armed robbery against ships, Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships, IMO MSC.1/Circ.1334 (23 June 2009), Piracy and armed robbery against ships, Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships.

45 The shipping industry includes various interest organizations for example tanker organizations and maritime organizations such as BIMCO, IMB, UKMTO etc.

46 BMP4 is the latest version that was issued in August 2011. These recommendations apply for the high-risk areas defined in these guidelines as an area bounded by Suez and the Strait of Hormuz to the North, 10° and 78°E.


48 Best Management Practices for Protection against Somalia Based Piracy (BMP) 4, section 8.5.
due to the fact that the equipment would not have an impact on the outside of the hull of the ship. Consequently, a voyage in the territorial sea by a ship equipped with physical barriers with a preventive effect used within the hull, along the hull or nearby the hull will be considered as an innocent passage in the territorial sea and these measures would be accepted by coastal states.

4.2.2 Particular on self-defence

As earlier mentioned, the ship owners take protection measures such as physical barriers to prevent pirates boarding a ship. Once the pirates are on board, the crew needs to rely on their own capacity to protect themselves unless the ship owner has put armed guards on board the ship. Questions arise whether the crew can use the right of self-defence and how far these rights go when a ship is under attack by pirates? As concluded earlier, the flag state has an exclusive jurisdiction over a ship on the high seas and therefore, the use of the self-defence depends on the law of the flag state. This requires an examination of a flag state’s national law, which will be done from a Swedish flagged ship’s perspective. The starting point will be to analyse the right to self-defence in Swedish law.

A person can be released from charges if using force as self-defence under some circumstance when some is threatened or attacked. The possibility to exercise self-defence in Swedish law is laid down in chapter 24 section 1 in the Penal Code (1962:700). According to this section, there are four situations when the right to self-defence can be used:

1. an initiated or imminent criminal attack to person or property
2. by a person when someone has stolen goods and is leaving the crime scene
3. when a person unlawfully enter or try to enter into room, house, yard or ship
4. when a person is refusing to leave a house or a flat
Self-defence can be used either when the act is directed against the person itself or when another person is exposed to danger. The person who uses self-defence cannot employ more force than the necessity of the case demands and the force must not be obviously indefensible.\(^4\)

Even if a person exceed these limits and employ more than the necessity demands, the person can be relieved liability if the circumstances were of such a nature that the person could hardly consider these circumstances at the time of the threat or attack. An example of this a robbery situation where in which a robber moves the hand in a way similar to that of a person pulls a weapon. The attacked person interprets it as the robber is going to fire a weapon and deems it necessary to defend himself. A self-defence in such a situation exceeds the limits of self-defence, but a person can be released from charges in such a situation according to chapter 24 section 6 in the Swedish Penal Code (1962:700).

A pirate attack that involves a high degree of brutality and violence, which is the case with piracy in the area of the Gulf of Aden and in the area of the Horn of Africa, could be a situation where persons on board would use the right of self-defence. Considering the violence and the heavy weapons in this kind of situation, there are questions regarding to what extent the crew can use self-defence. To use the same force as the pirates require the crew to have access to weapons when the ship is attacked. The right to carry a weapon and to use it is a question for the flag state on the high seas and Swedish law will apply for a Swedish-flagged ship. The use and possession of weapons are restricted in Sweden. A person needs to apply for a weapon license, state the reason for a weapon license and justify the need for it.\(^5\)

Looking at the situation with piracy in the maritime environment where no police force can come to aid, there could be arguments to equip the crew with weapons. Comparing with a situation in a territory where the response time for a police force to arrive is quite long and it would be

\(^4\) See section 10 in the Police Act (1984:387) in which it is stated that force can be used when other means are not sufficient and it is defendable considering the circumstances.

controversial to give permission to persons carrying weapons to be used in a self-defence situation for the reason that the response time for a police force is long. Even though the circumstances on the high seas are special considering the force and the weapons pirates use and that there is no police force available to come to aid, a solution for the crew to carry weapons on board to use in a self-defence situation is not an option. It would go against the Swedish restrictive weapon legislation. A wider scope of the permission to carry a weapon to use self-defence could in Sweden be regarded as the monopoly of use of force has been delegated which would not be in line with the restrictive weapon legislation.

The possibility to equip the crew with weapons to use it for self-defence is out of the question but what if a member of the crew grabs a weapon from a pirate and uses it to defend himself or another crewmember? As earlier mentioned a person who uses self-defence cannot employ more force than the necessity of the case demands. If a crewmember has taken one of the pirate’s weapon and fire it at a pirate who seems to make a move to use his weapon and there is still a threat at this time then, then it could be an act of self-defence according to chapter 24 section 1 in The Penal Code. Even if the pirate dies, the crewmember could go free from liability on the bases of excess of self-defence in chapter 24 section 6 in the Penal Code. In conclusion, a crewmember can use self-defence to the same extent as on the mainland in a territory but force beyond that would not be allowed according to Swedish law. In conclusion, a crewmember can use self-defence to the same extent as on the mainland and no more force than the necessity demands.

4.2.3 Particular on armed guards on board ships

The ship owners have in addition to protection measures as physical barriers, reporting procedures etc. put armed guards on board ships as a consequence of the particular pirates operating in the area of the Gulf

51 See section 10 in the Police Act (1984:387) regarding which means and force that are indefensible.
of Aden and in the area of the Horn of Africa which involves a high degree of brutality and violence. These guards are heavily armed and can use force which normally is restricted to a state. Questions are raised regarding the legal rights to use armed guards on board ships and the responsibility for actions taken by them. Furthermore, the high seas shall be reserved for peaceful purposes but is this condition fulfilled when armed guards take actions to protect the crew against pirates on the high seas?  

The flag states have chosen different paths regarding armed guards on board ships. Some states have chosen to support using military personnel, which is the case with Italy, the Netherlands etc. Other states such as Norway, Sweden, UK etc. have chosen to grant ship owners permission to use personnel from private companies.  

It is up to each flag state to decide whether armed guards in any form could be used on merchant vessels flying their flag. Even if the individual states have legislated the use of armed guards on board ships there is no international law directly regulating the use of armed guards. Therefore, an examination of the legal bases for armed guards on board ships requires an approach from other angles such as whether a ship’s voyage with armed guards on board would disturb peace and good order. The various maritime zones trigger different jurisdictions which set the limits for use of armed guards and therefore, the starting point is to examine these limits in UNCLOS. 

According to article 87 in UNCLOS, the high seas are open for all states. Furthermore, article 88 and the general requirements in article 301 gives that the high seas shall be reserved for peaceful purposes. It is clear that piracy disturbs, limits the freedom on the seas and is not a peaceful act, but does it justify others to do the same and to respond with the same kind of force with the aid from armed guards? Does the use of armed guards limit the freedom of the high seas? The initiative

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52 See article 88 in UNCLOS.
53 See Surveillance on board ships Act (2013:283).
54 The peaceful purposes is further emphasized in UNCLOS through article 301, which refers to the Charter of the United Nations which has a prohibition of violence in article 2(4).
to use armed guards on board the ships came from the ship owners as a pure protection measure and not as an act by a state to limit another state’s freedom of navigation. It can be argued whether acts by heavily armed guards are acts with a peaceful purpose. The discussions during the process with UNCLOS regarding whether military activities would go against the requirement in article 88 that the high seas shall be reserved for peaceful purposes, could have a bearing on the use of armed guards. Especially when a flag state provide military personnel as armed guards. Going back to the purpose to use armed guards, the purpose is not to claim the high seas or perform an action against another state or to provoke other states. The purpose to use armed guards on board ships is for protection against an international crime in a location where the long arm of a state’s police force cannot reach. It would be hard to see that armed guards would not have a peaceful purpose when it has had a preventive effect on the pirate attacks.

As earlier mentioned, UNCLOS does not regulate the use of armed guards. IMO has seen a need of guidance in this matter and have issued circulars with recommendations. Still, it has to be borne in mind that these circulars are only recommendations, and compared to the requirements in UNCLOS, which serves as the law of the sea for all states, the circulars are non-binding for the states and do not give rights and obligations as UNCLOS does. Consequently, it would leave the legislation and the authorization of armed guards to the flag state, but the legislation needs to be in line with international law and customary law.

The world society seems to have accepted ship owners to equip their ships with armed guards in high-risk areas of piracy on the high seas.

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56 IMO MSC.1/Circ. 1405/Rev.1 Revised interim guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area; MSC.1/Circ. 1406/Rev.2 Revised interim recommendations for flag states regarding the use of privately contracted armed security personnel on board ships in the high risk area; MSC.1/Circ.1408 Rev. 1 Revised interim recommendations for port and coastal state regarding the use of privately contracted armed security personnel on board ships in the high risk area.
Flag states permit ships to have armed guards on board, coastal states such as Kenya, Tanzania and Djibouti accept that armed guards with weapons enter into the coastal state’s territorial sea and to ports. Armed guards on board a ship with the purpose to protect a ship against piracy do not disturb peace and security on the seas, on the contrary it prevents pirate attacks. This altogether could be an indication that the use of armed guards on the high seas is turning into customary law.

In the previous part, the use of armed guards on the high seas was discussed, but could armed guards be used in the territorial sea to protect against armed robbery against ships? As earlier mentioned a flag state continues to have jurisdiction over a ship in the territorial sea, but it is limited by the coastal state’s jurisdiction. Basically, the flag state has jurisdiction for conditions and acts within the hull of a ship, while the coastal state has jurisdiction of acts outside the hull of a ship and a passage by a foreign ship in territorial sea must be in line with the coastal state’s jurisdiction. UNCLOS sets the limits for a foreign ship’s passage and the starting point will be to examine these limits. According to article 19 in UNCLOS, a ship’s passage in territorial sea must be innocent. It is clear in section 2. (b) that any exercise or practice with weapons of any kind is a threat against the peace, good order or security of the coastal state. Any of these activities on a passage in territorial sea will make the passage not innocent. The ships could have guards on board the ship and they could even be trained to use weapons, but any use of weapons or exercise is forbidden according to article 2. (b). Furthermore, the armed guards used on the high seas could either be hired from a private company, or military personnel from the flag state. The latter has an extra dimension that concerns the sovereignty of a state. Bringing military personnel on board a ship could be considered as a threat against the territorial integrity and the sovereignty due to that fact that military personnel represent a function of a state. Unless the coastal state has given its consent to a flag state to bring military

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57 This requires that the ship request to the port in the coastal state well before entering the territorial seas. In addition, a requirement is that the ship has the flag state’s permission to have armed guards on board the ship and that the weapons are kept in a safe and locked place on board the ship during the time in the port. It could also be the case that the authorities come on board the ship in the port and collect the weapons and give them back when the vessel leave the port.
personnel on board a ship, this action would not be considered as an innocent passage in a state’s territorial sea even if the military personnel does not bring or use any weapons.

Furthermore, a state has monopoly of the use of force and coercion and if armed guards on board a ship use force and coercion in territorial sea it would intrude on the coastal state’s sovereignty to create and enforce the law in its territory. A state could of course through legislation make it possible for a flag state to use armed guards on board the ship in territorial sea. This could be an attractive thought looking at the situation off the coast of Somalia and in some other areas, but that would challenge the sovereignty of a state and create a complex situation from many aspects. It would probably require an agreement between the coastal state and the flag state and most probably would both parties request to have the same rights in the two state’s territorial sea. If we imagine that Sweden would sign an agreement that would give Sweden the right to use armed guards in Somalia’s territorial waters and the other way around. That would not be accepted and it is difficult to imagine that a state would go in that direction to permit armed guards in territorial sea. In conclusion, armed guards on board ships in territorial sea would not fulfil the requirements of an innocent passage as defined in article 19 in UNCLOS and it would challenge the sovereignty of a state. Consequently, allowing armed guards on board and permitting them to use weapons in territorial sea would not be a solution to protect ships against piracy in territorial sea.

Going back to the use of armed guards on the high seas, there are some international guidelines for usage of armed guards. BIMCO\textsuperscript{58} provides ship owners with guidelines and standard contracts in the use of guards on board ships.\textsuperscript{59} According to these guidelines the rules for the use of force should be in accordance with the flag state law.\textsuperscript{60} Looking at the

\textsuperscript{58} The Baltic and International Maritime Council.

\textsuperscript{59} See BIMCO’s Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) of a Merchant Vessel (MV) and BIMCO’s Guidance on Rules for the Employment of Security Guards on Vessels.

\textsuperscript{60} See section 3, BIMCO’s Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) of a Merchant Vessel (MV).
use of force which armed guards are equipped and have the competence to use, the protection tasks an armed guard is exercising are close to the tasks for a police. The difference is that a police force is a part of the power of a state compared to the armed guards which are employed by a private company, but permitted by a state through permission to a ship owner. Who would then be responsible for an act by an armed guard? Is it the ship owner, the master of the ship, the private company in which the armed guard is employed, or is it the state which issues the permission to a ship owner to have armed guards on board? In general, it is the master on board a ship who has the responsibility of the ship and in Swedish law this is laid down in chapter 6 in The Maritime Code (1994:1009). The responsibility of a ship remains with the master of the ship even though armed guards are used on board and they act during a pirate attack. The BIMCO standard contract GUARDCON\(^6\) expresses this ultimate responsibility in section 4.8 (a). It is also clearly defined in the same section in 4.8 (c) that the individual person has responsibility for any decision or action. This is in contrast to if the armed guards were military personnel in which situation the responsibility for a decision would be the person who gave the order.

What force can then be used when a ship is under attack by pirates? Flag state decide through national legislation what force would be permitted on board. Even if the armed guards are hired from a company registered in another state than the flag state and the armed guards is of another nationality than the flag state, it is the flag state that has the exclusive jurisdiction of the ship. Consequently, if armed guards are used on a ship flying Swedish flag, Sweden has jurisdiction of the ship on the high seas and Swedish law will apply. The earlier mentioned the Surveillance on board ships Act (2013:283) only gives permission to ship owners to hire armed guards on board merchant ships but it does not regulate what force can be used. The answer of this must be found in the Penal Code (1962:300) which does not regulate this specific situation and consequently the use of force will be limited to self-

\(^6\) BIMCO’s standard contract for the employment of security guards on ships.
defence as defined in chapter 24 section 1 in the Penal Code. Going back to the earlier section regarding self-defence the same applies for an armed guard. A person who uses self-defence cannot employ more force than the necessity of the case demands and the force must not be obviously indefensible.\textsuperscript{62} If the pirates are heavily armed and use high a degree of force against the crew or any on board or against the ship the armed guards could respond to that with the same force but not for preventive purposes. As long as the attack is an on-going series of threat of violence by a pirate then the armed guards could continue to use force, but they would not be allowed to continue to use force once the threat have stopped.\textsuperscript{63} Before it goes that far, the armed guards should take a number of steps before discharging a weapon. BIMCO’s Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV) gives in section 7 guidance on these steps and when to use what degree of force.

4.3 Intervention against piracy

4.3.1 Introduction

Ship owner’s protection measures against piracy are important tools to prevent pirates from attacking and boarding a ship, but unfortunately these measures are not sufficient to combat and repress piracy. Combat and repression of piracy on the high seas is a common responsibility for all states and it requires that the states cooperate. This common responsibility is expressed in UNCLOS in article 100 as “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”. The question is what actions and measures that are required by

\textsuperscript{62} See section 10 in the Police Act (1984:387) in which it is stated that force can be used when other means are not sufficient and it is defendable considering the circumstances.

the states. UNCLOS does not specify further what is required from the states. But due to the fact that the wording in article 100 in UNLCOS is exactly the same wording as in article 38 in 1958’s Convention the High Seas, the comments by the International Law Commission at that time can give some guidance. The Commission commented that a minimum of support from the states would be that if a state has an opportunity to take measures against piracy and neglects this opportunity, then the state fails in the duty that is laid upon it by international law. 64 This would set the minimum level for a state to combat and repress piracy. A state cannot be forced to combat and repress piracy but if a state fails to follow international law and the general rules commonly accepted by the states, then the society of the world can take measures in the form of collective sanctions, reprisals or put pressure on the state by the international opinion. 65 Is it an obligation for the states to combat and repress piracy or is it voluntary? Looking at the wording in article 100 in UNCLOS and in particular the use of the word “shall”, this word indicates an obligation for the states. Examining the use of this word further, the Drafting committee of UNCLOS stated that “‘shall’ denotes an imperative and expresses an obligation”. 66 This follows the same reasoning the International Law Commission did back in 1958. Although, the question remains, how to put the duty to combat and repress piracy into practice.

4.3.2 Seizure

An important tool to combat and repress piracy is states’ rights to intervene in a piracy situation on the high seas by seizing a pirate ship, which is laid down in article 105 in UNCLOS. 67 Seizure of a ship is an intrusion on the flag state’s jurisdiction over a ship, which is exclusive on the high seas, and it brings up questions regarding when and who

64 Yearbook of the International Law Commission, 1956, vol. II, comment to article 38, p 282.
67 Article 105 in UNCLOS, Seizure of a pirate ship or aircraft: “On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”
can seize a ship. The elements to be fulfilled to trigger the possibility for states to seize a ship are as follows: location\textsuperscript{68} is the high seas, a pirate ship or a ship which is under the control of pirates. To start with, the criterion of pirate ship will be examined and then the alternative definition of a ship which pirates have taken the control of.

The definition of a pirate ship is laid down in article 103 which in turn defines it by a reference to article 101. The main elements which defines piracy and which have been examined in chapter 2 are: type of act, purpose, location and the requirement of two ships. Looking at article 101(b), the wording makes a reference to a pirate ship as defined in article 103, and going back to the definition of a pirate ship in article 103, it refers in its turn to article 101. These cross references creates a line of arguments back and forth which do not add further to the definition of a pirate ship and leaves more questions to be answered, which will not be discussed further in this thesis.\textsuperscript{69} In addition to a pirate ship as defined by a reference to article 101, a pirate ship is also considered a pirate ship if ship has been taken by pirates who have the control according to article 103 and therefore this ship could also be seized.

A pirate ship could be any ship which the pirates originally owned or had it in its possession. It could be a skiff, an open whaler, a mothership or a ship the pirates have attacked and taken the control of.\textsuperscript{70} As long as the master and the crew of the attacked ship have the control of their ship, the attacked ship is not considered a pirate ship and consequently no seizure is allowed. Once the pirates take over the control of a ship, it becomes a pirate ship which can be seized by a state on the high seas. According to article 103 the pirates needs to be in "dominant control" of the ship. The ship must not completely have been taken over by the pirates, but if they have the effective control of the ship, then the ship

\textsuperscript{68} The location can be in addition to the high seas "any other place outside the jurisdiction of an State", see article 105 in UNCLOS.


\textsuperscript{70} BMP4 section 4.2.
is considered, a pirate ship.\textsuperscript{71} An example of such situation where pirates have the effective control of a ship is when the pirates have boarded a ship and managed to stop the engine. Even if the ship has armed guards on board and they are still in operation, but the pirates has more control over the ship, then the ship is considered a pirate ship and a seizure is possible. From the attacked ship’s overview of the situation it might be pretty obvious when pirates have taken over the dominant control of the ship, but the question is how the relieving ship will know when a ship has become a pirate ship as per the definition in UNCLOS. BMP4 gives recommendations in section 9 how to act during the various stages of an attack. These recommendations could give guidance to the intervening ship regarding at what stage the pirate attack is and by that make a judgement of if an attacked ship has become a pirate ship, which gives the possibility to seize the ship in accordance with article 105 in UNCLOS. During the approach stage the attacked ship should report the attack immediately to UKMTO and send a distress message.\textsuperscript{72} If the pirates take control of the ship, then the crew should inform UKMTO before the pirates reach the bridge, evacuate the bridge and stop the main engine.\textsuperscript{73} If the attacked ship has taken these measures, the seizing ship can consider the attacked ship as a pirate ship and intervene and seize the ship in accordance with article 105 in UNCLOS. It is important the ship has passed this borderline to be defined as a pirate ship. A seizing ship can be held liable if the seizure is not based on adequate grounds according to article 106 in UNCLOS.

The state’s right in article 105 to seize a ship intrudes on the flag state’s exclusive jurisdiction. Considering that piracy is an enemy of all mankind and has a status as a universal crime and by that has led to an exception to the flag state’s exclusive jurisdiction on the high seas, therefore the states’ rights to seize a pirate ship on the high seas would


\textsuperscript{72} See BMP4 section 9.2 and section 10 for recommendations if the pirates take the control of the ship.

\textsuperscript{73} See BMP4 section 10 for recommendations if the pirates take control.
be justified.\textsuperscript{74} Furthermore, the seizure in article 105 in UNCLOS is limited to the high seas and does not support a seizure in territorial sea. A wider scope of the geographical area intrudes on the coastal state’s jurisdiction and it would create an even more complex jurisdictional environment.

The seizing state does not need to have a consent from the flag state of the ship that is seized.\textsuperscript{75} According to article 107 in UNCLOS a seizure must be carried out by a state’s warship, military aircraft or a ship that can be identified as a ship belonging to a state that carries duties on behalf of a state. It falls natural that the seizing ship represents a government when the seizure is a tool to combat piracy as a universal crime. If other ships than governmental ships would seize a pirate ship then who would be responsible for acts taken by the seizing ship in a maritime zone where no jurisdiction of a state applies.

In addition, to intervene against piracy is a risky operation. The pirates are often heavily armed and the attacks are often brutal, which require skills and equipment to intervene and seize a ship. Most probably it would only be a state which could supply such a ship and crew that could intervene and seize a pirate ship. Furthermore, looking at the type of ship there is no requirement of a specific ship more than it must be a ship in the service of a state and have the authority from a state. The definition in article 107 is a broad definition of what kind of ship can seize a pirate ship, which means a state can then contribute with a police ship, a ship from the coast guard etc. To a small extent this extends the possibilities for the states to fulfil their obligations to repress piracy to their full extent.


4.3.3 Right to visit and hot pursuit

In addition to the tool to seize a pirate ship, the states have a possibility to visit a ship when the ship is engaged in piracy according to article 110. The right for a warship to visit a foreign ship is an exception to the flag state’s exclusive jurisdiction on the high seas, but it is limited to some specific situations listed in article 110 of which piracy is one of these situations. There is a requirement of reasonable ground of suspicious that must be fulfilled before a warship can board a foreign ship. UNCLOS does not provide any further details, but if the degree of suspicious for a right to visit in article 110 is compared to the grounds for seizure in article 105, it can be concluded that it requires more than a suspicion to seize a ship compared to visit a ship. There is also a scale of action depending on the level of suspicion in article 110. The first level is the right to board the ship and if something suspicious is found when checking the documents, the warship can take further actions according to section 2. The compensation clause in section 3 could have a preventive effect on warships to visit ships without reasonable grounds.76

Another tool available in UNCLOS is the right to hot pursuit as defined in article 111 in UNCLOS. It gives the states the right to pursue a ship when a crime has been committed on board a ship which is a matter for the coastal state. Consequently, if the coastal state has criminalized armed robbery at sea in its national law then it gives the state the possibility to exercise its jurisdiction and to pursue a ship. The right to hot pursuit stops at the boarder of another state’s territorial sea including the flag state of the ship but if the ship continues into the high seas the coastal state could continue to pursue the ship.

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4.3.4 Particular about use of military force

An intervention against pirates can be initiated by states which can seize a pirate ship according to article 105 in UNCLOS. In addition, the UN Security Council has through a couple of resolutions given the mandate to states to intervene against piracy off the coast of Somalia through peacekeeping operations under chapter VII in the Charter of the UN.\textsuperscript{77} To intervene against the kind of piracy operating in the area of the Gulf of Aden and the Horn of Africa require competence, equipment and force which most likely only warships in a state can provide with. This raises questions to what extent can military actions be legally justified and who carries the responsibility? Can a State be responsible? Further how are operations under the chapter VII in the Charter of the UN in accordance with the prohibition against violence in the Charter of the UN? Firstly, an intervention against piracy by a state on its own mandate will be examined and then an intervention on the mandate by the UN Security Council will be examined.

As earlier mentioned a state can intervene against pirates and seize a pirate ship according to article 105 in UNCLOS. The seizing state's jurisdiction applies for the governmental ship and the seizing operation. Considering the brutality, force and violence the pirates use in the area of the Gulf of Aden and in the Horn of Africa, the seizing ship in the form of a warship are probably likely required to use the same degree of force, but to what extent can force be used? The right to intervene in a piracy situation, to seize a pirate ship, is the right for a state and it is the seizing state which can exercise the universal jurisdiction and apply the penalty for piracy according to its national criminal law. Consequently, if a Swedish warship seizes a pirate ship then Swedish law applies for the seizing operation. Looking at the authority to exercise force in Swedish law, this is restricted to a police officer according to section 10 in the Police Act (1984:387), but to some extent some tasks and force are delegated to other officials in certain specified

situations which are specified in section 29 in the Police Act.\textsuperscript{78} In addition to these delegations, military personnel in the form of military police has, in accordance with the sections 1 and 11 in Regulation (1980:123) with the regulations of the military police, the same authority as a police officer and can perform the same tasks but only in some situations. A military police officer can only perform duties as a police officer to maintain public order and security within the armed forces and in such exercises armed forces carried out together with other authorities according to section 1 in Regulation (1980:123) with the regulations of the military police. Looking at a situation in which a Swedish warship would seize a pirate ship on its own mandate based on article 105 in UNCLOS, this situation would not fall under the situations listed for when a military police office can exercise the same duties as a police officer. This is neither a situation to keep the public order and security within the armed forces, nor an exercise together with other authorities. Even if the police authorities would be present and participate in the operation, the duties can only be exercised at an exercise. There is nothing mentioned that the delegation of police duties would apply in a real situation such as a seizing operation would be. Consequently, the use of force by military personnel, if trained as a military police officer with support by the Police Act, is not possible. No other legislation in Swedish law support military personnel to use force. The legislation that remains to be used as support to use force, is the right of self-defence which is laid down in chapter 24 section 1 in the Penal Code (1962:700). Same limits for self-defence that applies in general, also applies for military personnel. Force can only be employed to the extent that it is necessary and the force cannot be obviously, indefensible. In addition to the excess of self-defence, in chapter 24 section 6 in the Penal Code (1962:700), military personnel can also be excluded from responsibility in a self-defence situation if an officer has given order of an act that goes beyond the self-defence according to chapter 24 section 8 in the Penal Code (1962:700). The order must be in accordance with Swedish law and to international law according to

\begin{footnote}{78 See Berggren, Nils-Olof, Munck Johan, \textit{Polislagen En kommentar}, Norstedts Juridik AB, 9th edn, Stockholm 2011 p 174.}
\end{footnote}
chapter 3 section 5 in Regulation (1996: 927) with the provisions of Armed Forces personnel. Otherwise the office would be held liable for the act but, not the person who took the action.\(^\text{79}\) Consequently, the limits for use of force by a warship in this situation would be limited to the use of right of self-defence.

In addition to the situation in which a state intervenes by its own initiative based on the mandate given in article 105 in UNCLOS, states can contribute and participate in international operations on the mandate by the UN. The UN Security Council has issued a couple of resolutions which has given states the right to intervene on the basis of Chapter VII in the Charter of UN against piracy and robbery at sea in Somali territorial sea in the Somali territorial sea and to act in accordance with international law.\(^\text{80}\) The main concern of the UN Security Council, which was stated in the preamble of the resolutions as in resolution S/RES/1816(2008), was the concern of the delivery of humanitarian aid, the world food programme, to Somalia. The earlier mentioned resolution and other resolutions by the UN Security Council gave a powerful tool for states to intervene against piracy in territorial sea, not only to protect the transportation of the world food programme but also to intervene when other transportations in this area were attacked. \(^\text{81}\) The resolutions gave the states the right to take the same actions against piracy as are permitted on the high seas and under international law. The states could thereby that use the tools given in UNCLOS such as seize a pirate ship (article 105), right to visit a ship (107) etc. The resolution S/RES/1816/(2008) urged the states to take actions under chapter VII in the Charter of the UN and consequently use of force could is allowed. Chapter VII actions goes against the prohibition against use of force in article 2(4) in the Charter of the UN. The UN has made an exception from the principle of prohibition of

\(^{79}\) A master cannot give this kind of order to the crew. It is not within the authority of a master. The responsibility for a master is regulated in chapter 6 in The Maritime Code (1994:1009).


\(^{81}\) See section 7 in S/RES/1816(2008).
violence in serious situations when there is a threat to peace and security in the world. According to Chapter VII the UN can intervene in such situations and use enforceable measures if decided by the Security Council. To what extent could this force be used? The resolution S/RES/1816/(2008) stipulates in section 7.(b) that the states, in cooperation with the Transitional Federal Government (TFG) in Somalia, could use “all necessary means to repress acts of piracy and armed robbery”. The UN claims that force and coercion beyond the right to self-defence as stipulated in article 51 in the Charter of the UN can be expanded but there is no legal ground for this. From a Swedish perspective there is no specific regulation regarding the use of military force in an operation that appears as an attack rather than self-defence.

4.3.5 Capture

Once a pirate is captured, that person needs to be arrested. The issue though is that according to Swedish law means of coercion are restricted to a police officer. According to section 10 paragraph 2 in the Police Act a police officer can use force when executing the means of coercion of arrest and detention which are laid down in chapter 24 in the Code of Judicial Procedure. Military personnel are not allowed to use the means of coercion, which are laid down in the Code of Judicial Procedure (1942:740). Remaining is the right for each one to intervene which is laid down in chapter 24 section 7 in the Code of Judicial Procedures (1942:740). The issue is that the suspect should promptly be handed over to a police officer, at a far distance. Normally, promptly would be within short, but in this situation it could take one or even two months before the seizing ship can hand over the suspect. Currently, this case has not been tested and this is one of questions that needs to be answered to make it possible to bring the person to court.
5 Conclusions

The pirates operating in the area of Gulf of Aden and the Horn of Africa symbolizes the modern type of piracy with high degree of violence. The legal framework defined in UNCLOS was formed at a time when piracy was not in particular focus and do not cover today’s level of brutality. To combat and to repress piracy and armed robbery at sea is a challenge from many perspectives. This thesis has focused on the legal aspects of piracy, and if the legal framework is sufficient.

The definition of piracy in article 101 in UNCLOS is a broad definition which includes various illegal acts and by that leaves room for interpretation. But a broad definition does not require the states to legislate the crime of piracy exactly as defined in UNCLOS and as long as piracy is criminalized as some kind of act in a state’s national law, a state can exercise the universal jurisdiction in article 105 in UNCLOS. But there is one element in the definition that narrows the definition and the universal jurisdiction which is the geographical limitation to the high seas. The legal tools in the form of seizure and universal jurisdiction do not apply for armed robbery at sea in territorial sea. Considering piracy and armed robbery at sea do not have any geographical boundaries an extension of the universal jurisdiction for the crime of piracy into territorial sea, especially in some areas, would be fruitful to combat armed robbery at sea. But it would create a complex jurisdictional situation and intrude on a state’s sovereignty. This would hardly be a solution that the states would accept and further taking into consideration the time to develop such a convention this is not the way forward. Instead the UN, through its organ IMO, should initiate cooperation between states in high-risk areas in order to develop regional agreements such as the ReCAAP agreement. The Djibouti Code of Conduct is non-binding for the parties. One step forward in the process would be to get binding agreements between the parties, but in the case of Somalia, this would require resources to fulfil the obligations in such an agreement. These kinds of regional agreements
in high-risk areas will to some extent fill the geographical limitation in UNLCOS and unify the definition of armed robbery at sea. It will secure that each state takes the responsibility to combat, repress and intervene against armed robbery at sea in territorial sea. Even though no universal jurisdiction is applicable in the territorial sea, it would be a progress if the coastal states in high-risk area of piracy commit themselves to exercise their territorial jurisdictions. A cooperation between states is the way forward to combat and reduce armed robbery at sea in territorial sea.

The ship owners have taken protection measures to protect their crew and ships, which have been effective and together with military presence in high-risk areas have led to reduced number of pirate attacks. One of these protection measures, armed guards on board ships, is a controversial step, which the ship owners have seen it necessary to take in order to protect their crew and ship. The legal bases for such protection measures are weak. There is no international law which regulates the use of armed guards on board on ships. Each flag state has different rules and regulations but there is no common legal framework which regulates this. The tasks and the forces that armed guards perform are normally within the power of a state and restricted to a state’s police force. From a legal point of view, the use of force will be limited to the use of self-defence in accordance with the law of the flag state. No force beyond that cannot be used with support by any national law, and this is definitely not in accordance with Swedish law. The use of force in this kind of special situation should be regulated, especially when the kind of protection measures could be restricted to a police force in a territory. If armed guards were authorized to use force that goes beyond self-defence, it could be regarded as the monopoly of force by a state thereby been delegated to a private company. This assumption is to some extent true, but to have an unregulated use of force involving heavy weapons and which is only based on self-defence is not sufficient. Altogether, the world society seems to have accepted the use of armed guards on board on ships for protection against piracy on the
high seas in high-risk areas leaning on customary law. Instead I suggest that the use of forces on the high seas should be established in international law, reserving it to be used for peaceful purposes.

Furthermore, when a state intervenes in a piracy situation by seizing a pirate ship, the state will most probably use a warship from the naval force and then this should be defined as a police task, at least according to Swedish legislation. It can be questioned whether military personnel can take the role of a police force. Currently, there is no legislation in Sweden, which supports the use of force by military personnel performing police tasks in a seizing operation and in addition to this, the use of force is not regulated. The only force that can be used by military personnel, from a legal perspective is self-defence, and that is most probably not sufficient to meet the force used by the pirates. There might be a resistant to regulate and give the authority to military personnel to use force beyond self-defence, which normally is restricted to the police force but to have it unregulated is not sufficient. Legislation that regulates the tasks as well as the force used by military personnel in a piracy situation would be necessary to cover this grey area, since the Swedish law does not cover this situation.

Finally, to combat and repress piracy on the high seas require efforts from many and different perspectives and one of them is the legal perspective. In order to solve the issue with piracy and armed robbery, or at least reduce it, requires that one deals with the root cause. Having armed guards on board ships or the use of naval ships for protection are initial some steps to protect and to intervene against piracy but the aid they provide is only temporary aid and piracy will continue to flourish. Maybe piracy and armed robbery is a social problem and by looking into that aspect of the problem piracy might be reduced to a greater extent than if the problem was only dealt with from a legal and from a protective perspective.
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