Juliane Rehberg, M. P. P., Berlin*

Towards An International Piracy Court?

What to do with apprehended pirates has become the central question of the current anti-piracy campaign which came up following recent pirate attacks off the coast of Somalia. While the enforcement of piracy law has been significantly strengthened by the United Nations Security Council in response to the criminal offences, a comprehensive international legal response on how to prosecute pirates is still lacking. This article gives an overview of the international law dealing with piracy including the currently ineffective regime design of law enforcement and adjudication. It uses legal arguments related to customary as well as codified international piracy law to show why an international adjudicative jurisdiction over piracy is an attractive alternative to traditional mechanisms. The article also aims to discuss the pros and cons regarding the likelihood of the different options at hand for an international piracy court to develop.

I. Introduction: Actuality and Relevance of the Topic

Piracy, "the oldest of international crimes", has witnessed a revival with an unprecedented rise in maritime hijacking in 2008, with 889 crew members having been taken hostage and eleven being killed.[1] Between 2006 and 2009 the number of incidents of piracy and armed robbery increased from 293 to 406 incidents. More than half of the 2009 incidents were reported to have occurred on the east coast of Somalia and in the Gulf of Aden alone – also called the "Pirate Alley".[2] Piracy, however, has attracted global attention not only because of the pirates' disposition to violence. Naval security is of vital interest for the international community as the world benefits from international trade with the majority of commodities being transported by sea. This is especially the case in view of the coast of Somalia as the Gulf of Aden, one of the most important trade gateways linking the Indian Ocean to the Mediterranean Sea, is used by 17,000 ships a year carrying 3.3 million barrels of oil a day from the Middle East to Europe.[3]

The current rise of piracy has political roots: the existence of the failed state *per se* – Somalia – bringing about poverty and uncontrolled violence at land and sea. The means to combat it are mainly of military and legal nature. However, while piracy law that governs the apprehension of pirates is going forward by an increased legal authorization to use force against pirates, there exists no comprehensive international response for prosecuting pirates. How to deal with captured pirates is therefore the central question of the current anti-piracy campaign. The answer given by former German Defence Minister *Jung* and Russian President *Medvedev* is that suspected pirates should face an international court.[4] This essay therefore considers piracy adjudication jurisdiction to be the most relevant area of the current piracy debate[5] and seeks to discuss the main legal arguments why pirates should and could be prosecuted via international judiciary.

This article shall proceed as follows: first, the legal framework for combating piracy is outlined and analysed in view of the mechanisms to apprehend and prosecute pirates. Second, the paper looks deeper into why international judiciary is a considerable option. Third, it assesses whether the development of an international piracy court is a viable option.

* *Juliane Rehberg* graduated at the Hertie School of Governance in Berlin, Germany as part of the Master of Public Policy Class of 2010. The article was written as a term paper in the seminar "International Law in World Politics" given by *Dr. Nico Krisch,* Professor of International Law, during the fall semester 2009. Since December 2010, *Juliane Rehberg* works as desk officer for the international section of the German Federal Ministry of Labour and Social Affairs in Berlin. All *opinions* expressed in this *article* are those of the *author* and do not *reflect* those of the Hertie School of Governance or the German Labour Ministry. The author would like to thank *Philip Horsfield,* research assistant and PhD student at the Department of Criminology in Greifswald, and *Dr. Nico Krisch,* Professor of International Law, for their helpful comments.

1 See *International Maritime Bureau (IMB) Piracy Reporting Centre (PRC),* icc-ccs.org, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=332:imb-reports-unprecedented-rise-in-maritime-hijackings&catid=60:news&Itemid=51 (12.12.2009).

2 See *International Maritime Bureau (IMB) Piracy Reporting Centre (PRC),* icc-ccs.org, http://www.icc-ccs.org/news/385-2009-worldwide-piracy-figures-surpass-400 (12.01.2011).

3 See *Mike Pflanz,* telegraph.co.uk, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/2602651/Pirates-hijack-record-four-ships-off-Somalia.html (12.12.2009). In November 2009, pirates captured one of the world's largest commercial vessels. The Saudi-owned "Sirius Star" was worth $ 100 million and loaded with two million barrels of oil, worth another $ 100 million. See for BBC World News America, http://www.youtube.com/watch?v=fphsPcvYLaM (12.12.2009).

4 See *New York Times,* nytimes.com, http://www.nytimes.com/2008/12/23/world/africa/23iht-23germanpirates-FW.18893813.html (12.12.2009) and *Megan O'Toole,* network.nationalpost.com, http://network.nationalpost.com/np/blogs/posted/archive/2009/05/04/today-in-piracy-russian-president-calls-for-international-pirate-court.aspx (12.12.2009).

5 For a good overview of the current debate see e. g. *Robin Geiss/Anna Petrig,* UN-mandatierte Piraterie-Bekämpfung im Golf von Aden – Langfristige Lösungen müssen gefunden werden, VN 2010, 3; *Andreas Fischer-Lescano,* Bundesmarine als Polizei der Weltmeere?, NordÖR 2009, 49; *Uwe Jenisch,* Pirateriebekämpfung vor Somalia auf dem Prüfstand – Mandate, Marinen, Mängel, NordÖR 2009, 385; *Anna Petrig,* Ungelöste Probleme der Pirateriebekämpfung vor Somalia, NZZ 2009, 9.

II. Background: Piracy and the Law of the Sea

1. Customary Law

Pirate attacks emerged increasingly alongside the development of international traditional sea trade routes in the seventeenth century.[6] Since the nineteenth century an international legal regime developed in response to the threat of piracy treated as a *hostis humani generis*: an enemy of all mankind.[7] In consequence, international customary law made piracy an offence of universal jurisdiction, such that any state may seize a ship engaged in piracy, and any state may prosecute a pirate according to that state's own law.

2. Multilateral Treaties and Agreements

The main source of the codified international piracy law is the 1982 United Nations Convention on the Law of the Sea (UNCLOS) ratified to date by 158 countries and the European Community.[8] Article 101 UNCLOS defines piracy as "any illegal act of violence, detention or depredation committed for private ends by the crew or passengers of a ship" and directed against another ship on the "high seas", or outside the "jurisdiction of any State". This definition reflects universal jurisdiction, while however excluding political, not privately motivated acts of piracy. It also leads to two categories of maritime zones of modern law on piracy: 1) "traditional" piracy acts which occur on the "high seas"[9] beyond the twelve nautical mile limits of state sovereignty and against which UNCLOS allows for the seizure of pirates on the high seas as well for prosecution of the pirates in the courts of the capturing state under Article 105, and 2) pirate-type acts not defined as piracy under UNCLOS, often referred to as "armed robbery", which occur within territorial waters and against which the coastal state is responsible to take action. In this case, other states would violate international law and national sovereignty when entering territorial waters.[10]

A regime has thus developed which is dependent on the fulfilment of the functions to secure waters as well as to try pirates by directly affected states.[11] Legal loopholes become visible as Somali authorities are neither able nor willing to fulfil these functions. UNCLOS also reduces the area where piracy can be internationally policed and prosecuted. For example in the Gulf of Aden as a narrow corridor, pirates are able to launch attacks in international waters and then return to Somali territorial waters where international intervention is not authorized by UNCLOS.[12]

The international community responded to these legal impediments by a number of United Nations Security Council (UNSC) Resolutions.[13] Res. 1816 authorizes states to enter the territorial waters of Somalia to undertake "all necessary measures" against piracy and armed robbery. This was renewed by Res. 1846 and extended by Res. 1851 which authorizes armed action also in Somali land territory and encourages shiprider agreements allowing regional states to facilitate prosecution and investigation.

All resolutions require any action in Somali territory to be in consent with the Somali Transitional Federal Government (TFG) as well as with international humanitarian law. The latter creates difficulties as pirates are said to be hybrids, acting in the grey zone between military combatants and civilian criminals.[14] Under international humanitarian law civilians may not be targeted except in immediate self-defence.[15] Thus, any action against pirates entails a risk of causing civilian casualties due to the difficulty of distinguishing pirates from anyone else. Yet, the maritime security powers conferred upon states to capture pirates translated into several armed anti-piracy missions.[16] Without a common leadership, they however stay incomprehensive with respect to the enforcement of either international law or domestic criminal law.

Pirate attacks are also punishable under the 1988 Convention for the Suppression of Unlawful Attacks against the Safety of Navigation (SUA Convention), which was signed by 156 states.[17] Article 3 (1) of the Convention

6 See *Donald R. Rothwell,* crimesofwar.org, http://www.crimesofwar.org/onnews/news-piracy.html (12.12.2009).

7 See *Eugene Kontorovich,* globallawforum.org, http://www.globallawforum.org/ViewPublication.aspx?ArticleId=96 (12.12.2009).

8 The US has not ratified UNCLOS, but the successor agreement.

9 See Art. 101 (a) (i) UNCLOS defining acts as piracy only when committed on high seas, and Art. 105 UNCLOS authorizing seizure of pirate ships only on "high seas".

10 This definitive weakness of UNCLOS is increasingly remedied by the International Maritime Organisation (IOM) code of practice which defines piratical acts in ports or national waters as "armed robbery against ships". See *Keyuan Zou,* New Developments in the International Law of Piracy, Chinese JIL 2009, 323 (326).

11 See *Roger Middleton,* Pirates and How to Deal With Them, Chatham House Africa Programme/International Law Briefing Note: AFP/IL BN 2009/01, 1 (3), chathamhouse.org, http://www.chathamhouse.org.uk/files/13845_220409pirates_law.pdf (12.01.2011).

12 See *Martin Murphy,* Piracy and UNCLOS: Does International Law help States to Combat Piracy, in: Peter Lehr (ed.), Violence at SEA: Piracy In The Age Of Global Terrorism, 2007, 155 (161–163).

13 UNSC Res. 1816 (2008) (02.06.2008); UNSC Res. 1846 (2008) (02.12.2008); and UNSC Res. 1851 (2008) (16.12.2008).

14 See *Wesley K. Clark/Kal Raustiala,* nytimes.com, http://www.nytimes.com/2007/08/08/opinion/08clark.html (12.12.2009).

15 See *Eugene Kontorovich,* International legal responses to piracy off the coast of Somali, ASIL 2009, footnote 9 pointing to the Geneva Conventions on the Laws of War, Common Art. 3 (1) (1949), the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II] (8 June 1977) Art. 13 (banning attacks on civilians); see also, International Covenant on Civil and Political Rights Art. 6 (1)-(2) (1976) (prohibiting extrajudicial killing). While the Geneva Convention does not by its terms apply to conflicts with pirates on the high seas, the minimal obligations of Common Art. 3 are widely thought to be generally applicable to all uses of military force as a matter of customary law.

16 See for a detailed analysis of international mandates of NATO and EU *Jenisch* (Fn. 5), NordÖR 2009, 385 (387 f.).

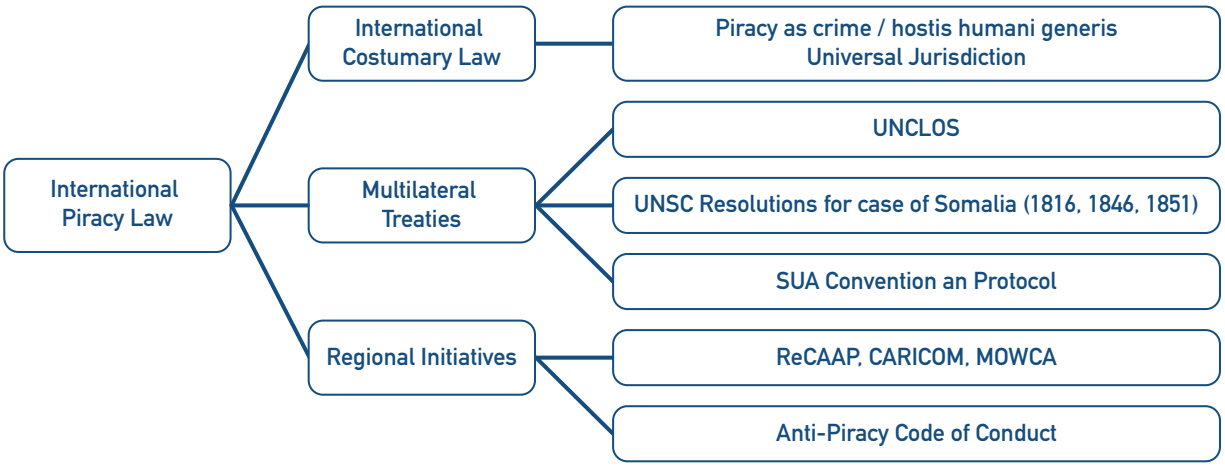
17 See International Maritime Organisation (IMO) Documentation, imo.amsa.gov.au, https://imo.amsa.gov.au/public/parties/sua88.html (12.12.2009).

does not distinguish between maritime areas. The SUA Convention gives jurisdiction over covered offences to all contracting parties either to extradite or prosecute alleged offenders.[18] Article 17 of the 2005 revised SUA Protocol, which has only been signed by seventeen states so far, entails the new "multilateral ship boarding provision" with automatic agreement of the flag state.[19] The SUA Protocol also widened the scope of the international regime to include acts of maritime terrorism and political piracy.

lowing anti-piracy missions in national territory. However, according to UNCLOS captured pirates are to be punished under the national criminal law of the capturing state and not under international law in an international tribunal.

The effectiveness of the international piracy regime is assumed to derive from the successful interplay of both enforcement and adjudication: without the right means to capture pirates, there will be no lawsuit. Also, it is unlikely that piracy can be stopped if pirates are not prosecuted as chances are very high that they will return to their previous piratical activities. However, as indicated above, jurisdictional loopholes such as definition-based issues or tensions with other agreements as well as practical matters such as the political will[21] or capacity of states to implement the given rules can significantly weaken the available mechanisms of apprehending and prosecuting pirates. The latter issue shall be analysed more deeply in the following.

Figure 1: International Law on Piracy



3. Regional Initiatives

Regional initiatives of neighbouring states to combat piracy add to the legal customary and codified regime. The most significant at the moment is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP), which was signed by 14 states and the anti-piracy code of conduct between Arab and African countries.[20] Participants intend to co-operate in the arrest, investigation and prosecution of pirates.

To conclude, the provisions of the international legal regime on piracy, summarized in figure 1, closely link the elements of enforcement and adjudication. Pirates may be captured on the high seas under international law. This was strengthened for the case of Somalia by UNSC al-

III. International Piracy Judiciary as a Desirable Option

This part shows that in spite of the widened scope of international law – especially concerning new developments in UNSC Resolutions, an enhanced role of the SUA and regional agreements – the current legal framework opting for domestic and regional trials is inadequate for prosecuting pirates effectively.

1. Domestic Courts

In practice, trials in the courts of the capturing nation, even though they are firmly rooted in customary and con-

18 See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, imo.org, http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686 (12.12.2009).

19 These are Austria, Bulgaria, Cook Islands, Dominican Republic, Estonia, Fiji, Latvia, Liechtenstein, Marshall Islands, Naru, St. Kitts and Nevis, Saint Vincent and the Grenadines, Serbia, Spain, Switzerland, Syria, Turkey and Vanuatu. See IMO Documentation, imo.amsa.gov.au, https://imo.amsa.gov.au/public/parties/suaprot05.html (12.01.2011).

20 ReCAAP signatories are Bangladesh, Brunei, Cambodia, China, India, Japan, Republic of Korea, Laos, Myanmar, the Philippines, Singapore, Sri Lanka, Thailand, and Vietnam. Other regional agreements are "CARICOM Maritime and Airspace Security Cooperation Agreement", see Law of the Sea Bulletin 68 (2008), 20–31; and "MOWCA Maritime Organisation of West and Central Africa" for 20 states from Mauretania to Angola of which only eleven signed, see Law of the Sea Bulletin 68 (2008), 51–70. For the code of conduct see Djibouti meeting, 26 January 2009, IMO News Magazine 2009, Issue 1, 1 (7).

21 In the words of former US Secretary of State *Rice* in her declaration of 16 December 2008 before the Security Council: "the international community already has sufficient legal authority and available mechanisms to apprehend and prosecute pirates, but sometimes the political will and the coordination have not been there to do so", Provisional Records of the Security Council S/PV.6046, 1 (10).

ventional international law under UNCLOS, have so far been treated as a temporary and disliked solution rather than a serious option in the longer term.

In fact, with the explosion of incidents over the last two years, the number of domestic trials, especially in the developed world, might have increased. As the New York Times reports, a federal court in the US state of Virginia convicted five Somalis of piracy who were captured in an April 2010 attack on a US guided-missile frigate. [22] Yet, as the author shows, these were the first defendants to be tried for piracy in the US since the early 19th century. As pointed out in the same article, since November 2010, a juvenile court in Hamburg has been the venue for a German piracy prosecution – the first in 400 years. All in all, however, the proportion of prosecuted pirates in national trials compared to the total number of incidents and the number of caught pirates is a lot smaller than the number of released pirates.[23]

Given the increasing number of piracy incidents, the UNSC also promoted nationalized prosecution of pirates: UNSC Resolution 1918 of April 2010 calls on all nations to criminalize piracy in their domestic law.[24] As part of the same resolution, however, UNSC also requests the Secretary-General to present a report on possible options „to further the aim of prosecuting and imprisoning pirates, including, in particular, options for the creation of special domestic chambers, possibly with international components, a regional tribunal, or an international tribunal to that end".[25]

Notwithstanding the recent engagement of the developed world and the UNSC – all this reflects governments' reluctance to prosecute pirates in their own courts. This reluctance is rooted in a wide range of anticipated difficulties and expenses:

As UNSC Resolution 1846 recognizes, "the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture" has hindered more robust action against pirates. This is obvious in cases of weak states such as Somalia which are breeding grounds for piracy. Yet, warships from functioning states also released pirates, as their national judiciaries are not prepared for cases of foreign pirates on the high seas.[26]

The legal complexities and logistical problems inherent in criminal proceedings to be held in faraway courts, i. e. in the EU and the US, increase the burden and costs of trial with extraordinary measures to be taken such as transportation of prosecution including defendants and witnesses as well as the provision of translation.[27] Lacking clarity and preparation seems to be a side effect of the current international legal regime itself producing tensions similar to the case of international terrorism – involving "conflicts between older rules designed to promote international security and newer ones aimed at protecting individuals from abuse by state authority."[28]

A problem which hinders capturing states in bringing prosecutions is e. g. the status of pirates: piracy is not a full-time job – the perpetrators are often fishermen.[29] In consequence, it is potentially rather difficult to prove who is a pirate.[30] It is hence not entirely clear whether pirates, being neither true civilians nor true combatants, are protected by international humanitarian law or even by country-specific protections. Being part of this grey zone, pirates could for example claim combatant status under the Geneva Convention, opening up a procedure which increases the uncertainty and cost involved. Another legal insecurity why capturing states, even those with sufficient capacities to carry out arrest and seizure, might hesitate to prosecute pirates is the risk of abuse allegations by pirates.[31] Also, during the domestic trial pirates could become a burden for the capturing nation by claiming refugee or asylum status when proving that their detention violates their human rights.[32]

2. Regional Trials

In case the capturing nation is not willing or able to prosecute, an available alternative to setting pirates free is transferring them to a cooperative third country in the region. UNSC Res. 1851[33] authorizes "special agreements between states and regional organizations fighting piracy with countries willing to take custody of pirates" in order to allow local law enforcement officials (shipriders) to pursue, arrest and prosecute the pirates.[34] Regional piracy tri-

22 See *Robert Mackey,* nytimes.org, http://thelede.blogs.nytimes.com/2010/11/24/somali-pirates-convicted-in-virginia/ (12.01.2011).

23 "Catch and release" seems to be the dominant practice due to a lack of prosecution. For instance, European countries caught 275 pirates in March and April 2010 and released 235 of them. See *Oliver Hawkins,* bbc.co.uk, http://www.bbc.co.uk/news/world-africa-11813168 (31.01.2011), and *Craig Whitlock,* washingtonpost.com, http://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303893_2.html?sid=ST2010052903844 (31.01.2011).

24 See Security Council Resolution 1918, un.org, http://www.un.org/News/Press/docs/2010/sc9913.doc.htm (12.01.2011).

25 Report of the UN Secretary-General S/2010/394, daccess-dds-ny.un.org, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/425/07/PDF/N1042507.pdf?OpenElement (12.01.2011).

26 See *Jenisch* (Fn. 5), NordÖR 2009, 385 (387).

27 Legal lawsuit costs for pirates cannot be assessed with certainty as almost no prosecutions in domestic courts have taken place.

28 *Eugene Kontorovich,* "A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists, CLR 2010, 243 (256).

29 See *Kontorovich,* globallawforum.org (Fn. 7).

30 For example in March 2009 nine pirates captured by the US had to be released as the evidence against the nine men „was not ironclad," partly because they were discovered at night. See *Kate Wiltrout,* The Virginian-Pilot 2009, hamptonroads.com, http://hamptonroads.com/2009/03/nine-suspected-pirates-set-free-others-could-face-trials (12.12.2009).

31 It is not unlikely that abuses regarding torture and denial of religious practices might be directed at the US and Europe as trial agreements could be perceived as attacks on Muslims and parallels could be drawn to Guantanamo. See *Kontorovich* (Fn. 28), CLR 2010, 243 (266).

32 See *Jenisch* (Fn. 5), NordÖR 2009, 385.

33 Also UNSC Res. 1816 had referred to regional cooperation and mutual assistance.

34 UNSC Res. 1851, at para 3. "Shipriders" are used in some bilateral agreements concluded by the US regarding drug trafficking, as, for instance, the Agreement concluded with Jamaica in 1997, Art. 7–9; they are mentioned also as "Embarked Officers" in the

als thus usually function on a case-by-case basis and are set up by bilateral agreements.

As encouraged by UNSC Resolutions, regional trials have taken place in the Somali case by capturing states transferring pirates to Kenyan courts.[35] ReCAAP activities have been used in the ASEAN region to decrease the number of piracy attacks, however, no special trials are known.

In practice, the alternative of regional cooperation in prosecuting pirates has certain advantages for sending states: they do not have to transport pirates to far away courts and can expect a rather speedy and informal trial.[36] In addition, regional similarities concerning language and culture might facilitate the process of prosecution. However, the problem of sending pirates back to their respective home country after trial in a third country remains. In addition, one can assume that the administrative cooperation by a third country is not free, and that something has to be offered in exchange for the prosecutorial assistance.

A legal problem that applies to all trials in third countries is that they can conflict with the sending state's obligation of non-refoulement[37] which prohibits sending people to countries where they will likely be abused. Many third countries in the region of Somalia themselves have no functioning governments and accused pirates would likely be subject to unfair trials.[38]

Furthermore, from a legal viewpoint, regional trials – even when encouraged in the case of Somalia by UNSC Res. 1851 – can be construed to be not in accordance with Article 105 UNCLOS which provides that the prosecution should be by "the courts of the state which carried out the seizure". The drafting history of this Article indicates that the original purpose of this was to exclude transfers to third-party states.[39] The other viewpoint is that Article 105 could be interpreted to mean that states may not try pirates on board the captured (potential third party) vessel hence not expressly prohibiting the practice of prosecution by other third party states other than of the pirates' ship nationality.

These problems posed by UNCLOS are the reason why officials have included the SUA Convention in UNSC Res. 1846 and 1851 which provides a clear mechanism for effective consequence delivery. Article 6 SUA Convention obliges any signatory, not only capturing states, to "take such measures as may be necessary to establish its jurisdiction" over anyone who commits a criminal offence in the sense of Article 3 (1) which corresponds with high sea piracy as well as armed robbery in territorial waters.[40] These advantages over UNCLOS are outweighed due to the limited scope of prosecution under the SUA Convention. Only one reported case of prosecution solely under the SUA Convention exists, and UNSC Resolution authorization to widen UNCLOS is limited in time and to only one country – Somalia.[41] Reluctance of states to use the SUA Convention as a basis for prosecution, though encouraged by the UN Generally Assembly[42], might thus be caused by the fact that there remain many open questions regarding the applicability of the SUA treaty, specifically in its combination with UNCLOS.

Moreover, there remain loopholes with respect to the pursuit of criminal charges not included in Article 2 where non-nationals or non-state vessels are involved. Even in the case of Somalia it is not clear how to apply the SUA Convention as Somalia has signed neither SUA 1988 nor SUA 2005.

Similar to SUA, ReCAAP and the Antipiracy Code of Conduct expand UNCLOS on a regional level. States are obliged to cooperate in their action against both high sea and coastal piracy. ReCAAP includes shiprider agreements and envisages that signatory countries review their legislation so that there are national laws in place that criminalize piracy. The problem here is, again similar to the SUA, that important states have not signed the treaty or are part of alternative agreements. [43]

As summarized in figure 2, an alternative governance option in form of an international piracy judiciary is desirable, as existing nationally and regionally rooted venues of prosecuting pirates, derived from customary law, multilateral treaties and regional and bilateral agreements, are limited in offering effective legal protection.

International adjudicative jurisdiction would free policing countries of the dilemma of handling prosecution themselves regardless of capacities or political will. A positive aspect would be the clear competence of the international body in cases where national structures are insufficient or unclear about jurisdiction. The burden of the trial could be shared as well as the risk of abuse allegations and the future treatment and location of pirates cushioned collectively by the international community. International expertise could be developed in the long-run so that

above-quoted Code of Conduct of 2009 for the West Indian Ocean and the Gulf of Aden (Art. 7).

35 Special agreements have been established prior to that in form of Memoranda of Understanding (MoUs) between the UK/Kenya, US/Kenya and EU/Kenya. See *Jenisch* (Fn. 5), NordÖR 2009, 385; and *Tullio Treves,* Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia, EJIL 2009, 399 (411). The exact contents of MoUs are unfortunately not accessible.

36 See *Kontorovich,* globallawforum.org (Fn. 7), Chapter III. A. 1.

37 See U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 3 (1), G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984).

38 This is partly accommodated for example in the EU/Kenya MoU which renounces the death penalty, torture and guarantees a fair trial, interpreter and access of EU observers. See *Jenisch* (Fn. 5), NordÖR 2009, 385 (387).

39 See *Kontorovich* (Fn. 28), CLR 2010, 243 (270) quoting the Report of the International Law Commission, Commentary of Art. 43: "This article gives any State the right to seize pirate ships […] and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another State."

40 Under Art. 4 the SUA Convention is explicitly not limited to acts on the high seas.

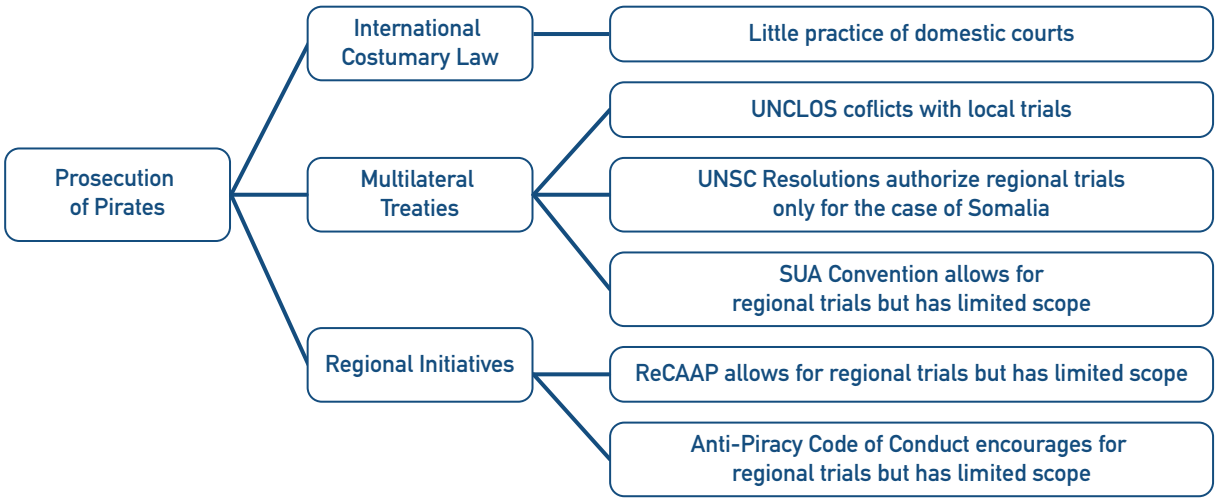
41 See *Kontorovich* (Fn. 28), CLR 2010, 243 (254).

42 See UNGA Res. 62/111 (12.02.2009), para 61–69.

43 In the case of Asian cooperation, Malaysia and Indonesia as the most important riparian states of the Street of Malacca have their own security mechanism together with Singapore. In the case of the African-Arabian Code, only nine of 21 states have signed it so far. See *Jenisch* (Fn. 5), NordÖR 2009, 385 (387).

initially increasing collective costs remain constant from a certain point. Finally, the strengthening of legal control in view of prosecuting pirates could have spill-over effects to an improved coordination of anti-piracy measures also before trial.

Figure 2: The Limits of Existing Venues of Prosecuting Pirates



IV. International Piracy Judiciary as a Viable Option

After having collected arguments for desirability, this chapter assesses the viability of an international trial. This will be done by looking at the pro and contra arguments in view of the different possible options as well as how likely it is that they will be realized.

1. Ad hoc International Piracy Tribunal

Such a tribunal could act to prosecute individuals responsible for acts of piracy under UNCLOS or crimes against international shipping as envisaged under the SUA Convention – analogue to other *ad hoc* tribunals like in the cases of Former Yugoslavia and Rwanda – under Chapter VII of the UN Charter.

The establishment of such a tribunal would present an adequate and effective short-term solution, using specialized indictors to free domestic courts from the burden of trial. The main contradicting argument, apart from the costs to set up such an *ad hoc* court, is however – similar to the past UNSC Resolutions on Somalia – that the authorization is limited *ratione temporis* and *ratione loci*: a temporary solution in one or a few situations[44].

In three anti-piracy resolutions, the UNSC strengthened anti-piracy measures by acting under Chapter VII of the UN Charter, and according to Article 39 of the UN Charter, determining the existence of piracy as a threat to the peace. Under Article 40 and 41 of the UN Charter, the UNSC could thus also decide on measures to prosecute pirates in an *ad hoc* international trial. This option seems increasingly viable as the new US government as well as the Russian president's comments raise hope.[45] What might speak against this option is that it is ever more questioned in academic and expert circles whether piracy is a threat to worldwide peace justifying the UNSC to use Chapter VII.[46]

2. Permanent International Piracy Tribunal

The establishment of a separate new international piracy court is a possible yet unlikely option. The UNSC could act under Chapter VII to establish it in the beginning – which is however questionable for the case of piracy as elaborated above. Such a new piracy court could be founded ordinarily by an international legal treaty between all countries. The downside of a specialized body would however be the high financial costs and time of setting up a new treaty with a ratification procedure as well as installing entirely new structures.

3. International Tribunal for the Law of the Sea (ITLOS)

ITLOS, which was established by UNCLOS, entered into force in 1994. Its task is settling disputes between the parties of the treaty. Apart from states, international organizations, natural and legal persons also have access to the Tribunal.

It might be perceived as a positive idea to use the existing structures of ITLOS to deal with the piracy issue in order to save costs. Theoretically, piracy could also be brought to the court when for example one state accuses another state of not having undertaken sufficient measures in combating piracy.[47]

44 See *Treves* (Fn. 35), EJIL 2009, 399 (404 f.).

45 See *New York Times,* nytimes.com, and *O'Toole,* network.nationalpost.com (each Fn. 4).

46 See for example press release of the Expert Meeting on Multinational Law Enforcement & Sea Piracy held at the Max Planck Institute for Foreign and International Criminal Law (MPICC), iuscrim.mpg.de, http://www.iuscrim.mpg.de/shared/data/pdf/press_release _expert_ meeting_english_mpg.pdf (12.12.2009).

47 Compare *Rüdiger Wolfrum,* itlos.org, http://www.itlos.org/news/statements/Wolfrum/%DCbersee-Club_Vortrag.final.27.2.08.

Limitations however derive from the legal procedure outlined in Article 287 UNCLOS.[48] Parties to the UNCLOS can choose between three dispute settlement mechanisms: ITLOS, International Court of Justice (ICJ) or arbitration. Offender and defender have to agree on the means of dispute settlement.[49] In practice, when brought to court, some parties have overruled the dispute settlement of ITLOS by declarations excluding several issues from obligatory jurisdiction under UNCLOS.[50] This explains why ITLOS has only decided on 15 cases so far and why, even if a claim regarding piracy as outlined above were to be issued, it is very unlikely that it would be brought before the ITLOS. As none of the few cases of ITLOS concerned piracy in any way, legal practice on piracy is generally not existent.

Additionally, it becomes clear that ITLOS is not a criminal court in nature and judges are specialized in law of the sea and not in criminal law. ITLOS has thus simply no capacities to deal effectively with piracy as a crime. Expending ITLOS to prosecuting pirates would not only require a significant elaboration of existing legal structures. The expansion of the ITLOS competences to include the prosecution of pirates would probably require the installation of a special piracy chamber and access for individual complaints. Such a special agreement would bring about an amendment of UNCLOS and would have to be authorized by all 159 parties by the non-objection amendment procedure under Article 313. This is rather unlikely as the existing consensus would have to be reopened in a time-intensive procedure to which many states certainly would object in view of costs and increased legal vulnerability. Overall, mandating ITLOS to deal with the pirates is a rather unviable option due to its general nature as a dispute settlement body rather than a criminal court, the high material costs and the potential impracticality and resistance of expanding its competences.

4. International Court of Justice (ICJ)

The ICJ was established under Chapter XIV of the UN Charter. Its main functions are to settle legal disputes submitted to it by states and to give advisory opinions on legal questions. Only states can access the court.

Piracy could theoretically be delegated to ICJ dispute settlement by the above described UNCLOS procedure when parties would actively choose the ICJ to decide on the issue. This expansion of the court's competence is however very unlikely because of the same reasons outlined above.

5. International Criminal Court (ICC)

The ICC is governed by the Rome Statute, which entered into force in July 2002, and is the first permanent, treaty based, international criminal court dealing with the most serious crimes of concern to the international community.

Establishing an additional competence of the ICC in view of piracy would be advantageous in view of using an already existing structure of international criminal prosecution. According to Article 13 (b) of the Rome Statute the ICC may exercise its jurisdiction with respect to a crime referred to in Article 5 when such a crime is assigned to the court by the Security Council acting under Chapter VII of the UN Charter. Similar to the option of an *ad hoc* piracy tribunal, it might be questionable whether piracy fulfils the requirement of Article 39 but it is still not entirely unlikely that the UNSC refers the situation to the ICC under Article 40 and 41 of the UN Charter. Assuming the UNSC intends to make a referral to the ICC, the problem remains that piracy is not an Article 5 core crime[51] of the ICC. The only possibility to assign the ICC with prosecuting piracy would thus be to add piracy to the core crimes by modifying the Rome Statute. This can be done in two ways: Articles 9 and 121 require a two-thirds majority of the state parties and ratification by seven-eighths for amendments initiated by parties. Also, a review conference in accordance with Article 123 can consider amendments in view of the list of crimes when integrated in the agenda. States may only propose amendments and hold a review conference seven years from the statute's entry into force. Hence, the earliest date for proposals was July 2009. The review conference took place in Kampala, Uganda from 31 May to 11 June 2010. Piracy was not dealt with on the agenda of the review conference.[52]

Overall, the extension of ICC competence would not add significant costs of creating new structures. The decisive factor for its viability is the pirates themselves and whether the threat they present to the state parties will significantly increase or decrease. The conference was a unique chance to add piracy to the list in the short-run. However, in view of the relative gravity of the other core crimes in comparison to piracy, which is mostly harmful to the economy rather than to human lives, it was not added to the established agenda. Also, in the long-run the widened competence of the ICC is not likely to be established for piracy as the threat will probably not be comparable to the core crimes.

pdf (12.12.2009).

48 See detailed information *Wolfrum,* itlos.org (Fn. 47).

49 Mostly states do not give a preference so that, according to the rules of procedure, they implicitly vote for arbitration. The reason for establishing this procedure is that states perceive arbitration as less influencing their sovereignty because in this way, they can decide on arbitrators.

50 So the US e. g. regarding security issues and the EU for issues regarding EU competences that have to be brought to the European Court of Justice (ECJ) instead.

51 These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

52 Until now, it will deal mainly with the crime of aggression. See Review Conference of the Rome Statute, iccnow.org, http://www.iccnow.org/?mod=review (12.01.2011).

6. International Piracy Chambers at National Courts[53]

Encouraged by the UNSC and with the consent of the respective state, specialized chambers affiliated to national courts could be set up. These chambers would be equipped with the necessary resources and manpower (experienced judges, specialized lawyers, translation services). The financial burden could be shared by all UN member states.

The pro arguments for such special "internationalized" chambers are the low costs of partly using national structures and the simultaneous expansion of national capacity in the long-run by the cooperation of national and international experts. The argument against this option when applied only to Somali piracy is similar to the *ad hoc* tribunal which is limited in time and applicable situations. It would be desirable to install an international mechanism to set up such chambers. This option is not entirely unthinkable as it has already been considered by the UN contact group on piracy off the coast of Somalia as well as by the recent report of the Secretary-General.[54] It has many of the above stated benefits, such as building on existing structures of national judiciary and internationally shared burden, but fewer of the downsides, such as time-consuming amendments and opening up long-standing consensus.[55]

V. Conclusion

The main purpose of this paper was to explore the existing legal regime on piracy, its legal insecurities in view of the interconnected enforcement and adjudication mechanisms, and especially in view of the latter issue of prosecuting pirates. It emphasized that the current legal framework cannot guarantee effective legal control over and protection from pirates.

Regarding the question whether international judiciary could effectuate legal protection, it has become clear that there are several options available for internationalised piracy adjudication as summarized in table 1.

Table 1: Options for International Piracy Judiciary

Option	Pro	Contra
Ad hoc tribunal	Short-term solution	Temporary solution and costly set-up Limited to one case UNSC Resolution under Chapter VII decreasingly justifiable Veto possibilities in UNSC
Permanent tribunal/New court	No court structures available	High costs to set up entire structure
ITLOS/ICJ	Minimal court structures Shared burden	Amendment of UNCLOS No expertise in criminal law
ICC	Criminal court structures Shared burden	UNSC Resolution under Chapter VII not justifiable Amendment of Rome Statute Piracy not comparable to core crimes
International Piracy Chambers at national courts	Criminal court structures Shared burden Long-term capacity building Transferable to other cases than Somalia	Like Ad hoc tribunal Dependent on consent of receiving state

It now lies in the hands of governments to coordinate action and to decide on establishing an international trial or internationalizing national structures. So far the UNSC has introduced most of the anti-piracy campaign under Chapter VII of the UN Charter without major protests. It is thus thinkable that an *ad hoc* piracy tribunal will not meet any significant enmity. With establishing an international trial, however, the problem remains to find states that will enforce prison sentences within their national systems. According to the majority of experts participating at the meeting "Multinational Law Enforcement & Sea Piracy" in November 2009 at the Max Planck Institute for Foreign and International Criminal Law in Freiburg/Germany, the option of international piracy chambers incorporated into national courts seems to have the greatest likelihood of success.[56] Dedicated piracy chambers with international capacities at the national level could also be usefully combined with the path of

53 This is a suggestion by the UN Contact Group on Piracy off the Coast of Somalia. See MPICC press release (Fn. 46).

54 See Report of the UN Secretary-General, daccess-dds-ny.un.org (Fn. 25).

55 However, possible frictions of such an 'internationalized' body within national courts and with national (constitutional) law should not be under-estimated.

56 See MPICC press release (Fn. 46) and *Anna Petrig,* Pirateriebekämpfung vor den Küsten Somalias – Expertentreffen zum Thema "Multinational Law Enforcement and Sea Piracy, ZStW 2010, 291 (296).

regional cooperation which, regardless of UNCLOS' legal constraint in Article 105, has been supported by the UNSC in combination with the SUA Convention. A sustainable and successful solution still would require compensating regional states that carry the responsibility and costs for regional internationalized piracy trials.[57]

57 See *Geiss/Petrig* (Fn. 5), VN 2010, 3 (8). The combination of special chambers at national courts with regional initiatives is also considered with or without UN participation and assistance in the Report of the Secretary-General of July 2010, daccess-dds-ny.un.org (Fn. 25).