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The Question of Pirates Trial in States without a Crime of Piracy

ZOU Keyuan and JIN Jing

Abstract

Many states in the world such as China have no specific domestic laws governing the suppression of piracy, leading the question whether these countries have the competence in punishing piracy as required by international law. This article argues that the lack of a crime of piracy within a domestic legal system should not become an insurmountable obstacle for states to prosecute pirates. Prosecution of pirates without a crime of piracy is feasible in that a state has domestic criminal laws that deal with similar illicit activities to piracy by indicting perpetrators with other criminal offences. However, such prosecution by analogy is not effective and adequate and it is better for that state to establish a specific crime of piracy in its domestic legal system. Furthermore, for a state without a crime of piracy, it is more urgent for it to build up legal grounds for exercising universal jurisdiction over piracy and relevant procedural provisions on the exercise of extraterritorial jurisdiction over international crimes at sea.

Keywords

Piracy, pirates trial, universal jurisdiction, criminal charges, UNCLOS

1. Introduction

Although Somali piracy is effectively suppressed, the threat still exists. It may revive easily if multilateral naval forces decrease and the international community is not careful enough.¹ Pirates in other places such as the Gulf of Guinea are rampant too. Southeast Asia and South America are also the hotspots of piracy. A recent report from the International Maritime Bureau (IMB) showed that during January-June 2020, the most piracy incidents were in Africa (38), followed by Southeast Asia (33) and the

¹ Robyn Kriel and Briana Duggan, 'Somali Pirates Seize Iranian, Thai ships', CNN, 24 November 2015, available at edition.cnn.com/2015/11/23/world/somalia-piracy/.

Americas (17).² Though the reported quantity of incidents (98) was significantly lower than that in the same period of 2018 (107), it exceeded those of 2017 (87) and 2019 (78), and was equal to that of 2016.³ In order to prevent the resurgence of piracy, it is vital for the whole international community to remain focused on prevention and punishment.

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

The second is trial in regional states. Kenya, Seychelles, and Mauritius have been the primary regional states where Somali pirates were sent and prosecuted. However, on a worldwide scale, few states are willing to accept pirates for prosecution. As the hotspots of piracy exist across different regions, the model to accept Somali pirates in Africa may not be workable in other regions. Even those regional states mentioned above still face enormous difficulties such as inadequate prison facilities;⁵ concerns of human rights of piracy suspects from the outside;⁶ and insufficient funds received from the international community.⁷ Also, the jurisdiction of the regional states is also challenged, as until now only capturing states seemed to have the indisputable authority to prosecute pirates according to Article 105 of the United Nations Convention on the Law of the

² IMB, Piracy and Armed Robbery Against Ships Report for the Period 1 January – 30 June 2020, available at https://www.icc-ccs.org/reports/2020_Q2_IMB_Piracy_Report.pdf.

³ Ibid.

⁴ Report of the UN Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chamber Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals and the Time and Resources Necessary to Achieve and Sustain Substantive Results, UN Doc. S/2010/394, 26 July 2010, § 19, at 14.

⁵ Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Annex to the Letter Dated 24 January 2011 from the Secretary-general Addressed to the President of the Security Council, UN Doc. S/2011/30, 25 January 2011, § 69, at 26.

⁶ For example, UNCS Resolution 1918 (2010) has mentioned that 'to enhance the capacity of the judicial and the corrections systems in Somalia, Kenya, Seychelles and other states in the region to prosecute suspected, and imprison convicted, pirates consistent with applicable international human rights law'. See SC Res. 1918 (2010).

⁷ Jordan Wilson, 'The Rise, the Fall, and the Eventual Return of Modern Piracy: Addressing an Age Old Problem with Modern Solutions', 47 *Journal of Maritime Law and Commerce* (2016) 297-230, at 325.

Sea (UNCLOS),⁸ which is the foundation for universal jurisdiction over piracy.

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

Nevertheless, states are often reluctant to bring pirates captured overseas to their own jurisdictional systems for prosecution. The rate of ‘catch and release’ was more than 90%.¹⁰ There are many reasons for it. For instance, states fear that pirates may seek asylum after their release.¹¹ Many states do not have domestic substantive and procedural law on piracy,¹² and some of them, such as China, do not even have a crime of piracy.

For the states without a crime of piracy, it is questionable whether they can undertake pirates trial in accordance with their domestic laws. While they can exercise universal jurisdiction as required by international law, there is a lack of domestic legal basis to prosecute pirates. It is a question whether those states should improve their domestic laws by introducing the crime of piracy so as to promote efficiency and effectiveness of international antipiracy cooperative operations.

2. Can a State without a Crime of Piracy Prosecute Pirates?

In state practice, the lack of a crime of piracy does not prevent states from prosecuting

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

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

¹⁰ Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, supra note 5, § 43, at 21.

¹¹ Tom Syring, ‘A Pirate and a Refugee: Reservations and Responses in the Fight against Piracy’, 17 *ILSA Journal of International & Comparative Law* (2011) 437-457, at 437.

¹² UNSC Res. 1918 (2010).

pirates and states have punished pirates under other relevant criminal charges, such as murder, robbery. Take China as an example. In December 1999, a court in Guangdong convicted *Weng Siliang*, *Soni Wee* and their accomplices, who robbed the ship *Cheung Son* and killed the crew, under the criminal charges of robbery and murder.¹³ In February 2000, a court in Guangxi convicted 14 Burmese pirates of robbery, for they hijacked the Panamanian registered ship *Marine Fortuner*.¹⁴ China also punished pirates under the crimes of robbery in the case of *Siam Xanxai*.¹⁵ In Europe, Austria deemed that the existing crimes, such as murder and deprivation of liberty, physical injury or trafficking in human beings, could cover most crimes related to piracy.¹⁶ Likewise, Norway held that it could punish piracy pursuant to general robbery crimes, such as armed robbery and aggravated armed robbery.¹⁷

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

¹³ Guangdong High People’s Court, The Judicial Verdict of the *Case of Cheung Son*, available at pkulaw.com/pfnl/a25051f3312b07f36f2aabfcd71b40b617e4d37dd86b2741bdfb.html.

¹⁴ For details, see Zou Keyuan, ‘New Developments in the International Law of Piracy’, 8 *Chinese Journal of International Law* (2009) 323-345, at 342 and 343. See also ‘Prosecuting Burmese Pirates in Guangxi’, *Lanzhou Morning News*, 22 August 2000, available at lzcbs.gansudaily.com.cn/system/2000/08/22/000292336.shtml.

¹⁵ For details, see Zou Keyuan, *supra* note 14, 342-343.

¹⁶ Letter from Permanent Mission of Austria to the United Nations to the Secretary-General of the United Nations, 8 February 2010, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUT_criminal_code.pdf.

¹⁷ Letter from Norway to IMO, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_piracy_summary.pdf.

¹⁸ Art. 101 of UNCLOS.

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

²⁰ Alfred P. Rubin, *The Law of Piracy* (Newport: Naval War College Press, 1988), at 145.

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

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

However, the name of a crime under the domestic law is not the only determining element of universal jurisdiction. UNCLOS does not explicitly require states to establish the crime of piracy in their domestic legal systems. Article 100 of UNCLOS only requires all states to ‘cooperate to the fullest possible extent in the repression of

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

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

²³ DENG Daming, ‘On the Relay of the Legislation of Piracy in China's Criminal Law and International Law’, 5 *Journal of Zhengzhou University (Philosophy and Social Sciences)* (2010) 42-45, at 42. (in Chinese)

²⁴ Piracy: Review of National Legislation, note by the Secretariat, IMO Doc. LEG 96/7, 20 August 2009, § 3, at 2.

piracy’, but does not provide a detailed legal framework.²⁵ It can be understood that all measures conducive to suppressing piracy should be appreciated, regardless of the formality. Similarly, Article 105 only stipulates that the courts of capturing states can ‘decide upon the penalties to be imposed’, but there is no explicit request for convicting pirates under the crime of piracy.²⁶ As Viscount Sankey LC held in *re the Piracy Jure Gentium v. State*, in terms of crimes defined by international law, they could be tried and punished under domestic law.²⁷ Therefore, domestic trials and punishment of piracy is consistent with UNCLOS, no matter what name of the offence is used.

In fact, it has been recognized to some extent that accusing pirates of other crimes is a form of exercising universal jurisdiction over piracy. Still take China as an example. Kontorovich and Art considered that there were several universal jurisdiction prosecutions in China, such as those in February 2000 and February 2003 separately.²⁸ Dutton has also admitted that China is a state which has incorporated universal jurisdiction over piracy into its domestic law.²⁹ In China, the case of *Siam Xanxai* is also regarded by the Supreme People’s Court of China as a typical case that guides the exercise of universal jurisdiction over piracy.³⁰

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

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

²⁵ Yaron Gottlieb, ‘The Security Council’s Maritime Piracy Resolutions: a Critical Assessment’, 24 *Minnesota Journal of International Law* (2015) 1-72, at 40.

²⁶ Art. 105 of UNCLOS.

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

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

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

³⁰ ‘The Robbery Committed by Atan Naim and Others: the Application of Criminal Universal Jurisdiction’, in Supreme People’s Court of China (ed.), *China’s Criminal Trial Guidance Case* (Beijing: Law Press, 2017) 355-360, at 355. (in Chinese)

A. Difficulties in Establishing the Definition of Piracy

The meaning of piracy in domestic law inevitably needs to make reference to the definition in international law. The domestic one should be able to reflect the internationally recognized definition, since only in this way can it claim universal jurisdiction.³¹ It is admitted that a state does have the right to define piracy differently in its domestic law, whether more extensive than that under UNCLOS or not. However, ‘only piracy as defined by international law allows for the assumption of jurisdiction on the basis of universality’.³² As the definition of piracy under UNCLOS has become the most widely accepted one,³³ domestic offences of piracy should align with that provided for in Article 101 of UNCLOS. For example, the United States has several provisions on piracy. One of them is 18 U.S.C. § 1655, stipulating a seaman who commits violence against the commander to prevent him from defending his ship or cargo is a pirate.³⁴ Since it does not meet the definition of piracy in international law, a jurisdictional nexus with the United States is required so that the United States has the jurisdiction over it,³⁵ and this jurisdiction is not a universal jurisdiction. In contrast, another provision on piracy in the United States’ law is 18 U.S.C.A. § 1651, considering that ‘whoever, on the high seas, commits the crime of piracy as defined by the law of nations’ is a pirate.³⁶ Prosecuting pirates under this provision may invoke universal jurisdiction.³⁷ As shown in many cases, although the United States is not a contracting party to UNCLOS, given that UNCLOS reflects customary international law and sets out the legal framework for anti-piracy, ‘piracy as defined by the law of nations’ means that under UNCLOS.³⁸ In short, expanding the definition of piracy in domestic law wider than that under UNCLOS is not relevant to the exercise of universal jurisdiction,

³¹ *US v. Hasan* (747 F.Supp.2d 599 (E.D.Va. 2010)).

³² Ivan Shearer, ‘Piracy’, § 4, Max Planck Encyclopedia of Public International Law, available at opil-ouplaw-com.ezproxy.library.uwa.edu.au/view/10.1093/law:epil/9780199231690/law-9780199231690-e1206?rskey=BFhVzM&result=1&prd=EPIL.

³³ Yaron Gottlieb, *supra* note 25, at 4.

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

³⁵ Collin McCarthy, *supra* note 19, at 134-135.

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

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

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

and the scope of universal jurisdiction will not be expanded accordingly.

However, the definition of piracy under UNCLOS is widely criticised because of its limitations and lack of clarity. It defines ‘piracy’ as only for ‘private ends’, which generally excludes actions for political or other purposes. The two ships requirement leads to the conclusion that ‘internal seizure’ within a ship does not constitute piracy.³⁹ Its geographic limitation could not ‘cover the whole picture of contemporary piracy’,⁴⁰ since some offences may happen within a state’s jurisdiction, in particular when the exclusive economic zone has been created under UNCLOS. In addition, it is not clear whether it is piracy to simply cruise to find target vessels, threaten violence, attempt to commit piracy, commit a clandestine attack, or plan or prepare for piracy (except for actions which can be subsumed into incitement and facilitation).⁴¹ UNCLOS does not give a clear answer to these questions.

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

³⁹ Zou Keyuan, *supra* note 14, at 326.

⁴⁰ *Ibid.*

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

⁴² According to Article 101 of UNCLOS, piracy should occur on the high seas or in a place outside the jurisdiction of any state. If an attack occurs in a state’s territorial sea, internal waters, or archipelagic waters, according to Article 2.2 of IMO Code of Practice of the Investigation of Crimes of Piracy and Armed Robbery against Ships (IMO Res. A.1025 (26), 18 January 2010), it is called armed robbery.

⁴³ See Art. 1 of ReCAAP.

⁴⁴ Uniform and Consistent Application of the Provisions of International Conventions Relating to Piracy, note by the Secretariat, IMO Doc. LEG 98/8, 18 February 2011, § 9-13, at 2 and 3.

acts endangering the safety of navigation'.⁴⁵ Others believe that the SUA enlarges the scope of piracy.⁴⁶ There is still a third view that SUA is a useful supplement to the definition of piracy under UNCLOS.⁴⁷ Also, several states believe that the SUA applies only to terrorist acts.⁴⁸ Consequently, the relationship between definitions of piracy and crimes under SUA is confusing.

Since there is no perfect definition of piracy in international law, if a crime of piracy in domestic law is established solely for the purpose of exercising universal jurisdiction, states have to accept the definition under UNCLOS which has limitations and a relatively narrow scope. If the domestic law seeks to include a definition of piracy different from UNCLOS, it is necessary to address the relationship with the definition of piracy under UNCLOS, different components of municipal piratical acts, and other definitions of broader piracy-related crimes in international law. Otherwise, the crime of piracy may be insufficient or inefficient to punish pirates. Article 340 of Korean Criminal Act defines 'marine robbery', which was considered by some scholars as piracy,⁴⁹ as a person, 'through the threat of collective force in the sea, forcibly seizes a ship or forcibly takes another's property after intruding upon a ship'.⁵⁰ It does not require two ships requirement and private ends, and the offence needs not to be committed on the high seas or in a place outside the jurisdiction of any state. It only includes seizing a ship or taking property and the injury or murder during the process,

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

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

⁴⁷ Observations on the Concept of 'Private Ends' in the Definition of 'Piracy' in the United Nations Convention on the Law of the Sea, submitted by the Islamic Republic of Iran, IMO Doc. LEG 97/9/4, 7 October 2010, §3, at 1.

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

⁴⁹ There are also views that Article 340 does not provide for the crime of piracy. See LU Yongtun and CUI Yongchun, 'On the Enlightenment of South Korean Pirate Trial to China', 2 *Jin Ling Law Review* (2015) 275-288, at 278. (in Chinese)

However, when the IMO, United Nations Division of Ocean Affairs and Law of Sea, and the United Nations Office on Drugs and Crime requested states to submit samples of national legislation on piracy and armed robbery at sea, Korea also used the word 'piracy' for the crimes stipulated in Article 340 in its reply. See Laws and Ordinances on Punishment of Acts of Piracy and Armed Robbery at Sea of Korea, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_legislation_piracy.pdf.

⁵⁰ See Laws and Ordinances on Punishment of Acts of Piracy and Armed Robbery at Sea of Korea, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KOR_legislation_piracy.pdf.

not other forms of piracy. Meanwhile, South Korea has the Punishment of Damaging Ship and Sea Structures Act, which criminalizes several acts endangering the safety of ship and navigational facilities.⁵¹ Therefore, in the first Korean piracy prosecution, *Republic of Korea v. Araye*, the four Somali pirates were charged with many crimes, not only attempted murder during commission of marine robbery and injury by marine robbery, but also attempted murder during commission of robbery, injury by robbery, injury during special obstruction of the performance of official duties, and violation of the Punishment of Damaging Ships and Sea Structures Act.⁵²

The diversity of state practices may show the difficulties in reaching a consensus on a best definition of piracy in domestic law. IMO, United Nations Division of Ocean Affairs and Law of Sea (UNDOALOS), and the United Nations Office on Drugs and Crime (UNODC) used to compile lists of national legislation on piracy, and requested states to submit samples of national legislation on piracy and armed robbery at sea.⁵³ The responses from states showed that the definition of piracy varied greatly. Australia partly adopted the definition under UNCLOS, which basically followed the contents of Article 101 (a) and (b), but did not stipulate inciting and facilitating in (c).⁵⁴ In some states, the definitions of piracy were basically the same as that under UNCLOS, and they include the Republic of Cyprus,⁵⁵ Kenya,⁵⁶ Malta,⁵⁷ South Africa,⁵⁸ and Greece.⁵⁹ Some did not provide for piracy as a specific crime. For example, the Czech Republic proscribed crimes endangering an aircraft, civil vessel and fixed platform

⁵¹ Ibid.

⁵² Supreme Court of Korea, Decision 2011 Do 12927, available at http://library.scourt.go.kr/SCLIB_data/decision/24-2011Do12927.htm.

⁵³ UNDOALOS, National Legislation on Piracy, updated 26 October 2011, available at un.org/Depts/los/piracy/piracy_national_legislation.htm. See also Request for Information on National Legislation on Piracy, IMO Doc. Circular Letter No. 2933, 23 December 2008.

⁵⁴ Australian Crimes Act 1914, Part IV, Piracy, available at un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUS_1914_crimes_act.pdf.

⁵⁵ Information Submitted by the Republic of Cyprus on Piracy National Legislation, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CYP_piracy.pdf.

⁵⁶ Art.369 of Kenyan Merchant Shipping Act 2009, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_merchant_shipping_act.pdf.

⁵⁷ Art. 328N of Maltese Criminal Code (re: Act X1 of 2009), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MLT_criminal_code.pdf.

⁵⁸ Art. 24 of South African Act to Provide for the Defence of the Republic and for Matters Connected therewith (No. 42 of 2002), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ZAF_defence_act_2002.pdf.

⁵⁹ Letter from Hellenic Republic Ministry of Mercantile, Marine, Aegean & Island Policy, General Directorate for Shipping Policy, Directorate for Shipping Policy & Development, Unit for International Organizations & EU, to IMO Secretariat, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRC_piracy.pdf.

rather than piracy,⁶⁰ while Turkey prohibited hijacking of a vessel.⁶¹ Latvia punished piracy under murder, intentional serious bodily injury, threatening to commit murder and to inflict serious bodily injury, kidnapping, seizure of hostages, robbery, terrorism, and seizure of an air or water transport vehicle.⁶² And Liberia used kidnapping and related offences.⁶³ Poland did not provide a specific definition of piracy because it believed that UNCLOS can be applied directly as its domestic law and it can integrate piracy into other crimes.⁶⁴ Finland,⁶⁵ Norway,⁶⁶ Zambia,⁶⁷ Brazil,⁶⁸ Bulgaria,⁶⁹ Grenada,⁷⁰ Iran⁷¹ do not incorporate the definition of piracy into their domestic laws, either.

A significant number of states define piracy, but, at least literally, the definitions were obviously different from UNCLOS. For example, Greece defined piracy as ‘anyone aboard a ship who, by using corporal violence or threat thereof against persons, commits acts of depredation against another ship on the high seas with the intention to take possession of objects so obtained’.⁷² Similar legislations are also from Italy,⁷³ the

⁶⁰ Czech Republic Criminal Code (Law No. 40/2009), Section 290 and 291, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CZE_criminal_code_2010.pdf.

⁶¹ Turkey’s National Legislation with Regard to Offences Related to Piracy and Armed Robbery at Sea, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_penal_criminal_procedure.pdf.

⁶² The enclosure to the Note No. 41/121-714 of 16th February, 2010 of the Ministry of the Republic of Latvia to the Secretariat of the United Nations, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LVA_criminal_law.pdf.

See also Latvian Criminal Law, Section 88, 176 and 268, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LVA_national_legislation.pdf.

⁶³ An Act to Amend Chapter 14 and 15 Sub-chapter (c), Title 26 of the Liberian Code of Laws Revised, Known as the New Penal Law of 1976, by Adding thereto Four New Sections thereby Making the Crimes of Armed Robbery, Terrorism and Hijacking, Respectively, Capital Offenses, and Providing Punishment thereof (Approved 22 July 2008), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LBR_national_legislation.pdf.

⁶⁴ Letter from Poland to UNDOALOS, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/POL_penal_code.pdf.

⁶⁵ Verbal Note from Permanent Mission of Finland to the United Nations to Secretariat of the UNDOALOS, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_criminal_code.pdf.

⁶⁶ Norwegian General Civil Penal Code, available at un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf.

⁶⁷ The Zambian Anti-Terrorism Act, 2007, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ZAM_anti_terrorism.pdf.

⁶⁸ Letter from Brazilian Permanent Representation to IMO, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BRA_National_Legislation.pdf.

⁶⁹ Letter from Bulgaria to UNDOALOS, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BGR_penal_code.pdf.

⁷⁰ Letter from Permanent Mission of Grenada to the United Nations to UNDOALOS, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRD_piracy.pdf.

⁷¹ Letter from Iran, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_national_legislation.pdf.

⁷² Letter from Greece, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRC_penal_code.pdf.

⁷³ Art. 1135 of Italian Maritime Code (Approved with R. D.30th March 1942, n.327, as Subsequently Modified and Integrated until 2002), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_maritime_law.pdf.

Philippines,⁷⁴ Sri Lanka,⁷⁵ Suriname,⁷⁶ Thailand,⁷⁷ Tanzania,⁷⁸ Argentina,⁷⁹ Denmark,⁸⁰ Estonia,⁸¹ Israel⁸², Korea,⁸³ Russia,⁸⁴ and Ukraine.⁸⁵ Penal codes in Singapore and New Zealand provide for ‘piracy by the law of nations’ and ‘piratical acts’.⁸⁶ The behaviour of ‘piracy by the law of nations’ and ‘piratical acts’ may be almost the same, while the latter were the acts which have nexus with these states, and the former did not need such a connection.⁸⁷ The Singapore Maritime Offences Act also prohibits other maritime acts, such as hijacking of ships, destroying or damaging ships, offences involving threats, and ancillary offences, which may overlap with the scope of piracy under UNCLOS.⁸⁸

Even in the newly legislated piracy law of some states in the period of combating

⁷⁴ Art. 122 of the Revised Penal Code of the Philippines (Act No. 3815), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_revised_penal_code.pdf; and Anti-Piracy and Anti-Highway Robbery Law of 1974, Section 2, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_decree_1974.pdf.

⁷⁵ Piracy Act of Sri Lanka (No.9 of 2001), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LKA_national_%20legislation_piracy.pdf.

⁷⁶ Shipping and aviation crimes of Suriname, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SUR_national_%20legislation_piracy.pdf.

⁷⁷ Thailand’s Act on Prevention and Suppression of Piracy B.E. 2534 (1991), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA_piracy.pdf.

⁷⁸ Tanzania Penal code, Chapter 16 of the Laws (revised) (principal legislation) (issued under Cap. 1, s. 18), Art. 66, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TZA_penal_code.pdf.

⁷⁹ Note Verbale from the Embassy of the Republic of Argentina to the United Kingdom, Addressed to the Secretary-General, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARG_national_legislation.pdf.

⁸⁰ Danish Note (17 April 2009), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_national_legislation_piracy.pdf.

⁸¹ Estonian Legislation on Piracy, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/EST_legislation_piracy.pdf.

⁸² Letter from Permanent Mission of Israel to the United Nations to UNDOALOS, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ISR_anti_piracy.pdf.

⁸³ Laws and Ordinances on Punishment of Acts of Piracy and Armed Robbery at Sea of Korea, *supra* note 50.

⁸⁴ Information concerning National Legislation on Piracy - Russian Federation, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_national_legislation_piracy.pdf.

⁸⁵ Criminal Code of Ukraine 2001 (abstracts), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_criminal_code.pdf.

⁸⁶ Extract of ‘Penal Code’ (CAP 224) of Singapore, Chapter VIA ‘Piracy’, and Extract of ‘Maritime Offences Act’ (Cap 170B) of Singapore, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SGP_penal_code_maritime_offences.pdf; and New Zealand Law on Piracy, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NZN_crimes_act_1961.pdf.

⁸⁷ For example, in light of Singapore Admiralty Offences (Colonial) Act 1849, ‘A person commits piracy who does any act that, by the law of nations, is piracy’ (130B.); and, a person commits piratical acts is ‘whoever, while in or out of Singapore - (a) steals a Singapore ship; (b) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Singapore ship; (c) does or attempts to do a mutinous act on a Singapore ship; or (d) counsels or procures a person to do anything mentioned in paragraph (a), (b) or (c)’ (130C). See Extract of ‘Penal Code’ (CAP 224) of Singapore, Chapter VIA ‘Piracy’, and Extract of ‘Maritime Offences Act’ (Cap 170B) of Singapore, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SGP_penal_code_maritime_offences.pdf.

⁸⁸ Extract of ‘Penal Code’ (CAP 224) of Singapore, Chapter VIA ‘Piracy’, and Extract of ‘Maritime Offences Act’ (Cap 170B) of Singapore, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SGP_penal_code_maritime_offences.pdf.

Somali piracy, the definition of piracy is not always consistent with UNCLOS. For example, the Japanese Law on Punishment of and Measures against Acts of Piracy, adopted in 2009, defines piracy as:

the following acts committed for private ends on the high seas (including exclusive economic zone defined in UNCLOS) or territorial sea as well as internal waters of Japan by the crew or the passengers of a ship (except for warships and other government ships) as “acts of piracy”:

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

above.⁸⁹

Although the definition has made reference to the definition in UNCLOS, it obviously defines piracy in a different way. It breaks through the geographical limits, requires that the ship under attack must be ‘in navigation’ and the persons under attack must become ‘irresistible’, and does not specify ‘operation of pirate ship’ and ‘inciting and facilitating’ as in Article 101 (b) and (c) of UNCLOS. Moreover, it seems that pure injury or killing without other purpose does not fall within the scope of the definition.

B. Difficulties in Establishing the Degree of Punishment for Piracy

Since universal jurisdiction over piracy permits the same piratical act to be prosecuted by any state, it may lead to unfairness if the variance in sentences of similar offences from various states is too large.⁹⁰ Neither UNCLOS nor the related conventions, such as SUA, prescribe the specific penalties. There is also disunity among domestic laws in different states. According to Kontorovich, as of 2010, the maximum sentences in different states ranged from life in prison (e.g., in the US, UAE and Kenya) to significantly shorter periods (e.g. 30 years in Seychelles; 15 years in Germany; 12 or 15 in Holland; 14 or 20 in Italy).⁹¹ In practice, the sentences for similar piratical acts were up to life sentence in one state, and as low as 4.5 or five years in another.⁹² This indicates that the degree of punishment may not be a decisive factor for a state to establish the crime of piracy in its domestic legal system.

The sentences for different kinds of piratical offences need to be distinguished. The act of piracy incorporates various criminal elements (from property damage to personal violence) which necessarily affect the measurement of sentencing. Piracy is a general term for the whole criminal phenomenon, but piratical acts may vary in the different

⁸⁹ See Outline of the Draft Anti-Piracy Measure Law of Japan, available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_anti_piracy.pdf. See also ZHUANG Yuyou (translated), ‘the Japanese Law on Punishment of and Measures against Acts of Piracy (in Chinese)’, and the Act in Japanese, 2 *Chinese Oceans Law Review* (2009) 176-183, at 176, 180 and 181.

⁹⁰ Eugene Kontorovich, ‘The Penalties for Piracy: An Empirical Study of National Prosecution for International Crime’, Northwestern Public Law Research Paper No. 12-16, 10 July 2012, available at scholarlycommons.law.northwestern.edu/facultyworkingpapers/211.

⁹¹ Ibid.

⁹² Ibid.

places where they occur.⁹³ Somali pirates tend to hijack ships and crews for ransom,⁹⁴ while the Asian pirates, as well as the pirates in West Africa and South America, are more likely to focus on property, such as robbery or theft.⁹⁵ For example, West African pirates often hijack and sell refined oil for quick profits.⁹⁶ Also, sometimes the pirates in Southeast Asia hijack ships, and then repaint, rename and sell them.⁹⁷ In addition, the extent of violence varies from place to place. It is believed that the pirates in West Africa and South Africa are more violent than those in Asia.⁹⁸ In terms of the forms of piracy, they include murder, intentional injury, explosion, robbery, raping, kidnapping, assault, illegal detention, and so on. There are noticeable differences among these forms in conduct, consequence, circumstances, and degree of social danger. The mere act of robbing goods is obviously less severe than both robbing goods and kidnapping crews for ransom. Pure murder and robbery of goods also have significant distinctions between each other.⁹⁹ It is criticized that there is only one punishment - life imprisonment - for piracy under international law in the United States, as the offence may be extremely light.¹⁰⁰ Therefore, in order to meet the principle of ‘fitting punishment to crimes’, it is necessary to distinguish the specific acts, and set different sentencing standards and conditions affecting sentencing, even though all of these acts are included within one category, i.e., piracy.

Furthermore, if the crime of piracy is established in domestic law, the sentence for it

⁹³ Anna Petrig, ‘Piracy’, in Donald Rothwell, Alex Oude Elferink, Karen Scott, and Tim Stephens (eds.), *Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015) 844-865, at 843.

⁹⁴ The World Bank, *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation* (2013), available at hdl.handle.net/10986/16518, at 92.

⁹⁵ See Piracy and Armed Robbery against Ships, Regional Seminar and Workshop on Piracy and Armed Robbery against Ships held in Mumbai, India (March 2000), IMO Doc. MSC 73/14/1, 26 July 2000, § 28, at 11; R. Beckman, ‘Piracy and Armed Robbery Against Ships in Southeast Asia’, in D Guilfoyle (ed.), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing 2013) 13-34, at 13, 15-16 and 23-25; and Report of the United Nations Assessment Mission on Piracy in the Gulf of Guinea, annex to the Letter dated 18 January 2012 from the President of the Security Council, UN Doc. S/2012/45, 19 January 2012, § 35, at 11.

⁹⁶ Alan Cowell, ‘West African Piracy Exceeds Somali Attacks, Report Says’, the New York Times, 18 June 2013, available at nytimes.com/2013/06/19/world/africa/west-african-piracy-exceeds-somali-attacks-report-says.html?_r%20=0 (visited 4 June 2019).

⁹⁷ See Piracy and Armed Robbery against Ships, Regional Seminar and Workshop on Piracy and Armed Robbery against Ships held in Mumbai, India (March 2000), *supra* note 95, § 28, at 11. See also R Beckman, *supra* note 95.

⁹⁸ Piracy and Armed Robbery against Ships, Regional Seminar and Workshop on Piracy and Armed Robbery against Ships held in Mumbai, India (March 2000), *supra* note 95, § 28, at 11.

⁹⁹ The motivation of a piracy attack is normally the pecuniary gain. However, in the light of the definition of piracy under UNCLOS, theoretically, a murder without an intention to seek a pecuniary advantage can also constitute piracy in some cases.

¹⁰⁰ M. Bob Kao, ‘Assessing Maritime Piracy in American Law: A Century-old Punishment for an Evolving Crime’, 34 *International Journal of Marine and Coastal Law* (2019) 755-777, at 775.

must be coordinated with that of other existing traditional domestic crimes. Within each jurisdiction a state will fit the punishment into the overall scale of sentencing in that specific jurisdiction. As mentioned above, the forms of piracy include murder, intentional injury, explosion, robbery, raping, kidnapping, assault, illegal detention, and so on, which can correspond to different existing domestic crimes. The sentences between them vary considerably. According to the Criminal Law of the People's Republic of China, whoever unlawfully detains another, or deprives him of his freedom by other means, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprivation of political rights.¹⁰¹ Whoever commits this crime and causes a person's serious injury (without violence) is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment; when he causes a person's death (without violence), he is to be sentenced to not less than ten years of fixed-term imprisonment.¹⁰² Contrarily, whoever intentionally kills another (including a death of detainees caused by violence in detention) is to be sentenced to death, life imprisonment or not less than ten years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment.¹⁰³ That means the punishment of piracy should take into account the sentencing of the relevant felonies, such as intentional murder, and relatively minor crimes, such as illegal detention. In order to make the punishment fit the crime, the sentencing of piracy should not be abnormally shorter or longer than that of these established crimes.

This is also reflected in the domestic piracy legislation of South Korea and Japan. According to Korean Criminal Act, robbery by hostage may cause imprisonment for life or a definite term of three or more years,¹⁰⁴ while a robber who causes bodily injury to another shall be sentenced to imprisonment for life or not less than seven years,¹⁰⁵

¹⁰¹ Art. 238 of Criminal Law of the People's Republic of China, available at law.npc.gov.cn:8081/FLFG/flfgByID.action?flfgID=239&keyword=%E5%88%91%E6%B3%95&zlsxid=01.

¹⁰² Ibid, Art. 238 and 232.

¹⁰³ Ibid, Art. 232.

¹⁰⁴ Art. 336 of Criminal Law of Republic of Korea. See Supreme Court of Korea, Decision 2011 Do 12927, available at http://library.scourt.go.kr/SCLIB_data/decision/24-2011Do12927.htm.

¹⁰⁵ Ibid, Art. 337.

and a robber “shall be punished by death or imprisonment for life” if murdering another one, or “shall be punished by imprisonment for life or ten or more years” if resulting in the death.¹⁰⁶ As discussed above, the Act also defines ‘marine robbery’, considered by some scholars as piracy, which is like the robbery at sea. The punishment of marine robbery is a bit harsher than robbery in general. The one who commits marine robbery shall be punished ‘by imprisonment for life or ten or more years’, or ‘by imprisonment for life or not less than ten years’ if causing injury to another, or ‘by death or imprisonment for life’ if ‘killing another or causing another person’s death or committing rape’.¹⁰⁷ However, there is a big gap between the punishment of marine robbery and that of robbery by hostage, and the definition of the former does not include the latter. As for the Japanese Law on Punishment of and Measures against Act of Piracy, since the punishment to be set up in the law was heavier than that of ordinary criminal crimes, in order to avoid the imbalance among the punishments for the high seas, territorial waters and internal waters, the offences committed in the territorial sea and internal waters were included in the definition of piracy.¹⁰⁸

4. Is the Crime of Piracy Still Necessary for a State Currently without It?

A. Deficiencies of Punishing Pirates under Other Crimes

Though a state can try pirates according to its domestic law as discussed above, it is still necessary to establish the crime of piracy domestically. First of all, an important reason to support the establishment of a crime of piracy rather than the use of other crimes is that other crimes do not cover all the connotations of piracy so that applying existing ‘similar’ crimes will lead to a considerable number of pirates escaping punishment.¹⁰⁹ Even robbery and kidnapping in the piracy attacks were deemed to have

¹⁰⁶ Ibid, Art. 338.

¹⁰⁷ Ibid, Art. 340.

¹⁰⁸ Law development as piracy measures in Somalia and Gulf of Aden - Outline of piracy law and discussion in Congress, available at https://www.sangiin.go.jp/japanese/annai/chousa/rippou_chousa/backnumber/2009pdf/20090801015.pdf, at 21. (in Japanese)

¹⁰⁹ See ZHAO Bingzhi and HUANG Fang, ‘On International Criminal Law Norms in Chinese Criminal Code’, 9 *Law Science* (2003) 48-61, at 53 (in Chinese); HUANG Li, ‘On Connection about China Penal Law and International Penal Law’, 4 *Law Science Magazine* (2009) 34-36, at 36 (in Chinese); HU Ming and XU Ying,

their own characteristics in many aspects, such as the way they are conducted, the intent of the crime and the interests infringed.¹¹⁰ Though seldom discussed in detail in terms of which specific offences will be omitted, some Chinese scholars believe that ‘intentionally facilitating’ in the crime of piracy does not have corresponding or similar concepts in Chinese criminal law, and is not illegal according to the principle of *nulla poena sine lege*.¹¹¹ In addition, because pirates are often captured during the process of threatening and chasing merchant ships before actual boarding, it is difficult for prosecutors to prove that the suspected pirates have accomplished the crime.¹¹² It is sometimes also difficult to prove who made the shooting first, although it is clear that collectively the pirates have committed murder.

Secondly, without a crime of piracy, the piracy attacks may constitute different crimes. On the one hand, there are different forms of violence, and a piracy attack may contain one or more of them. On the other hand, the social interests impaired by piracy include navigation safety, personal safety, property safety and so on. Therefore, one piracy attack may involve several crimes simultaneously. In the case of *Cheung Son* tried in China, among 38 defendants, some were convicted of murder and robbery (as well as other relevant crimes), while some were only convicted of robbery.¹¹³ According to the Chinese Criminal Law, if a person commits several crimes before the judgement, the punishment shall be decided, upon the circumstance, within the total term of the sentence for all crimes and not less than the maximum term for any one of the crimes, except for those sentenced to death or life imprisonment.¹¹⁴ The court needs to determine the specific crimes and the corresponding punishment for each crime according to the specific act of the suspect, and then calculate the final punishment. The

‘Piratization of Terrorism: Three Models and Dual Regulation – Perspective on the Relationship between International Law and Domestic Law’, 1 *Social Sciences in Chinese Higher Education Institutions* (2016) 90-101, at 99; and MA Jinghong, ‘The Dual Attribute of the Law on Piracy and the Development Path of Coordination and Regulation’, 5 *Social Science Journal* (2014) 85-88, at 88. (in Chinese)

¹¹⁰ WANG Pei, ‘Present Tendency of Pirate and Suggestions on its Punishment’, 2 *Hebei Academic Journal* (2011) 157-159, at 159. (in Chinese)

¹¹¹ See QIAN Fei, ‘On Domestic Criminal Legislation of International Crime of Piracy’, 7 *China Water Transport (Academic Version)* (2007) 257-258, at 257-258 (in Chinese). See also YAO Chunyan, *supra* note 22, at 85.

¹¹² YU Fumin, ‘System Construction and Improvement of Jurisdiction and Trial of International Crime’, 3 *China Legal Science* (2018) 288-302, at 301. (in Chinese)

¹¹³ Guangdong High People’s Court, *supra* note 13.

¹¹⁴ Art. 69 of Criminal Law of the People’s Republic of China, *supra* note 101.

method of conviction and sentencing here inevitably has many drawbacks, such as the failure to reflect the overall nature of piracy, the confusion with the nature of the act, and the cumbersome conviction and sentencing process.¹¹⁵

Thirdly, although punishment of piracy under other existing domestic traditional crimes is feasible, objectively there are still some controversies about it as discussed above. The existence of such controversies may lower the reputation of a state's legal system, leading to adverse effects on the authority of the law. Moreover, in international criminal judicial cooperation, 'piracy' as a recognized international crime is easier to be understood and therefore can facilitate collaborative actions among states in the international community. If other crimes are used, the differences in legal systems and even ideological perspectives of various states may impede international cooperation combating piracy.¹¹⁶

B. Rational Choice

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

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

First, the major deficiencies in punishing pirates under other existing domestic

¹¹⁵ GUO Yuchuan, 'How to Stipulate the Crime of Piracy in Our Criminal Law', *Procuratorate Daily*, 23 January 2009 (3), available at newspaper.jcrb.com/html/2009-01/23/content_10239.htm (visited 4 June 2019). (in Chinese)

¹¹⁶ LIU Renwen, 'Retrospect and Prospect of the Tree-dimensional Criminal Law', 5 *Journal of Beijing University of Technology (Social Sciences Edition)* (2017) 57-68, at 63. (in Chinese)

crimes can be basically addressed within the current domestic legal system. As traditional domestic crimes have experienced long-term development and repeated practice, it is rarely possible to omit crimes relating to essential acts of violence. The main differences between an existing traditional domestic crime and piracy are concerning particular persons and localities. According to Article 101 (a) of UNCLOS, the subject of piracy is restricted to the crew or the passengers of a private ship or a private aircraft, and the locality of piracy is limited to ‘the high seas’ or ‘a place outside the jurisdiction of any state’.¹¹⁷ In contrast, existing traditional domestic crimes usually have no such restrictions. As mentioned previously, if the same acts occur within a state’s jurisdiction, traditional domestic crimes are sufficiently invoked to punish them without special laws. As for the factor of different localities, it can be considered as an element affecting the sentencing.

Articles 101 (b) and (c) of UNCLOS also provide for other kinds of piracy acts, including ‘any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft’, and ‘any act of inciting or of intentionally facilitating an act’.¹¹⁸ Besides the ‘traditional principals who attack and plunder’, the translators, negotiators, and other facilitators are pirates too.¹¹⁹ They help to bring about the success of the ‘acts of violence or detention, or act of depredation’. Consequently, a suspect, whose conduct satisfies the definition of an accomplice, can be convicted under traditional domestic criminal charges. For instance, Turkey takes the general clauses of its criminal law as the basis to deal with conspiracy, including, among others, incitement and assistance.¹²⁰ Japan, a state with a crime of piracy, does not have the definition of piracy in its domestic law explicitly contain ‘inciting or of intentionally facilitating piracy’, either, because the legislator claims that the provisions on accomplice in the existing criminal law can be applied to such acts.¹²¹

¹¹⁷ Art. 101 of UNCLOS.

¹¹⁸ Ibid.

¹¹⁹ Collin McCarthy, *supra* note 19, at 147.

¹²⁰ Turkey’s National Legislation with Regard to Offences Related to Piracy and Armed Robbery at Sea, *supra* note 61.

¹²¹ Law development as piracy measures in Somalia and Gulf of Aden - Outline of piracy law and discussion in Congress, available at https://www.sangiin.go.jp/japanese/annai/chousa/rippou_chousa/backnumber/2009pdf/20090801015.pdf, at 22. (in Japanese)

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

Second, a review of the emergence of universal jurisdiction over piracy may provide some reference. Piracy has long been reflected in practice as robbery, murder, plunder and other illegal acts.¹²² The British Offences At Sea Act of 1536, the early legislation on piracy, mentioned the word pirates as well as traitors (traytors), thieves, robbers, murderers (murtherers) and confederates in the preface, and stated that they ‘many times escaped unpunished’.¹²³ Then the Act provides that the Admirals are authorized to inquire, try, hear, determine and judge those offences ‘in like Form and Condition, as if any such Offence or Offences had been committed or done in or upon the Land’.¹²⁴ Subsequently, the jurisdiction of the Admirals gradually expanded internationally, forming a kind of universal jurisdiction.¹²⁵ Unlike other international crimes, such as genocide and crime against humanity, which require specific intent, piracy’s objective element is the pecuniary gain or other private ends, which is more similar to many existing domestic crimes.¹²⁶ Compared with other international crimes, universal jurisdiction over piracy is more ‘a practical difficulty in protecting a community interest’ than ‘a universal concern of a moral nature’.¹²⁷ The International Law Commission’s comment on the definition of piracy also stated that it regarded the conduct of aircraft in an unoccupied territory as piracy in order to ‘prevent such acts committed on ownerless territories from escaping all penal jurisdiction’.¹²⁸ Therefore, the universal

¹²² Dubner Barry Hart, *The Law of International Sea Piracy* (The Hague: M. Nijhoff Publishers, 1980), at 1.

¹²³ British Offences At Sea Act of 1536, 28 Henry VIII c. 15, the text is available in Alfred P. Rubin, *supra* note 20, at 359.

¹²⁴ *Ibid.*

¹²⁵ See Alfred P. Rubin, *supra* note 20, at 88.

¹²⁶ Yaron Gottlieb, *supra* note 25, at 7.

¹²⁷ Santiago Villalpando, ‘The Legal Dimension of the International Community: How Community Interests Are Protected in International Law’, 21 *European Journal of International Law* (2010) 387-419, at 406.

¹²⁸ Report of the International Law Commission on the Work of its Eighth Session, 23, 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), UN Doc. A/CN.4/104, at 282.

jurisdiction over piracy arose because it would occur on the high seas which did not belong to the sovereignty of any state,¹²⁹ not because piracy is an abnormal form of crime different from existing traditional crimes such as robbery and murder. The main purpose of universal jurisdiction over piracy is to punish criminals to the maximum extent,¹³⁰ with the ultimate goal to eliminate the crime. Even without a crime of piracy domestically, a state should exercise universal jurisdiction and punish piracy within the scope of its existing law.

Third, the location of piracy outbreak is always changing, and piracy incidents often grows explosively. The place where piracy and armed robbery against ships occur most frequently is sometimes Asian waters (especially the Malacca Straits and the South China Sea),¹³¹ and sometimes Somalia waters. Now West Africa is impacted by piracy seriously (see Figure 1). It also shows that the quantity of incidents often increases or declines sharply. Therefore, states, even those without a crime of piracy, should always be ready to deal with piracy, even though they may be not affected by piracy severely for the time being. However, for the same reason, the utilization rate of the crime of piracy subject to universal jurisdiction may not be high in a certain period. For instance, though the provision of marine robbery was amended in 1995,¹³² the first Korean piracy prosecution, the case of *Republic of Korea v. Araye*, was in 2011. The first Japanese piracy prosecution, the case of *M/V Guanabara*, started in 2011, too, around two years after the Law on Punishment of and Measures against Act of Piracy was adopted in 2009. Actually, there are rarely other pirate prosecutions subject to universal jurisdiction that have been reported in either state.

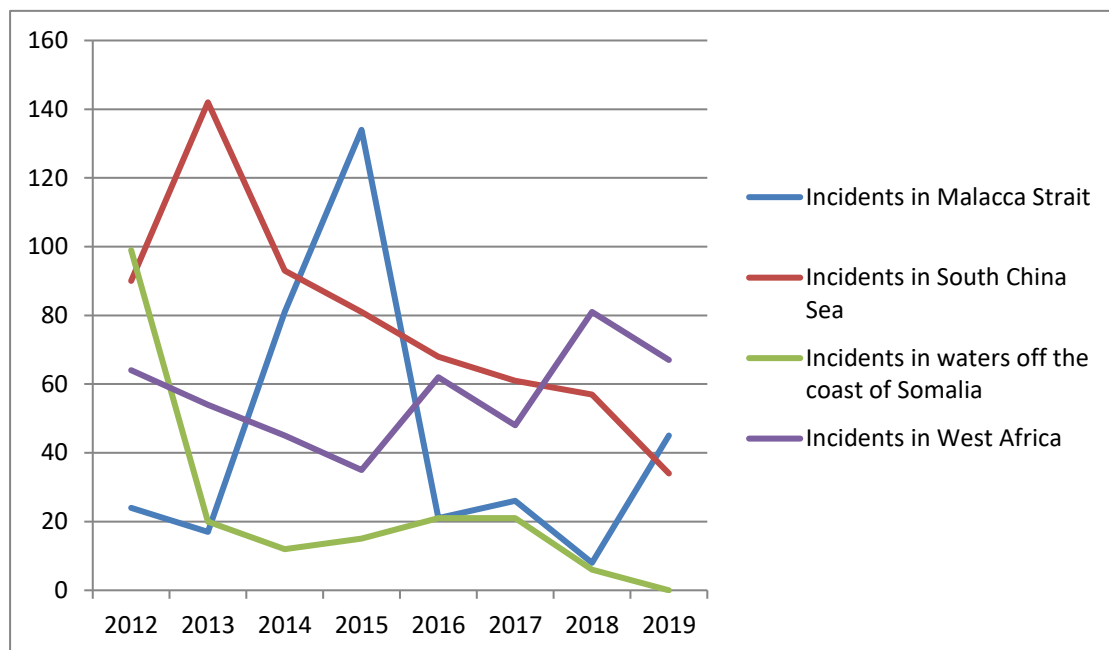
Figure 1: Acts of Piracy and Armed Robbery against Ships in Four Regions from 2012 to 2019

¹²⁹ Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality', 10 *Chinese Journal of International Law* (2011) 503-530, at 506.

¹³⁰ Huang Yao, 'Universal Jurisdiction over Piracy and East Asian Practice', 11 *Chinese Journal of International Law* (2012) 623-655, at 626.

¹³¹ See the record of the presentation of Mr. Sato (Director of the Ocean Division, Ministry of Foreign Affairs of Japan), in: Report on the Work of the United Nations Open-ended Informal Consultative Process Established by the General Assembly in Its Resolution 54/33 in order to Facilitate the Annual Review by the Assembly of Development in Ocean Affairs at Its Second Meeting, UN Doc. A/56/121, 22 June 2001, § 270, at 47.

¹³² See Laws and Ordinances on Punishment of Acts of Piracy and Armed Robbery at Sea of Korea, *supra* note 50.



Source: Drawn by the authors based on IMO data.¹³³

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

5. Need of Other Domestic Laws Related to Piracy?

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

Article 105 of UNCLOS has been considered as the foundation for universal

¹³³ Data from IMO 2012-2019 Annual Report on Acts of Piracy and Armed Robbery Against Ships. See IMO, 2019 Annual Report on Acts of Piracy and Armed Robbery against Ships, available at <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/MS.C.4-Circ.264%20Annual%20Report%202019.pdf>; 2018 Annual Report on Acts of Piracy and Armed Robbery against Ships, available at [imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/271%20MSC.4-Circ.263%20Annual%202018.pdf](http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/271%20MSC.4-Circ.263%20Annual%202018.pdf); IMO, 2017 Annual Report on Acts of Piracy and Armed Robbery against Ships, available at [imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/258%20Annual%202017.pdf](http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/258%20Annual%202017.pdf); IMO, 2016 Annual Report on Acts of Piracy and Armed Robbery against Ships, available at [imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/245%20Annual%202016.pdf](http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/245%20Annual%202016.pdf); IMO, 2015 Annual Report on Acts of Piracy and Armed Robbery against Ships, available at [imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/232_Annual_2015.pdf](http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/232_Annual_2015.pdf); IMO, 2014 Annual Report on Acts of Piracy and Armed Robbery against Ships, available at [imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/219_Annual_2014.pdf](http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/219_Annual_2014.pdf); IMO, 2013 Annual Report on Acts of Piracy and Armed Robbery against Ships, available at [imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/208_Annual_2013.pdf](http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/208_Annual_2013.pdf); and IMO, 2012 Annual Report on Acts of Piracy and Armed Robbery against Ships, available at [imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/193_Annual2012.pdf](http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/193_Annual2012.pdf).

jurisdiction over piracy, which reaffirms the rule of customary international law.¹³⁴ As some scholars believe, without authorization by domestic law, any grant of jurisdiction by international law to arrest and prosecute pirates is meaningless.¹³⁵ The absence of a crime of piracy does not mean that other domestic laws related to piracy are not necessary. For instance, no matter whether a state has a crime of piracy or not, if without an explicit domestic legal basis for the exercise of universal jurisdiction over piracy, there may be disputes on the application of universal jurisdiction. In the case of *Siam Xanxai*, the defendants claimed that they had not violated Chinese criminal law so that China had no jurisdiction, or that China did not have universal jurisdiction over robbery which they were charged with.¹³⁶ In the case of *M/V Guanabara*, the defendants challenged Japan's universal jurisdiction by asserting that Article 105 of UNCLOS grants only the capturing state, rather than the state which receives pirates from the capturing state, to prosecute them.¹³⁷ The Mauritian Piracy and Maritime Violence Act, came into force in 2012, does not expressly provide for the extraterritorial jurisdiction, and thus the court's jurisdiction was challenged by the defendants during the case of *Police v Mohamed Ali Abdeoukader and Ors*.¹³⁸

Turning to the relationship between international law and domestic law, there are two principal schools: monism and dualism. For the monists, they believe that international law and domestic law belong to an integrated system, and if international law conflicts with domestic law, the former should prevail.¹³⁹ The civil law jurisdictions often incorporate customary international law (sometimes as well as treaties) into the domestic law automatically,¹⁴⁰ which means that these states do not need to enact

¹³⁴ Rebecca M. M. Wallace, *International Law* (4th ed., Sweet & Maxwell, 2002), at 113.

¹³⁵ Andrew Michael Bagley, 'You're a Crook, Captain Hook: Navigating a Way out of the Somali Piracy Problem with the Rule of Law', 40 *Georgia Journal of International and Comparative Law* (2012) 715-749, at 735-736.

¹³⁶ 'The Robbery Committed by Atan Naim and Others: the Application of Criminal Universal Jurisdiction', in the first to fifth chambers of criminal trial of the Supreme People's Court of China (ed.), *China's Criminal Trial Guidance Case* (Beijing: Law Press, 2017) 355-360, at 356-357. (in Chinese)

¹³⁷ Akio Morita, 'On the criminal jurisdiction over piracy in states other than arresting state', *Supplement of Law Seminar – Quick report of cases*, Vol.13, 30 August 2013, available at www.internationalcrimesdatabase.org/upload/icd/Prof-Akio-Morita-Piracy-Trial-in-Japan-2013.pdf. (in Japanese)

¹³⁸ Jamil Ddamulira Mujuzi, 'The Mauritian Piracy Act: A Comment on the Director of Public Prosecutions v Ali Abeoukader Mohamed Decision', 48 *Ocean Development & International Law* (2017) 69-78, at 69 and 70. See also *Police v Mohamed Ali Abdeoukader and Ors*, 2014 INT 312.

¹³⁹ Rebecca M. M. Wallace, *supra* note 134, at 35.

¹⁴⁰ James Crawford, *Brownlie's Principle of Public International Law* (8th edn., Oxford: Oxford University Press, 2012), at 88 and 93.

corresponding specific domestic law. Contrarily, the dualists regard international law and domestic law as two independent systems. International law is applied within a dualist state only when that state expressly incorporate it into its domestic law.¹⁴¹ Hence, theoretically, monist states can exercise universal jurisdiction over piracy even if there is no domestic law on piracy, whereas the dualists must enact a specific law if they want to exercise that jurisdiction.

This holds true in state practice. Some states, which follow a monist tradition and have not proscribed a crime of piracy in their domestic law, insist that they can exercise universal jurisdiction over piracy, for the reason that they can directly incorporate piracy treaties they have ratified. Bulgaria, Poland, and Ukraine stated that universal jurisdiction over piracy was available to them, because they were parties to UNCLOS, and the terms of treaties had prevailed over or became part of their domestic laws.¹⁴²

Notwithstanding the above, the courts in a monist state may consider to what extent to apply international law directly,¹⁴³ and several states also add more limitations to themselves in the case of exercising universal jurisdiction, such as raising higher requirements for the automatic incorporation of criminal rules than laws in other fields. A court in Senegal, in a case concerning the Chadian former dictator *H. Habré* who was alleged to have committed torture in Chad, stated that criminal law required more clarity and ‘formalism’ than other laws, and refused to exercise universal jurisdiction over crimes without a specific domestic law even though the state had ratified relevant conventions allowing it to exercise universal jurisdiction.¹⁴⁴ The French Court, in the case of *Javor*, also rejected an argument that the 1949 Geneva Conventions to which France was a party were directly incorporated into French domestic law, because the provisions were so general that they could not ‘create rules on extraterritorial

¹⁴¹ Rebecca M. M. Wallace, *supra* note 134, at 35.

¹⁴² See Letter from Bulgaria to UNDOALOS, *supra* note 69; Letter from Poland to UNDOALOS, *supra* note 64; and Ukraine’s Legislation on Piracy (Overview), available at un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_criminal_code.pdf.

¹⁴³ James Crawford, *supra* note 140, at 58.

¹⁴⁴ Reed Brody and Helen Duffy, ‘Prosecuting Torture Universally: Hissène Habré, Africa’s Pinochet?’, in Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (2001), 817-832, as quoted in Yvonne M. Dutton, *supra* note 29, at 1155.

jurisdiction in criminal matters’.¹⁴⁵

These self-restrictions reflect the prudence of states or their domestic courts in extra-territorial criminal jurisdiction, and may, to some extent, be inconsistent with what they are supposed to do according to the doctrine of monism. Even if a state without domestic law on piracy is a monist, its domestic court may still have the discretion to reject the direct application of specific international law in the cases concerned, like in Senegal and France.

For dualist states, undoubtedly they need domestic law to transform international law into force at the national level. For instance, in terms of criminal law, China looks more or less a dualist, as Article 9 of Chinese Criminal Law has been widely regarded as the ground for universal jurisdiction over piracy,¹⁴⁶ which stipulates that this law applies to the crimes specified in international treaties to which the PRC is a signatory state or with which it is a member and the PRC exercises criminal jurisdiction over such crimes within its treaty obligations.¹⁴⁷

However, words like ‘treaty obligations’ lead to confusion — if prosecution of pirates is not an obligation, can those states still exercise universal jurisdiction? While some regard the exercise of universal jurisdiction as an obligation,¹⁴⁸ some hold the view that UNCLOS authorizing universal jurisdiction does not create an obligation for states.¹⁴⁹ Article 100 requires all states to cooperate ‘in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’, but does not mention the prosecution of pirates.¹⁵⁰ Article 105 provides that the courts of the capturing states may decide upon the penalties. The use of the word ‘may’ rather than ‘shall’ infers that this article intends to confer power on states to prosecute pirates, but

¹⁴⁵ Brigitte Stern, ‘Universal Jurisdiction over Crimes against Humanity under French Law-grave Breaches of the Geneva Conventions of 1949-Genocide-Torture-Human Rights Violations in Bosnia and Rwanda’, 93 *American Journal of International Law* (1999) 502-533, at 527.

¹⁴⁶ See ZOU Keyuan, ‘Enforcing the Law of Piracy in the South China Sea’, 31 *Journal of Maritime Law and Commerce* (2000) 107-117, at 115; Yvonne M. Dutton, *supra* note 29; and HUANG Li, *supra* note 109, at 36.

¹⁴⁷ Art. 9 of Criminal Law of the People's Republic of China, *supra* note 101.

¹⁴⁸ See James Thuo Gathii, ‘Kenya’s Piracy Prosecutions’, 104 *American Journal of International Law* (2010) 416-436, at 425.

¹⁴⁹ See Ved P. Nanda, ‘Maritime Piracy: How Can International Law and Policy Address this Growing Global Menace?’, 39 *Denver Journal of International Law and Policy* (2011) 177-20, at 182. See also M.D. Saiful Karim, ‘Prosecution of Maritime Pirates: the National Court is Dead — Long Live the National Court?’, 32 *Wisconsin International Law Journal* (2014) 37-94, at 48.

¹⁵⁰ Art. 100 of UNCLOS.

not to impose such obligation on states.¹⁵¹ Also, UNCLOS has not clarified what measures can be used to ensure states to take responsibility for prosecuting piracy.¹⁵² From this perspective, the provisions in UNCLOS do not constitute a sufficient and solid legal basis for the exercise of universal jurisdiction over piracy at the national level.

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

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

On the premise of having the domestic legal basis to allow the exercise of universal jurisdiction over piracy, the need for procedural law of exercising extraterritorial jurisdiction over international crimes at sea seems more urgent than the establishment of a crime of piracy domestically. Universal jurisdiction includes prescriptive jurisdiction, enforcement jurisdiction and adjudicative jurisdiction, among which the enforcement jurisdiction is exercised outside a state's territory. In accordance with Article 105 of UNCLOS, the location where states may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest persons and seize the property on board is 'the high seas', or 'a place outside the jurisdiction of any state'.¹⁵³ In the process of combating piracy in Somalia, United Nations Security Council Resolutions have allowed and encouraged states to enter Somali territorial waters and even inland to combat piracy,¹⁵⁴ which is a breakthrough of universal

¹⁵¹ Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', 20 *European Journal of International Law* (2009) 399-414, at 402.

¹⁵² Jessica Piquet, *supra* note 9, at 261.

¹⁵³ Art. 105 of UNCLOS.

¹⁵⁴ See SC Res. 1816(2008) and SC Res. 1851(2008).

jurisdiction over piracy under exceptional circumstances. In either case, the action is outside the territory of the state which exercises universal jurisdiction.

Generally speaking, the absence or insufficiency of regulations on extraterritorial enforcement in domestic law may affect the implementation of universal jurisdiction over piracy. Even those states which already have a crime of piracy may suffer from the lack of necessary procedural law. For instance, in the case of *Republic of Korea v. Araye*, the pirates claimed that Korea lacked a proper procedural basis to transfer them to its territory, and their procedure rights, such as being arrested pursuant to a warrant, receiving legal assistance promptly, being protected from injury, and enjoying due process in detention, were violated.¹⁵⁵ Whether the Korean navy was the qualified subject to arrest pirates was also one of the concerns of the case.¹⁵⁶ In the case of *M/V Guanabara* in Japan, the pirates also believed that their rights related to arrest procedure, period of detention, and assistance of interpreter and counsel, were not guaranteed.¹⁵⁷ In the case of *Hassan and Others*, it was argued that as a matter of procedure, France did not promptly bring the pirates captured in Somali territorial water before a legal authority after they arrived in France so that the extent of time for the detention of pirates was illegal.¹⁵⁸

As a result, states need to address concerns in many perspectives. They may face considerable logistical challenges in transferring suspect pirates to their own judicial system. Also, they should consider the human rights implications of pirates in long-term detention and ensure prompt access to legal advice and judicial scrutiny at sea.¹⁵⁹ Furthermore, as the United Nations Open-ended Informal Consultative Process has suggested, the states concerned should take measures to provide appropriate training

¹⁵⁵ Seokwoo Lee and Young Kil Park, 'Republic of Korea v. Araye', 106 *American Journal of International Law* (2012) 630-636, at 631.

¹⁵⁶ Ibid.

¹⁵⁷ Akio Morita, *supra* note 137.

¹⁵⁸ Dubner Barry Hart and Otero Brian, 'The Human Rights of Sea Pirates: Will the European Court of Human Rights Decisions Get More Killed?', 15 *Washington University Global Studies Law Review* (2016) 215-254, at 219.

¹⁵⁹ Report of the UN Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chamber Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals and the Time and Resources Necessary to Achieve and Sustain Substantive Results, *supra* note 4, § 22, at 15.

for personnel involved in all aspects of dealing with piracy, including arrest, investigation, prosecution and exchange of evidence.¹⁶⁰ All of these call for corresponding provisions in domestic procedural law.

Another reason for the need for procedural provisions is that procedural law on exercising universal jurisdiction over international crimes at sea can be independent of substantive law on piracy. For one thing, the procedural law can work in both the states with and without a crime of piracy in their domestic laws. For another thing, piracy is not the only international crime committed at sea subject to extraterritorial jurisdiction. Article 99 of UNCLOS requires every state to ‘take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose’.¹⁶¹ Similarly, Article 109 calls on all states to ‘cooperate in the suppression of unauthorized broadcasting from the high seas’.¹⁶² The flag state of the ship, the state of registry of the installation, the state of which the suspect is a national, any state where the transmissions can be received, or any state where authorized radio communication is suffering interference may arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.¹⁶³ Although such jurisdiction over unauthorized broadcasting from the high seas is not universal jurisdiction, it also requires extraterritorial enforcement by states. If a state wants to exercise extraterritorial jurisdiction over such crimes, corresponding procedural law is also needed. UNCLOS stipulates in the same article (Article 110) the right of boarding vessels engaged in piracy, slave trade, unauthorized broadcasting and other crimes.¹⁶⁴ Correspondingly, procedural provisions in domestic law can also be appropriately designed and applied to all the above-mentioned international crimes at sea.

6. Conclusion

¹⁶⁰ Report on the Work of the United Nations Open-ended Informal Consultative Process Established by the General Assembly in Its Resolution 54/33 in order to Facilitate the Annual Review by the Assembly of Development in Ocean Affairs at Its Second Meeting, UN Doc. A/56/121, 22 June 2001, § 68, at 11.

¹⁶¹ Art. 99 of UNCLOS.

¹⁶² Art. 109 of UNCLOS.

¹⁶³ Ibid.

¹⁶⁴ Art. 110 of UNCLOS.

In the light of Article 100 of UNCLOS, all states shall cooperate in the repression of piracy to the fullest possible extent.¹⁶⁵ Whether or not prosecuting pirates is obligatory, prosecution is a primary method to reduce maritime piracy.¹⁶⁶ In fact, if it is feasible for a state to prosecute pirates even without a domestic crime of piracy but it fails to do so, then it shows that state does not fulfil its treaty obligation to the fullest extent as required by Article 100 of UNCLOS.

Among the ways to prosecute pirates, pirates trials can take place in the country of origin, regional states, and other countries, and benefit the whole international community.¹⁶⁷ However, burden-sharing within the international community should be strengthened.¹⁶⁸ It would be valuable to distribute the tasks of prosecuting pirates to capturing states, most of which are sea powers and more competent than regional states in dealing with complicated issues during prosecution. A regional state willing to accept and prosecute pirates seized by foreign naval forces, such as Kenya, the Seychelles, Tanzania, Mauritius and the Maldives, usually needs substantial international financial and judicial support,¹⁶⁹ and the pirates' country of origin, e.g. Somalia, has no resources to do so. Notwithstanding transport of suspects, witnesses, and evidence from further away may incur additional costs, the capturing states do not have to invest lots of money in infrastructure and capacity building. Their existing systems are more self-sustaining and 'readily adaptable to prosecuting piracy in other regions'.¹⁷⁰

For a state not having an existing crime of piracy, it prosecutes pirates in other relevant crimes, such as murder, robbery, and various existing domestic crimes, because the acts associated with piracy and existing traditional domestic crimes have much in common. If the state explicitly incorporates universal jurisdiction over piracy into its domestic law, it is more convenient for the state to exercise extraterritorial jurisdiction over piracy under Article 101 of UNCLOS. In addition, piracy is not the only crime that

¹⁶⁵ Art. 101 of UNCLOS.

¹⁶⁶ Gregory Morrison, 'Applying Lessons from the Golden Age of Piracy: How to Use Specialized U.S. Tribunal to Prosecute Pirates in the Modern Era', 82 *George Washington Law Review* (2014) 1304-1341, at 1309.

¹⁶⁷ Jessica Piquet, *supra* note 9, at 273.

¹⁶⁸ Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, *supra* note 5, § 75, at 27.

¹⁶⁹ Jade Lindley, *Somali Piracy: a Criminological Perspective* (Farnham: Ashgate Publishing Limited, 2015), at 124.

¹⁷⁰ Jessica Piquet, *supra* note 9, at 263.

can be tried at the national level so that the name of a crime under domestic law is not a decisive factor in the exercise of universal jurisdiction. UNCLOS does not explicitly require states to prosecute pirate solely under a domestic crime of piracy. In this sense, the crime of piracy in international law and that in domestic law may have their own characteristics.

While it is better for a state to exercise universal jurisdiction over piracy by establishing a specific crime of piracy in domestic law, there are difficulties in both establishing suitable definitions and appropriate sentences as discussed above. To deal with this, long-term efforts are needed at both national and international levels. In addition to legal obstacles, states may lack political will to exercise universal jurisdiction over piracy. Thus, it is impossible to expect that states sufficiently improve the law on piracy and establish best practice substantive and procedural rules in a short time.

For a state without a crime of piracy, what it can do at the current stage is not to let pirates escape from punishment despite the deficiencies in its law. It is more urgent to improve domestic law on pirates trials than establishing a crime of piracy itself. A state without a crime of piracy can build up legal grounds for exercising universal jurisdiction over piracy and relevant procedural laws on the exercise of extraterritorial jurisdiction over international crimes at sea, by using existing traditional domestic crimes to punish pirates. Just as the Special Adviser to the UN Secretary-General said in the report on legal issues related to piracy off the coast of Somalia, mobilization of states to prosecute pirates must be an evolving process, and it is necessary to design innovative short-and medium-term solutions to the need for action.¹⁷¹

¹⁷¹ Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, *supra* note 5, § 76, at 27.