No. 5 - 2025

ISIL Occasional Paper

Rethinking Accountability in Maritime Piracy and PMSCs: Is it time to drop the anchor on Universal Jurisdiction?

-Ms Ayesha Khan

Although Maritime Piracy presents a persistent threat to global trade and security, international legal responses have, more often than not, struggled to ensure effective prosecution. This is particularly striking given its subjection to universal jurisdiction as defined by the UNCLOS. Although hailed as the primary mechanism for prosecuting piracy through international cooperation, such jurisdiction has proved to be ineffective due to legal inconsistencies, selective enforcement, and the reluctance of states to assume jurisdiction over piracy cases due to their identities as "stateless" individuals.

In this paper, firstly, I highlight such problems that underlie the inadequacy of Universal Jurisdiction as a means of ensuring effective prosecution, through case studies from the UK and India, which highlight the practical limitations of such jurisdiction in piracy cases. Secondly, I analyse the increasing role of Private Military and Security Companies (PMSCs) in counter-piracy operations, which further complicate the legal landscape and raise even greater questions on jurisdiction and accountability. I dissect this idea through the Enrica Lexie case, which creates an understanding of rising jurisdictional issues due to the use of force in naval and maritime warfare. A lack of existing Rules of Engagement governing the actions of such private actors further contributes to the obscurity in this sector. In light of the same, thirdly, I argue that instead of universal jurisdiction, a more effective solution may be found in the form of specialised tribunals dealing exclusively with maritime piracy, as analysed through the positive experiences of Kenya in implementing the same. I extend the conception of these domestic tribunals to further allow for jurisdiction over their PMSCs, possible only through an underlying UN framework laying down regulations on the prosecution of such private actors.

Introduction

At its core, Maritime Piracy is an issue affecting maritime transport and navigation, giving rise to considerable economic and human costs. More often than not, it involves multiple kinds of violence and the use of force to achieve non-governmental goals. Maritime Piracy has broad and complex repercussions for both domestic and interconnected global economies. Due to its widespread damaging nature, there is a clear need for stringent rules to ensure accountability and prosecution of such pirates. However, as captured in the words of the United Nations Security Council with respect to Somali Piracy in particular, "Somali-based piracy is flourishing because it is…nearly consequence-free."[1] Despite being

subject to universal jurisdiction, it has been clear through the experiences of multiple states that the problem of piracy has not been able to be dealt with adequately through the exercise of such jurisdiction. In the sections below, I highlight some of these problems through case studies of the UK and India, building towards the need for a more comprehensive solution and framework in the form of specialised tribunals, as attempted in Kenya.

Maritime Piracy and the Messiah of Universal Jurisdiction

As highlighted above, Maritime Piracy poses a global threat to maritime security and economic trade. It has been acknowledged that piracy is ultimately "a problem that starts ashore and requires an international solution ashore." [2] However, the job is easier said than done. In relation to the operations conducted in the Indian Ocean and Arabian Sea, the challenge of security was compared to "patrolling an area the size of Western Europe with three police cars". [3] Apart from simply the size of area to cover, security forces may face several other problems, including lack of any national identification on pirates, creation of hostage situations, and extended periods of detention at sea.

Having acknowledged the severity of the problem, pirates have long been considered to be *hostis humanis generis*, or enemies of all mankind. Such a title, perhaps, lay the foundation for their subjection to universal jurisdiction under the United Nations Convention on Law of the Seas (hereinafter the "UNCLOS"). Interestingly, such a link between the two has also been questioned, with some authors believing that such "euphemistic labels" for pirates did not show any clear intention to permit universal jurisdiction or give any legal meaning in national laws. [4]

Regardless, with the adoption of the UNCLOS in 1982, the implementation of universal jurisdiction for maritime piracy was formalised through Articles 100-107 (and Article 105 in particular). The primary basis to ensure accountability and effective prosecution, thus, was cooperation between sovereign nations and an exercise of jurisdiction by any state, without a need to prove any jurisdictional nexus or genuine link to the crime. Interestingly, however, universal jurisdiction was never formally defined through any such document, causing the principle to remain ambiguous and lack uniformity in its application. Such a discussion was well captured in the Sixth Committee of the United Nations General Assembly, with all nations voicing their concerns on the risks of misuse and abuse of the principle, in light of the lack of clear limitations and definitions. [5] A crucial problem flagged by the majority seemed to be the creation of conflicts of jurisdiction between states and the potential for politically motivated attacks. By allowing any State to exercise jurisdiction, universal jurisdiction takes away any level of priority of jurisdiction that may have been accorded to the victim state or the state of nationality of the actor. It was also acknowledged by the delegate of Singapore that universal jurisdiction "is a last resort and intended to complement and not supplant other bases of jurisdiction under international law".

In conclusion, the states seemed to acknowledge a need to achieve "the right balance to end impunity and not to abuse the principle of universal jurisdiction". This gives an understanding of the theoretical principles and objectives involved in the origin and implementation of universal jurisdiction. Evidently, in its current form and considering its expansive nature, the principle remains open to misuse and lacks any kind of binding nature to ensure compliance by specific states in exercising their jurisdiction.

Extending this idea, in the following section, I analyse some of the obstacles that have been faced in the implementation of the principle and its inadequacies in the real-life situations of global economies and state interests.

Is the Exercise of Universal Jurisdiction a Sinking Ship?

It is clear that in its theoretical and principled understanding, universal jurisdiction suffers from legal ambiguities and requires greater refinement and clarity in its definition. However, even in its real-life application and implementation, it falls short of its goal of achieving greater prosecutions and preventing impunity. The situation is further complicated by the identities of pirates as "stateless" individuals, subject to the laws and asylum of countries that exercise their jurisdiction, even after trial. As we shall see through the examples of the UK and India, this serves as a great disincentive to the exercise of such jurisdiction.

Such an inadequacy of the principle is also reflected empirically, in the number of times it has actually been exercised. In fact, a study conducted in 2010 found that "Of all clear cases of piracy punishable under universal jurisdiction, international prosecution occurred in no more than 1.47 percent. This figure includes the unprecedented international response to the Somali piracy surge that began in 2008, which accounts for the vast majority of prosecutions. Prior to 2008, nations invoked universal jurisdiction, a doctrine that arose precisely to deal with piracy, in a negligible fraction of cases (just 0.53 percent, a total of four cases)." [6]

Keeping in mind our earlier analysis, such statistics do not come as a surprise. As captured in a paper by Giuseppe Stuppia, "The states not directly affected by piracy have always been (and will be) reluctant to employ enormous resources and means to combat it or indeed are contrary to trying pirates who have no link with their state." [7] Due to their identities as stateless individuals, the host state undertaking the trial would need to ensure fair procedure, basic human rights, and the possibility of asylum and citizenship after their terms have ended. Added to this, the process of gathering evidence abroad is quite complicated, especially given the lack of mutual legal assistance treaties and agreements.[8] For most states, the high evidential burden to prove guilt resulting in fewer convictions, alongside the financial and procedural costs on the nation, make it a theoretically and realistically unfeasible option to exercise universal jurisdiction.

Further, the differing legislations governing piracy, crimes against humanity, extradition etc. varying across countries makes it difficult to determine standards of punishment and criminal responsibility. For instance, the punishments in different legal systems for the crime of piracy varies from three years in Argentina to life imprisonment in the US and Kenya, and to capital punishment in Singapore. [9]

Lack of extradition treaties between two nations also complicates the general principle of *aut dedere aut judicare* ("either extradite or prosecute"). Additionally, disparities in sentencing (with European jurisdictions generally considered more lenient than the US) further impact defendants and extradition. [10] Similar problems are faced with respect to differing Statutes of Limitation, arrest procedures and immunities of individuals in different states.

In general, due to reasons such as the lack of consistency in domestic laws, concerns of respecting state sovereignty, difficulty in collective evidence, challenges in extradition and the high costs of prosecution, universal jurisdiction seems to lose its viability and ability to serve as an effective means of ensuring prosecution, accountability, and deterrence.

Case Study: The United Kingdom – Legal, Political, and Practical Barriers to Exercising Jurisdiction

Compared to other European nations, the UK is infamous for its failure to prosecute those caught for piracy, creating frustration due to the occurrence of catch and release cases. [11] The considerable practical challenges of detaining and transferring suspects captured in the area of the Indian Ocean arises not simply from an issue of jurisdiction but also from the

unique maritime environment in which it is happening. [12] In general, the country seems to acknowledge the challenges of finding enough evidence to convince local authorities to initiate a trial. Importantly, the country faces complications due to the involvement of a number of states' citizens and ships. [13] Once again, it comes down to a question of respect for the sovereignty of other nations as a basic principle of international law, while also exercising jurisdiction over an international crime.

Interestingly, out of all other countries, Kenya accepted by far the most suspects extradited out of the UK but suspended all agreements allowing this in 2010. [14] Now, it only accepts suspects on a case-to-case basis. I argue that the resort to extradition arises from a lack of incentive to prosecute stateless individuals as well as an undue burden on countries that face different levels of piracy. That is, prosecuting more cases and coming down harsher on the crime of piracy is a benefit which is worth the burden *only* for countries which are affected most adversely by it (i.e. countries like Kenya). It is simply not worth the cost and resources for other nations like UK, which is no longer as adversely affected by the crime. The situation is further complicated as any internationally cooperative solution would reduce the crime and generate safety as a non-excludable public good, allowing for the problem of free-riders.[15] Thus, any feasible solution must solve this problem of creating incentive.

Further, the UNCLOS framework merely enables individual states to take action against pirates in the high seas by treating it as a crime against humanity. This requires states to prosecute the pirates as per their own domestic legislation on maritime piracy. [16] Such legislation must be strengthened in nations facing disproportionally higher effects of the crime. A good example of such a specialised framework was recently introduced in India through the Anti-Maritime Piracy Bill 2019, becoming an Act in 2022.

India's Anti-Maritime Piracy Act: Strengthening Legal Frameworks to Overcome Jurisdictional Challenges

In the famously termed *Alondra Rainbow* case (Christianus Aeros Mintodo v. The State of Maharashtra, 2003) it was identified by the Mumbai High Court that Indian law faced a lacuna in domestic legislation on maritime piracy as a crime in particular. [17] The case was also a great example of the shifting natures and nationalists of the parties involved in committing an act of piracy. For instance, "In this case, the vessel was owned by a Japanese national, the crew onboard was from the Philippines, and the vessel was under the command of two Japanese officers. The vessel was hijacked by pirates when en route from Indonesia to Japan." [18] The trial was conducted in India.

Consequently, the Anti-Maritime Piracy Bill was introduced in 2019 to fill this gap in the existing legislative framework and fulfil our international obligations as laid down under the UNCLOS. The bill went beyond the UNCLOS in also criminalising attempts to commit piracy or abetment of the crime. [19] Abiding by universal jurisdiction, it allows for the exercise of jurisdiction beyond the Indian Exclusive Economic Zone (EEZ) and across all high seas. It further allows for a presumption of guilt of the accused. Clearly, the Indian legislature has chosen to come down harshly on the crime through strict legislation and punishment. This is unsurprising considering the rising cases of piracy in the Indian Ocean.

Finally, the bill made piracy an extraditable offence in Section 14 (1). By formalising such a provision, international cooperation may be aided in the prosecution of such a crime. Then converted to an Act in 2022, there are several beneficial lessons from the legislation in formalising extradition provisions, increasing punishment, and strengthening domestic legislations to fulfil international obligations. In fact, after its enforcement in 2022, there have been greater cases of prosecution of pirates, as opposed to the usual practice of

leaving the disarmed pirates at sea. [20] However, there is still a long way to go. The bill, for instance, does not lay down the procedure for collecting evidence (Despite that being one of the greatest obstacles to the prosecution of the crime). [21]

Further, although it creates specialised legislation, it is still adjudged by regular courts who may lack knowledge and expertise in areas of international maritime law and face difficulties in prosecuting nationals from different countries and gaining permission from other nations to allow nations to appear as witnesses or defendants. This lays the premise for my central argument in this paper - while the Anti-Maritime Piracy Bill has introduced some well needed changes into the framework, its lacunae can only be overcome through the solution of a specialized domestic maritime tribunal that enforces such legislation and handles tasks of collecting international evidence, conducting extraditions, and ensuring accountability through the maintenance of international cooperation with other nations and tribunals.

However, the terrain of international maritime law is rarely that simple. In the succeeding section, I analyse the rise of new actors in the scene, specifically the role of Private Military and Security Companies (PMSCs) in anti-piracy operations and how their involvement further complicates the questions we have raised on accountability and jurisdiction. By blurring the lines on the State's monopoly over violence, the actions of such Private Military and Security Companies depict a clear need for strict regulation and governmental control.

Much like the problem of universal jurisdiction failing to ensure consistent prosecution of pirates, the absence of clear legal frameworks governing PMSCs creates uncertainty about when and how these actors can use force, and who holds them accountable when they do.

In this manner, it becomes essential to look at accountability on both sides of the coin – the alleged committers of the crime of maritime piracy, as well as the security companies and government naval forces that act against them. Inevitably, a balance must be maintained between the human rights and basic liberties of the pirates while also ensuring effective prosecution and preventing impunity.

Thus, if piracy tribunals are to be an effective alternative to universal jurisdiction, they must also consider the role of PMSCs and establish accountability mechanisms for their actions.

Private Military and Security Companies and The Use of Force - Legally Grey Areas in the Fight Against Maritime Piracy

In response to the threats of piracy, many states deployed naval forces along their coast and forced piracy operations to move further away from the coast. Leading to an incomplete solution, several states started moving towards private security companies to assist state forces in anti-piracy operations. Over time, the reliance on such companies has gradually increased, with the cost of contracted maritime security services totalling over 700 million USD in East Africa and over 345 million USD in West Africa in 2016. [22] Such forms of private protection are usually hired by the day and can consist of an armed escort boat, unarmed guards on board, and armed guards on board. [23] By virtue of their private nature, they generate greater obstacles and jurisdictional challenges in their prosecution. Importantly, due to their ability to exercise the use of force against pirates, there is a greater need for regulation over their actions and the creation of a clear distinction between lawful and unlawful uses of force.

In this respect, I address certain core issues in the following section that arise from the legal ambiguities of the status of a PMSC between a citizen, combatant, and a state actor. Through the case of Enrica Lexie, I highlight the crucial need for Rules of Engagement even for PMSCs and the inadequacy of the Montreaux Document in ensuring effective regulation. All such problems lead to jurisdictional questions and the effective prosecution of PMSCs when their use of force is illegal.

I use this discussion to build towards my argument of expanding the jurisdiction of specialized maritime tribunals to include PMSCs and tackle questions of accountability in cases of use of force by both pirates as well as private military actors.

The Enrica Lexie Case: A Case Study in Jurisdictional Chaos

At the outset, it is important to acknowledge that Private Military and Security Companies do not fall neatly into any of the existing legal categories that already exist within the framework of International Humanitarian Law or domestic legal frameworks. International Humanitarian Law usually views individuals as civilians or combatants, with the use of force being legal only against the latter. If civilians meet the threshold of "directly participating in hostilities", they lose their civilian status and become lawful targets during armed conflict.[24] Simultaneously, combatants enjoy certain privileges and protections such as the status of Prisoners of War (PoW) under the Geneva Conventions. Further, while states hire PMSCs to perform security functions, it is easy for them to avoid responsibility by arguing that PMSCs act independently.

As non-state actors exercising the use of force against a universal threat, PMSCs fall into a legally ambiguous zone, facing a lack of existing legislation and regulation. If they were considered to be citizens (as they certainly lack official state recognition unlike state naval forces to be combatants), they would lose such status at any point when they exercise the use of force to participate in hostilities against pirates. Of course, the answer is not quite so simple and raises several important questions – What would be the threshold of force required to constitute direct participation in hostilities? Following the Geneva Convention, would there be a need for the existence of an armed conflict prior to the use of such force? Finally, what would be the legal status of such PMSCs prior to the use of any such force? The answers to such questions remain unclear, once again due to the lack of clarity of rules and legislation on the same.

Relevant to this paper, the conclusion remains that there is a clear jurisdictional gap that needs fixing – when PMSCs commit illegal acts, who shall prosecute them?

A relevant case study in this regard, which aids us in viewing these implications in real time, is the Enrica Lexie case between India and Italy.

The Enrica Lexie case arose on 15th February, 2012, when a fishing boat of Kerala named 'St. Antony' was attacked by open fire by two Italian men aboard the privately owned Italian tanker- Enrica Lexie. [25] The two individuals saw the fishing vessel as potential pirates and viewed them as a threat to their security. Thus, they opened fire and led to the instant death of two Indian fishermen, Valentine Jelastine and Ajeesh Pink. [26] Importantly, the International Maritime Organisation had earlier declared the high seas of Kerala waters as subject to a grave problem of maritime piracy.

Relevant to this paper are the questions that arose with regard to jurisdiction and accountability of the two individuals who exercised the use of force against a perceived threat in international waters.

After a case was initiated in the Kerala High Court, Italy chose to take the case to the Permanent Court of Arbitration (PCA), under the United Nations Convention on the Law of the Seas (UNCLOS). The arguments advanced by Italy included "continuous warnings such as flags, horns, and flashlights" despite which the fishing vessel did not change its course. Such prior measures draw a parallel to general Rules of Engagement, which govern the exercise of deadly and non-deadly use of force by state actors and require several levels of warnings to be issued before the actual exercise of the use of force. [27]

Importantly, it was further argued by the petitioners that the mariners were operating under official state duty and possessed sovereign and functional immunity under the UNCLOS. In response, India contested the claim to sovereign immunity as the mariners were merely operating as a private company exercising commercial functions, and sovereign immunity cannot be used as a way to absolve responsibility for their actions. While there were also questions on territorial jurisdiction, we limit our discussion in this paper to the relevant aspects of sovereign immunity and the legal status of the individuals involved.

This is precisely the ambiguity of jurisdiction that becomes further complicated in the case of PMSCs. As seen in Enrica Lexie, there is ambiguity as to the legal status of the two individuals who opened fire on the Indian fishermen. While it is in Italy's favour to argue for sovereign immunity and exclude India's jurisdiction to protect its nationals, simultaneously, India would wish to protect its nationals as victims of the crime and argue for the commercial nature of the individuals as private actors. Once again, it comes down to a balance between respecting the sovereignty of other nations while also protecting your own nationals.

Importantly, our learnings for PMSCs from this case study are many. Firstly, the few Rules of Engagement that do regulate the actions of state forces are also absent in the case of non-state actors. Secondly, there are often legal ambiguities even in deciding who is a state actor and who is not. Such questions are always tainted by nations' own state interests and alliances. Thirdly, in the case of Enrica Lexie, even if the two Italian individuals were recognised to be acting as PMSCs, there would still be clashes between India and Italy in the exercise of jurisdiction, as there is simply no legally established priority for the same, in light of universal jurisdiction.

This case has helped us lay the ground for a rising need for the accountability of actors engaged in the fight against piracy and a recognition of their legal status. In the subsequent sections, I highlight a few other obstacles that come in the way of effective prosecution of PMSCs- primarily, the lack of an established, binding legal framework.

The Crucial Need for Rules of Engagement (RoE) to Govern PMSCs

Rules of Engagement usually refer to issued orders that set out permissions and limitations for tasks and activities conducted by state forces. [28] These orders vary between domestic legislations of different states and also between different governments of the same state. For example, certain presidents of the USA have preferred to be completely informed and in control of military operations of US forces while others, including Donald Trump, have allowed for more flexible rules and decision making by forces in their expertise.

However, regardless of differences over time and nation, certain basic principles can be seen as followed in most Rules of Engagement. These include use of force only in case of self-defence (of person or property), a use of only minimum force as necessary and reasonable in the situation, and use of deadly force only when there is an immediate threat to life. The existence of such basic rules ensures the protection of basic human rights when dealing with situations involving actors like pirates and also ensures accountability of state actors, as legally bound by such directions.

Unlike such regulation for state forces, PMSCs usually set their own Rules of Engagement through private contracts and agreements with the state- leading to inconsistency in standards and no minimum level of accountability. This also leads to a lack of oversight by any domestic or international authority, leading to the possible creation of a dangerous situation of near impunity.

The creation of domestic Rules of Engagement for PMSCs as well, or the extension of existing RoE to include PMSCS, would be a strong

step in the right direction towards ensuring uniform standards of accountability and prosecution of private actors, when acting in a state capacity. Such rules would need to clearly specify when a private actor's functions remain commercial in nature and when their engagement with overseas pirates warrants state oversight. There is also a clear need to distinguish between the lawful use of deadly and non- deadly force as well as the issuance of compulsory warnings prior to the same.

While acknowledging some potential criticisms to the system of domestic creation of RoE for PMSCs, it is true that varying rules for different states will lead to disparity and uncertainty. For instance, it would not be in any state's interest to strictly regulate and harshly punish their PMSCs as the private actors work on a contractual basis and would simply shift operations to a nation with more flexible and less stringent rules.

In light of the same, I argue that there is first a need for a uniform international framework advanced by the United Nations that sets certain levels of minimum standards of accountability and regulation as binding on all nations. Upon accepting this bare minimum, states shall still remain free to exercise their discretion in the level of regulation and oversight they wish to enforce. Such legislation, both at the domestic and international level, would allow for the foundational basis of accountability of PMSCs.

At the same time, it becomes relevant to acknowledge the inadequacies of the current system of regulation that oversees the activities of PMSCs. The major legislation governing the same is the Montreux Document of 2008. [29] However, the document was designed primarily for PMSCs operating in armed conflicts on land, and its provisions do not specifically apply to maritime security. In fact, maritime PMSCs usually operate in peacetime commercial security to protect ships from pirates, and not during armed conflict. Further, the document assumes PMSCs to operate within a specific state's jurisdiction, unlike maritime PMSCs who often operate in international waters, making jurisdictional questions a lot more complicated. Importantly, maritime PMSCs are not always contracted by states and are often contracted by private shipping companies to protect their goods. Finally, the Montreaux Document holds no legally binding value and creates guidelines but no enforceable obligations.

Similarly, the International Maritime Organization (IMO) has issued its "Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the high-risk area" in 2012 to address specific guidelines for maritime PMSCs. [30] However, similar to the Montreux document, para 1.5 of its Annexure states that "This interim guidance is not legally binding and is not in itself a set of certifiable standards. It does, however, provide minimum recommendations on the competencies and abilities a professional PMSC is expected to have." [31] While a step in the right direction, by lacking legally binding value, the document also falls short of creating the legal framework that PMSCs necessitate.

In conclusion, there is a visible sense of ambiguity and several jurisdictional issues that arise in the prosecution of both pirates as well as PMSCs that work against them. We have acknowledged a need to ensure accountability and reduce impunity on both sides of the coin. The aim is to tackle the widespread problem of maritime piracy while also ensuring a continued respect for international rules and human rights by privately contracted actors.

The solution for this, as argued in this paper, has been *firstly*, a move away from the dependence on universal jurisdiction as an inadequate means of ensuring prosecution of pirates, and *secondly,* the creation of a common international legislative framework to regulate the actions of PMSCs and ensure accountability.

In the final section of this paper, I extend these ideas to the sphere of enforcement. In this regard, I argue that the enforcement of such legislation against PMSCs as well as of captured pirates, must be carried out by specialised maritime tribunals established in states as per domestic legislation. I establish the viability of this idea through a case study of the Kenyan specialised maritime tribunals and their success in this regard. Simultaneously, the theoretical underpinnings of such tribunals solve the challenges I had raised earlier in this paper.

That is, we recall the problem faced by states in prosecuting pirates under universal jurisdiction due to the undue financial and legal burden that is not worth the benefits for many countries, also allowing for the possibility of freeriding once security is achieved. The burden of creating of domestic tribunals will be borne by states that disproportionately face the effects of the crime of maritime piracy. For such states, it is beneficial to set up such a tribunal to allow for specialisation in dealing with cases relating to international maritime law and the prosecution of pirates as well as PMSCs.

Such a tribunal would solve several of the challenges raised earlier in this paper. It would prevent jurisdictional conflicts like those seen in Enrice Lexie, with multiple states claiming authority over the issue. It would also ensure consistency and uniformity in the way piracy case and PMSC related offences are dealt with. Further, it centralises prosecution and does not require any perceived incentive to a nation, as in the case of universal jurisdiction. This would prevent selective enforcement and removes political reluctance of states to prosecute such pirates.

The tribunal shall also be able to enforce standardized Rules of Engagement, as suggested for PMSCs. This would reduce legal uncertainty overall and eliminate the existing reliance on private contracts. It would also prevent the overburdening of other national courts which would also lack expertise in piracy and maritime security. With a specialization in the area, such tribunals can take on the burden on evidence collection and witness testimonies, ensuring faster trials and consistent sentencing. Most importantly, it would ensure greater and more effective prosecutions through a uniform and neutral legal framework and prevent impunity in international waters. A real-life example of such a tribunal can be analysed through the experiences of Kenya.

Kenya's Specialized Maritime Tribunal- What Can We Learn?

In 2010, a special court in Kenya was initiated with the aid of the U.N. Office of Drugs and Crime to hear maritime piracy cases. [32] The aim of the tribunal was to "increase trial efficiency in the system and provide a secure, modern environment suitable for piracy cases". The creation of the tribunal was a part of a UN regional model to lead to internationally cooperative local solutions in states facing the negative effects of maritime piracy. As per the UNODC, Kenya held a total of 123 piracy related prisoners 18 of whom were convicted and already serving their sentence. [33] Some of the major issues faced by Kenya before the establishment of the tribunal arose from inconsistent court rulings. [34] Further, there was a disparity between domestic laws and international legislation relating to maritime security and counter-piracy operations. Additionally, was the problem that "judicial officers receive inadequate or no training on the complexities of domestic and international maritime law".[35] By allowing for decentralization of judicial power and a concentration of expertise, the tribunal allowed for a solution to all such problems and introduced local solutions to an international problem.

The experiences of Kenya are still ongoing and certainly have a long way to go. Regardless, the idea of a specialised tribunal acted as a solution to several impending problems in maritime law and security. In this paper, I have

argued that the jurisdiction of such tribunals must also be extended to the prosecution and accountability of Private Military Security Companies, considering their rising nature in the scene of international maritime law and counter-piracy operations.

Conclusion

I began this paper by examining the failures of universal jurisdiction in effectively prosecuting maritime piracy and highlighting the increasing complexities introduced by the rise of Private Military and Security Companies. While universal jurisdiction was intended to create a framework for international cooperation in prosecuting pirates, practical challenges—such as legal inconsistencies, political reluctance, and evidentiary burdens—have made it largely ineffective. I utilized case studies of the UK and India to demonstrate how states often avoid prosecuting pirates due to financial and diplomatic concerns, leading to impunity.

The subsequent section analysed the rise of PMSCs in further complicating the legal landscape. These private actors operate in a legally gray-zone, lacking clear Rules of Engagement (RoE) and standardized accountability mechanisms. I used the Enrica Lexie case to illustrate the jurisdictional disputes that arise when security forces use force at sea, emphasizing the urgent need for clear regulations. The Montreux Document, while a guiding framework, remains non-binding and inadequate for maritime operations.

Given these challenges, this paper argued for the establishment of a specialized piracy tribunals modelled upon Kenya's approach. These tribunals would not only streamline piracy prosecutions but also regulate PMSCs under UN-backed legal framework, ensuring accountability, legal consistency, and effective maritime security governance. Without such measures, legal uncertainty and impunity shall continue to persist in international waters.

Endnotes

1 National Security Council, Countering Piracy off the Horn of Africa: Partnership & Action Plan (2008), p. 12.

2 William Gortney, "Testimony of the Commander of U.S. Naval Forces Central Command before the House Armed Services Committee", 5 March 2009.

3 Interview with Christian Rune, Commodore for Task Force 508 Ocean Shield 2010, Copenhagen, 8 November 2019.

4 Matthew Garrod, "Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law", Diplomacy & Statecraft, vol. 25 (2014), pp. 195-213 at p. 200.

5 For details pertaining to the Security Council's adoption of Resolution 2442 (2018), calling upon states to strengthen efforts in the fight against piracy off the Somali coast, available at: <https://press.un.org/en/2018/gal3571.doc.htm> accessed on 17 February 2025.

6 Eugene Kontorovich & Steven Art, "An Empirical Examination of Universal Jurisdiction for Piracy", *Northwestern University School of Law Faculty Working Papers*, vol. 38 (2010), pp 436- 453 at p. 436.

7 Giuseppe Stuppia, "The Issue of Jurisdiction in Piracy Cases", in Angela Del Vecchio (ed.), International Law of the Sea: Current Trends and Controversial Issues (Eleven International Publishing, 2014), p. 167.

8 Amnesty International, Universal Jurisdiction: The Challenges for Police and Prosecuting Authorities (AI Index: IOR 53/007/2007, June 2007), pp 1-21 at p. 16.

9 Stuppia, *note 7*, p. 183.

10 Evan K. Gruetter, "Piracy, a Crime of Universal Jurisdiction: A Perspective into the History of United States Piracy Jurisprudence, its English Common Law Roots, and Relationship with the Law of Nations", *SSRN Electronic Journal* (2019), p. 31.

11 House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia: Tenth Report of Session 2010–12*, HC 1318 (2012), pp. 1-103 at p. 43.

12 Ibid 44.

13 Ibid 45.

14 Ibid 50.

15 Peter Viggo Jakobsen & Troels Burchall Henningsen, "Success Defying All Expectations: How and Why Limited Use of Force Helped to End Somali Piracy", *Journal of Strategic Studies*, vol. 47 (2024), pp. 263-287 at p. 270.

16 Mazyar Ahmad, "Prosecution of Maritime Pirates in India: A Critical Appraisal", Norwegian Centre for Law of the Sea (NCLOS), pp. 1-19 at p. 3.

17 *Christianus Aeros Mintodo v. The State of Maharashtra,* AIR 2013 MH 541.

18 Ahmad, *note 16,* p. 13.

19 Ibid 14.

20 For details pertaining to India's prosecution of 35 pirates who hijacked a ship off Somalia, available at: <https://www.reuters.com/world/india-prosecute-35-pirates-who-hijacked-ship-off-somalia-navy-official-says-2024-03-20/> accessed on 13 February, 2025.

21 Ahmad, *note 16,* p. 14.

22 Maritime Working Group, "Outreach Briefing Note: Working Group on the Use of Private Military and Security Companies in Maritime Security", Montreux Document Forum (2018), pp.1-2 at p. 1.

23 For details pertaining to the emerging role of Private Military and Security Companies in anti-piracy operations, available at: <https://thesecuritydistillery.org/all-articles/market-for-force-the-emerging-role-of-private-military-and-security-companies-in-anti-piracy-operations> accessed on 18 February 2025.

24 For details pertaining to direct participation in hostilities, available at: <https://www.icrc.org/en/law-and-policy/direct-participation-hostilities> accessed on 20 February, 2025.

25 Permanent Court of Arbitration (PCA), "The 'Enrica Lexie' Incident (Italy v. India)," Case No. 2015-28, Final Award, 2 July 2020.

26 For details pertaining to the Enrica Lexie case, available at: <https://juriscentre.com/2021/05/02/analysis-enrica-lexie-case/> accessed on 20 February, 2025.

27 Rules of Engagement Handbook: VBSS and Gangway / Access Control Point, UN Doc.

28 Ibid 2.

29 The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Adopted by the Government of Switzerland, in cooperation with the International Committee of the Red Cross (ICRC) on 17 September 2008.

30 International Maritime Organization*, Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, Adopted by the International Maritime Organization on 25 May 2012 at its Ninetieth session, UN Doc. MSC.1/Circ.1443.

31 Deeksha Kathayat, "In Accordance with International Maritime Laws, Should Maritime Policing Activities Be Privatized?", *Supremo Amicus*, vol. 31 (2022), pp. 1-5 at p. 1.

32 For details pertaining to Kenya's piracy court, available at: <https://edition.cnn.com/2010/WORLD/africa/06/25/kenya.piracy.court/index.html> accessed on 22 February 2025.

33 For details pertaining to UNODC's work on piracy, available at: <https://www.unodc.org/easternafrica/en/unodc/piracy/index.html> accessed on 23 February 2025.

34 Rosemelle Mutoka, "Assessing Current Trends and Efforts to Combat Piracy: A Case Study on Kenya", Case Western Reserve Journal of International Law, vol. 46 (2014), pp. 125-143 at p. 132.

35 Ibid 134.

About the Author

Ayesha Khan is a second-year B.A., LL.B. (Hons.) student at the National Law School of India University, Bengaluru. She is deeply interested in international law and human rights, and her academic work often explores how global legal systems respond to questions of justice, accountability, and inequality. She particularly enjoys thinking about contemporary developments in international law, especially in maritime, humanitarian, and environmental law. Through her work, she hopes to engage critically with international legal frameworks and contribute to ongoing conversations about how the law can respond more meaningfully to global challenges. This research project was conducted under the guidance of Dr. Parineet Kaur, Assistant Professor and Head, Centre for Advanced Studies in Intellectual Property and Technology Law, ISIL, New Delhi.

About the ISIL

The Indian Society of International Law (ISIL), a premier national institution for teaching, research and promotion of international law was established in 1959. In sixty-six years of its existence, the ISIL, under the dynamic leadership and guidance of distinguished persons, has grown into a prestigious research and teaching centre of international law in India. It has played a leading role in shaping the thoughts on international legal issues not only in the region, but also in generating informed debates across the world. The ISIL aspires to foster nation-wide study, research, interpretation, development, and appreciation of international law. In order to transform ISIL as a multi-disciplinary progressive policy research and narrative building in international legal matters and achieve its vision, ISIL brings out publications in the form of Journals, Books, Monographs, Occasional Papers, and articles by the researchers and members.
At present ISIL enjoys the able stewardship of its President Prof. (Dr.) Manoj Kumar Sinha.

Price: ₹ 250.00

The Indian Society of International Law (ISIL)

VK Krishna Menon Bhawan, 9, Bhagwan Das Road, New Delhi 110001
Tel: 91-11-23384458/59, E-mail: isil@isil-aca.org