

**THE *MS ACHILLE LAURO* HIJACKING: ON PIRACY, MARITIME  
TERRORISM AND THE SAFETY OF SHIPPING**

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# THE *MS ACHILLE LAURO* HIJACKING: ON PIRACY, MARITIME TERRORISM AND THE SAFETY OF SHIPPING

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During the Grotian era, when ocean governance was dominated by the principle of *mare liberum* (free seas), two notable areas of law prevailed against a backdrop of minimal ocean regulation: the laws of war at sea; and the law relating to sea piracy.<sup>1</sup> They became two essential normative pillars of *mare liberum*, simply because war and piratical acts both posed major threats to the essential rights and freedoms enshrined in the notion of ‘free seas’. Each threatened peaceful trading activities and had the potential to disrupt maritime imperial access. Their regulation or suppression were significant imperatives for the great powers with seaborne empires, whose navies had a combination of war-fighting and constabulary purpose. We are clearly concerned with the suppression of violence at sea, but we are focusing in this chapter only on that violence emanating from non-state entities. Traditionally, this would have meant the suppression of piracy<sup>2</sup> but, in the contemporary maritime security environment, we need to broaden our focus to include other manifestations of non-state violence, including armed robbery and terrorism.

The *Achille Lauro* hijacking in 1985 provides us with a most pertinent case study, the influence of which remains significant. The seizure was effected by ‘terrorists’ and raised awareness of the potential for terrorist attacks within the maritime environment, something that had previously not generated substantial international concern. Importantly, however, the hijacking also fell outside the legal parameters of piracy. For that reason, it prompted serious reflection on piracy’s widely accepted international legal definition. The law of sea piracy had

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<sup>1</sup>I take the Grotian era to mean the three centuries from the early-17<sup>th</sup> century to the middle of the 20<sup>th</sup> century, since when fundamental and wide-ranging developments have occurred in relation to ocean governance driven by profound change in all dimensions of the ocean environment: political; institutional; economic; social; technological; physical; security; and normative.

<sup>2</sup>Navies also had other important constabulary roles, in particular in relation to the protection of inshore fisheries and in the enforcement of customs, fiscal and quarantine regulations. These were, however, essentially about the maintenance of order within territorial jurisdiction or relatively close to the coast. The suppression of piracy was a high seas role usually involving more distant deployment.

been codified in the *1958 Geneva Convention on the High Seas*.<sup>3</sup> In the mid-1980s that codification had only very recently been repeated in the *1982 UN Convention on the Law of the Sea*. It was, as a result, rapidly coming to be regarded as the customary position on the subject.<sup>4</sup>

That is certainly not to suggest that this law was entirely adequate as a means of dealing with non-state violence at sea. The reason why the *Achille Lauro* incident is sufficiently significant to warrant a chapter in this volume is that, in highlighting the obvious shortcomings in the law of sea piracy, it also led directly to new treaty law on maritime security, negotiated under the auspices of the International Maritime Organisation - namely the *1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*.<sup>5</sup> This is the foundation document of what can usefully be referred to as the SUA Regime.<sup>6</sup>

The SUA Regime has already achieved significance in relation to maritime security operations and there is certainly evidence that the utility of this new law has the potential to well exceed that of the pre-existing law of sea piracy. Could the *Achille Lauro* hijacking come to be regarded as a watershed event in maritime security law, consigning the traditional and established law of piracy to history? In order to answer that question we need to examine the relationship between the law of piracy and the SUA Regime. We also need to give some consideration to the degree of obligation attached to those two bodies of law. Before we do that, it will be useful to provide some background comments on both the law of sea piracy and

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<sup>3</sup> See *1958 Geneva High Seas Convention* arts 14-21 and *1982 UNCLOS* arts 100-107.

<sup>4</sup>*1982 UNCLOS* arts 100-107. Relatively recent texts noting that the conventional law of piracy reflects prior customary law are Donald Rothwell and Tim Stephens, *The International Law of the Sea* 2<sup>nd</sup> Edition (Hart Publishing, 2016) 171-173; and Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 355.

<sup>5</sup>Hereafter, the *1988 SUA Convention*.

<sup>6</sup>At the same time as the *1988 SUA Convention* was agreed, a protocol (essentially a separate but related treaty) was also agreed: the *1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* (hereafter the *1988 SUA Protocol*). Following the events of 11 September 2001, two further protocols were negotiated and agreed, in 2005. They were intended to develop the law in the previous two instruments and broadened the range of offences to include terrorist acts and trafficking in weapons of mass destruction. While these four instruments will be referred to collectively as ‘the SUA Regime’ in this chapter, it should be noted that not all states party to the 1988 instruments are also party to the 2005 protocols. .

the phenomenon of ‘maritime terrorism’. We will then move on briefly to describe the events of October 1985, before reaching some conclusions as to the consequences, legal and operational.

## I THE LAW OF SEA PIRACY

Events off Somalia, in the north-western Indian Ocean and in the Gulf of Aden in recent years served to raise the profile of sea piracy and led to the mounting of significant multi-national naval operations to suppress it. It was not always regarded as so obviously a contemporary problem, however. Dubner, in his classic treatment of the subject published in 1980, noted that ‘most international jurists and states consider the matter of “traditional” piracy a dead issue.’<sup>7</sup> Even more recently, the prominent international criminal lawyer, Cherif Bassiouni, remarked that ‘Piracy, almost non-existent nowadays, neither threatens peace and security nor shocks the conscience of humanity, although it may have at one time.’<sup>8</sup> Dubner was somewhat less sanguine than Bassiouni, arguing that there ought to be some modification of the law of piracy (the treaty law from 1958) to take account of ‘incidents of alleged terrorism on the seas’. Nevertheless, he also noted the difficulties likely to be experienced in obtaining any sort of international consensus to that effect.<sup>9</sup>

That extant law of piracy is simply stated. It concerns ‘any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship ... and directed on the high seas, against another ship ... or against persons or property on

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<sup>7</sup>Barry Dubner, *The Law of International Sea Piracy* (Martinus Nijhoff, 1980) 69.

<sup>8</sup>M. Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’ (1996) *Law and Contemporary Problems*, 63-74. Bassiouni’s view is surprising as piracy had certainly not ceased being a problem – see, for example, the comments made around the same time in Robin Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press, 3<sup>rd</sup> ed, 1999) 209.

<sup>9</sup>Dubner, above n 7, 69. When Dubner was writing, the Third UN Conference on the Law of the Sea was underway but drawing to a conclusion. It had been the obvious forum for brokering any change. None was made, and the resultant 1982 *Convention* contained precisely the same provisions on piracy as had the 1958 *High Seas Convention*.

board such ship.’<sup>10</sup> The law is a reflection of the traditional and popular perception of piracy, involving pirate vessels crewed by ruthless criminals out for private gain and attacking and seizing ships going about their lawful purpose on the high seas. It was this that the law of piracy during the Grotian era was developed to suppress, with a fundamental element of that law being the establishment of universal jurisdiction to allow the warships of any state to take action, regardless of the state of registry of the pirate vessels encountered.

There is some evidence that ‘piracy’ was not previously as narrowly defined as it is today; the term being applied to various forms of criminal violence and armed robbery at sea. Indeed, in the inter-War years, the study conducted by the Harvard Research in International Law produced a draft convention on piracy that included criteria that are today excluded from the definition.<sup>11</sup> That draft convention was never taken forward into treaty law, however, and by the time the law of piracy was codified in the 1950s, universal jurisdiction was exercisable only in respect of the narrower definition. It was this, established in both conventional and customary terms that applied in October 1985, when the *Achille Lauro* was hijacked.

The renowned 17<sup>th</sup> century publicist, Hugo Grotius, addressed the issue of piracy, and the jurisdiction necessary to prosecute it, in the final paragraphs of his treatise *Mare Liberum*. He distinguished between jurisdiction over ocean space and jurisdiction over individuals to be found within it. It was emphatically the latter that he argued provided the basis for the prosecution of piracy and not any assumed dominion over the seas.<sup>12</sup> In establishing his argument, he referred to the classical example of Julius Caesar’s capture of pirates, his attempt to achieve their prosecution by placing them within the jurisdiction of the Roman authorities ashore, and his reaction when the officiating pro-consul declined to prosecute. Caesar (at that time a private citizen) sailed back onto the high seas with the detained pirates on board and promptly crucified them, something he would not have been legally entitled to do if the seas had fallen within the territorial jurisdiction of the Roman *imperium*.

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<sup>10</sup>1982 UNCLoS art 101. The ‘high seas’ is taken to mean any sea area beyond territorial jurisdiction and includes, therefore, the waters of the exclusive economic zone beyond the 12 nautical mile territorial limit; see 1982 UNCLoS art 58 together with art 87.

<sup>11</sup>See the discussion of the ‘History and Development’ of piracy in Dubner, above n 7 ch III, 37.

<sup>12</sup>Hugo Grotius, *The Free Sea* (Liberty Fund, 2004) 128-9.

Interestingly, Caesar's reaction, two millennia ago, has echoes in the modern opinion that regards the outlawing of piracy as a *jus cogens*.<sup>13</sup> As a peremptory norm of international law, states do not merely have the right to act against those who have committed acts of piracy; they are arguably under an obligation to do so. Indeed, the conventional law states that 'All states shall cooperate to the fullest possible extent in the repression of piracy'. This seems very clear. As Bassiouni has suggested:

the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognising certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite ... Above all, the characterisation of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.<sup>14</sup>

This obligation *erga omnes* arguably provides the legal grounds for a breach of the norm of exclusive flag state jurisdiction on the high seas (which is itself a further pillar of *mare liberum*).<sup>15</sup> Logical though such an argument is, it is not uncontroversial; we shall return to it later in the chapter.

## II MARITIME TERRORISM

As Walter Laqueur noted in his classic work on the subject, 'terrorism is ... an insurrectional strategy that can be used by people of very different political convictions.'<sup>16</sup> It has an assumed utility in domestic political contexts but it has also long had an international dimension, with groups identified with one society or political entity often crossing and operating over political

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<sup>13</sup>For a recent discussion of *jus cogens*, see James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8<sup>th</sup> ed, 2012) 594-603. Further useful relevant discussions are: M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59(4) *Law and Contemporary Problems*, 63-74; see also Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997).

<sup>14</sup>Bassiouni, above n 12, 65-66. He lists those crimes he considers have achieved *jus cogens* status and includes piracy in that list (on p 68).

<sup>15</sup>The third, and final, pillar of *mare liberum* has been the traditional law of war at sea that permits the use of the seas for war but serves to protect the freedom to trade, especially in relation to neutral powers.

<sup>16</sup>Walter Laqueur, *Terrorism* (Abacus, 1980) 14.

boundaries. That said, if we look back over time at manifestations of international terrorism, it becomes apparent that the global socio-political and communications conditions necessary for terrorism to be seriously internationalised, were not substantially in place prior to the middle of the 20<sup>th</sup> century. Indeed, the contemporary phenomenon we refer to as ‘international terrorism’ only became a serious international concern in the late 1960s. By then, the conditions conducive to it were in place. There was also a political cause whose leaders recognised the opportunity it provided. That cause was the product of the deep-seated animosity between the state of Israel and its Arab neighbours, exacerbated by the fate of those Muslim communities both living in and displaced from Palestine.

International terrorism first became a serious issue in the late-1960s and 1970s because armed groups identified with the Palestinian cause took their campaign to the international level, most dramatically by targeting civilian airliners. The hijacking of aircraft by the Popular Front for the Liberation of Palestine (PFLP) began with that of El Al Flight 426 from Rome to Tel Aviv on 23 July 1968. It continued with a number of incidents in the 1970s, including the so-called Dawson Field Hijackings in September 1970 that ended with the explosive destruction of three civil airliners on the ground in the Jordanian Desert and the negotiated release of a number of PFLP fighters. Such incidents were deliberately dramatic and high profile. They demanded an international legal response.

There were, however, political and practical difficulties associated with defining ‘terrorist’ and distinguishing between those who mounted attacks deliberately to spread fear and others who used similar techniques for other reasons. The result was an international legal response that aimed at dealing with the fact of hijacking rather than either the motives or the purpose of those committing the offence. The *1970 Hague Convention for the Suppression of the Unlawful Seizure of Aircraft* was one result. It entered into force quite quickly, in 1971. The word ‘terrorism’ did not appear anywhere in its title, preamble or substantive text.

At that time there was no conventional law dealing with terrorist acts that might occur at sea, essentially because it was not considered a sufficiently serious threat. Very obviously, piracy had a long history, hence the first ever treaty dealing with the regulation of the high seas

included provisions on piracy as an international crime.<sup>17</sup> While often violent and terrifying for its victims, piracy was not politically motivated terrorism, however. As a matter of record, while aircraft were being hijacked in the air, ships were certainly being seized at sea, but generally by local small-time pirates operating close inshore rather than politically or religiously motivated terrorists – and the incidents were far less dramatic, attracting little worldwide publicity.

Instances of maritime terrorism were rare, albeit not entirely unknown. In January 1961, for example, the Portuguese flagged passenger ship *Santa Maria*, with 600 passengers embarked, was seized off the Brazilian coast by a political group opposed to the Salazar-led regime in Portugal. The Third Officer and three other crew members were killed.<sup>18</sup> The *Achille Lauro* would not be the first cruise ship to suffer such an assault. There were also several other, largely isolated, attempted attacks on ships and offshore oil installations, none of which was especially noteworthy. In the 1970s, the Provisional Irish Republican Army (PIRA) seemed to toy with the idea of targeting ships, but nothing of real substance occurred. The placing of a bomb on-board the passenger ferry *Ulster Queen* while it was alongside in Belfast was perhaps more to do with the campaign of terror in Belfast than about taking the struggle to sea.<sup>19</sup> Then, in February 1981, the PIRA did suddenly go maritime and managed to sink the British registered cargo vessel, *MV Nellie M*, in the approaches to the port of Londonderry. The ship was stationary in the water when it was boarded by a PIRA unit that had seized the Merville Point Pilot Station, which serviced the port of Londonderry in Northern Ireland but which was located in County Donegal in the Republic of Ireland. Its ship's crew was taken ashore to safety before the vessel was sunk by the detonation of charges placed in its bilges. There was some press coverage of this incident but not a great deal. Nevertheless, it was a successful

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<sup>17</sup>1958 *Geneva Convention on the High Seas*; Piracy is dealt with in arts 14-22, with the international crime of piracy defined in art 15.

<sup>18</sup>The leader of the group that seized the ship subsequently published his account of it, in Henrique Galvão, *Santa Maria. My Crusade for Portugal* (Weidenfeld & Nicolson, 1961).

<sup>19</sup>The information quoted here is taken from Brian Parritt (Ed), *Violence at Sea: A Review of Terrorism, Acts of War and Piracy, and Countermeasures to Prevent Terrorism* (ICC Publishing, 1986); see 'Chronology of Terrorist and other Attacks' 235-56. This contains mention of one PIRA attack, on the British registered passenger ferry, *Ulster Queen*, damaged while alongside in Belfast by a bomb placed in its First Class lounge. Despite this happening on-board a ship, its location suggests that it is probably best regarded as a part of the terrorist violence in Belfast rather than a distinctive act of 'maritime terrorism'.

attack and PIRA repeated the operation exactly twelve months later and in exactly the same location, with an equally successful attack on the *MV St Bedan*.<sup>20</sup> Despite the effective way in which the attacks were carried through, neither had a major impact in either Northern Ireland or internationally. Tactical success brought with it no discernible strategic advantage for PIRA and the organisation never thereafter repeated its attempts to mount attacks on significant maritime targets. Indeed, their strategic failure seemed to substantiate the view that terrorist acts at sea have less potential to generate public or media impact than similar scale attacks on land, especially in heavily population areas. Terrorists feed off publicity; if there is little prospect of significant media impact following attacks on certain types of target, they will probably be passed by in favour of more attractive options.

Operations at sea also require the skills necessary to function effectively in the maritime environment; few groups will have these as a matter of course. Terrorist acts at sea will always be challenging, will involve a measure of sea-going expertise and may well not result in the level of publicity and political impact that may be more easily achieved in other ways. For these reasons, while much effort was put into negotiating international arrangements for dealing with aviation related terrorism, nothing was done to put in place any international legal framework for dealing with ‘maritime terrorism’. Things changed, however, in October 1985, prompted by the high-profile incident at sea in the Mediterranean that is the subject of this chapter.

### III THE ACHILLE LAURO HIJACKING

The *MS Achille Lauro* was a former Rotterdamsche Lloyd ocean liner transformed, in 1965, into an Italian registered cruise ship of the Flotta Lauro Line. By 1985, however, she was on charter to the Chandris Line, the Lauro Line having gone bankrupt three years earlier. The planned 12-day cruise she was undertaking at the time of the hijacking included stops in both Arab (Egyptian and Syrian) and Israeli ports. She left the Italian port of Genoa on 3 October with 748 passengers embarked and arrived in Alexandria (Egypt) on 7 October. The majority

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<sup>20</sup>The present author was the Staff Operations Officer (head of the naval operations department) in the Naval Headquarters within the Northern Ireland Security Forces at the time of the 1981 attack on the *Nellie M*. He coordinated the naval response to it and, following that experience, was in communication with the naval operational staff in Belfast in the immediate aftermath of the second attack, on the *St Bedan*, the following year.

of the passengers disembarked for a sightseeing tour, leaving 97 on the ship together with the crew. The ship planned to steam from Alexandria to Port Said that day, re-embarking the other passengers on arrival in the evening.

Unknown to the master and crew, there were four members of the Palestine Liberation Front (PLF) embarked in the vessel. They were there on the orders of PLF leader Abu al-Abbas who had conceived the attack after watching cruise ships sail in and out of ports around the Mediterranean. It appeared to him that such cruise vessels provided an easy means of accessing Israeli territory. The four men had embarked disguised as cruising tourists, their intention being to land in Israel when the ship paid its planned visit to the port of Ashdod. Their ultimate mission was to launch an attack within Israel, possibly a suicide attack (although that is by no means certain), against the Israeli military. The four had conducted dry runs on earlier cruises but, on this final voyage, they had their weapons with them. Unfortunately for them, a crew member apparently discovered them in their cabin cleaning the weapons while the ship was leaving Alexandria. The four men immediately abandoned their original plan and decided instead to hijack the ship. Their aim shifted from that of launching an attack in Israel to one of seizing the ship and somehow arranging to disembark to safety.<sup>21</sup>

They ordered the ship's master to steam towards the Syrian port of Tartus where they hoped to disembark into a sympathetic Arab state. They also took the opportunity to demand the release of around 50 Palestinian fighters held in Israeli prisons, in exchange for the safe passage of the ship, its crew and its passengers. Following diplomatic pressure from the Italian and US governments, the Syrian authorities declined to cooperate, however. Nor did the Israelis

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<sup>21</sup>The details of the *Achille Lauro* hi-jacking are well documented and the facts not generally in dispute (although the precise circumstances of the decision by the four men to hijack the ship rather than land in Ashdod are still not entirely clear). See, for example, Richard Pallardy, 'Achille Lauro Hijacking', Encyclopaedia Britannica, <[www.britannica.com/event/achille-lauro-hijacking](http://www.britannica.com/event/achille-lauro-hijacking)>. Many of the details seem to have been confirmed by a recent account of the background to the attack and the attack itself written by Reem al-Nimer, the widow of Mohammad Abbas (aka Abu al-Abbas) the PLF leader who masterminded the operation. (Reem al-Nimer *Curse of the Achille Lauro: A Tribute to Lost Souls* (Cune Press, 2013)). Abbas was captured by US forces in Iraq in 2003 and died in detention the following year. Al-Nimers's book was widely reported when published - see, for example, Robert Fisk, 'How Achille Lauro hijackers were seduced by the high life', *The Independent*, 5 May 2013.

respond to the demand for them to release Palestinian prisoners. The ship having been refused entry to Tartus, the terrorists killed one of the hostages, an elderly, wheel-chair bound Jewish-American tourist (Leon Klinghoffer), whose body and wheel-chair were thrown overboard. Eventually, in order to end the hijacking and secure the safety of the crew and passengers, the Egyptian authorities agreed to the ship docking in Port Said, where the four Palestinians would be allowed to disembark and then take advantage of free air passage out of Egypt. This arrangement was honoured and the terrorists boarded an Egyptian commercial aircraft which took off from Egypt bound for Tunisia. There followed an interception of the Egyptian aircraft over the Mediterranean by fighter aircraft from the US Sixth Fleet carrier *USS Saratoga*. The aircraft was ordered to land at a NATO airbase in Sicily, where the hijackers were arrested by the Italian authorities.

The US action prompted complaints from Egypt about the interception of an Egyptian commercial aircraft, and from Italy about the decision to force the aircraft down in Sicily (without prior approval from Rome). Although Washington would have preferred to move the detained terrorists to the US for prosecution (which would have required extradition from Italy), the four hijackers were eventually prosecuted in Italy and sentenced to periods in jail of up to 30 years. The jurisdiction of the Italian courts in these cases relied on the *Achille Lauro* being an Italian flag vessel; the hijacking and murder of Leon Klinghoffer occurred, therefore within Italian jurisdiction. Two of the convicted hijackers were released on parole in 1991 and the other two were released in 2008 and 2009.

There were a number of interesting and challenging legal issues raised by these events and the responses they provoked, all of which provide fertile ground for legal analysis. One can, for example, examine the legality of the deal brokered to allow the hijackers to disembark in Port Said and to take free passage out of Egypt, the US interception of the Egyptian commercial aircraft, and the forced landing of that aircraft in Italian territory without the prior approval of the Italian authorities. These each raise important questions, but they are not the reason for the inclusion of this case study in this volume. The legal questions of greatest interest here were to do with how the hijacking itself might be regarded in law. Was the seizure of the vessel an act of piracy or not? Depending on the answer to that question, what were the jurisdictional and operational consequences?

The answer to the first of these two questions is very clear: the hijacking of the ship was emphatically not an act of piracy as defined in international law. For it to be so, the seizure would have needed to have taken place on the high seas, it would have needed to involve another vessel launching the attack, and those carrying out the hijacking would have needed to be acting for their own private ends. It failed to satisfy the piracy criteria in all senses: it was seized in Egyptian internal or territorial waters; it was seized by passengers; and the four men were politically motivated. A natural though misplaced perception that it was piracy served to highlight the shortcomings of the law dealing with criminal violence against shipping. Resolving those shortcomings would require either a re-drafting of the law on piracy or a quite separate development of law to do with terrorist attacks on shipping – something, indeed, like the treaty law already developed to deal with the hijacking of aircraft.

#### **IV THE SUA REGIME**

In December 1985, the UN General Assembly called for ‘appropriate measures’ to be proposed for dealing with such incidents and there began a process to develop the law.<sup>22</sup> The International Maritime Bureau (IMB), which had a particular role in monitoring violence at sea, convened an expert workshop in San Jose, California in March 1986 to identify a way forward. One of its conclusions was that any response to maritime terrorism should avoid becoming distracted by defining terrorism, and the motives of those involved, and concentrate instead on the physical acts that could place shipping in jeopardy. This reflected the pragmatic thinking behind the conventional law developed previously to deal with aircraft hijackings. Defining ‘terrorism’ and dealing with the political sensitivities that discussion of motives would inevitably generate, would only serve to delay or, more likely, prevent agreement over effective action.

The IMB also discussed practical actions that could be taken to reduce the risks to shipping.<sup>23</sup> The workshop in San Jose explored a number of options, ranging from simple and easily

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<sup>22</sup>GA Res 40/61, UN GAOR, 108<sup>th</sup> plen mtg, UN Doc A/RES/40/61 (9 December 1985).

<sup>23</sup>The outcome of which was reported in Parritt, *Violence at Sea*, above n 19. The present author was a member of the IMB expert workshop that met in San Jose and the author of the paper that argued that a response should not focus on motive but on the criminal acts themselves; see Steven Haines ‘Criminal Violence at Sea: Observations on the Threat and Appropriate Responses’, 93-108.

implemented physical security measures to consideration of the deployment of ‘sea marshals’ (an idea inspired by the previous deployment of air marshals on civilian airliners). Its recommendations were fed into the Maritime Safety Committee of the International Maritime Organisation, which went on to produce interim guidance for the shipping industry that September.<sup>24</sup> The following year it also began to consider a draft international convention proposed jointly by Egypt, Italy and Austria, the eventual result of which was the *1988 SUA Convention* agreed in Rome in March 1988. As we have already noted, this is the foundation document of the SUA Regime. Space precludes a detailed analysis of this body of law but, fortunately, this is not necessary as a most useful and comprehensive commentary has already been produced by Kraska and Pedrozo.<sup>25</sup>

There are two features of the SUA Regime that we need to highlight. The first is the range of offences covered by Article 3 of the *1988 SUA Convention* (further expanded by the 2005 protocols). Study of these reveals that they not only more than adequately cover the offences committed on-board the *Achille Lauro*, but also subsume piracy as currently defined. States within the SUA Regime may no longer have any need to rely on the law of piracy. They are obliged to have domestic legislation in place to allow for the prosecution of SUA offences<sup>26</sup> – although they are under no obligation to dispense with law dealing with sea piracy.<sup>27</sup>

Since not all states are within the SUA Regime, the law of piracy still has some relevance and application. Nevertheless, the number of states within the regime – over 166 at the time of writing, including the flags of around 95% of the world’s merchant ship tonnage – does mean that it is close to being universal. That being the case, there is good reason for asking what the future relevance of the law of piracy might be – could it soon become moribund?

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<sup>24</sup>IMO Documents, MSC/Circular 443 of 26 September 1986 *Measures to Prevent Unlawful Acts Against Passengers and Crews Onboard Ships*.

<sup>25</sup>James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff, 2013),801-58. For simplicity, and since the 1988 SUA Convention is both the foundation document and the most ratified of the four instruments, we will tend to refer to this in the discussion that follows.

<sup>26</sup>*1988 SUA Convention*, art.5.

<sup>27</sup>In the case of the United Kingdom, for example, offences of piracy can be prosecuted using either pt II of the *Aviation and Maritime Security Act 1990* (which enabled ratification of the *1988 SUA Convention*) or under s 26 of the *Merchant Shipping and Maritime Security Act 1997*, which acknowledges the definition of piracy in the *1982 UNCLOS* as ‘constituting part of the law of nations’.

## V THE LAW OF PIRACY AND THE SUA REGIME COMPARED

To answer this question, we need to compare and contrast the two legal regimes and consider enforcement and prosecution. There is certainly overlap because acts of piracy are effectively covered within the list of offences covered by the SUA Regime (although, very clearly, the reverse is not the case). The most important areas of contrast, however, are to do with jurisdiction and with the rights and obligations to suppress the acts included within the two regimes.

Piracy has long been subject to universal jurisdiction. Indeed, it was the first crime to be so subject, paving the way for subsequent development of the concept.<sup>28</sup> It does not fall within the jurisdiction of the International Criminal Court, however, and can only be prosecuted in municipal courts. That would depend, of course, on the availability of appropriate domestic law and individual states may experience difficulty in applying it at the national level. Significantly, there is no specific international obligation on states to ensure that piracy is adequately reflected in domestic law. The effectiveness of a general ability to prosecute piracy at the municipal level could realistically only be tested if states sought to prosecute. This would itself depend on their willingness to exercise universal jurisdiction by deploying naval forces capable of enforcing the law. There has, however, been a general failure to exercise universal enforcement jurisdiction over piracy, with the naval operations in response to Somali-based piracy being quite exceptional.<sup>29</sup> The bulk of the cases arising from naval operations to suppress Somali piracy have been dealt with by the rendition of captured pirates from the

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<sup>28</sup>M. Cherif Bassiouni, 'The History of Universal Jurisdiction and its place in International Law' in Stephen Macedo (Ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2006).47-9. While piracy is subject to universal jurisdiction, there is some doubt as to the extent of that, including in relation to aspects of the crime that are located ashore. There is, however, the 'intrinsic difficulty of addressing maritime criminality only by taking action at sea, as inevitably, the roots of such crimes lie ashore' (see Douglas Guilfoyle, Policy tensions and the legal regime governing piracy' in Douglas Guilfoyle, *Modern Piracy: Legal Challenges and Responses* (Edward Elgar, 2013), 325-36.

<sup>29</sup>See Eugene Kontorovich and Steven Art, 'An Empirical Examination of Universal Jurisdiction for Piracy' (2011) 104 *American Journal of International Law*, 436-53.

warships of enforcing states to the jurisdiction of courts in the region.<sup>30</sup> In contrast, while the offences created under the SUA Regime are not subject to universal jurisdiction, they should be capable of being dealt with in the municipal courts of all states within the regime because of the obligation placed upon them to enact appropriate domestic legislation.<sup>31</sup>

The fact that the SUA Regime does not establish universal jurisdiction means that without the cooperation and agreement of relevant flag states, action cannot always be taken to suppress illicit activities on the high seas. Exclusive flag state jurisdiction still applies – except, of course, in the case of offences that are also contrary to the law of piracy. This means that in operational and enforcement terms, there is very good reason for not consigning the law of piracy to the archives. While the offences constituting piracy are covered in the SUA Regime, the enforcement possibilities are by no means as flexible under SUA as they are under the law of piracy. If a vessel is seized by pirates, enforcement action can, if necessary, be taken without reference to the flag state. This would, for example, allow a surprise special forces’ operation to be mounted to end a hijacking without a high risk of compromise. Universal jurisdiction remains a valuable option which SUA does not provide.

The second issue worthy of comparison is to do with *jus cogens* and the related notion of obligations *erga omnes*. As we noted above, it has been argued that piracy is a breach of a peremptory norm of international law (*jus cogens*) which ought to generate an obligation *erga omnes*. Bassiouni argued that if there is no such obligation, it is difficult to see how a *jus cogens* can exist. But is there an obligation *erga omnes* to suppress piracy? Article 100 of the 1982 UNCLOS certainly codifies a duty to cooperate to the fullest extent in its repression. Unfortunately, all other articles relating to piracy contain a discretionary tone rather than a mandatory one. It is by no means certain that piracy has achieved full *jus cogens* status. According to the International Law Commission, a treaty representing an agreement between two states to facilitate acts of piracy would be contrary to the law of treaties.<sup>32</sup> This will not

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<sup>30</sup>Following agreements with regional states such as Kenya, the Seychelles, and Mauritius. See Kontorovich and Art above n 29, and Tullio Treves, ‘Piracy and the International Law of the Sea’, in Guilfoyle, *Modern Piracy* (above n 28) 117-46.

<sup>31</sup>See, eg, the obligation included in art 5 of the 1988 SUA Convention.

<sup>32</sup>Examples mentioned by the International Law Commission as being potential breaches of art 53 of the 1969 Vienna Convention on the Law of Treaties included ‘a treaty contemplating or conniving in the commission of

mean, however, that there is a certain obligation *erga omnes* placed on all states to take positive action to suppress piracy. This is what Bassiouni seemed to be implying in the quote included earlier in this chapter. There is too great a discretionary element in the expectations placed upon states for this to be the case. In contrast, the SUA Regime contains clear obligations on states to take action, especially in relation to prosecution. In common with other counter-terrorism instruments, there is an obligation on all states party to either prosecute or extradite (to a state willing to prosecute) any pirates present within their jurisdiction. The SUA Regime obligation is seemingly stronger than that in the law of piracy.

## VI CONCLUSIONS

The SUA Regime has certainly not to date completely subsumed or replaced the existing law of piracy. It has gone some way towards doing so but, importantly, it has not established universal jurisdiction for SUA offences. What it has done, however, is create an obligation to either prosecute or extradite those who are accused of a range of unlawful acts that threaten the safety of maritime navigation. This is stronger than the discretionary nature of the universal jurisdiction contained in the law of piracy. Any future developments to do with the security of shipping are more than likely to involve further development of the SUA Regime. It is extremely difficult to imagine any serious attempt to review the law of piracy in the future. Indeed, if for any reason that became a serious possibility, it is surely the case that it would become fully subsumed within the SUA Regime. That being the case, the hijacking of the *Achille Lauro* must be regarded as a profoundly significant event that initiated a fundamental and lasting development in maritime security law. Today, the SUA Regime provides a broad legal framework for the suppression of unlawful acts against shipping and is likely to be the legal forum for developments in the future. If it does dominate in this way, the *Achille Lauro* hijacking will surely come to be seen as the seminal event in the decline of the traditional law of sea piracy – but at the time of writing it has most certainly not consigned the law of sea piracy to history.

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acts, such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to cooperate' (*Yearbook of the International Law Commission*, 1966 II, 247-8).