ADDRESSING PIRACY THROUGH THE INDIAN LEGAL FRAMEWORK

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ABSTRACT

In October 1999, MV Alondra Rainbow was hijacked by a group of armed Indonesian pirates who were captured by the Indian Coast Guard in the Arabian Sea. However, prosecution of these criminals proved difficult due the absence of specific legislation recognising piracy as an offence. Indian waters are still plagued by several such incidents whose perpetrators are tried under provisions of the Indian Penal Code and archaic colonial admiralty law. The Piracy Bill introduced recently in Parliament attempts to address this issue, but suffers from various shortcomings. The definition of 'piracy' in the Bill, reproduced from the United Nations Convention on the Law of the Sea, leaves ambiguity concerning situations that come under the ambit of the proposed legislation. Given that 'piracy', according to the Bill, is committed only on the high seas or outside the jurisdiction of any state, such acts committed within territorial waters remain unrecognised. Requiring these acts to be committed only for 'private ends' limits the scope of acts constituting piracy. Also, whether 'hijacking' can be recognised as 'piracy' remains controversial. Additionally, the Bill fails to distinguish acts of piracy from discrete, individual offences committed on sea without any piratical intent. This paper argues that the Piracy Bill should incorporate some modifications modelled on the Suppression of Unlawful Acts against Safety of Maritime Navigation Act, 2002,to act as a better instrument to tackle piracy.

I. INTRODUCTION

Battling the crime of piracy has been an ongoing struggle for nations across the world and has been recognised as a crime of universal jurisdiction in international law.[1] Despite the sharp rise in instances of piracy, there is no legislation in India specifically dealing with the crime of piracy. In order to address this situation, the External Affairs Minister, S. M. Krishna, introduced the Piracy Bill in the Lower House of Parliament on April 24, 2012. It has been reviewed by

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1 M Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82(2) American Journal of International Law 269, 290 (1988).

the Parliamentary Standing Committee attached to the Ministry of External Affairs. It recognised the 1982 United Nations Conventions on the Laws of the Sea ["UNCLOS"] to which India is a signatory.

Without any recognised offence of 'piracy' in India, pirates have so far been charged under sections of the Indian Penal Code [hereinafter "IPC"]. The hijacking of *MV Alondra Rainbow* is a case in point. A Panama registered ship, the *MV Alondra Rainbow*, belonging to Japanese owners, was hijacked by pirates in September 1999. Within a month, the Indian Coast Guard and Navy captured the pirates and India assumed jurisdiction for their prosecution. The Mumbai Sessions Court tried and convicted the pirates under various sections of the IPC. However, on 18 April 2005, the Mumbai High Court overruled the lower court's decision and acquitted all the accused.[2] The sections they were charged under included trespassing under Sections 441 and 447, Waging War Against the Country under Section 121, Attempt to Murder under Section 307 and Armed Robbery or Dacoity under Sections 397 and 398 of the IPC along with other laws such as the Foreigners Act, 1946, the Passports Act, 1967, and the archaic British Admiralty law which was sought to be repealed in 2005.[3] This indicates the shortcomings of the existing legislation that can be made applicable to piracy.

This paper attempts to analyse the efficacy of the Bill and possible issues that may arise with regard to its interpretation. In the first part, the lacunae in the definition of the offence have been highlighted. The incorporation of the UNCLOS definition of 'piracy' has brought with it, the various legal loopholes that exist in this definition. Furthermore, simply transposing this provision in the Indian context creates further issues and that have been discussed. The second part attempts to interpret the Bill in the light of the doctrine of harmonious construction. Its relevance is discussed vis-a-vis the provisions of the Indian Penal Code, 1908, and the enactment, recognising the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation ["SUA Convention"] to which India is a signatory and which deals with an area of crime that overlaps with piracy. Such construction is done with a view to preserve the

2 K Zou, *New Developments in the International Law of Piracy*, 8(2) Chinese Journal of International Law 323, 344.

3 R Mishra, *Draft Indian Piracy Bill – Preliminary Assessment*, National Maritime Foundation,http://maritimeindia.org/article/nmf-exclusive-draft-indian-piracy-bill-preliminary-assessment-raghevendra-mishra (last accessed Dec. 5, 2012).

universal jurisdiction granted to India under international law with respect to piracy.

II. LACUNAE IN THE DEFINITION OF PIRACY

Several interpretational issues surround Article 101 of the UNCLOS, which has been reproduced in the Piracy Bill. Most of these issues are now transmuted to the problem of tackling piracy in the Indian scenario. Article 101 of the UNCLOS, which reads the same as Section 2(e) of the Piracy Bill, defines piracy as follows,

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

Section 2(e)(iv) of the Piracy Bill adds to this definition. According to this clause, "*any act which is deemed piratical under the customary international law*" is to be considered piracy under the Bill. However, this definition proves problematic in several ways, as it severely limits the applicability of the Bill to the following situations which ought to be addressed through this Bill.

a. Clandestine acts

The definition provided under Article 101 of UNCLOS has been criticised for not including non-violent piratical acts of the kind that are rampant in the South-East Asian region. The description of the acts seems to suggest that all acts covered by the UNCLOS definition require an element of violence, and hence do not address these newer forms of piracy, which often involve non-violent

clandestine theft.[4] The wording of the definition, "*any illegal acts of violence **or** detention **or** any act of depredation*" suggests piracy is either an act of violence or detention or depredation. Black's Law Dictionary defines 'depredation' as 'plunder or pillage' and, further, defines 'pillage' as "the forcible seizure of another's property".[5] Given this understanding, it does seem to require an element of violence or forcible deprivation of property. In Collins' words, "*another common form of attack....is a clandestine attack where attackers board the vessel at night-whether steaming or at anchor-and steal cargo, equipment or cash without the knowledge of the crew. This type of attack would therefore not fall within the definition of violence, unless the act of trespassing is considered depredation*."[6] For the purpose of clarity and comprehensiveness, 'trespass' and 'theft' should be included within the definition of piracy. Further, as will be discussed later in this paper, the punishment imposed for acts of piracy indicates that such acts of piracy are not addressed by the Piracy Bill.

b. High seas

The definition places a limit on the geographical area in which any such act can be considered 'piracy' by restricting piracy to acts of violence, detention or depredation on the high seas and excluding acts committed in the territorial waters of any nation. However, most piratical acts occur within territorial waters.[7] Of late, there have been several incidents of piracy in Exclusive Economic Zones (EEZs) as well.[8] Thus, unless municipal legislation recognises the acts as piracy within territorial waters, the acts cannot be termed piracy according to the definition.[9] The issue of EEZs is addressed by the Piracy Bill, which states, in Section 14 (1) that "*for the purposes of geographic scope, the provisions of this Act shall also extend to the exclusive economic zone of India*." The expression 'Exclusive Economic Zone' is defined in the Territorial Water, Continental Shelf,

4 R Collins and D Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40(1) Journal of Maritime Law & Commerce 89, 96 (2009).

5 'Depredation', Black's Law Dictionary 473 (8th ed., 2004); 'Pillage', Black's Law Dictionary 1185 (8th ed., 2004).

6 Collins and Hassan, *supra* note 4 at 97.

7 Zou, *supra* note 2 at 329.

8 H Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, 17 University of Miami International and Comparative Law Review 1, 6 (2009).

9 T Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 Tulane Maritime Law Journal 257, 265(2002).

Exclusive Economic Zone and Other Maritime Zones Act, 1976 as "*an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline*."[10] Thus, the EEZ excludes and is beyond the limit of territorial waters of India, which is defined as "*the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.*"[11] The Piracy Bill makes no mention of territorial waters. This implies that only acts of violence, detention and depredation on the high seas or in the Exclusive Economic Zone of India can be recognised as 'piracy' under the Piracy Bill and not any such activities in the territorial waters of India.

It can be argued that such omission is deliberate so as to enable prosecution under the IPC for piratical acts committed in territorial seas. In fact, Dutton highlights several instances where if attacks occur within a state's own territorial waters, the state can apply its domestic law such as those governing robbery or assault to prosecute the pirates. In such a situation, the piracy legislation incorporating the UNCLOS definition of piracy need not be applicable to the piratical act committed in territorial waters.[12] However, the statement of objects and reasons of the Bill clearly highlights the inadequacy of the IPC provisions to deal with such situations. It mentions that,

> *[t]he provisions of the Indian Penal Code pertaining to armed robbery and the Admiralty jurisdiction of certain courts have been invoked in the past to prosecute pirates apprehended by the Indian Navy and the Coast Guard but in the absence of a clear and unambiguous reference to the offence of maritime piracy in Indian law, problems are being faced in ensuring prosecution of the pirates.*

It can be gleaned that the purpose of the Bill is to encompass all situations that are currently being tackled with the provisions of the IPC and the Bill is intended to be a comprehensive legal framework to tackle all instances of piracy.

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10 Section 7, Territorial Water, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.

11 Section 3(2), Territorial Water, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.

12 Y Dutton, *Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will*, 86 Tulane Law Review 1111, 1156 (2012).

c. Two ships

The next concern that most scholars have about the definition of piracy in the UNCLOS and is also debatable in the Indian context is the requirement of two ships for any act to be recognised as piracy. The definition requires the piratical act to be committed by the crew or the passengers of a private ship or private aircraft, and be directed against 'another ship or aircraft.' Most scholars interpret this definition to mean that there should be two ships for such an act of piracy to take place.[13] Thus, the act of hijacking, whereby the passengers of a ship forcefully take control of that ship and commit acts of violence, detention and depredation on that ship, cannot be classified as 'piracy'. In fact, in the *Achille Lauro* incident in 1985, Palestinian terrorists posing as passengers on an Italian cruise ship later held the ship's crew hostage and murdered one of the passengers.[14] The accused in that case could not be prosecuted under UNCLOS provisions because the incident failed to meet the two-ship requirement.[15] Thus hijacking is not covered by the definition of 'piracy' in the Piracy Bill.

The two-ship requirement might be dispensed with if both components of Section 2(e) are read together. The act can be directed against (i) **another** ship or aircraft, or against persons or property on board such ship or aircraft **or** (ii) against **a** ship, aircraft, persons or property in a place outside the jurisdiction of any State. Thus while Section 2(e)(i)(A) addresses attacks against another ship, Section 2(e)(i)(B) could include an attack against the same ship with the pirates on board. If such a reading of the definition is to be accepted, there is no two-ship requirement. However, this is contentious and needlessly ambiguous. In order to lend clarity to the Bill, it is suggested that 'another' in Section 2(e)(i)(B) be replaced

13 *See* generally, Collins and Hasan, *supra* note 4; Zou, *supra* note 2 at 326; Halberstam, *supra* note 1 at 290; JM Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 American University Law Review 1267, 1283 (2010); GD Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 Tulane Law Review 1433, 1443 (2007).

14 Halberstam, *supra* note 1 at 269.

15 Australian Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize*, ALRC Report 48 (1990), p. 46-47 <*http://www.austlii.edu.au/au/other/alrc/publications/reports/48/48.pdf*> (last accessed Dec. 5, 2012).

with **'a'**. Australian anti-piracy legislation, for instance, amended the clause to avoid this ambiguity while incorporating the UNCLOS definition of piracy.[16]

d. Private ends

One of the most contentious issues in constructing a legal regime to tackle piracy is whether terrorism on the sea should be regarded as piracy or should be regulated separately. The definition adopted by the Piracy Bill requires an illegal act of violence or detention, or any act of depredation to be committed for 'private ends'. The exact intent behind the drafting of this definition can be gauged from the *travaux préparatoires* of this article, which can be found in the Harvard Research Draft which incorporated the condition of 'private ends' to exclude situations where the crew of a ship have a political purpose such as mutiny or the ship is utilised for terrorist activities.[17] In fact, attack on vessels with a political aim, such as highlighting a state's struggle for independence has been accepted as a defence to piracy.[18] While in international law, piracy and terrorism are seen as distinct offences,[19] national regimes such as in the United States of America have prosecuted terrorists at sea under the charge of piracy.[20]

However, some scholars argue that, in contemporary times, terrorism and piracy have become more closely related. There have been instances of terrorist ships that wish to make a political statement but rob and plunder the ship.[21] An authority on piracy law, Malvina Halberstam, interprets the expression 'private ends' broadly to include acts of terrorism. She argues that 'private ends' can be interpreted to mean personal motives arising from "*real or supposed injuries done by persons or classes of persons or by a particular national authority*."[22] It remains

16 DA Lavrisha, *Pirates, Ye Be Warned: A Comparative Analysis of National Piracy Laws*, 42 University of Toledo Law Review 255, 265 (2010).

17 *Harvard Research Draft Convention on Piracy*, 26 American Journal of International Law 739 (Supp. 1932).

18 Collins and Hassan, *supra* note 4 at 99.

19 Garmon, *supra* note 9 at 258.

20 United States v. The Ambrose Light, 25 F 408, 412-13 (SDNY 1885).

21 LM Diaz and BH Dubner, *On the Evolution of the Law of International Sea Piracy: How Property Trumped Human Rights, the Environment and the Sovereign Rights of States in the Areas of the Creation and Enforecement of Jurisdiction* ,13 Barry Law Review 175, 189 (2009); DR. Burgess, Jr., *Piracy is Terrorism*, NewYork Times, Dec. 5, 2008 http://www.nytimes.com/2008/12/05/opinion/05burgess.html (last accessed Dec. 5, 2012).

22 Halberstam, *supra* note 1 at 282.

ambiguous whether the expression 'private ends' excludes terrorist activities on sea from the definition of piracy. In the opinion of the researchers the expression is to be interpreted with due regard to the Indian context and existing legislations dealing with terrorism. This dimension will be further explored in the next part in relation to other Indian statutes dealing with the matter.

e. Piratical acts

One of the potentially contentious provisions in the Piracy Bill which is not found in UNCLOS is Section 2(f), which includes "*any act which is deemed piratical under the customary international law*" under the definition of piracy. The term 'piratical' is itself a term of pervasive vagueness if put in context of international customary law since no authoritative definition of 'piracy' exists under customary international law.[23] The question of inclusion of terrorist activities at sea is one of the many controversies in the definition.

The United States of America followed a similar provision which stated that, "*[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.*"[24] This created several problems as there was no fixed definition of privacy in the law of nations. Section 4 of the same statute stated that, "*whenever any vessel or boat, from which any* ***piratical*** *aggression, search, restraint, depredation or seizure....the Court shall thereupon order a sale and distribution."* Justice Story in the case of *United States* v. *Brig Malek Adhel*[25] was faced with the task of ascertaining the meaning of the term 'piratical' constrained by the definition of 'piracy' as per law of nations, and said:

> *"Where the act uses the word 'piratical,' it does so in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means that the act belongs to the class of offences*

23 Garmon, *supra* note 9 at 260, Halberstam, *supra* note 1 at 272-73.

24 Section 5, An Act to protect the commerce of the United States and punish the crime of piracy, 1819 < http://www.brymar-consulting.com/wp-content/uploads/piracy/Protection_against_piracy_18190303.pdf> (last accessed Dec. 5, 2012).

25 43 US 210 (1844).

> *which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power."*

This is clearly a wide interpretation of the term despite the condition that it is to be interpreted according to the law of the nations. In the present context, such wide interpretation could even lead to treating terrorist activities as acts of piracy. Given the uncertain description of the offence in customary international law, Indian courts are bound to face difficulty in the interpretation of Section 2(f) of the Piracy Bill.

It is argued by some scholars that the definition of piracy that is most widely regarded as custom in contemporary times is the UNCLOS definition.[26] Even if this argument was to be accepted, it makes Section 2(f) redundant as the UNCLOS definition of piracy is already incorporated into the Piracy Bill.

III. RECONCILING THE BILL WITH EXISTING MUNICIPAL LAW

The interpretation of the Piracy Bill with regard to existing legislation governing similar or overlapping offences in the territory of India can prove problematic. In the international sphere, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation [the "SUA Convention"] is an important move towards battling piracy through an effective legal framework. It was framed as a response to the *Achille Lauro* incident which the UNCLOS did not apply to.[27] Thus, the SUA Convention was aimed at effectively addressing maritime piracy.

The SUA convention was ratified by India and has been given effect through the enactment of the Suppression Of Unlawful Acts Against Safety Of Maritime Navigation and Fixed Platforms On Continental Shelf Act, 2002. [the "SUA Act"] This act, incorporating the wording of the SUA Convention,

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26 DP Paradiso, *Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its* Cause, 29 Penn State International Law Review 187, 198 (2010); M Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy* Operations, 40 Vanderbilt Journal of Transnational Law 1, 10 (2007); Garmon, *supra* note 9 at 275.

27 Garmon, *supra* note 9 at 271; BH Dubner and K Greene, *On the Creation of a New Legal Regime to Try Sea* Pirates, 41 Journal of Maritime Law and Commerce 439, 460 (2010).

recognises the following acts as offences:

> *"(a) an act of violence against a person on board a fixed platform or a ship which is likely to endanger the safety of the fixed platform or, as the case may be, safe navigation of the ship*
> *(b) destruction of a fixed platform or a ship or causes damage to a fixed platform or a ship or cargo of the ship in such manner which is likely to endanger the safety of such platform or safe navigation of such ship*
> *(c) seizure or exercise of control over a fixed platform or a ship by force or threat or any other form of intimidation*
> *(d) placing or causing to be placed on a fixed platform or a ship, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or that ship or cause damage to that fixed platform or that ship or its cargo which endangers or is likely to endanger that fixed platform or the safe navigation of that ship*
> *(e) destruction or damage to maritime navigational facilities or interference with their operation if such act is likely to endanger the safe navigation of a ship.*
> *(f) communication of information which the offender knows to be false thereby endangering the safe navigation of a ship*
> *(g) attempt to commit any of the above."*

a. Overlapping legislation

The provisions of the SUA Convention can be used to prosecute acts of piracy.[28] At the SUA Convention, the Special Representative of the UN Secretary General noted the fact that piracy is covered within the offences in the Convention.[29] Thus, acts of piracy do fall under the offences provided in the SUA Convention[30] The Act provides a comprehensive coverage of offences committed at sea, along with a more detailed and fine list of penalties specific to each offence. This is in contrast with the Piracy Bill, which only recognises a punishment of imprisonment for life for 'any act of piracy' other than those resulting in the death

28 *See generally* Halberstam, *supra* note 1; Diaz and Dubner, *supra* note 21 at 189.

29 The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea*, ¶ 57, delivered to the General Assembly, Mar. 10, 2008, U.N. Doc. A/63/63, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/266/26/PDF/N0826626.pdf?OpenElement>.

30 Tuerk, *supra* note 8 at 31.

of a person for which the pirates maybe sentenced to death.[31] Any attempt to commit piracy or any unlawful attempt intended to aid, abet, counsel or procure for the commission of an act of piracy is to be punished with imprisonment up to fourteen years with a fine.[32]

Thus, only a few of the provision that pirates can be charged with under the IPC, i.e., the gravest offences, are covered under the Piracy Bill. A finer gradation based on the varying gravity of the piratical offence has not been made. Charges of murder under Section 300 and 302 of the IPC, punishable with imprisonment for 10 years up to life imprisonment, can be seen to be envisaged by the Bill. Similarly, attempt to murder under Section 307, punishable with imprisonment up to 10 years or life imprisonment, and rape under Sections 375 and 376, punishable with imprisonment for up to 10 years or life imprisonment, are covered. Robbery or dacoity while armed with a deadly weapon or with an attempt to cause grievous hurt under Sections 397 and 398, punishable with imprisonment of not less than seven years, may be seen to be covered under the Piracy Bill if piracy is seen as an aggravated offence Waging War against the State under Section 121 of the IPC is a problematic provision to use for acts of piracy as the act is done for a political end. The definition of privacy which is restricted to offences committed for 'private ends' is to be interpreted in such a manner so as to exclude politically motivated acts, as will be discussed subsequently.

However, less serious offences such as trespass under Sections 441 and 447, punishable with imprisonment for three months and a fine, along with theft under Sections 378 and 379, punishable with imprisonment for three years and a fine, is clearly not envisaged as piracy under the Piracy Bill. Thus, clandestine thefts of the type already discussed earlier have not been included within the Piracy Bill and the pirates engaging in such theft will have to be charged under the IPC. Wrongful confinement to extort property under Section 347, punishable with imprisonment for three years, voluntarily causing hurt to extort property under Section 327, punishable with imprisonment for up to ten years, and simple robbery under Section 382, punishable with imprisonment for up to ten years, are other offences pirates can be guilty of but are not envisaged by the Piracy Bill. For these offences,

31 Section 3, Piracy Bill, 2012.
32 Section 4, Piracy Bill, 2012.

pirates will have to be tried under the IPC. However, the jurisdiction of the IPC to try such offences committed on the high seas is questionable.

It is argued that the SUA Act itself cannot be used to prosecute acts of piracy. This is because the SUA Convention covers terrorist activities and therefore has a different purpose than to simply address piracy. The difference between acts of terrorism at sea and piracy has been highlighted earlier. While piracy is committed with the essential purpose to rob and avoid being captured, acts of terrorism have no or more than a financial motive and are aimed at garnering attention.[33] An obvious feature of a piratical act is that pirates always try to take away what they have robbed without being captured. Similar to other ordinary crimes, their acts are often planned and executed in ways that can help them to avoid identification and apprehension. By contrast, in order to put the public into a state of heightened fear, terrorists will try to publicise their violence, although sparingly. Thus, while terrorism may involve similar acts, these acts are entirely different in nature and need to be treated as separate crimes. In Xu's words, "*in order to have more efficient control over the crimes, the legal regime and public policy must be designed in a way that the distinction between piracy and terrorism is adequately appreciated and the key areas are targeted where the law and policy can function in a better way*."[34] Treating piracy and terrorism as crimes of the same nature by prosecuting them both under a specialised statute will undermine both the piracy and terrorism control regimes.[35]

More importantly, piracy and terrorism are treated differently in international law, resulting in difference of the jurisdiction India exercises over these crimes. While piracy is a crime of universal jurisdiction,[36] terrorism is not, and Indian officials can only capture terrorists in territorial waters.[37] Thus the SUA Act can be used only to prosecute terrorists. Further, it is seen that when an Indian legislation is enacted to recognise its treaty obligations, the *travaux* of the relevant international treaty are used to interpret the legislation. For example, in the recent

33 J Xu, *Piracy as a Maritime Concern: Some Public Policy Considerations*, Journal of Business Law 639, 645 (Sept., 2007).
34 Xu, *supra* note 34 at 644.
35 Collins and Hassan, *supra* note 4 at 100; Tuerk, *supra* note 8 at 27.
36 *See generally* Collins and Hassan, *supra* note 4;Halberstam, *supra* note 1.
37 Gabel, *supra* note 13 at 1445; Garmon, *supra* note 9 at 271; Isanga, *supra* note 13 at 1292, 1293.

case of *Hari Singh* v. *State*,[38] provisions of the Anti-Hijacking Act recognising the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, were to be interpreted. The Delhi High Court took into account the *travaux* and purpose of the Convention to interpret the legislation. As has already been discussed, the Harvard Draft was designed with the intent of excluding acts driven by political consideration from the purview of piracy.[39]

For these reasons, 'private ends' in Section 2(f) must be interpreted to exclude acts of a political nature and thus, all terrorist activities from the definition of piracy. Further, though piracy under customary international law may recognise terrorist activities on sea as a part of piracy,[40] under Section 2(g), that version of the understanding of 'piratical' acts in customary law must be accepted which does not include terrorist activities within the meaning of piracy. Finally, there are arguments to suggest that the offence of piracy can be subsumed within terrorist activities and be prosecuted under SUA Convention.[41] Even if this argument is to be accepted, once the Bill is enacted and a law dealing with piracy is in force, the courts will be compelled to apply the more specific statute and the SUA Act, though having piracy within its ambit, will not be applied to cases concerning piracy.[42]

b. Improvement of the definition of piracy with regard to the SUA Act

While the SUA Act cannot be used to prosecute acts of piracy, it provides a more comprehensive definition of piratical acts and a better gradation of quantum

38 Crl. A 598/2001, MANU/DE/1289/2011.

39 MC Houghton, *Walking the Plank: How United Nations Security Council Resolution 1816, While Progressive, Fails to Provide a Comprehensive Solution to Somali Piracy*, 16 Tulsa Journal of Comparative and International Law 253, 274 (2009).

40 "There is substance in the view that, by continuous usage, the notion of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that it now covers generally ruthless acts of lawlessness on the high seas by whomsoever committed." L Oppenheim, International Law (8th ed., 1955) *c.f.* Halberstam, *supra* note 1 at 289. Diaz and Dubner, *supra* note 21 at 189.

41 Diaz and Dubner, *supra* note 21 at 189.

42 In case of overlapping criminal offences, the Supreme Court has applied *generalia specialibus non derogant* and in Godawat Pan Masala Products IP Ltd. v. Union of India, (2004) 7 SCC 68, upheld the application of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, over the Prevention of Food Adulteration Act, 1954; in Dilawar Singh v. Parvinder Singh, (2005) 12 SCC 709, the Prevention of Corruption Act was the specific statute.

of punishment. It can, therefore, be used to craft a better definition within the Piracy Bill. For instance, Japanese anti-piracy legislation incorporates clauses from the SUA Convention in addition to a modified version of the UNCLOS definition to provide a more comprehensive legal framework.[43]

A legal obstacle to such modification of the UNCLOS definition is that it may cost the universal jurisdiction acquired by Indian law with respect to piratical acts. The principle of universal jurisdiction *"provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended."*[44] Universal jurisdiction over piracy was initially recognised under customary law.[45] Now, however, it is recognised under treaty law. Thus, in order to punish pirates in exercise of universal jurisdiction, the definition of piracy should be in accordance with international law.[46] If the act is considered piratical under domestic law but not international law, universal jurisdiction cannot be exercised. The UNCLOS definition of piracy is the most widely accepted definition of piracy in international law. A departure from this definition may strip Indian law of universal jurisdiction.

However, the UNCLOS definition is widely criticised and the definition of piracy under the SUA Convention addresses its shortcomings. States like Australia and Kenya continue to exercise universal jurisdiction despite having modified the UNCLOS definition in their domestic legislation.

c. Universal jurisdiction of the provisions of the IPC applicable to piracy

As per Section 9(2) of the Bill, , *"[w]hile trying an offence under this Act, a Designated Court may also try an offence other than an offence under this Act, with which the accused may, under the Code be charged at the same trial."* This provision necessitates an examination of universal jurisdiction exercisable under the IPC. Randall posits that all states can use their domestic legislation in order to prosecute piracy.[47] However, universal jurisdiction cannot be exercised unless the

43 Article 2, Law on Punishment of and Measures Against Acts of Piracy (Japan).
44 KC Randall, *Universal Jurisdiction Under International Law*, 66 Texas Law Review 785, 788 (1987-88).
45 Aban Loyd Chiles Ltd. v. Union of India, (2008) 11 SCC 439.
46 Randall, *supra* note 45 at 795.
47 Randall, *supra* note 45 at 791.

state proposing to exercise it has enacted the treaty provisions expressly granting such universal jurisdiction.[48] Further, it has been held by the Supreme Court of India that if a treaty provision modifies or affects the rights of a citizen or any other person, it has to be expressly enacted.[49] Thus, unless provisions of the UNCLOS are enacted by the legislature, universal jurisdiction cannot be exercised under Indian law and the sections of the IPC cannot be used to prosecute piratical acts on the high seas.

In order to address this situation, it is suggested that all possible piratical acts be covered under the Piracy Bill, including a gradation of punishments to address these offences. Upon such expansion, the IPC will not be required to prosecute additional acts that may not be covered under the current Piracy Bill and universal jurisdiction can be exercised to prosecute such acts.

IV. CONCLUSION

Thus the definition of 'piracy' as given in the Piracy Bill suffers from various shortcomings. This definition is the same as that in the UNCLOS which has been extensively critiqued and has faced problems in interpretation. The definition should be reframed keeping these criticisms in mind. First, piratical acts of a less serious nature, such as clandestine thefts, should be incorporated into the definition. In order to facilitate this, a wider set of penalties should be assigned so that less grave crimes of piracy can also be prosecuted under the Bill. The IPC cannot be used to prosecute such crimes committed on the high seas because its application does not extend beyond territorial waters. Second, the two–ship requirement has been bothersome in various other jurisdictions. This defect should be cured in the definition adopted in the Bill. More importantly, a glaring limitation of the Bill is that it fails to cover piratical acts covered within the territorial waters of India. The Kenyan definition of piracy involves acts committed on territorial waters. Such a provision should be introduced in the Piracy Bill as well.

For harmonious interpretation with the SUA Act, it must be utilised solely to prosecute crimes of terrorism on sea even though it can include acts of piracy

48 Javor et al. (Tribunal de Grande Instance de Paris), (2005) 127 ILR 126; Dutton, *supra* note 12 at 1155.
49 Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1.

within its ambit. In order to facilitate this, 'private ends' in Section 2(f) should be interpreted to exclude acts of terrorism so that these are dealt with exclusively under the SUA Act. While interpreting 'piratical acts' as per customary international law that is deeply divided on the issue, that interpretation must be favoured that excludes acts committed with a political agenda.

The Piracy Bill affords the Indian criminal justice system the advantage of universal jurisdiction by expressly enacting its UNCLOS obligations. Allowing for any piratical act to be prosecuted under the IPC erodes this benefit, and therefore, the Bill should be comprehensive enough to encompass all conceivable piratical acts.