

CAN AN ACT OF PIRACY BE COMMITTED AGAINST AN OFFSHORE PETROLEUM INSTALLATION?

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1 Introduction

Acts of piracy are of tremendous concern to the International Maritime Organization (IMO) and the international shipping community.¹ Piracy has a long history. It has been a challenge for maritime transport for hundreds of years.² In recent years, piracy has also become a concern to the offshore petroleum industry.

The rules on piracy have been developed in customary international law and found their way into modern conventional law. However, piracy remains a difficult legal concept.³ In the context of the security and protection of offshore petroleum installations, one of the first questions is whether the law of piracy applies to offshore installations.⁴

2 Threat of Piracy to Offshore Petroleum Installations

Piracy is regarded as a security threat to offshore petroleum installations,⁵ and there have been several reported piracy attacks on offshore installations.⁶ As argued by Hansen, '[i]n understanding maritime security threats from groups conducting unlawful acts, it is important to understand their motivation, organizational structure and tactics'.⁷ In assessing piracy as a security threat to offshore petroleum installations, this paper considers geographical and other enabling factors relating to piracy, as well as motivations and objectives, offshore capabilities and tactics of perpetrators, taking into account past piracy attacks involving offshore petroleum installations.

2.1 Geography and Enabling Factors

Piracy is a security threat that is usually defined by geography.⁸ It requires the presence of other factors such as an unstable political environment, weak government, low level of economic development, poverty, social or cultural acceptability, lack of effective law enforcement, and the opportunity for reward in order to prosper.⁹ As observed by Fort, 'piracy overlays seamlessly onto this template of transnational threats with the maritime domain providing an environment ripe for exploitation'.¹⁰ Relatively few places offer such a combination of factors. These include parts of Southeast Asia, parts of Africa, and some parts of South America. While the majority of the world's maritime piracy has occurred in Asia, by 2007 the Gulf of Guinea had emerged as an important locality for piracy and attacks on offshore installations which represents an expansion of this threat to

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¹ International Maritime Organization (IMO), *Piracy and Armed Robbery against Ships* < <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>>, 3 September 2012.

² Smith, S, (Speech presented by Warren Snowdon on behalf of Stephen Smith at the Counter-Piracy Conference, Perth, 16 July 2012) printed in Australian Strategic Policy Institute, *Calming Troubled Waters: Global and Regional Strategies for Countering Piracy* (Special Report No 47, Australian Strategic Policy Institute, August 2012), 3.

³ O'Connell, D, *The International Law of the Sea* (Vol 2, 1983-84), 966.

⁴ Kessler, C, 'Legal Issues in Protecting Offshore Structures' *Professional Paper No 146, Center for Naval Analyses* (June 1976), 18.

⁵ See, for example, Lindsay, M, 'The Security Threat to Oil Companies In and Out of Conflict Zones' (2005) 3(2) *Exploration and Production: The Oil and Gas Review* <http://www.touchoilandgas.com/security-threat-companies-conflict-a688-1.html>>, 30 October 2008; Elliott, R, 'Piracy on the High Seas' (2007) 51(6) *Security Management* 40, 40-41.

⁶ See Kashubsky, M, 'A Chronology of Attacks on and Unlawful Interferences with, Offshore Oil and Gas Installations, 1975-2010', (2011) 5(5-6) *Perspectives on Terrorism*, 139.

⁷ Hansen, H, 'Distinctions in the Finer Shades of Gray: The "Four Circles Model" for Maritime Security Threat Assessment' in Herbert-Burns, R, Bateman, S, and Lehr, P (Eds), *Lloyd's MIU Handbook of Maritime Security* (2008), 73, 75. Hansen further suggests (*ibid*, 82) that the significance of the distinction and inter-relationship between different threats is important 'from the perspective of industries, governments, and international organizations that confront these groups'.

⁸ Shie, T, 'Ports in a Storm? The Nexus Between Counterterrorism, Counterproliferation, and Maritime Security in Southeast Asia' (2004) 4(4) *Issues & Insights*, 1, 14.

⁹ See Murphy, M, 'Contemporary Piracy and Maritime Terrorism' (2007) 47(338) *Adelphi Papers*, 1, 15-17; Banlaoi, R, 'Maritime Security Outlook for Southeast Asia' in Ho, J and Raymond, C (Eds), *The Best of Times, the Worst of Times* (2005), 59, 62-3; Balaga, T, 'Is Piracy a Threat to Australian Seaborne Trade?', (2009) 27 *Papers in Australian Maritime Affairs*, 311, 316.

¹⁰ Fort, B, 'Transnational Threats and the Maritime Domain' in Ong-Webb, G, (Ed), *Piracy, Maritime Terrorism and Securing the Malacca Straits* (2006), 23, 28.

offshore petroleum installations.¹¹ Piracy on the east coast of Africa has also affected the offshore petroleum industry. For example, it has been reported that a number of oil companies have signed contracts with the Kenyan government for exploration in the offshore Lamu Basin, but there is a real concern about the threat posed to offshore petroleum installations by Somali pirates operating in the area.¹² There has been at least one piracy attack on the east coast of Africa involving an offshore petroleum installation.¹³

2.2 Motivations and Objectives

Piracy is considered an economic crime, committed for financial gain.¹⁴ However, it is important to note that this form of maritime crime can also be carried out by some groups that are politically motivated, yet carrying out the act itself at a tactical level for largely financial reasons.¹⁵ Considering that the primary objective of piracy is financial gain, attacking an offshore petroleum installation would probably not be a cost-effective operation for pirates as it is likely to yield little or no direct financial benefit for the attackers,¹⁶ unless their intention is to kidnap offshore workers for ransom, which seems to have become a trend.¹⁷ Isolated stationary offshore installations could be considered attractive targets for theft or kidnap purposes.¹⁸ Since piracy is an economically motivated crime, the destruction of such installations is not the goal.¹⁹ Any damage to an offshore petroleum installation resulting from a pirate attack would usually be incidental to the financial objectives of the pirates. Nevertheless, the dangers of piracy include a direct threat to the lives and welfare of offshore workers and the potential for incidental environmental pollution, as well as damage to equipment resulting from a pirate attack.²⁰

2.3 Capabilities and Tactics

In general, there are two types of piracy, namely 'low-level' piracy and 'high-level' piracy.²¹ Low-level piracy is usually committed by poor, ill-equipped fishermen or villagers from coastal areas, whose activities are often the result of relative desperation, and whose attacks are mostly opportunistic.²² In contrast, high-level piracy is usually committed by well-organised, highly professional and skilled groups of people with sophisticated weapons, advanced technology and equipment including mother ships and high-speed boats, which enable them to operate far offshore.²³ Pirates have already shown the ability to successfully attack offshore petroleum installations as demonstrated below.

2.4 Past Piracy Attacks on Offshore Petroleum Installations

In the last six years, there have been at least six pirate attacks involving offshore petroleum installations. Four of these took place in the Gulf of Guinea, one near Tanzania, and one near India. On 22 March 2007, the *Aban VII*

¹¹ Nincic, D, 'Maritime Piracy: Implications for Maritime Energy Security' (2009) February *Journal of Energy Security*, [7], <http://www.ensec.org/index.php?option=com_content&view=article&id=180:maritime-piracy-implications-for-maritime-energy-security&catid=92:issuecontent&Itemid=341>, 1 March 2009.

¹² Jones, S, *Exploration Issues*, (18 May 2011), Maritime Security Review, <<http://www.marsecreview.com/2011/05/exploration-fears/>>, 30 June 2011.

¹³ On 3 October 2011, the *Ocean Rig Poseidon* drill ship was attacked by pirates off the coast of Tanzania: International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships Annual Report 2011* (2012), 94.

¹⁴ Valencia, M 'The Politics of Anti-Piracy and Anti-Terrorism Responses in Southeast Asia' in Ong-Webb, above n 10, 84, 87. See also Testimony before the Committee on Transportation and Infrastructure, United States House of Representatives, Washington DC, 4 February 2009, 1 (Peter Chalk, Senior Policy Analyst). Chalk stated in his testimony that 'piracy is, above all, an economically driven phenomenon': 1.

¹⁵ Hansen, above n 7, 76.

¹⁶ See, for example, Kaye, S, 'International Measures to Protect Oil Platforms, Pipelines, and Submarine Cables from Attack', (2007) 31(2) *Tul Mar LJ*, 377, 415.

¹⁷ For example, as demonstrated below, one offshore worker was kidnapped in the attack on the *Bulford Dolphin* drilling rig on 1 April 2007; eight offshore workers were kidnapped in the attack on the floating production, storage and offloading unit (FPSO) *Mystras* on 3 May 2007; and one worker was kidnapped in the attack on the *Trident VIII* offshore rig on 5 May 2007: Pearl, D, and Aboufasha, S, *Worldwide Threats to Shipping: Marine Warning Information*, (2007), National Geospatial-Intelligence Agency, <http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts_20070502100000.txt>, 22 September 2008; International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships Report for the Period 1 April - 30 June 2007* (2007), 43.

¹⁸ Australian Government, Department of Transport and Regional Services (DOTARS), *Offshore Oil & Gas Risk Context Statement* (2005), 17.

¹⁹ Russel, L, (Ed), 'Attacks Prompt Vital New Onboard Vigilance Regime', (2004) 1 *Shipping Australia*, 10, 10.

²⁰ Valencia, above n 14, 84, 87.

²¹ This is an unofficial classification adopted for the purposes of this discussion.

²² Hansen, above n 7, 80.

²³ As Richardson notes, the main distinguishing feature of past and present piracy is that 'the contemporary skull and cross bone operations can, and increasingly do, exploit modern technology and weapons': Richardson, M, 'The Threats of Piracy and Maritime Terrorism in Southeast Asia', (2004) 6 *Maritime Studies*, 18, 18.

jack-up rig was boarded by pirates in speedboats near the southwest coast of India (outside India's territorial sea)²⁴ while under tow.²⁵ Pirates were seen preparing to transfer some equipment from the rig to their speedboats and the alarm was raised. The pirates jumped overboard and escaped in their speedboats.²⁶ On 1 April 2007, the *Bulford Dolphin* mobile offshore drilling rig about 65 kilometres off the coast of Nigeria was attacked by gunmen, believed to be pirates.²⁷ The attackers boarded the rig via an offshore support vessel that was secured alongside the offshore installation at the time of the incident.²⁸ One expatriate worker was abducted and taken ashore from the installation, but released three days later.²⁹

On 3 May 2007 in Nigeria, the floating production storage and offloading unit (FPSO) *Mystras* was attacked about 55 nautical miles³⁰ offshore by gunmen, believed to be pirates.³¹ The attackers boarded the offshore installation using the anchor chain and kidnapped eight foreign workers from the FPSO and a nearby offshore support vessel. The workers were released the following day.³² Again, two days later, on 5 May 2007 in Nigeria, the *Trident VIII* offshore rig was attacked and boarded by gunmen, believed to be pirates, and one crew member was kidnapped.³³ On 5 January 2010, a group of pirates attacked the floating storage and offloading unit (FSO) *Westaf* off Lagos, Nigeria.³⁴ Seven crew members were taken to hospital as a result of the attack. The attackers stole cash, crew belongings and expensive equipment.³⁵ More recently, on 3 October 2011, the *Ocean Rig Poseidon* drill ship was attacked by pirates off the coast of Tanzania.³⁶ It was reported that, when seven pirates in a skiff approached the drill ship, it sent out a distress signal which was responded to by a vessel which had Tanzanian navy personnel onboard. Following the exchange of fire with the navy, pirates were apprehended and handed over to the police.³⁷

The above examples demonstrate that piracy attacks on offshore petroleum installations have been geographically limited to three regions: West Africa, East Africa and South Asia. It is also apparent that the primary motive of the attacks was financial. Two of the abovementioned incidents involved a theft of equipment and property, and on three occasions offshore workers were abducted (apparently for ransom), but released after a short period of time. The attacks also indicate sophisticated offshore capabilities of the perpetrators, with some attacks occurring more than 50 kilometres offshore, such as in the case of the attacks on the *Bulford Dolphin* drilling rig on 1 April 2007 and the FPSO *Mystras* on 3 May 2007.

Notwithstanding the above examples of so called 'piracy attacks' on offshore petroleum installations and claims that piracy is a threat to offshore installations, the important legal question is whether the law of piracy applies to offshore petroleum installations. This question will now be addressed.

3 The Law of Piracy and Offshore Petroleum Installations

The *United Nations Convention on the Law of the Sea 1982*³⁸ (*LOSC*) contains a number of provisions dealing with piracy, and it obliges all contracting States to cooperate to the fullest possible extent in the repression of piracy.³⁹

²⁴ Reported co-ordinates — 08°43.0'N, 076°14.0'E.

²⁵ IMB, *Piracy and Armed Robbery Against Ships Annual Report 1 January-31 December 2006*, (2007), 53.

²⁶ *Ibid.*

²⁷ The exact coordinates were not reported.

²⁸ IMB, *Piracy and Armed Robbery Against Ships Report for the Period 1 April-30 June 2007*, (2007), 42; IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly — Acts Reported During April 2007*, IMO Doc MSC 4/Circ 102, (19 June 2007), Annex 1 ('Acts of Piracy and Armed Robbery Allegedly Committed Against Ships Reported by Member States or International Organizations in Consultative Status').

²⁹ Bergen Risk Solutions, *Niger Delta Maritime Security Quarterly Review*, (9 July 2007), 19 <<http://www.bergenrisksolutions.com/index.php?dokument=294>>, 2 January 2011.

³⁰ Reported co-ordinates — 03°59.0'N; 007°17.0'E. However, some sources report that the distance from land was 55 kilometres, not 55 nautical miles.

³¹ Pearl and Aboufasha, above n 17; IMB, above n 28, 43.

³² *Ibid.*

³³ IMB, above n 28, 43. Exact co-ordinates of this incident are unreported.

³⁴ Exact co-ordinates were not reported.

³⁵ Chief's Briefs by Oyibos OnLine, *Gulf of Guinea 20th – 26th March 2010 Weekly Intelligence Summary*, (2010), <<http://www.chiefsbriefs.com/?p=3431>>, 3 December 2010.

³⁶ Reported co-ordinates — 07°49.0'S; 040°14.0'E: IMB, *Piracy and Armed Robbery Against Ships Annual Report 2011*, (2012), 94.

³⁷ IMB, above n 36, 94.

³⁸ *United Nations Convention on the Law of the Sea 1982*, opened for signature 10 December 1982, 1833 UNTS 3, (entered into force 16 November 1994).

³⁹ See *LOSC*, Art 100.

3.1 Definition of Piracy

The ‘contemporary’ legal definition of piracy in international law is contained in Article 101 of the *LOSC*, which defines piracy as consisting of any of the following acts:

(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 a private aircraft, and directed: (i) *on the high seas, against another ship* or aircraft, or against persons or property on board such ship or aircraft; (ii) *against a ship, aircraft, persons or property in a place outside the jurisdiction of any State*; (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).⁴⁰

The *LOSC* definition of piracy is virtually identical to the definition of piracy in Article 15 of the *Convention on the High Seas 1958*⁴¹ (*High Seas Convention*). The common view is that the positions taken in both the *LOSC* and the *High Seas Convention* are declaratory of customary international law with regard to piracy.⁴² For the purposes of the analysis of piracy in the context of offshore petroleum installations security, the most important question is whether an act of piracy can be committed against an offshore installation (in the legal sense).⁴³

Several issues arise in relation to the legal definition of piracy. The *LOSC* definition of piracy contains several elements (criteria) that need to be satisfied in order for an act to be considered piracy. To qualify as piracy an act must be an ‘*illegal*’ act of ‘*violence or detention, or depredation*’ committed for ‘*private ends*’ by the crew or the passengers of a ‘*private ship*’ ‘*on the high seas*’ and against ‘*another ship*’ or against ‘*property in a place outside the jurisdiction of any State*’. Many of these elements and related issues have been extensively discussed in the literature.⁴⁴

In the context of offshore petroleum installations security, the significance of the definition of piracy in international law is that, in piracy, a ship must be involved.⁴⁵ In particular, one of the criteria in the *LOSC* definition of piracy is that the act must be directed against a ship.⁴⁶ In applying this criterion to offshore petroleum installations, the key issue is whether an offshore installation has the status of a ‘ship’ in international law or can be treated as a ship in this context.⁴⁷ However, it is important to note that the *LOSC* does extend the definition of piracy to acts committed against ‘persons or property in a place outside the jurisdiction of any State’.⁴⁸

3.2 ‘Property in a Place outside the Jurisdiction of any State’

The issue is whether the phrase ‘property in a place outside the jurisdiction of any State’ in subparagraph (a)(ii) of Article 101 of the *LOSC* includes offshore petroleum installations. To answer this question it is necessary to consider the meaning of the expression ‘a place outside the jurisdiction of any State’.

Article 100 of the *LOSC* provides that States shall cooperate to the fullest possible extent in the repression of piracy ‘on the high seas or in any other place outside the jurisdiction of any State’. The equivalent provision in the *High Seas Convention* is Article 14, which is identical to Article 100 of the *LOSC*. Clearly, both the *LOSC*

⁴⁰ *LOSC*, Art 101 (emphasis added).

⁴¹ *Convention on the High Seas 1958*, opened for signature 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962).

⁴² See Ronzitti, N, ‘The Law of the Sea and the Use of Force Against Terrorist Activities’ in Ronzitti, N, (Ed), *Maritime Terrorism and International Law* (1990), 1. See also Guilfoyle, D, *Shipping Interdiction and the Law of the Sea* (2009), 26. Cf Halberstam, M, ‘Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety’, (1988) 82 *American Journal of International Law*, 269, 276–91.

⁴³ This question had been raised by Esmaili in his analysis of the legal status of offshore oil rigs, but it had not been investigated or answered. See Esmaili, H, *The Legal Regime of Offshore Oil Rigs in International Law* (2001), 37. Esmaili has also raised the question of whether oil rigs may commit an act of piracy.

⁴⁴ See, for example, O’Connell, above n 3, 966–83; Halberstam, above n 42; Guilfoyle, above n 42; Ronzitti, above n 42, 1–5; Menefee, S, ‘Piracy, Terrorism, and the Insurgent Passenger: A Historical Perspective’ in Ronzitti (Ed), above n 44, 43, 47–58; Murphy, M, ‘Suppression of Piracy and Maritime Terrorism: A Suitable Role for a Navy?’, (2007) 60(3) *Naval War College Review*, 23; Hansen, above n 7; Lanham, L, *Walk the Plank: Somali Pirates and International Law* (Bachelor of Laws Dissertation, The University of Otago, 2009), 17–18, <http://www.otago.ac.nz/law/oylr/2009/Honor_Lanham.pdf>, 12 March 2011; Murphy, M, *Small Boats, Weak States, Dirty Money: Piracy & Maritime Terrorism in the Modern World* (2009); Mason, C, ‘Piracy: A Legal Definition’ (Congressional Research Service Report for Congress, US Congress, 2010).

⁴⁵ Esmaili, above n 43, 37.

⁴⁶ *LOSC*, Art 101(a). As noted by Kaye, ‘[t]raditional approaches to the definition of piracy have under committed it exclusively against ships’: Kaye, above n 16, 415. However, it should also be noted that the *LOSC* and the *High Seas Convention* clearly state that an act of piracy can be committed by an aircraft.

⁴⁷ See Summerskill, M, *Oil Rigs: Law and Insurance* (1979), 41.

⁴⁸ *LOSC*, Art 101(a)(ii).

and the *High Seas Convention* distinguish the term ‘high seas’ from the term ‘a place outside the jurisdiction of any State’.⁴⁹ The commentary of the International Law Commission (ILC) on this provision states:

In considering as ‘piracy’ acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.⁵⁰

The above comment of the ILC clarifies that the expression ‘in a place outside the jurisdiction of any State’ refers to unoccupied ownerless territories (including certain islands) which had not been claimed by any State.⁵¹ Accordingly, it can be argued that the expression ‘a place outside the jurisdiction of any State’ does not refer to any area of the sea at all.⁵² This view is consistent with the ILC’s explanation set out above. It appears that in using the expression ‘against a ship, aircraft, persons or property in a place outside the jurisdiction of any State’, the drafters of this provision did not intend the word ‘property’ to refer to or include offshore petroleum installations.

In determining whether an act of piracy can be committed against an offshore petroleum installation, it ultimately comes down to whether an offshore installation can be treated as a ‘ship’ in this context because of the requirement in subparagraph (a)(i) of Article 101 that an act must be directed against ‘another ship’.⁵³ If so, the definition of piracy will apply to offshore installations, which would mean that an act of piracy can be committed against offshore petroleum installations. If not, then an act of piracy cannot be committed against offshore petroleum installations.

3.3 Are Offshore Petroleum Installations ‘Ships’?

Even though it is generally accepted that offshore petroleum installations are not ‘ships’, in some contexts they may be treated as ships depending on the aims and purpose of a particular international convention or legal instrument.⁵⁴ The legal rules on piracy are contained in the *LOSC*; therefore, the *LOSC* is the relevant international Convention that should be referred to in order to determine whether offshore installations are considered to be ships in the context of piracy. The *LOSC* does not define the terms ‘ship’ or ‘vessel’, but it treats all types of offshore petroleum installations (fixed and mobile) as distinct from ‘ships’ or ‘vessels’.⁵⁵

Furthermore, it is doubtful that, when the provisions on piracy were drafted in the 1950s and adopted at UNCLOS I in 1958, the drafters contemplated that an act of piracy could be committed against an offshore installation.⁵⁶ Therefore, it can be concluded that an act of piracy, as defined in the *LOSC*, cannot be committed against an offshore installation (whether fixed or mobile). This appears to be a substantial limitation in the international legal framework on piracy as far as it relates to the protection of offshore installations. However, an alternative approach to the legal status of offshore installations is to treat mobile offshore installations as

⁴⁹ See also the wording of Art 105 of the *LOSC*, which also appears to distinguish expressions ‘the high seas’ and ‘a place outside the jurisdiction of any state’.

⁵⁰ International Law Commission (ILC), ‘Report of the International Law Commission on the Work of its Eighth Session (23 April – 4 July 1956)’, [1956] II *Yearbook of the International Law Commission*, 253, 282.

⁵¹ Jesus argues that subpara (a)(ii) of Art 101 serves no useful purpose because it is impossible today to find a piece of land on earth that is not claimed by any State, perhaps with the exception of Antarctica: Jesus, J, ‘Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects’, (2003) 18(3) *International Journal of Marine and Coastal Law*, 363, 377.

⁵² Apart from the high seas, there are no other parts of the sea that are ‘outside the jurisdiction of any State’.

⁵³ *LOSC*, Art 101(a)(i).

⁵⁴ For discussion on the legal status of offshore petroleum installations in international and municipal law see Papadakis, N, *The International Legal Regime of Artificial Islands* (1977), 174–8; Summerskill, above n 47, 12–85; Sharp, D, *Offshore Oil and Gas Insurance* (1994), 18–28; Esmaili, above n 43, 20–53; Gold, E, Chircop, A, and Kindred, H, *Essentials of Canadian Law Series: Maritime Law* (2003), 73–4, 147–9; Spicer, W, ‘Canadian Maritime Law and the Offshore: A Primer’, (1984) 15(4) *Journal of Maritime Law and Commerce*, 489, 495–504; Spicer, W, ‘Canadian Maritime Law and the Offshore: A Primer’, (1985) 16(1) *Journal of Maritime Law and Commerce*, 39; Spicer, W, ‘Application of Maritime Law to Offshore Drilling Units – The Canadian Experience’ in Gault, I, (Ed), *Offshore Petroleum Installations Law and Financing: Canada and the United States* (1986), 105. The legal status of offshore petroleum installations has also been considered by courts and governments. See, for example, *Passage through the Great Belt (Finland v Denmark)* (1991) ICJ, 94 ILR (1994) 446; The Memorial of the Government of the Republic of Finland, filed with the International Court of Justice on 20 December 1991 in the case *Passage through the Great Belt (Finland v Denmark)* (1991) ICJ. See also Koskenniemi, M, ‘Case Concerning Passage Through the Great Belt’, (1996) 27(3) *Ocean Development & International Law*, 255.

⁵⁵ For example, in defining the term ‘dumping’, Art 1(5)(a)(i) of the *LOSC* states that dumping means ‘any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea’, which indicates that the *LOSC* makes a distinction between ‘ships’ and offshore installations or other man-made structures. The *Continental Shelf Convention* uses the term ‘installations and other devices’, which is distinguished from the term ‘ship’ used in the *Continental Shelf Convention*. See also Esmaili, above n 43, 20–53.

⁵⁶ It may also be that the drafters intended to exclude violence committed against offshore installations from the definition of piracy, although it is probably not the case because there are no references to offshore installations in the ILC’s commentary on piracy provisions.

‘ships’ when they are in transit or moving from one place to another, but to treat them as ‘installations’ when they are on location engaged in drilling or production operations.

This approach can be referred to as the ‘dual status approach’. Under this approach, the legal status of a mobile offshore installation can change depending on the nature of activity being performed by the installation at a given point in time. The International Maritime Organization (IMO) has adopted this ‘dual status approach’. For example, the IMO, in its Resolution A.671(16) dealing with safety zones around offshore installations, clarified that (for the purpose of that resolution) MODUs that are used for exploratory offshore drilling ‘are considered to be vessels when they are in transit and not engaged in drilling operation, but are considered to be installations or structures when engaged in drilling operation’.⁵⁷

Some writers disagree with such treatment of mobile offshore installations (ie the dual status approach). For example, Summerskill argues that it is undesirable that a court would adopt the position that ‘a particular drilling unit was a ship during such times as it was moving to or from the drilling site, but not when it had arrived at the site or perhaps when part of the structure (such as legs in the case of a jack-up rig) was in contact with the seabed’.⁵⁸ Gold argues that it would be illogical to treat mobile offshore installations as ships only when they are actually floating or moving, but not when they are anchored or on location engaged in offshore operations.⁵⁹ Similarly, Spicer has stated that this approach is a ‘dangerous and illogical argument’.⁶⁰ However, neither Gold nor Spicer have explained why they considered this approach to be illogical.⁶¹ According to Papadakis, an offshore petroleum installation should be considered either as an installation or a ship, but it cannot be both in the legal sense of the terms used.⁶² Nevertheless, this ‘dual status approach’ has been adopted by the IMO,⁶³ and it appears that it has also been adopted by some international conventions.⁶⁴

Applying the ‘dual status approach’ in the context of piracy, it can be argued that an act of piracy cannot be committed against offshore installations operating on location because such offshore installations would be considered to be ‘installations’ (or in some cases they may be considered to be offshore ports), but they will not be considered to be ‘ships’. By contrast, an attack on an offshore installation while it is in transit or moving from one place to another may be regarded as an act of piracy (provided that all other criteria in the definition of piracy are satisfied).

3.4 Geographical Limits of Piracy

Assuming that an act of piracy can be committed against a mobile offshore installation when it is in transit or moving from one place to another, the geographical limits of piracy (ie the maritime zones in which an act of piracy may be committed) become a relevant issue. In regard to this issue, it should be noted that a crucial element of the *LOSC* definition of piracy is that piracy is an act which occurs on the high seas. However, by virtue of Article 58(2) of the *LOSC*, provisions on piracy (including Article 101) also apply to the exclusive economic zone (EEZ).⁶⁵ This means that an act of piracy can only be committed on the high seas and within the EEZ of a coastal State, but it ‘cannot be committed within the territory of a State or in its territorial sea’.⁶⁶ Therefore, ‘an equivalent act of violence which took place within the territorial sea would not be piracy for the purposes of international law’.⁶⁷ Likewise, an equivalent act of violence committed within the internal waters of the coastal State or the archipelagic waters of archipelagic State would not be piracy under international law.

⁵⁷ IMO, *Safety Zones and Safety of Navigation around Offshore Installations and Structures*, A Res 671(16), Agenda Item 10, IMO Doc A Res A 671(16), (19 October 1989), 288.

⁵⁸ Summerskill, above n 47, 85.

⁵⁹ Gold, Chircop and Kindred, above n 54, 74.

⁶⁰ Spicer, W, ‘Application of Maritime Law to Offshore Drilling Units – The Canadian Experience’ in Gault, I, (Ed), *Offshore Petroleum Installations Law and Financing: Canada and the United States* (1986), 105, 107.

⁶¹ Although Spicer has noted that ‘[n]one of the statutory definitions of ships give any support to this view’: *ibid*.

⁶² Papadakis, above n 54, 176.

⁶³ See, for example, IMO, above n 57, 288.

⁶⁴ For example, the *International Convention for the Prevention of Pollution of the Sea by Oil 1954*, adopted 12 May 1954, 327 UNTS 3, (entered into force 26 July 1958), as amended in 1962, 1969 and 1971 (*OILPOL*); *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988*, opened for signature 10 March 1988, 1678 UNTS 201 (entered into force 1 March 1992) (*1988 SUA Convention*); *International Convention on Salvage 1989*, adopted 28 April 1989, 1953 UNTS 165 (entered into force 14 July 1996) (*1989 Salvage Convention*).

⁶⁵ Art 58(2) of the *LOSC* states that ‘Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part’. The word ‘Part’ refers to Part V of the *LOSC*, which deals with the EEZ.

⁶⁶ ILC, above 50, 282.

⁶⁷ Rothwell, D, and Stephens, T, *The International Law of the Sea* (2010), 162.

It follows that, from the international law perspective and in the context of offshore petroleum installations, an act of piracy cannot be committed against a mobile offshore installation when the installation is located (or is moving) in the territorial sea, the internal waters or the archipelagic waters of the archipelagic State. If committed in the territorial sea, the internal waters or the archipelagic waters, such an act would not be regarded as piracy under the *LOSC*, but would probably be considered to be ‘armed robbery’.⁶⁸ An attack against an offshore installation in the territorial sea, the archipelagic waters or the internal waters is a matter for the coastal States to deal with and subject to the domestic laws of the coastal State (with respect to any enforcement operations).⁶⁹ However, the national laws dealing with piracy may differ from the international law in some important respects,⁷⁰ and States other than the coastal State would have no jurisdiction over such acts of piracy in the territorial sea unless exceptional arrangements have been put in place.⁷¹

3.5 Jurisdiction over Piracy

The *LOSC* provides for universal jurisdiction with respect to piracy.⁷² This means that any State, not merely the flag State or the coastal State, can respond to an attack on a moving offshore installation and apprehend and punish the perpetrators.⁷³ The question is whether all States have universal jurisdiction in matters of piracy in the EEZ.⁷⁴ As noted by Kaye, ‘the rationale for universal jurisdiction for piracy against shipping cannot be easily applied to installations’.⁷⁵ However, considering that an act of piracy can only be committed against mobile offshore installations when they are moving from one place to another, such offshore installations will be under the exclusive jurisdiction of the flag State (ie the State of registration) and not under the coastal State’s jurisdiction. Therefore, it is difficult to accept the proposition that there is no universal jurisdiction over piracy committed against an offshore installation in the EEZ. Although the *LOSC* ‘does not preclude new customary coastal state rights arising in the EEZ, there is little practice supporting any rule of exclusive and general coastal state criminal enforcement jurisdiction in the EEZ’.⁷⁶ Article 58(2) clearly provides that piracy provisions apply in the EEZ; therefore, there will be universal jurisdiction over piracy in the EEZ involving mobile offshore installations.

3.6 The Importance of National Law

Although rights to board, search and seize foreign ships suspected of piracy and persons on board exist under international law,⁷⁷ piracy prosecutions are subject to national law and the national courts would need to determine whether or not a crime of piracy had been committed.⁷⁸ Considering that the applicability of piracy to offshore installations depends on whether an offshore installation can be treated as a ship, this determination would need to be made by the national courts. If a national court determines that an attacked offshore installation was a ship or vessel in that context, then an act of violence committed against an offshore

⁶⁸ The term ‘armed robbery against ships’ is defined by the IMO in the *Draft Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery at Sea* as ‘any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy”, directed against a ship or against persons or property on board such a ship, within a State’s jurisdiction over such offences’: IMO, *Draft Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery at Sea*, IMO Doc MSC/Circ 984, (20 December 2000), Annex, para 2.2.

⁶⁹ It should be noted that many coastal States do not have an offence of ‘piracy’ in their national legislation: Comité Maritime International (CMI), ‘Abbreviated Responses of the CMI National Member Associations to the Questionnaires Concerning the Law of Piracy’, (2000) *CMI Yearbook*, 426, 426–34. In 2009, the IMO Secretariat conducted a survey of national laws on piracy which revealed that only a few States fully incorporate the definition of piracy contained in Article 101 of the *LOSC*, as well as a jurisdictional framework based upon the concept of universal jurisdiction, and in most cases, piracy is not addressed as an independent, separate offence with its own jurisdictional framework, but is subsumed within more general categories of crime: IMO, *Report of the Legal Committee on the Work of Its Ninety-Sixth Session*, IMO LEG, 96th sess, Agenda Item 13, IMO Doc LEG 96/13, (14 October 2009), 17.

⁷⁰ According to Griggs, it is only when a large number of States adopt a uniform law of piracy with wide jurisdictional powers that conform to the *LOSC* and uniform penalties that ‘it will be possible to present a united front against acts of piracy on an international basis’: Griggs, P, ‘CMI Draft Guidelines for National Legislation’, (Speech delivered at the meeting of the Political Affairs Committee of the European Parliamentary Assembly, Brussels, 17 November 2009), 3.

⁷¹ Rothwell and Stephens, above n 67, 163.

⁷² *LOSC*, Arts 105, 110.

⁷³ *LOSC*, Art 105.

⁷⁴ Guilfoyle argues that the ‘pressing issue is the geographic extent of state jurisdiction over piracy’: Guilfoyle, above n 42, 43.

⁷⁵ Kaye, above n 16, 415. Kaye further notes that the rationale for allowing universal jurisdiction in combating piracy is that ships may be navigating thousands of miles away from a flag State or a flag State may be landlocked, and therefore in the event of a piratical attack help may be far away or impossible to obtain. Considering that piracy is regarded as the enemy of all humankind, it is a duty of all States to combat it, not merely the flag States of those ships attacked: 415–6.

⁷⁶ Guilfoyle, above n 42, 45.

⁷⁷ *LOSC*, Arts 105, 110.

⁷⁸ Griggs argues that it is therefore ‘essential that the rights given under international law are implemented by national legislation so that national courts are able to deal efficiently with those arrested and accused of crimes at sea’: Griggs, P, *Piracy Today*, (October 2010), Comité Maritime International, <<http://www.comitemaritime.org/Uploads/Piracy/Piracy%20BA%2010%20-%20P.Griggs.doc>>, 12 March 2011.

installation could be considered as piracy. It is likely that a national court would turn to municipal laws (as well as international law) in order to determine whether an offshore installation is a ship. In some cases, offshore installations have been treated as vessels or ships under the municipal laws,⁷⁹ and there has been at least one court decision supporting a proposition that an offshore installation is a ship when it is moving and not a ship when it is engaged in offshore operations on site.⁸⁰ It is possible that a national court may determine that an offshore installation is a ship in certain circumstances.

3.7 Internal Seizures of Offshore Petroleum Installations

Another issue that needs to be considered is whether an internal seizure of an offshore petroleum installation by the crew or offshore workers while the offshore installation is in transit (ie when an offshore installation is considered to be a ship under the ‘dual status approach’) may be regarded as piracy. Under Article 101 of the *LOSC*, to qualify as piracy, an act must be committed by the crew or passengers of one ship against another ship.⁸¹ This is commonly referred to as the ‘two-ship requirement’.⁸²

The commentary to the *Harvard Draft Convention on Piracy* argued that piracy should not be extended to acts committed entirely on board a ship because, under international law, the ship is under the exclusive jurisdiction of the flag State on the high sea.⁸³ This view was generally supported by the ILC, which commented that acts ‘committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy’.⁸⁴ Clearly the intention of the drafters was to exclude internal seizures from the definition of piracy. Thus there is a ‘two-ship requirement’ in the definition of piracy. Applying this to offshore petroleum installations, an internal seizure or hijacking of an offshore installation by the crew while the installation is in transit or moving from one place to another can therefore never be regarded as piracy in international law, particularly under the *LOSC*.

3.8 Pirate Ships

Most acts of piracy (and most of the attacks against offshore installations) are carried out using small motorised boats. The question arises whether a motorised boat has the status of or can be treated as a ‘ship’ in international or municipal law. It is apparent from the analysis of the definitions of ship in international conventions that motorboats or speedboats would fall within the meaning of ‘ship’ as defined in a number of international conventions including the *International Convention for the Prevention of Marine Pollution from Ships 1973* as amended by *Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973*⁸⁵ (*MARPOL*), the *International Convention on Oil Pollution Preparedness, Response and Co-operation 1990*⁸⁶ (*OPRC*), the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988*⁸⁷ (*1988 SUA Convention*) and the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*⁸⁸ (*2005 SUA Convention*). Speedboats are considered to be ships in municipal law as well. For example, the *Merchant Shipping Act 1894* (UK) defined ‘vessel’ as including ‘any ship or boat, or any other description of vessel used in navigation’ and defined ‘ship’ as including

⁷⁹ See, for example, *Claborne McCarty v Service Contracting Inc* [1971] AMC 90, 90–91; *In re Complaint of Sedco Inc* [1982] AMC 1461; *Producers Drilling Co v Gray* [1966] AMC 1260; *Marine Drilling Co v Autin* [1966] AMC 2013, cited in Esmaili, above n 43, 25.

⁸⁰ *Dome Petroleum v Hunt International Petroleum Co* [1978] 1 FC 11, cited in Gold, Chircop and Kindred, above n 54, 74. However, Gold notes that this Canadian case has been neither followed nor supported: at 74. See also *Passage through the Great Belt (Finland v Denmark)* (1991) ICJ, 94 ILR (1994) 446. In the *Great Belt* case, the issue was whether an offshore installation can be treated as a ship for the purpose of innocent passage.

⁸¹ *LOSC*, Art 101(a)(i).

⁸² For a detailed discussion on the ‘two-ship requirement’, see Halberstam, above n 42, 284–91.

⁸³ Bingham, J, et al, ‘Harvard Research in International Law: Draft Convention on Piracy’ (1932) 26 *Supp American Journal of International Law* 739, cited in O’Connell, above n 3, 972.

⁸⁴ ILC, above 50, 282.

⁸⁵ *International Convention for the Prevention of Marine Pollution from Ships 1973*, adopted 2 November 1973, 1340 UNTS 184, (entered into force 2 October 1983), amended by *Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973*, adopted 17 February 1978, 1340 UNTS 61, (entered into force 2 October 1983) (*MARPOL*). *MARPOL* defines ships as ‘a vessel of any type whatsoever operating in the marine environment and includes hydrofoil, air-cushion vehicles, submersibles, floating craft, and fixed or floating platforms’. See *MARPOL*, Art 2(4).

⁸⁶ *International Convention on Oil Pollution Preparedness, Response and Co-operation 1990*, adopted 30 November 1990, 30 ILM 1991 (entered into force 13 May 1995) (*OPRC*). The *OPRC* defines a ship as ‘a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft of any type’. See *OPRC*, Art 2(3).

⁸⁷ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988*, opened for signature 10 March 1988, 1678 UNTS 201 (entered into force 1 March 1992) (*1988 SUA Convention*).

⁸⁸ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 February 2006, IMO Doc LEG/CONF 15/21 (entered into force 28 July 2010) (*2005 SUA Convention*). The *1988 SUA Convention* and the *2005 SUA Convention* define ‘ship’ as ‘a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft’. See *1988 SUA Convention*, Art 1; *2005 SUA Convention*, Art 1(1)(a).

‘every description of vessel used in navigation not propelled by oars’.⁸⁹ Similarly, the *Canada Shipping Act 1985* defines ‘ship’ to ‘include every description of a vessel used in navigation and not propelled by oars’.⁹⁰ In *Weeks v Ross*,⁹¹ a motorboat capable of carrying more than 12 passengers was held to be a ship. In general, it can be concluded that motorboats and speedboats are considered to be ships in domestic and international law.

Another important aspect of piracy under international law is that the definition of ‘pirate ship’ (and pirate aircraft) in Article 103 of the *LOSC* is worded in a way that allows States to take measures against a pirate ship to *prevent* the intended acts of piracy as well as to *punish* acts of piracy that have already been committed, as long as the persons who have committed those acts are still in control of the ship in question.⁹² This means that States can take action against a pirate ship and prevent an attack before it takes place. However, to prevent piracy attacks that have not been committed will require ascertaining the intent of the perpetrators.

4 Conclusions

In considering the application of the law of piracy to offshore petroleum installations, it was found that an act of piracy cannot be committed against offshore petroleum installations operating on location because such offshore installations would most likely be considered to be ‘installations’ rather than ‘ships’, but an attack on an offshore installation while it is in transit or moving from one place to another may arguably be regarded as an act of piracy. The internal seizure or hijacking of an offshore petroleum installation by the crew while the installation is in transit or moving from one place to another cannot be regarded as piracy in international law. Furthermore, acts of violence committed against offshore petroleum installations in the internal waters, the territorial sea, and the archipelagic waters cannot be regarded as piracy.

Based on the above analysis, it can be concluded that piracy has a very limited scope of application in the context of offshore petroleum installations and there may be considerable difficulties in applying piracy rules to offshore petroleum installations. Accordingly, it might be desirable to clarify the definition of piracy in the next amendment of the *LOSC* to clarify that an act of piracy may be committed against an offshore petroleum installation. In particular, paragraph (a)(i) of Article 101 can be amended to read: ‘on the high seas, against another ship or aircraft *or artificial island, installation and structure*, or against persons or property on board such ship or aircraft *or artificial island, installation and structure*’. This would eliminate any ambiguity relating to the application of the piracy rules to offshore petroleum installations.

⁸⁹ *Merchant Shipping Act 1894* (UK), s 742. Section 313 of the *Merchant Shipping Act 1995* (UK) defines a ship as including ‘every description of vessel used in navigation’.

⁹⁰ *Canada Shipping Act*, RSC 1985, c S-9, s 2. Similarly, *Canada Shipping Act*, SC 2001, c26, defines ‘vessel’ in section 2 to ‘include every description of a vessel used in navigation and not propelled by oars’. See Gold, Chircop and Kindred, above n 54, 74.

⁹¹ *Weeks v Ross* [1913] 2 KB 229.

⁹² See also ILC, above 50, 283.