



## Somalia and the Problem of Piracy in International Law

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### Abstract

*This article looks at the events off the Somali Coast, which have once again thrown the spotlight on one of the oldest topics in international law: the law on piracy. Following an analysis of the situation in Somalia and the origins of, and reasons for, the existence of piracy there, the definition of piracy in international law is examined in detail. This is followed by a survey of the UN Security Council's reactions to the Somali situation. The main argument made by the authors is that neither the numerous attempts by American academics to broaden the definition of piracy nor the Security Council's ad-hoc decisions to create new ways of enforcing the law on piracy offer an adequate solution to the problem. No matter how international law is manipulated by outsiders, piracy will continue to be a fact of life in Somalia – and other places – as long as the severe social and political problems of such a dysfunctional, failed state remain unaddressed*

**Keywords:** Definition of Piracy, International Law, Maritime Terrorism, Piracy, Somalia, UN Security Council Resolution.

### INTRODUCTION

An especially unwelcome aspect of the absence of a fully-functioning government in Somalia has been a flourishing in piratical attacks in the Gulf of Aden and Indian Ocean, stemming from Somalia's inability to exert effective control over its territorial waters. As the UN and various nations (including Somalia itself) strive to tackle the problem, attention has inevitably refocused on existing rules of international law aimed at combating piracy and other violent acts at sea, most notably as embodied in Article 101 of the 1982 Law of the Sea Convention, which in turn replicates the provisions of Article 15 of the 1958 Geneva Convention on the High Seas.

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This article examines how piracy has emerged as a problem in Somalia as a result of the country's protracted civil war; discusses the problematic definition of the term 'piracy' in international law, particularly in respect of whether that definition extends to terrorist acts; and considers what modifications to the international law position have been necessary in order to combat piracy in the Somali case. Whilst the previous major debate on international law provisions governing piracy – prompted by the hijacking of the *Achille Lauro* and given added impetus by the 9/11 attacks – centred around disagreement as to exactly what actions were encompassed by the term 'piracy', the Somali situation has instead drawn attention to jurisdictional and enforcement issues. Moreover, whilst the earlier debate resulted in the conclusion of a further multi-party treaty aimed at combating terrorism and similar threats to maritime safety, the response to the Somali piracy problem (contained in a series of UN resolutions) has been much more circumscribed, with any modifications of the international law position intended to apply to Somalia alone rather than having more general repercussions. Both situations, however, are useful in serving to pinpoint weaknesses in the international legal framework set up to deal with piracy – the oldest crime of universal jurisdiction.

#### THE ORIGINS OF THE PROBLEM

In 2002, in the Gulf of Aden and other waters surrounding the Horn of Africa, a phenomenon occurred which, although commonplace in other maritime areas, was relatively new to this location: ships and fishing vessels were being attacked by armed groups, using small wooden boats in order to intercept their often much larger prey. The press was quick to condemn such activity as piracy – a convenient label that has since been routinely affixed to acts carried out in the region.<sup>1</sup>

In subsequent years, these attacks have intensified, to the increasing consternation of ship owners, since the Gulf of Aden is one of the most heavily-used shipping lanes in the world. An estimated 16,000 vessels pass through the Red Sea, either inbound or outbound for the Suez Canal, every year.<sup>2</sup> In 2006, it was estimated that the piracy 'industry' in Somalia was worth about \$30 million; in 2009, that estimate had risen to \$150 million,<sup>3</sup> comprising ransom money which was paid out by companies in order to secure the safe return of their ships, together with their crews and cargoes.<sup>4</sup>

This state of affairs can be directly attributed to Somalia's current situation as a so-called failed or collapsed state:<sup>5</sup> i.e. one which lacks a properly-

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<sup>1</sup> Sjöpirater kräver miljoner i lösen, *Svenska Dagbladet*, 13 August 2002, [http://www.svd.se/nyheter/utrikes/sjopirater-kraver-miljoner-i-losen-rubrik-30-p\\_60878.svd](http://www.svd.se/nyheter/utrikes/sjopirater-kraver-miljoner-i-losen-rubrik-30-p_60878.svd), (accessed February 22, 2010).

<sup>2</sup> Karl Sörenson, 'State Failure on the High Seas – Reviewing the Somali Piracy', *FOI Somalia Papers: Report 3*, Stockholm: Swedish Defence Research Agency, 2008, p. 8.

<sup>3</sup> Ben Macintyre, 'The Battle Against Piracy Begins in Mogadishu', *The Times*, 16 April 2009.

<sup>4</sup> 'Somalia: "Robin Hood" Pirates Stealing from the Rich', *African Press*, 14 October 2008.

<sup>5</sup> A collapsed state representing, according to Robert I. Rothberg, 'a rare and extreme version of a failed state', and one where, in the words of William Zartman, 'the structure, authority (legitimate

functioning central government able to exercise control over the state as a whole, including (which is crucial for effective attempts to combat piracy) the ability to police its own territorial waters. The Somali population has suffered fourteen failed governments in the past two decades, the main catalyst being the rebellion against the Siad Barre regime in 1991, which propelled Somalia into civil war. Between 1995 and 2005, the fighting continued, but was at least confined to particular regions and to certain factions within the different clan communities. In October 2004, following roughly two years of peace talks held in Kenya, the Transitional Federal Government (TFG) of Somalia was established. Strongly influenced by Ethiopia, the TFG excluded all Islamic groups from its membership.<sup>6</sup> In 2006, the Union of Islamic Courts (UIC) assumed power, but was overthrown later that year by a rapid military advance undertaken by TFG allied forces with the help of the Ethiopian military. Shortly after this, a splinter group from the UIC formed the Alliance for the Re-Liberation of Somalia, and peace talks have since been held between this organization and the TFG. However, at this moment in time, Somalia still has no sitting government, although other regional and local governing bodies continue to exist and control various parts of the country, including the self-declared Republic of Somaliland in north-western Somalia and the semi-autonomous state of Puntland in north-eastern Somalia.<sup>7</sup> Arguably, it is this absence of any central command in Somalia able to effectively control the state's territorial waters which can be said to have contributed to, if not engendered, the piracy problem itself, rendering the country powerless to prevent the over-fishing of its waters by foreign vessels<sup>8</sup> or the dumping of toxic waste off its coast,<sup>9</sup> which in turn have deprived many Somali fishermen of their livelihoods, incentivizing some to take up piracy as an alternative means of exploiting their knowledge of the sea in order to earn some money.<sup>10</sup>

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power), law, and political order have fallen apart and must be reconstituted in some form, old or new.' Both cited in Jonathan E. Hendrix, 'Law Without State: The Collapsed State Challenge to Traditional International Enforcement', *Wisconsin International Law Journal*, Vol. 24, 2006–2007, p. 587–626, at p. 587.

<sup>6</sup> Sörenson, 'State Failure...', p. 11.

<sup>7</sup> CIA – *The World Factbook*, 'Somalia', <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>, (accessed February 22, 2010).

<sup>8</sup> According to Douglas Guilfoyle, 'up to 700 foreign vessels – some of them armed – have taken advantage of chaos in Somalia to conduct unlicensed fishing (or fishing 'licensed' only by local warlords), adding to local fishing communities' hardships.' Douglas Guilfoyle, 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts', *International and Comparative Law Quarterly*, Vol. 57, No. 3, 2008, p. 690–99, at p. 691; see also Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 399–414, at p. 399; Johann Hari, 'You are being Lied to about Pirates', *Independent*, 5 January 2009.

<sup>9</sup> *Ibid.* Hari reports the comments of the UN envoy to Somalia, Ahmedou Ould-Abdallah: 'Somebody is dumping nuclear material here [i.e. off the coast of Somalia]. There is also lead, and heavy metals such as cadmium and mercury – you name it.' This waste can be traced back, asserts Hari, to factories and hospitals in Europe, with one illegal dumping incident resulting in the death of more than 300 Somalis from radiation sickness.

<sup>10</sup> Somali pirates routinely cite both over-fishing and waste-dumping by foreigners as justifications for their turning to piracy. Although undoubtedly appealed to cynically by some pirates as a convenient excuse for their actions, the behaviour of foreign vessels in exhausting fish stocks

Who then are these Somali pirates and where do they come from? To answer these questions, let us first look at an incident that took place on 14 May 2007, 180 nautical miles off the coast of Somalia. The vessel in question is the UAE-owned cargo ship *IBN Younus*:

*Pirates, armed with machine guns and rocket launchers, approached the general cargo ship underway from her port quarter. The pirates ordered the ship to stop and started firing towards the bridge. The duty officer raised the emergency alarm. The master activated the Ship Security Alarm System and started taking evasive action manoeuvres to prevent the boarding of the pirates. The master had to fire rocket-parachute distress signals on the pirate boat when he was preparing to fire a rocket propelled grenade. The ship was hit and the accommodation caught fire. The crew took preventive measures to stop the fire from spreading, and finally managed to extinguish the fire. There was extensive damage to the accommodation.*

*The master continuously manoeuvred the vessel to prevent the pirates from boarding. The attack lasted for one hour before the pirates aborted the attack.*

*The Piracy Boarding Centre relayed a message to the coalition navy for assistance.<sup>11</sup>*

According to the International Maritime Bureau, this report is not unlike many others detailing attacks against ships in the Gulf of Aden, the difference being that in this incident the attackers were prevented from boarding the ship. Others are not so lucky.

The pattern is usually the same: two to four small high-speed boats, or skiffs, with a crew of about three to six individuals on each vessel, approach the targeted ship. The pirates then attempt to board the ship, often one boat-load at a time, and, if successful in taking over the vessel, pick up other pirates once underway in order to better control the ship and the hostages on board. The hijacked ship is then taken to a safe harbour, often on the Puntland south-eastern shore, beyond the reach and control of any international naval forces that may be patrolling the area. A ransom to secure the release of the crew and the ship, together with the vessel's cargo, is then negotiated, with the exchange taking place when both parties reach agreement.<sup>12</sup>

Over the years, the pirates have become more and more organized, and it has been reported that many pirates repeatedly change the anchor position of

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and poisoning the waters surrounding Somalia has unquestionably made making a legitimate living from the sea more difficult and exacerbated poverty in the country. As Eugene Kontorovich notes, 'the "manpower" available for piracy does not just stem from the fact that piracy is much more lucrative than fishing, but mainly because fishing was made impossible due to the exploitation of resources by big foreign ship factories; if piracy is ever to be suppressed, securing prosperity in Somali waters will be essential for giving a decent alternative to criminal businesses.' Eugene Kontorovich, 'International Legal Responses to Piracy off the Coast of Somalia', *ASIL Insights*, Vol. 13, No. 2, 6 February 2009, p. 250–67, at p. 266.

<sup>11</sup> 'Piracy and Armed Robbery against Ships', ICC International Maritime Bureau, *Annual Report*, 2007, <http://www.southchinasea.org/docs/ICC-IMB-PRC-2007.pdf>, (accessed February 22, 2010).

<sup>12</sup> Sörenson, 'State Failure...' p. 17.

the hijacked vessel on the advice of associates based on shore. This suggests that the pirates form part of a well-organized network, able to control more than one safe harbour on the Somali shoreline.<sup>13</sup> Given this arguably sophisticated level of operation, the payoff for the individual pirate might differ, depending on if the group has a hierarchal structure in place, and the extent of the ransom given. There have also been reports that part of the ransom money has been handed over to another state, such as Yemen or Kenya; if this is part of a sort of 'safekeeping' or not is not clear. It has even been suggested that the president of Puntland, Mohamud Muse Hersi, is receiving money from the pirates as a token of good will.<sup>14</sup>

There are those, however, who argue that piracy is something of a misnomer for what is taking place in the region, arguing that it should instead be viewed as part of a long and unique tradition of African banditry. A more traditional name for the marauders currently operating out of Somalia is *shiftas*, deriving from the Somali word *shúfto*, which can be translated as bandit or rebel, revolutionary or outlaw, depending on the view taken of the activities being carried out.<sup>15</sup> The *shiftas* originated in the nineteenth century as a form of local militia based in the north-eastern African mountains. However, they soon developed into a sort of freelance unit, supporting themselves by cross-border looting and killing. They fought against the British colonizers and later against the Italian occupation of Ethiopia and Somalia during the Second World War, playing an important resistance role. The *shiftas* had a reputation for being extremely ruthless, and it was said that they 'killed for the sake of killing, holding human life cheap if it stood in the way of rape and pillage.'<sup>16</sup>

However, the term *shiftas* also carries with it more complex connotations, denoting something nobler than mere killing and thieving. The word can also refer to, as explained above, a rebel or even a revolutionary – individuals who, far from being abhorred, tended to enjoy the respect and admiration of their local community. Indeed, two of the nineteenth-century Ethiopian emperors were originally *shiftas*. Eric Hobsbawm describes this type of individual as the 'social bandit'<sup>17</sup> – an outlaw who rises above his crimes to attain a kind of 'Robin Hood' status. These men made themselves admired by 'championing the interests of the folk masses against elite oppression. In exchange, peasants admired, protected and aided them.'<sup>18</sup>

Hobsbawm's social bandit model can be said to have some relevance to the current 'piracy' activity being carried out off the coast of Somalia. The individuals involved are following a code of conduct, as well as a formula for

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<sup>13</sup> *Ibid.* p. 19. However, it must be emphasized that this does not include all pirates that are hijacking vessels around Somalia. Some groups operate in a more ad hoc manner.

<sup>14</sup> *Ibid.* p. 21.

<sup>15</sup> Macintyre, 'The Battle Against...' note 3.

<sup>16</sup> *Ibid.*

<sup>17</sup> Eric Hobsbawm, *Bandits*, (New York: Pantheon, 1981).

<sup>18</sup> Richard W. Slatta, *Eric J. Hobsbawm's Social Bandit: A Critique and Revision*, [http://www.ncsu.edu/aco/ntnacorrrente/spring\\_04/Slatta.pdf](http://www.ncsu.edu/aco/ntnacorrrente/spring_04/Slatta.pdf), (accessed March 23, 2010).

dividing up the proceeds amongst themselves, and are sometimes regarded as heroes and breadwinners by their own community – maritime revolutionaries who are fighting the forces of Western oppression.<sup>19</sup> Yet the life of a Somali 'pirate' is often anything but glamorous, more often resembling that of Hobbesian man in his natural state, in being 'nasty, brutish and short' – as is perhaps unsurprising for individuals existing without the benefit of proper government and in a state of perpetual war. Those taking part in the attacks are often very young, desperate and careless of life; the vessels they use are barely seaworthy, and many of them cannot even swim. Very few of those who participate gain much more than their 'daily bread' for their efforts,<sup>20</sup> standing as testimony to what years of conflict and international complacency have wreaked on Somali society. Thus, even though world leaders, including US President Barack Obama, have pledged to 'halt the rise of piracy',<sup>21</sup> this cannot be done with guns and military force alone: ultimately, the problem must be eradicated at source through a determined effort to alleviate the poverty and lawlessness which have for so long afflicted Somali society.

Notwithstanding the severity of the problems within Somalia itself, the serious consequences of the piratical attacks emanating from the country must be addressed. According to recent statistics compiled by the International Chamber of Commerce, the number of piratical incidents ascribed to Somali pirates has increased to more than 200 per year.<sup>22</sup> In particular, the report states that in 2009 alone, 47 vessels were hijacked and 867 crew-members were taken hostage.<sup>23</sup> Moreover, figures collated by the International Maritime Organization reveal that Somali pirates have been responsible for holding hundreds of civilians for ransom, and that some of their civilian victims even lost their lives during these incidents.<sup>24</sup>

Furthermore, piratical acts committed off the Somali coast account for more than half of all such incidents worldwide.<sup>25</sup> This is owing to the fact that the Gulf

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<sup>19</sup> Macintyre 'The Battle Against...'

<sup>20</sup> That pirates may receive only a comparatively modest amount of the funds obtained as a result of their activities is confirmed by a UN workshop on piracy, which estimated that ransom monies are typically divided as to 30 per cent to the pirates, 30 per cent to government officials, 20 per cent to the pirates' leaders and 20 per cent set aside for weapons, fuel, etc., to be used in future attacks. See Chatham House Conference Report *Piracy and Legal Issues: Reconciling Public and Private Interests*, 1 October 2009 (hereafter Chatham House Report), p. 19–20.

<sup>21</sup> 'President Obama: 'We remain Resolved to Halt the Rise of Piracy in this Region'', *Fox News*, <http://whitehouse.blogs.foxnews.com/2009/04/12/president-obama-we-remain-resolved-to-halt-the-rise-of-piracy-in-this-region>, (accessed March 25, 2010).

<sup>22</sup> '2009 Worldwide Piracy Figures Surpass 400', ICC *Commercial Crime Services*, 2009, [http://www.icc-ccs.org.uk/index.php?option=com\\_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51](http://www.icc-ccs.org.uk/index.php?option=com_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51), (accessed October 3, 2010).

<sup>23</sup> *Ibid.*

<sup>24</sup> International Maritime Organization, 'Piracy in the Waters off the Coast of Somalia', [http://www.imo.org/home.asp?topic\\_id=1178](http://www.imo.org/home.asp?topic_id=1178), (accessed October 3, 2010); Ortaođu Stratejik Arařtırmalar Merkezi, 'Kızıldeniz Güneyindeki Deniz Haydutluđu Olayları, Siyasi ve Hukuki Sonuçları' 2009, [http://www.orsam.org.tr/tr/trUploads/Toplantilar/Dosyalar/20091216\\_20094171\\_orsam.denizhaydutlugu.pdf](http://www.orsam.org.tr/tr/trUploads/Toplantilar/Dosyalar/20091216_20094171_orsam.denizhaydutlugu.pdf) (accessed October, 3 2010), p.9.

<sup>25</sup> '2009 Worldwide ...'

of Aden is widely used for maritime transport, thereby providing many opportunities for Somali pirates to seize passing vessels.<sup>26</sup> Indeed, the strategic location of the Gulf of Aden has meant that vessels registered in many different states have long preferred to take this route, which in turn has created an environment conducive to piracy.<sup>27</sup>

The numerous pirate attacks off the Somali coast have necessarily targeted ships from many different states, including Turkish vessels. The most serious incident involving Turkey thus far was the hijacking of the Turkish-owned cargo vessel *MV Horizon 1* on 8 July 2009. This incident was resolved in October 2009, when the vessel and the crew were released after a large ransom had been paid.<sup>28</sup>

However, the fact that the vessels of so many different states have been attacked, and vital trading routes disrupted, has also meant that the problem of Somali piracy has been “internationalized”, leading to unprecedented transnational cooperation in the struggle to combat these criminal activities.<sup>29</sup> Consequently, attention has again focused on the role of international law in combating piracy, to which we now turn.

#### **THE MEANING OF THE TERM ‘PIRACY’ IN INTERNATIONAL LAW**

No matter how underhand and unpredictable the tactics of pirates may be, any response to their conduct ought to be lawful. In other words, it should comply with the relevant rules of international law governing piracy. This, however, presupposes that such rules can easily be identified and followed – something that, unfortunately, is far from being the case.

Thinking of childhood stories and recent Hollywood blockbusters, it might be assumed that finding a legal definition of piracy would be a simple task, involving something along the lines of an act of robbery committed on the high seas, with a skull-and-crossbones flag hoist on the pirates’ ship in order to signal its lack of allegiance to any nation. And, indeed, some of these assumptions are reflected in the international law of piracy. Surprisingly, however, given piracy’s centuries’ old pedigree in international law, finding a consensual definition of piratical acts has always proved extremely difficult and

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<sup>26</sup> International Maritime Organization ‘Piracy in the...’, see also Jale Nur Ece, *Stratejik Sularda Deniz Haydutluğu ve Korsanlık*, 2008, [http://www.denizhaber.com/index.php?sayfa=yazar&id=11&yazi\\_id=100350](http://www.denizhaber.com/index.php?sayfa=yazar&id=11&yazi_id=100350), (accessed October 3, 2010), who points out that the sheer expansion in international shipping and trade has in itself increased the number of vessels available for hijacking by pirates.

<sup>27</sup> Celalettin Yavuz, for instance, asserts that although the reason for the emergence of piracy in East Africa may be ideological to some extent, pirates have been much more concerned with pure economic gain. Celalettin Yavuz, *Somali’de Korsanlık- Denizde Terör ve Deniz Ulaştırmasının Güvenliği*, 2008, <http://www.turksam.org/tr/a1535.html>, (accessed October 3, 2010).

<sup>28</sup> ‘Somalia Pirates Attack Turkish Commercial Vessel’, *World Bulletin*, 20 March 2009.

<sup>29</sup> International Maritime Organization, ‘IMO Assembly Calls For Action on Piracy off Somalia’, 2005, [http://www.imo.org/newsroom/mainframe.asp?topic\\_id=1018&doc\\_id=5428](http://www.imo.org/newsroom/mainframe.asp?topic_id=1018&doc_id=5428), (accessed October 3, 2010); Cenap Çakmak, *Uluslararası Hukukta Korsanlık*, 2008, [http://www.bilgesam.org/tr/index.php?option=com\\_content&view=article&id=241:uluslararası-hukukta-korsanlık&catid=122:analizler-guvenlik&Itemid=147](http://www.bilgesam.org/tr/index.php?option=com_content&view=article&id=241:uluslararası-hukukta-korsanlık&catid=122:analizler-guvenlik&Itemid=147), (accessed October 3, 2010).

controversial. As a result of the *Achille Lauro* incident in 1985, and in the wake of the terrorist attacks of 11 September 2001, the debate on what constitutes piracy as opposed to maritime terrorism continues to rage.<sup>30</sup>

Given the fact that piracy and acts of maritime terrorism are both outlawed by treaties, the distinction between them might seem academic. There is, however, one vital difference between the status of piracy and of maritime terrorism in international law: only as far as piracy is concerned is the principle of universal jurisdiction regarded as reflective of customary international law and therefore binding not only on signatories to the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea (UNCLOS) but on all states. As far as acts of maritime terrorism included in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention)<sup>31</sup> are concerned, this is not the case, which means its provisions – in any event not based on universal jurisdiction – apply only to state parties to it.<sup>32</sup>

The starting point for any discussion of the definition of piracy in international law must be Article 15 of the Convention on the High Seas/Article 101 of UNCLOS, which both state that:

Piracy consists 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).*

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<sup>30</sup> Graham Gerard Ong, ' "Ships Can be Dangerous Too": Coupling Piracy and Maritime Terrorism in Southeast Asia's Maritime Security Framework', *ISEAS Working Paper: International Politics & Security Issues Series*, No. 1, 2004, p. 3; Erik Barrios, 'Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia', *Boston College International and Comparative Law Review*, Vol. 28, p. 149–64, at p. 150; Tina Garmon, 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11<sup>th</sup>', *Tulane Maritime Law Journal*, Vol. 27, 2002–2003, p. 257–75, at p. 258.

<sup>31</sup> Adopted on 10 March 1988, the SUA Convention entered into force on 1 March 1992, and currently has 156 state parties.

<sup>32</sup> Barrios, 'Casting A Wider...' 30, p. 155; Lawrence Azubuike, 'International Law Regime Against Piracy', *Annual Survey of International and Comparative Law*, Vol. 15, 2009, p. 43–59, at p. 56; Garmon, 'International Law...' note 30, p. 259 and p. 271; Malvina Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety', *American Journal of International Law*, Vol. 82, 1988, p. 269–310, at p. 272.



This definition of piracy is overwhelmingly regarded as including most of the main elements of the concept as it had come to be viewed by the community of states in 1958, namely:<sup>33</sup>

1) the act of piracy must occur 'on the high seas'<sup>34</sup> or 'outside any' state's 'jurisdiction'<sup>35</sup>;

2) the so-called 'two-ship requirement' must be satisfied, which means that the pirates' actions must be directed against *another* ship/aircraft (including the passengers or property on board); attacks against passengers on board the *same* ship, for example, do not qualify as 'piracy'; and

3) the pirates must be acting 'for private ends' from a 'private ship' or 'aircraft'.

In the many hundreds of years that international treaties on piracy have been concluded, none of these requirements had, however, been uncontroversial or applied consistently before the 1958 treaty was finalized.

It is, for example, now generally accepted that pirates are distinguished by the fact that their actions cannot be 'fairly' attributed to a state.<sup>36</sup> That was not always the case. In the Middle Ages, for example, it became common practice for bilateral treaties between states to stipulate that the sovereign of one state had to compensate another sovereign's merchants for piratical acts carried out by nationals of the former.<sup>37</sup> In the seventeenth and eighteenth centuries, Britain and France, in particular, employed pirates in warfare (then called 'privateers'),<sup>38</sup> and in the late eighteenth and early nineteenth centuries pirates founded something akin to states along the North African coast,<sup>39</sup> especially in what is now Algeria. European states subsequently entered into treaties with the pirates, a practice that came to an end only when France occupied Algeria in 1830.<sup>40</sup> As late as the First World War, many were arguing that the commanders of German submarines should be tried as pirates owing to the apparent deviousness of this type of warfare, although there was no doubt that the officers had, at the time, been acting under orders from the German government.<sup>41</sup>

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<sup>33</sup> Azubuike, 'International Law...' note 32, p. 51.

<sup>34</sup> This can include a state's Exclusive Economic Zone.

<sup>35</sup> Including, for example, islands which are *terra nullius* and therefore do not belong to any state.

<sup>36</sup> Azubuike, 'International Law...' p. 47.

<sup>37</sup> Edward Lewis, 'Responsibility for Piracy in the Middle Ages', *Comparative Legislation and International Law*, Vol. 19, 1937, p. 77–89.

<sup>38</sup> Azubuike, 'International Law...' p. 45–6; Sörenson, 'State failure...' p. 26–7 and p. 30–1.

<sup>39</sup> It was a fictional version of one of these pirates that captured Robinson Crusoe in the early part of Daniel Defoe's eponymous novel of 1719. See *Robinson Crusoe* (London: Penguin Books, 1994), p. 22–38.

<sup>40</sup> J.E.G. De Montmorency, 'Piracy and the Barbary Corsairs', *Law Quarterly Review*, Vol. 35, 1919, p. 133–42; Sörenson, 'State failure...' p. 31.

<sup>41</sup> De Montmorency, 'Piracy and State failure...' p. 134 and p. 141. Similarly, the action taken in May 2010 by the Israeli navy 'piracy and...' the Turkish-sponsored aid flotilla attempting to reach Gaza has been denounced by some as an act of piracy, although, of course, the operation was authorized by the Israeli government.

Neither the 'two-ship requirement', nor the fact that the act had to be committed on the high seas, was always universally accepted, either. In 1880, a famous commentator on international law, W.E. Hall, claimed that pirates were 'persons who deprecate by sea or land without authority from a sovereign'.<sup>42</sup> Indeed, international controversy regarding the definition of piracy was still so great in the 1930s that an attempt to codify the ban on piracy in a treaty was abandoned.<sup>43</sup> The definition of piracy arrived at in the 1958 Convention on the High Seas therefore must properly be viewed as reflecting the minimum criteria that all state parties could agree to;<sup>44</sup> Article 15 – it is overwhelmingly agreed – decisively resolved the above controversies.

It is the last requirement – which a pirate must be acting for 'private ends' – that, despite the treaties, has remained controversial, reigniting the debate following the attacks on 9/11, since it has often been seen as the dividing line between a pirate and a (maritime) terrorist.<sup>45</sup> Following a number of terrorist attacks carried out at sea (such as the attack on the USS *Cole* off Yemen in 2000 and the suicide bombing of the French-flagged *Limburg* off Yemen in 2002),<sup>46</sup> and based on growing fears that terrorists might in future resort to maritime attacks more regularly, some (mainly American) scholars have begun re-examining the meaning of 'private ends' with the intention of broadening the scope of Article 15 of the Convention on the High Seas/Article 101 of UNCLOS. They have attempted to overcome the majority view which still holds that acting for 'private ends' excludes anybody acting for political, religious or ethnic reasons from the definition of piracy as found in the two treaties.<sup>47</sup>

This majority view has been criticized for ignoring the fact that neither state practice nor the historical background of the piracy definition conforms to it. Introducing the requirement of acting for 'private ends' was, it is argued, meant to exclude only acting for 'public' ends from the definition of piracy, which is simply a confirmation of the principle that a pirate's actions should not be 'fairly' attributable to a state.<sup>48</sup> Therefore a terrorist, acting for his personal political or religious views whilst not being in the employ of a state, was acting for his 'private' ends and was consequently a pirate.<sup>49</sup>

Proponents of this argument refer to certain examples of state practice that supposedly confirm a broad definition of piracy. In the *Santa Maria* incident of

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<sup>42</sup> Azubuike, 'International Law...' p. 46.

<sup>43</sup> *Ibid.* p. 47–8.

<sup>44</sup> Barrios, 'Casting a...' p. 153.

<sup>45</sup> Ong, 'Ships Can be...' p. 9 and p. 15.

<sup>46</sup> *Ibid.* p. 6.

<sup>47</sup> *Ibid.* p. 15–16; Barrios, 'Casting a...' p. 153 and p. 156; Barry Hart Dubner, 'The Law of International Sea Piracy', *New York University Journal of International Law and Politics*, Vol. 11, 1978–1979, p. 471–517, at p. 475; Azubuike, 'International Law...' p. 52; Garmon, 'International Law...', p. 258; Sörenson, 'State failure...', p. 29; Dieter Würfelspitz, 'Die Beteiligung der Bundeswehr am Kampf gegen Piraten', *Neue Zeitschrift für Wehrrecht*, 2009, p. 133–50, at p. 134–5.

<sup>48</sup> Azubuike, 'International Law...' p. 52.

<sup>49</sup> Ong, 'Ships Can be...' p. 15 (although acknowledging that the overwhelming majority of states do not agree, Ong maintains that support for such a broad definition of piracy could nevertheless be 'easily argued').

1961, a Portuguese general, opposed to the Portuguese dictator Salazar, seized a Portuguese cruise ship with the aim of overthrowing Portugal's government. At the request of that government, the commander of a US destroyer boarded the ship and persuaded the general to surrender. When justifying the American actions, the US government claimed it had acted 'under the international laws against piracy'.<sup>50</sup> In the 1975 *Mayaguez* incident, Cambodian naval forces seized an American merchant vessel for alleged customs violations. Based on the fact that the USA had refused to recognize the government of Cambodia as legitimate, President Ford (also) justified the subsequent rescue mission as a strike against 'piracy'.<sup>51</sup> And, finally, during the 1985 *Achille Lauro* incident – in which Palestinian terrorists seized an Italian cruise ship in order to obtain the release of Palestinian prisoners from Israel and killed one US tourist – the US government officially declared the seizure to be an act of 'piracy'.<sup>52</sup> Despite their being 'political' in nature, it is argued, all these incidents were treated as acts of piracy under international law, implying that 'private ends' excluded only state responsibility for pirates' actions.

Advocates of a broad definition of piracy also point to the historical background of Article 15 of the Convention on the High Seas and its negotiating history. They argue that this provision must be seen in its context: following the upheavals in many states, especially in the 1930s – in particular, the Spanish Civil War of 1936–1939 – the problem of how to react to insurgents had emerged. Once an insurgency had evolved into a state of belligerency and had been recognized as such, the belligerents' ships could definitely no longer be treated as piratical. Especially during the Spanish Civil War, the problem had, however, arisen as to how to react to ships taken over by insurgents not recognized as belligerents.<sup>53</sup> The Spanish government had appealed to other states to treat such ships as piratical, but, generally, other states (officially) decided to adopt a policy of non-intervention.<sup>54</sup>

Against this highly controversial backdrop, the drafters of the 1958 Convention on the High Seas, it is argued, had therefore merely wanted to exclude from the definition of piracy incidents not directed against any other state besides the insurgents' home state.<sup>55</sup> This argument is supposedly further

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<sup>50</sup> Dubner, 'The Law...', p. 483–4; Halberstam, 'Terorism on...' 32, p. 286–7.

<sup>51</sup> Dubner, 'The Law...', p. 484–5.

<sup>52</sup> Robert Pear, 'State Department; Legal Adviser, Once a Judge, Wields Wide Influence', *New York Times*, 30 December 1985, p. A12; The author points out that Abraham Sofaer, the Legal Adviser at the US Department of State, immediately concluded that the laws of piracy applied to the *Achille Lauro* incident, which resulted in the USA officially requesting extradition of the terrorists from Italy on the basis of the laws against piracy; 'Transcript of White House News Conference on the Hijacking', *New York Times*, 12 October 1985, p. A6; during the press conference, President Reagan claimed the terrorists had committed an act of 'piracy'; Halberstam, 'Terorism on...' 32, p. 270.

<sup>53</sup> Garmon, 'International Law...' 261–2; Halberstam, 'Terorism on...' 32, p. 280–1.

<sup>54</sup> For a discussion of 'piracy' during the Spanish Civil War, see S. H. Brookfield, 'The Nyon Arrangements', *British Yearbook of International Law*, Vol. 19, 1938, p. 198–208; Raoul Genet, 'The Charge of Piracy in the Spanish Civil War', *American Journal of International Law*, Vol. 32, 1938, p. 253–63.

<sup>55</sup> Garmon, 'International Law...' p. 261–2; Halberstam 'Terorism...' p. 277–80 and p. 282.

confirmed by the fact that earlier attempts at including 'robbery' as a requirement of piracy had been explicitly rejected, and that many scholars and some domestic courts had, prior to the conclusion of the 1958 Treaty, argued that piracy simply amounted to 'unauthorized acts of violence committed on the high seas'.<sup>56</sup>

These arguments in favour of assuming that purely political or religious motivations are not excluded from the definition of piracy to be found in the Convention on the High Seas and UNCLOS ultimately fail to convince and must be rejected.

As far as state practice is concerned, the almost exclusive reliance on US (and some British) practice severely undermines the contrary argument.<sup>57</sup> It should be self-evident that the fact that the USA declares an action to be piracy is in itself not sufficient for it to be judged so. In fact, the above incidents had almost nothing in common with the definition of piracy as found in the Convention on the High Seas to which the USA is a state party. Neither the 1961 *Santa Maria* incident nor the 1985 *Achille Lauro* incident fulfilled the 'two-ship' requirement, making it impossible to subsume these incidents under Article 15 of the Convention on the High Seas/Article 101 of UNCLOS even if the political motivation of the actors was not relevant. The *Santa Maria* incident even fails to meet the necessity of a 'non-domestic' relevance criterion, the existence of which is acknowledged even by those adopting a generous interpretation of the piracy provisions, as it concerned only Portuguese affairs.<sup>58</sup>

Regarding the 1975 *Mayaguez* incident, it is very doubtful whether the fact that the US government did not recognize the Cambodian government resulted in the actions of the Cambodian naval forces being piratical.<sup>59</sup> Such an assumption would surely lead to the collapse of the universal jurisdiction principle, as states recognizing the Cambodian government could, of course, not have proceeded on the basis of treating Cambodian naval forces as pirates. As far as the 1985 attack on the *Achille Lauro* is concerned, there is no evidence that any other state shared the USA's view on piracy.<sup>60</sup> In fact, this attack is generally viewed as having created the momentum necessary for concluding the SUA Convention: surely an acknowledgement of the fact that this type of incident was generally viewed as not having been addressed in the treaties dealing with piracy.<sup>61</sup>

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<sup>56</sup> Barrios, 'Casting a...', p. 161; Halberstam, 'Terrorism...' p. 277-8.

<sup>57</sup> For example, Barrios, 'Casting a...' p. 161-2, refers only to British and US practice and court decisions, as does Halberstam, 'Terrorism...' 32, p. 273-6; as far as these authors refer to decisions by US and British courts, their argument is further undermined by the fact that the domestic interpretation of 'piracy' often has very little in common with the international law definition of the same term.

<sup>58</sup> Dubner, 'The Law...' p. 475 and p. 483-4.

<sup>59</sup> *Ibid.* p. 475 and p. 484-5.

<sup>60</sup> Robert D. McFadden, 'Many U.S. Allies Applaud Move, But Some Question Its Legality', *New York Times*, 12 October 1985, p. A7.

<sup>61</sup> Barrios, 'Casting a...' p. 154.

The US statements concerning these three incidents were *contra legem* and – as they failed to receive any significant support from other states – could also not contribute to the creation of new customary international law.

The arguments relating to the historical background and the negotiating history of the piracy treaty provisions also fail to convince. It is certainly true that events such as the Spanish Civil War once again served to demonstrate many of the controversies relating to the definition of piracy in international law. These controversies were, however, decided in favour of excluding political/religious motivations from the definition of piracy in the 1958 Convention. As the Comment on the *Harvard Draft*, heavily relied on by the drafters of the 1958 Convention,<sup>62</sup> points out, it had 'excluded from its definition of piracy all cases of wrongful attacks on persons or property for political ends'.<sup>63</sup> This is further confirmed by the fact that an attempt by the Czechoslovak representative during the negotiations of the 1958 Convention to delete the reference to 'private ends', because Czechoslovakia thought it a mistake not to include 'political piracy' in the definition of piracy, was rejected.<sup>64</sup>

The further argument put forward in favour of a generous interpretation of Article 15 of the Convention on the High Seas/Article 101 of UNCLOS, namely, that its intention was to exclude only incidents that were of purely domestic concern (that is, where the interests of no other state was affected, as in the case of insurgencies) is specious, since it ignores reality – ships' crews have traditionally tended to be international, thereby automatically implicating more than one state in the matter, and consequently rendering the exception just acknowledged meaningless. There is no indication in the negotiating history of the treaty or its text that the actors' nationality is relevant when judging whether an act of piracy has occurred. Lastly, state practice overwhelmingly supports a narrow interpretation of piracy, excluding political or religious motives from the definition.<sup>65</sup> It must therefore be concluded that piracy as defined in Article 15 of the Convention on the High Seas/Article 101 of UNCLOS does not include acts carried out by terrorists in order to achieve or promote political or religious ends.

Some advocates of a broad interpretation of the term 'piracy' acknowledge that terrorists are not covered by the piracy definitions found in the treaties.<sup>66</sup> They, however, argue that the customary international law definition of piracy was/is broader, including what is currently viewed as terrorism, and can therefore serve to justify universal jurisdiction.<sup>67</sup> This argument has three major

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<sup>62</sup> Garmon, 'International Law...' p. 263; Halberstam, 'Terrorism...' p. 277.

<sup>63</sup> Garmon, 'International Law...' p. 263 and p. 265.

<sup>64</sup> Ong, 'Ships Can Be...' p. 15–16.

<sup>65</sup> *Ibid.* at p. 12 and p. 15–16 (referring to the ASEAN member states as 'careful not to stretch the linkages between ... piracy, terrorism ...'); Barrios, 'Casting a...', p. 153; Sörenson, 'State Failure...', p. 29; Würfelspitz, 'Die Beteiligung...' p. 135.

<sup>66</sup> Barrios, 'Casting a...' p. 160–1.

<sup>67</sup> *Ibid.* p. 161–3 (Barrios's argument has a further weakness: he justifies his assumptions on the basis that UNCLOS did not come into force until 1994 because states were so hesitant to sign

weaknesses: 1) as has already been shown, it is extremely difficult to ascertain what the customary international law definition of piracy actually was before the 1958 Convention on the High Seas came into force, as virtually every aspect of piracy was still controversial;<sup>68</sup> 2) as far as state parties to the 1958 Convention and UNCLOS are concerned, they would not be justified in applying customary international law definitions of piracy not in accordance with the treaties in their dealings with other state parties; and 3) the provisions in the 1958 Convention and UNCLOS regarding piracy are overwhelmingly viewed as reflecting customary international law, at least as it has developed since the 1958 Convention came into force.<sup>69</sup> Therefore, it cannot be assumed that customary international law offers additional grounds for assuming universal jurisdiction based on the prohibition on piracy.

It should be pointed out that the concepts of piracy and terrorism can overlap even when a narrow interpretation of piracy is adopted. There is no reason to doubt that groups engaged solely in a piratical act in order to obtain valuables so as to later finance terrorist activities somewhere else nevertheless (also) qualify as pirates. When, in the 1970s, German terrorists committed bank robberies in order to pay for weapons and explosives for later terror attacks there could be no doubt that a bank robbery had been committed whatever the money was used for.<sup>70</sup> It is therefore decisive whether the 'piratical' actions were directly intended to achieve a political aim (such as the release of prisoners or the shock and/or economic damage created by a suicide attack), in which case the actors are *not* pirates, *or* whether the actions were intended to procure monetary gains which might end up being used in support of terrorist aims somewhere else. In the latter case, based on the fact that the actors can freely decide what to do with any gains obtained, an act of piracy has been committed whether or not the actors are also terrorists.<sup>71</sup>

However, such exceptions should not serve to blur the clear distinction between pirates on the one hand and terrorists on the other indicated by the requirement of acting for 'private ends'. By controversially trying to broaden the definition of piracy, those proposing such an interpretation may actually achieve the opposite of what they hope for – instead of extending universal jurisdiction to terrorism they may, by introducing the controversial concept of

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up to the 1982 treaty, which he views as proving that the UNCLOS provisions were not reflective of customary international law; he, however, seems to overlook the fact that the definition of piracy in the 1958 Convention was identical); Halberstam, 'Terrorism...', p. 289–90 (her arguments, however, seem contradictory, as, on the one hand, she acknowledges that there is no 'authoritative definition of piracy under international law' (p. 272), but then goes on to state that 'a strong argument can be made for the application of the customary law on piracy to terrorist acts').

<sup>68</sup> Azubuike, 'International Law...' p. 47 and p. 48–9; Garmon, 'International Law...', p. 260–1; Halberstam, 'Terrorism...', p. 273.

<sup>69</sup> Barrios, 'Casting a...' p. 153; Dubner 'The Law of...', p. 475; Azubuike, 'International Law...', p. 49.

<sup>70</sup> An example also cited by Sörenson 'State Failure...', p. 33.

<sup>71</sup> *Ibid.* p. 33–4; Roger Middleton, 'Piracy in Somalia', *Chatham House Briefing Paper: AFP/IL BN 2009/1*, October 2008, p. 8–10.

terrorism into piracy, serve to undermine even the universally accepted concept of fighting piracy.<sup>72</sup> That is the consequence of sovereign equality: states, certainly those of at least middle-rank status, will not be bullied into accepting concepts they disagree with on the basis of apparently inventive, but actually dubious, constructions of international law that have little to do with the treaties states entered into.

### **SOMALI PIRACY AND THE UNITED NATIONS SECURITY COUNCIL RESOLUTIONS**

If the attacks described above, particularly that on the *Achille Lauro*, proved controversial in terms of whether they amounted to a piratical act or not, the same cannot be said of the attacks mounted off the coast of Somalia, which in many ways conform to a classic definition of piracy, involving attacks carried out on the high seas<sup>73</sup> against a variety of vessels for financial gain (albeit that, in piracy's modern incarnation, the latter is likely to take the form of ransoms extracted from ship-owners for the safe return of their ships, together with crew and cargo,<sup>74</sup> as opposed to any profit made from the vessels and cargoes themselves).

The Somali attacks against various vessels and their crews and passengers have not only met the 'two-vessel' limb of the definitional test set out in Article 15 of the High Seas Convention and Article 101 of UNCLOS, but have also clearly complied with the 'private ends' requirement, their aim undoubtedly being personal commercial gain; in other words, they fall within the narrow, generally accepted definition of what is meant by 'private ends' in Article 101,<sup>75</sup>

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<sup>72</sup> Dubner, 'The Law of...' 47, p. 489–90, points to the practical difficulties of expanding the definition of 'piracy'; Azubuike, 'International Law...', p. 52–3, refers to the 'reluctance of other states to assert jurisdiction over politically-motivated acts that do not have a commercial aspect'; Garmon, 'International Law...', 30, p. 269–71, explains how difficult it is to find a consensual definition of terrorism.

<sup>73</sup> Where attacks have been carried out purely within Somalia's territorial waters, they cannot constitute acts of piracy under international law, since, by virtue of Article 101 of UNCLOS/Article 15 of the Convention on the High Seas, such acts must be carried out on the high seas or otherwise outside the jurisdiction of any state.

<sup>74</sup> In certain cases, as with the British couple Rachel and Paul Chandler, captured in October 2009 aboard their pleasure yacht en route from the Seychelles towards Tanzania, the ransom may be sought in exchange for the safe return of the crew/passengers rather than the vessel, with the demands made of the individuals' families and/or the governments of the state of which they are nationals. The Chandlers were released just over a year after they were seized, in November 2010, in exchange for a payment reported to be just under a \$1 million (around £620,000) – much less than the \$7 million that their captors had originally demanded. The money was apparently raised by family, friends and supporters (including members of the Somali community in the UK), the British government having refused to contribute anything out of fear of encouraging further kidnappings. See 'Chandlers to Come Back "Very Soon" after Piracy Ordeal', *BBC News*, 15 November 2010, <http://www.bbc.co.uk/news/uk-11754758>, (accessed November 26, 2010).

<sup>75</sup> See John E. Noyes, 'An Introduction to the International Law of Piracy', *California Western International Law Journal*, Vol. 21, 1990–1991, p. 105–21, suggesting (at p. 110) that most (though not all) commentators on the law of piracy agree on at least a 'core' definition of piracy, which

and hence do not engage the vexed question of whether or not the phrase encompasses politically-motivated acts or indeed any acts which are private in the sense of not being state-sponsored. This is not to deny, of course, that some of the proceeds obtained by Somali pirates is employed in the furtherance of political and religious ends – whether to support certain clan leaders or war lords;<sup>76</sup> to purchase weapons for use in the country's ongoing civil war,<sup>77</sup> thereby circumventing the arms embargo imposed on Somalia by the UN Security Council in 1992;<sup>78</sup> or even channelled directly to terrorist causes;<sup>79</sup> it is merely to note, as mentioned above, that the immediate purpose of the attacks is financial gain, not the furtherance of any ideological objective.

It is therefore not so much a definitional problem regarding what exactly is meant by the term 'piracy' that the Somali case has thrown into relief (i.e. what does and does not amount to a piratical act, which was central to the debates prompted by the politically-motivated attacks examined above), but rather the limitations of that definition when applied to the Somali situation and the peculiar jurisdictional and enforcement difficulties which arise from that state's lack of a properly-functioning central government able to effectively combat piracy within Somalia's territorial waters. More specifically, it is the fact that states cannot pursue and apprehend pirates within the territorial waters of another state that has created particular obstacles in tackling the Somali piracy problem.

Jurisdictional issues in fact go to the heart of international law governing piracy: it is because piratical acts, if they are to count as such, must be committed on the high seas, or otherwise beyond the jurisdiction of any state, which provides the rationale for piracy's relatively rare status as a crime of universal jurisdiction,<sup>80</sup> allowing any state to apprehend and prosecute those committing acts of piracy regardless of any nexus between the state and the perpetrators of the attack, or between the state and the victim vessel or its crew

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'include[es] attacks by those on a private ship against another vessel on the high seas for purely private, commercial gain.'

<sup>76</sup> See Middleton, 'Piracy in...', p. 5, noting that many Somali pirates are from Puntland, and that part of the proceeds which they obtain from their activities is passed on to the region's ruler, Somalia's former president Abdullahi Yusuf Ahmed, if only as a 'gesture of goodwill'.

<sup>77</sup> *Ibid*, p. 9.

<sup>78</sup> UNSC Resolution 733 of 23 January 1992, paragraph 5.

<sup>79</sup> See Middleton, 'Piracy in...' p. 10, expressing fears that Somali pirates may be co-opted by terrorist groups, and noting the probability that a proportion of the pirates' funds is already being diverted to the Al-Shabaab militant organization, which controls much of southern Somalia and which claims links to al-Qaeda. But see also Eric Pardo Sauvageot, 'Piracy off Somalia and its Challenges to Maritime Security: Problems and Solutions', *UNISCI Discussion Papers*, No 19, January 2009, p. 250–67, who concludes (at p. 262–3) that, notwithstanding the apprehension voiced by some commentators, the link between piracy and terrorism in Somalia has been overstated.

<sup>80</sup> Although, for some commentators, piracy is not a crime as such under international law but rather a means of asserting universal jurisdiction over certain acts which may then be prosecuted as crimes under the domestic laws of various states. See Kenneth Randall, 'Universal Jurisdiction under International Law', *Texas Law Review*, Vol. 66, 1987–1988, p. 785–841, at p. 796; and Michael H. Passman, 'Protections Afforded to Captured Pirates Under the Law of War and International Law', *Tulane Maritime Law Journal*, Vol. 33, No. 1, 2008, p. 1–40, at p. 11, note 71.



or passengers.<sup>81</sup> Since no state commands control of the high seas, any state is permitted to take action against piracy, closing down the legal vacuum that would otherwise enable pirates to operate with impunity. Conversely, where an act of piracy has been committed within the territorial waters of a state, it is for that state alone (according to how such acts are defined and dealt with in its domestic legislation) to apprehend and punish those responsible.<sup>82</sup> Similarly, where piratical acts have been carried out on the high seas but the perpetrators have subsequently fled to territorial waters, then only the state which commands those waters can take action against them; the vessels of foreign powers are debarred from entering what amounts to another country's territory – an act which would constitute an infringement of that state's sovereign integrity.

It is Somalia's inability – owing to the protracted civil war, the absence of a fully-functioning government, and the lack of an adequate law-enforcement and judicial system – to effectively suppress the actions of pirates operating from its shores that has prompted a spate of United Nations Security Council (UNSC) resolutions seeking to address this difficulty. In essence, these resolutions have, in regard to the Somali situation, modified the normal jurisdictional and enforcement rules governing piracy to permit other states to take action in Somalia's territorial waters, and even on the Somali mainland, in order to repel pirate attacks originating from the country.

Somalia has in fact been the subject of a number of UNSC resolutions going back to 1992, which, in line with the powers granted to the Security Council under Chapter VII of the UN Charter, are aimed at combating the 'threat to international peace and security' posed by the Somali civil war and the general instability which this has caused in the region as a whole.<sup>83</sup> In the past couple of years, however, these resolutions (in particular, UNSC Resolutions 1816, 1838, 1846, 1851, 1897 and 1918) have been directed towards dealing with a further manifestation of the war and the lack of law and order in the country: namely the threat posed to international shipping in the Gulf of Aden and the waters surrounding the Horn of Africa by pirates operating out of Somalia.

The first of these resolutions, Resolution 1816,<sup>84</sup> authorizes states co-operating with Somalia's Transitional Federal Government (TFG) in suppressing piracy to:

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<sup>81</sup> See Article 105 of UNCLOS, which provides as follows:

*On the high seas, or in any place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.*

<sup>82</sup> That is, such acts do not constitute acts of piracy as defined by international law (since they do not take place on the high seas or otherwise outside the jurisdiction of any state) and can be characterized as piracy only if so defined within the municipal law of the state in whose territorial waters the acts are committed.

<sup>83</sup> See UNSC Resolution 733 of 23 January 1992.

<sup>84</sup> UNSC Resolution 1816 of 2 June 2008.

- (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
- (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.<sup>85</sup>

Consequently, within the parameters set by Resolution 1816, Somalia's territorial waters are treated as an extension of the high seas, empowering the vessels of selected states to take the same enforcement measures against pirates that they are permitted to take in locations that do not fall within the jurisdiction of any state. Thus, the states in question can both pursue those who have committed piratical acts on the high seas into Somalia's territorial waters and apprehend them, and can also pursue and arrest those whose attacks are carried out solely within the confines of Somali waters. This latter modification of the normal legal rules in effect widens the definition of what amounts to piracy in the Somali case, since attacks that would not otherwise amount to acts of piracy under international law (since they do not take place outside the jurisdiction of a particular state) are designated as such by the Resolution.

This extension of the range within which states are permitted to operate to repress piratical acts was carried a step further in Resolution 1851,<sup>86</sup> which permitted both states and regional organizations co-operating with the TFG to take action on the Somali mainland itself to combat piracy, authorizing 'all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.'<sup>87</sup>

Resolutions 1816 and 1851 also give states greater flexibility in combating the activities of pirates than is conventionally the case on the high seas, since they are permitted to take action not only against acts of piracy but also against instances of 'armed robbery'. As Tullio Treves explains, although the phrase 'armed robbery' is left undefined, it would seem to be borrowed from International Maritime Organisation (IMO) terminology, where it is used to refer to violent acts which are carried out for purposes akin to those of piracy but which for some reason are precluded from falling within the traditional definition of piratical acts, most notably because they do not involve an attack by one ship on another.<sup>88</sup> Although the IMO confines its use of the phrase to activities carried out within the territorial waters of a state, Resolutions 1816 and 1851 apparently authorize states to fight armed robbery which has occurred

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<sup>85</sup> *Ibid.* at paragraph 7.

<sup>86</sup> UNSC Resolution 1851 of 16 December 2008.

<sup>87</sup> *Ibid.* at paragraph 6.

<sup>88</sup> Treves, 'Piracy, Law...', p. 403. Although apparently a superfluous requirement in the Somali case (since two ships are normally involved in the relevant attacks), the reference to armed robbery may be intended, as Treves notes, to encompass 'all acts connected with piracy (such as preparatory acts) and future possible acts involving only one ship.' *Id.* See also Guilfoyle, 'Piracy off...', p. 694, pointing out that armed robbery includes hostage-taking.

both 'in the territorial waters of Somalia and the high seas off the coast of Somalia,'<sup>89</sup> thereby enabling states to take action which they would not normally be able to take under international law even outside the jurisdiction of any state – because, for example, the activities concerned do not involve more than one vessel. In addition, states are authorized to use 'all necessary means' and 'all necessary measures'<sup>90</sup> within Somali's waters and on the Somali mainland to combat piracy – phrases, which, in United Nations parlance, refer to the use of military force.<sup>91</sup>

As might be expected, these authorizations, which would otherwise amount to a serious violation of Somalia's territorial integrity, are hedged about with qualifications and safeguards. Hence, it is only those states which are actively co-operating with the TFG to suppress piratical attacks which are permitted to enter Somalia's waters and territory, and then only after advance notification of this permission has been provided by the TFG to the UN Secretary General.<sup>92</sup> Consequently, the TFG is allowed to exercise control over which states can enter Somali territory to combat piracy, in contrast to the position on the high seas, where any state, of its own volition, can take such action. Moreover, it is made clear that the measures authorized by the resolutions are undertaken with the explicit consent of the TFG,<sup>93</sup> with each resolution also careful to recite 'its respect for the sovereignty, territorial integrity, political independence and unity of Somalia.'<sup>94</sup>

In addition, the action that nominated states may take against pirates in Somalia and its territorial waters must conform to the principles of international law governing piracy – i.e. the measures used must not exceed those employed

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<sup>89</sup> See Treves, 'Piracy, Law...', p. 403, pointing out that the phrase occurs in the penultimate preambular paragraphs of both resolutions.

<sup>90</sup> See UNSC Resolution 1816, paragraph 7(b) and UNSC Resolution 1851, paragraph 6, respectively.

<sup>91</sup> Guilfoyle, 'Piracy off...', p. 695.

<sup>92</sup> Although, in theory, the TFG could itself have simply permitted certain states to enter Somali territory (including the state's surrounding waters) to combat piracy, obtaining UN authorization circumvents any problematic questions as to whether the TFG possesses the necessary capacity to act on behalf of Somalia as a whole. Conversely, despite the fact that the UNSC, in pursuance of its Chapter VII authority, is entitled to issue the relevant resolutions without the TFG's consent, securing the government's specific permission to such interventions demonstrates respect for Somalia's sovereignty and territorial integrity, and serves to allay fears that a state's territorial waters (and even its mainland) can ever be invaded to fight piracy without its consent. Obtaining the TFG's permission to enter its territorial waters may also, as Treves suggests, have the additional advantage of dispensing with the practical difficulty of determining the exact extent of such waters, since Somalia's domestic legislation, which apparently still sets the width of the country's territorial waters at 200 miles, conflicts with its obligations as a state party to UNCLOS, under which the relevant limit is only 12 miles. Treves, 'Piracy, Law...', p. 407.

<sup>93</sup> See UNSC Resolution 1816, paragraph 9; UNSC Resolution 1846 of 2 December 2008, paragraph 11; UNSC Resolution 1851, paragraph 10; and UNSC Resolution 1897 of 30 November 2009, paragraph 8.

<sup>94</sup> The wording appears in the preamble to all of the following resolutions: UNSC Resolutions 1816, 1838, 1846, 1851 and 1897. In addition, Resolutions 1851 and 1897 state that respect for Somalia's sovereign integrity extends to 'Somalia's rights with respect to offshore natural resources, including fisheries, in accordance with international law', presumably in an attempt to deter the unlawful activities of foreign fishing vessels in Somali waters.

to combat piracy on the high seas. Despite, therefore, the references to 'all necessary means' and 'all necessary measures' being taken to combat piracy and armed robbery in Somali territorial waters and in Somalia itself, it is likely, as Douglas Guilfoyle asserts, that the force exerted 'must be necessary, proportionate and should be preceded by warning shots where practicable.'<sup>95</sup> Furthermore, where action is taken on the Somali mainland to combat piracy, then this must be 'consistent with applicable international humanitarian and human rights law'.<sup>96</sup>

The powers conferred by the resolutions are also limited in duration, albeit that they have been subject to renewal. The authorization contained in Resolution 1816, allowing co-operating states to enter and take action against pirates in Somalia's territorial waters, was initially granted for a period of only six months from 2 June 2008,<sup>97</sup> but has since been extended twice – to 2 December 2009 by Resolution 1846<sup>98</sup> and then to 30 November 2010 by Resolution 1897.<sup>99</sup> Similarly, the permission granted in Resolution 1851, enabling co-operating states to take action in Somalia itself to combat piracy, was initially granted for 12 months from 2 December 2008,<sup>100</sup> but was also extended by Resolution 1897 to 30 November 2010.<sup>101</sup>

Most notably, perhaps, the Security Council has taken great pains to emphasize that the provisions contained in the resolutions are relevant only to the case of Somalia, and are not intended to have a more general application. Consequently, the resolutions make clear that the measures which they authorize are strictly limited in geographical terms to Somalia and the territorial waters and high seas off the coast of Somalia,<sup>102</sup> and are not meant to interfere with the rights of passage enjoyed by vessels of third-party states sailing in the affected waters.<sup>103</sup> The resolutions also confirm that they are not in any way to be interpreted as altering the normal rules of international law governing the combating of piracy. Accordingly, Resolution 1816:

*Affirms that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention [i.e. UNCLOS], with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law ...*<sup>104</sup>

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<sup>95</sup> Guilfoyle, 'Piracy of Somalia...', p. 695.

<sup>96</sup> UNSC Resolution 1851, paragraph 6.

<sup>97</sup> UNSC Resolution 1816, paragraph 7.

<sup>98</sup> UNSC Resolution 1846, paragraph 10.

<sup>99</sup> UNSC Resolution 1897, paragraph 7.

<sup>100</sup> UNSC Resolution 1851, paragraph 6.

<sup>101</sup> UNSC Resolution 1897, paragraph 7.

<sup>102</sup> And do not, for example, extend to other states in the region and their territorial waters, such as Kenya or Yemen, nor to other states with piracy problems, such as Indonesia.

<sup>103</sup> See UNSC Resolution 1816, paragraph 8; UNSC Resolution 1846, paragraph 13; and UNSC Resolution 1897, paragraph 10.

<sup>104</sup> UNSC Resolution 1816, paragraph 9. Similar statements are to be found in UNSC Resolution 1838, paragraph 8; UNSC Resolution 1846, paragraph 11; UNSC Resolution 1851, paragraph 10;

This and similar reassurances reiterated in all the resolutions seek to alleviate the concerns expressed in the Security Council by certain developing states that the powers granted by the resolutions might otherwise create an unwelcome precedent, serving to undermine existing legal rules, particularly those set out in UNCLOS.<sup>105</sup> Unlike the hijacking of the *Achille Lauro*, therefore, which gave rise to a general treaty aimed at overcoming the deficiencies of UNCLOS which that incident highlighted<sup>106</sup> – the SUA Convention<sup>107</sup> – the international community's response to the geographical and jurisdictional problems posed by the latest attacks has been much more cautious and limited, and deliberately designed to have no application beyond the Somali case itself.

As well as widening the geographical area in which states are permitted to operate, and allowing them to take action against armed robbery as well as piracy proper, the UNSC Resolutions also address a further problem apparent in attempts to counter piratical acts: the general reluctance of states (particularly Western states) to prosecute any pirates which they apprehend. Repatriating the individuals concerned to Somalia is not regarded as a viable option, both because the country currently lacks a functioning government and an adequate law-enforcement and judicial infrastructure capable of mounting successful

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UNSC Resolution 1897, paragraph 8; and UNSC Resolution 1918 of 27 April 2010, preambular paragraph 4.

<sup>105</sup> The explicit confirmation in Resolution 1816 that its measures are not intended to impact on legal rules beyond the Somali situation was particularly welcomed by Indonesia's representative to the UN Security Council, who stressed his country's strong commitment to existing international law as represented by the provisions of UNCLOS and noted that 'it was his duty to voice strong reservations if there were actions envisioned by the Council, or any other forum, that could lead to modification, rewriting or redefining the Convention.' Similarly, the Vietnamese representative warned that '[t]he resolution adopted [i.e. 1816] should not be interpreted as allowing any actions taken in maritime areas other than Somalia's, or under conditions contrary to international law and the Law of the Sea Convention.' Meanwhile, South Africa's representative was keen to emphasize that it was Somalia's internal governance problems rather than piracy per se which represented the real threat to international peace and security. See UN press release of 2 June 2008, *Security Council Condemns Acts of Piracy, Armed Robbery off Somalia's Coast, Authorizes for Six Months 'All Necessary Means' to Repress Such Acts*, <http://www.un.org/News/Press/docs/2008/sc9344.doc.htm>, (accessed March 22, 2010).

<sup>106</sup> Namely, the requirement, contained in Article 101 of UNCLOS, that there must be an attack by one vessel on another before the provisions of the Convention are activated (and which therefore precludes internal hijackings or attacks), as well as confusion as to whether the phrase 'private ends' in Article 101 was intended to cover politically-motivated acts.

<sup>107</sup> The various offences which the SUA Convention outlaws are detailed in Article 3, and include seizing and exercising control over a ship by force or the threat thereof, and committing various acts likely to imperil the safe navigation of a ship, such as committing violence against a person on board, damaging the ship or its cargo, placing devices or substances on board a ship likely to cause damage, and destroying or seriously harming maritime navigational facilities. As pointed out in the Chatham House Report, *supra* note 20, p. 32, although a terrorist attack provided the inspiration for the SUA Convention, a terrorist or political motive is not an essential feature of the offences which it creates, the treaty having instead sought 'to proceed by criminalising typical terrorist acts or tactics, given that no consensus on a universal definition of terrorism could be reached.' Nor is it relevant whether the offences are committed in the course of an attack involving one vessel alone (for example, during a mutiny-type scenario) or as a result of an attack by one vessel on another.

prosecutions,<sup>108</sup> and because of the danger that the pirates will suffer ill-treatment and not receive a fair trial.<sup>109</sup> This latter concern in particular prevents many Western states from returning Somali pirates to their homeland, since to do so would entail them flouting the provisions of one or more international covenants governing human rights to which they are a party.<sup>110</sup> Such states are also deterred from prosecuting pirates in their own courts because of the logistical problems and costs involved, and also owing to fears that it will be impossible to deport the pirates once any sentence is served because of possible reprisals which those individuals would face if returned to Somalia.<sup>111</sup>

Indeed, one of the weaknesses of UNCLOS is that, although it empowers a seizing state to prosecute pirates, it does not compel it to do so,<sup>112</sup> so that states are free to choose whether or not to take any further action against pirates which they apprehend. This is in contrast to the SUA Convention, which provides that state parties must ensure that those committing offences set out in the Convention are subject to prosecution, including implementing appropriate domestic legislation enabling such prosecution to take place.<sup>113</sup> Since, however, the attacks being carried out off the Somali coast are not only prohibited under UNCLOS, but are also unlawful under the SUA Convention

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<sup>108</sup> Sauvageot, 'Piracy off Somalia...', p. 253–4; Kontorovich, 'International Legal...', p. 3.

<sup>109</sup> *Ibid.*

<sup>110</sup> For example, Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 forbids state parties from sending individuals to countries where they are likely to suffer torture. In a recent incident, Russia chose to release ten Somali pirates captured by the Russian navy in the course of attacking a Libyan-flagged oil tanker off the coast of Yemen, rather than returning the individuals to their homeland and thereby risking accusations of human rights violations. See Ellen Barry, 'Russia Frees Somali Pirates it had Seized in Shootout', *New York Times*, 8 May 2010, p. A4.

<sup>111</sup> It was this concern that led the Danish navy to free ten pirates that it had apprehended in the waters surrounding Somalia in 2008 rather than taking them to Denmark to stand trial. See Treves, 'Piracy, Law...', p. 4.

<sup>112</sup> Hence, the language employed in the relevant provision of UNCLOS – Article 105 – is permissive rather than imperative, stating that: 'The courts of the State which carried out the seizure *may* decide upon the penalties to be imposed, and *may* also determine the action to be taken with regard to the ships, aircraft or property ...' (emphases added). Although Article 100 of the Convention is more strongly worded, stipulating that: 'All 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,' it is unclear whether this imposes on a state party a duty to prosecute pirates, including ensuring that its domestic criminal legislation allows for such prosecution. See Chatham House Report; *Piracy and Legal Issues...*, p. 26–7.

<sup>113</sup> See *id.*, p. 33–7, for a detailed discussion of the provisions governing jurisdiction under the SUA Convention. Under Article 6 of the Convention, a state party must take measures to establish its jurisdiction over the offences set out in Article 3 (see *supra* note 107) when committed against or on board one of its flag vessels, within its territorial waters, or by one of its nationals, and can further choose to establish its jurisdiction over any such offence if it is committed against one of its nationals, or is committed by a stateless person who habitually resides in the state in question, or is carried out with the object of forcing the state to do or refrain from doing a certain act. Where a state finds within its territory an individual who has committed, or is suspected of committing, one of the offences listed in Article 3, then it must refer the case to its legal authorities to consider whether to prosecute or not, unless there is another state or states which enjoy jurisdiction in the matter, in which case the first state can choose to extradite the individual to one of the latter countries rather than taking action against the individual itself. See Articles 6(4) and 10(1) of the Convention.

(involving as they do the seizure and control of vessels by force or the threat of force<sup>114</sup>), those states assisting with combating piracy in the region which are parties to the Convention are under a legal obligation to ensure that captured pirates face appropriate criminal proceedings.

The various resolutions dealing with piracy in Somalia have therefore increasingly sought to impress upon states their obligations not only to prevent the attacks from occurring, but also to prosecute those responsible. Both Resolutions 1816 and 1846, for example, urge states which possess the necessary jurisdiction under international and domestic law 'to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia';<sup>115</sup> however, Resolution 1846 goes a step further and specifically exhorts those states which are parties to the SUA Convention 'to fully implement their legal obligations' under the Convention, and reminds them that this involves 'creat[ing] criminal offences, establish[ing] jurisdiction, and accept[ing] delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation.'<sup>116</sup> In addition, states are called on to 'cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.'<sup>117</sup>

This concern with ensuring that pirates are prosecuted when captured is also evident in Resolutions 1851 and 1897. Resolution 1851 deprecates 'the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture', which 'has hindered more robust international action' being taken against piracy 'and in some cases [has] led to pirates being released without facing justice.'<sup>118</sup> Resolution 1897, meanwhile, 'stress[es] the need for States to criminalize piracy under their domestic law and to favourably consider the prosecution, in appropriate cases, of suspected pirates, consistent with applicable international law.'<sup>119</sup> States are again urged to co-operate with one another in determining jurisdiction and in ensuring that those committing acts of piracy and armed robbery at sea face judicial proceedings,<sup>120</sup> and are also asked to assist Somalia 'to strengthen [its] capacity ... to bring to justice' those responsible for planning and carrying out attacks from the Somali mainland.<sup>121</sup>

As a means of tackling the problem, both Resolutions suggest that states and regional organizations conclude 'ship-rider' agreements with countries prepared to prosecute pirates (particularly those located in the region), under which law-enforcement officers from those countries travel on vessels

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<sup>114</sup> See *supra* note 107.

<sup>115</sup> UNSC Resolution 1816, paragraph 11; UNSC Resolution 1846, paragraph 14.

<sup>116</sup> UNSC Resolution 1846, paragraph 15. An identical reminder appears in UNSC Resolution 1897, in the eighth preambular paragraph.

<sup>117</sup> UNSC Resolution 1846, paragraph 15.

<sup>118</sup> See the ninth preambular paragraph of UNSC Resolution 1851.

<sup>119</sup> UNSC Resolution 1897, eighth preambular paragraph.

<sup>120</sup> *Ibid.* at paragraph 12.

<sup>121</sup> *Ibid.* at paragraph 11.

combating piracy in order to investigate and prosecute those caught carrying out piratical attacks or committing armed robbery.<sup>122</sup> This represents a departure from the provisions of UNCLOS, under which it would seem to be only the seizing state which has jurisdiction to try pirates.<sup>123</sup> However, certain safeguards are provided – the advance consent of the TFG to any third state exercising jurisdiction over apprehended individuals must be obtained, and the arrangements reached must 'not prejudice the effective implementation of the SUA Convention.'<sup>124</sup>

Several countries, including Britain and the US, have in fact already attempted to deal with the prosecution problem by agreeing with Kenya that it will prosecute pirates that they capture. To this end, Kenya signed memoranda of understanding with these nations enabling captured pirates to be tried in Kenyan courts,<sup>125</sup> and Kenya has been praised by the Security Council for its efforts in this respect.<sup>126</sup> However, the Kenyan government, having increasingly voiced its dissatisfaction with such arrangements – stating that the country's already overburdened judicial and prison systems were unable to cope with the additional strain of dealing with the Somali pirates,<sup>127</sup> and accusing other states of shirking their responsibilities by refusing to try the pirates in their own courts<sup>128</sup> – cancelled the relevant agreements in September 2010.<sup>129</sup> Quite apart

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<sup>122</sup> UNSC Resolution 1851, paragraph 3; UNSC Resolution 1897, paragraph 6.

<sup>123</sup> See *supra* note 81, and Kontorovich, 'International Legal...' p. 3.

<sup>124</sup> UNSC Resolution 1851, paragraph 3; UNSC Resolution 1897, paragraph 6.

<sup>125</sup> Such memoranda have been concluded with Canada, China, Denmark, the UK, the US, and the European Union. See UN press release *Secretary-General calls for broader cooperation, new push for stability in Somalia, to combat resurgence of piracy as General Assembly meets to examine global scourge*, Sixty-fourth General Assembly Meeting of the Plenary on Piracy, GA/10940, 14 May 2010 (hereafter UN report on Somali piracy), p.2, <http://www.un.org/News/Press/docs//2010/ga10940.doc.htm>, (accessed May 18, 2010).

<sup>126</sup> See the ninth preambular paragraph of UNSC Resolution 1897, which also commends the help given by the United Nations Office of Drugs and Crime and by the Contact Group on Piracy off the Coast of Somalia to states in the region – particularly Kenya, Somalia, the Seychelles and Yemen – in their efforts to prosecute and imprison those convicted of piracy.

<sup>127</sup> A point recently made by Kenya's Trade Minister, Amos Kimunya, before an informal meeting of the UN General Assembly convened to discuss the piracy problem in Somalia, in which he explained that prosecuting and imprisoning Somali pirates was imposing an 'unbearable' burden on Kenya. See UN report on Somali piracy, *supra* note 125, p. 2.

<sup>128</sup> See *ibid.* p. 3; and also 'Kenya Wants Pirates Pact Reviewed', *Capital News*, 15 May 2010, <http://www.capitalfm.co.ke/news/Kenyanews/Kenya-wants-pirates-pact-review-8482.html>, (accessed May 18, 2010) reporting an interview conducted with Kenya's Foreign Affairs Minister, Moses Wetangula, in which the minister complained that other nations were ducking the prosecution issue, leaving Kenya alone to deal with the problem. Recently, however, there has been some indication that Western nations may be prepared to take a more proactive stance on this issue. In May 2010, the Netherlands opted to prosecute a group of suspected Somali pirates in its courts; the individuals having been apprehended by the Danish navy in the course of an apparent attempt to hijack a cargo ship registered in the Netherlands Antilles. In addition, a further group of Somalis captured by the Dutch navy whilst allegedly attacking a German cargo vessel were taken to the Netherlands and are now to be extradited to Germany to stand trial. See 'Trial of alleged Somali pirates opens in Netherlands', *BBC News*, 25 May 2010, <http://news.bbc.co.uk/1/hi/world/africa/10151792.stm>, (accessed June 6, 2010) and 'Dutch court sends Germany Somali piracy suspects', *Associated Press*, 4 June 2010, <http://news.yahoo.com/s/ap/piracy>, (accessed June 6, 2010).



from Kenya's own objections to continuing to act as the main prosecutor of Somali pirates, concerns have also been raised that some individuals sent to Kenya for prosecution have not received a fair trial, and also that Kenyan legal proceedings are particularly onerous and hence likely to deter potential participants.<sup>130</sup> Any attempt, therefore, to tackle piracy off the coast of Somalia by dividing it into two distinct tasks – with the richer, predominantly Western nations hunting down and capturing pirates, and the impoverished nations of the region then prosecuting and incarcerating them – is unlikely to be a sustainable solution, unless the latter states are provided with a great deal more financial and logistical support.

This urgent need for a greater number of states to share the burden of prosecuting pirates, rather than simply apprehending them, has been particularly emphasized by the most recent Security Council resolution on the matter, Resolution 1918 of 27 April 2010. Noting the pressure which the prosecution of pirates has placed on Kenya (while at the same time encouraging the country to persevere in its endeavours<sup>131</sup>), the Security Council expresses concern that a number of states have failed to implement effective domestic legislation criminalizing piracy,<sup>132</sup> and calls on them to rectify this with a view to prosecuting suspected pirates and, if appropriate, imprisoning them.<sup>133</sup> Omitting to do so, warns the Security Council, simply 'undermines the anti-piracy efforts of the international community.'<sup>134</sup> On a more positive note, it commends the Seychelles for agreeing to participate in prosecuting pirates, including contemplating 'hosting a regional prosecution centre',<sup>135</sup> and calls for a report to be prepared examining various options for prosecuting and incarcerating those responsible for committing acts of piracy or armed at robbery at sea, including the feasibility of setting up specialist chambers of domestic courts, or possibly a regional or international tribunal.<sup>136</sup>

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<sup>129</sup> Jeff Davis, 'Kenya Cancels Piracy Trial Deals', *Daily Nation*, 30 September 2010, <http://www.nation.co.ke/News/Kenya%20cancels%20piracy%20trial%20deals/-/1056/1021740/-/u7eds2z/-/index.html>, (accessed November 26, 2010).

<sup>130</sup> See Kontorovich, 'International Legal...', p. 3, who points out that, under Kenyan law, witnesses must present themselves in person, thereby adding greatly to the cost burden of the parties involved.

<sup>131</sup> UNSC Resolution 1918, preambular paragraph 8.

<sup>132</sup> *Ibid.* at preambular paragraph 14.

<sup>133</sup> *Ibid.* at paragraph 2.

<sup>134</sup> *Ibid.* at paragraph 1.

<sup>135</sup> *Ibid.* at preambular paragraph 10.

<sup>136</sup> *Ibid.* at paragraph 3. The report (S/2010/394) was in fact published on 26 July 2010, and sets out seven possible options for prosecuting pirates for consideration by the Security Council, with varying degrees of international participation. In summary, the options are as follows: 1) helping to improve the ability of regional states to prosecute and incarcerate those committing acts of piracy; 2) setting up a Somali court in the territory of a third-party state in the region to prosecute suspected pirates; 3) establishing a special chamber within the national jurisdiction of a state or states in the region to deal with the problem; 4) the same as 3), but with UN participation; 5) establishing a regional tribunal based upon a multilateral agreement concluded among regional states, with UN participation; 6) establishing an international tribunal based upon an agreement between a regional state and the UN; and 7) setting up an international tribunal under Chapter VII of the Charter of the United Nations. The report is available at

## CONCLUSION

As the Somali case emphasizes, international efforts to combat piracy remain fraught with difficulty, with it again proving necessary to modify existing provisions of international law (albeit that such alterations have been carefully tailored so as not to resonate beyond the Somali situation itself) in order to effectively deal with the problem at hand. In this instance, it has been necessary to temporarily amend the 'high seas' element of the definition of piracy so as to allow other states to take action in Somalia – both on its mainland and in its territorial waters – which would otherwise not be possible under the jurisdictional rules governing piracy which normally apply. The Somali piracy attacks have also highlighted another weakness in the international legal framework aimed at combating piracy – its inability to compel states (including richer nations which possess the resources to do so) to prosecute those responsible for committing acts of piracy and armed robbery. It may be the case therefore, that some form of international court – or perhaps regional tribunals based in piracy 'hot spots' – offers the best means of countering this reluctance and ensuring that poorer nations, such as Kenya, do not become over-burdened with the task of carrying out such prosecutions.

Ultimately, however, as the UNSC Resolutions in the Somali case recognize, the most effective means of dealing with the scourge of piracy in the waters surrounding Somalia and elsewhere does not involve an expansion of the scope of the term 'piracy' in international law through the imposition of new interpretations or by extending enforcement measures, but through an elimination of the problem at source, by encouraging an end to the country's protracted civil war, promoting improvements in its internal governance, and reducing the poverty of Somali citizens.<sup>137</sup> As in other cases where piracy is an endemic problem, the solution lies not at sea, where the acts of piracy are committed, but on land, where the circumstances which engender those acts – poverty, lack of governance and lawlessness – arise.

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<sup>137</sup> See in particular the penultimate preambular paragraphs of UNSC Resolution 1897 and 1918, '[e]mphasizing that peace and stability within Somalia, the strengthening of State institutions, economic and social development and respect for human rights and the rule of law are necessary to create the conditions for a durable eradication of piracy and armed robbery at sea off the coast of Somalia ...'

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### **International Instruments**

- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988
- Geneva Convention on the High Seas 1958
- UN Convention on the Law of the Sea 1982
- UN Security Council Resolution 733 of 23 January 1992
- UN Security Council Resolution 1816 of 2 June 2008
- UN Security Council Resolution 1838 of 7 October 2008
- UN Security Council Resolution 1846 of 2 December 2008
- UN Security Council Resolution 1851 of 16 December 2008
- UN Security Council Resolution 1897 of 30 November 2009
- UN Security Council Resolution 1918 of 27 April 2010